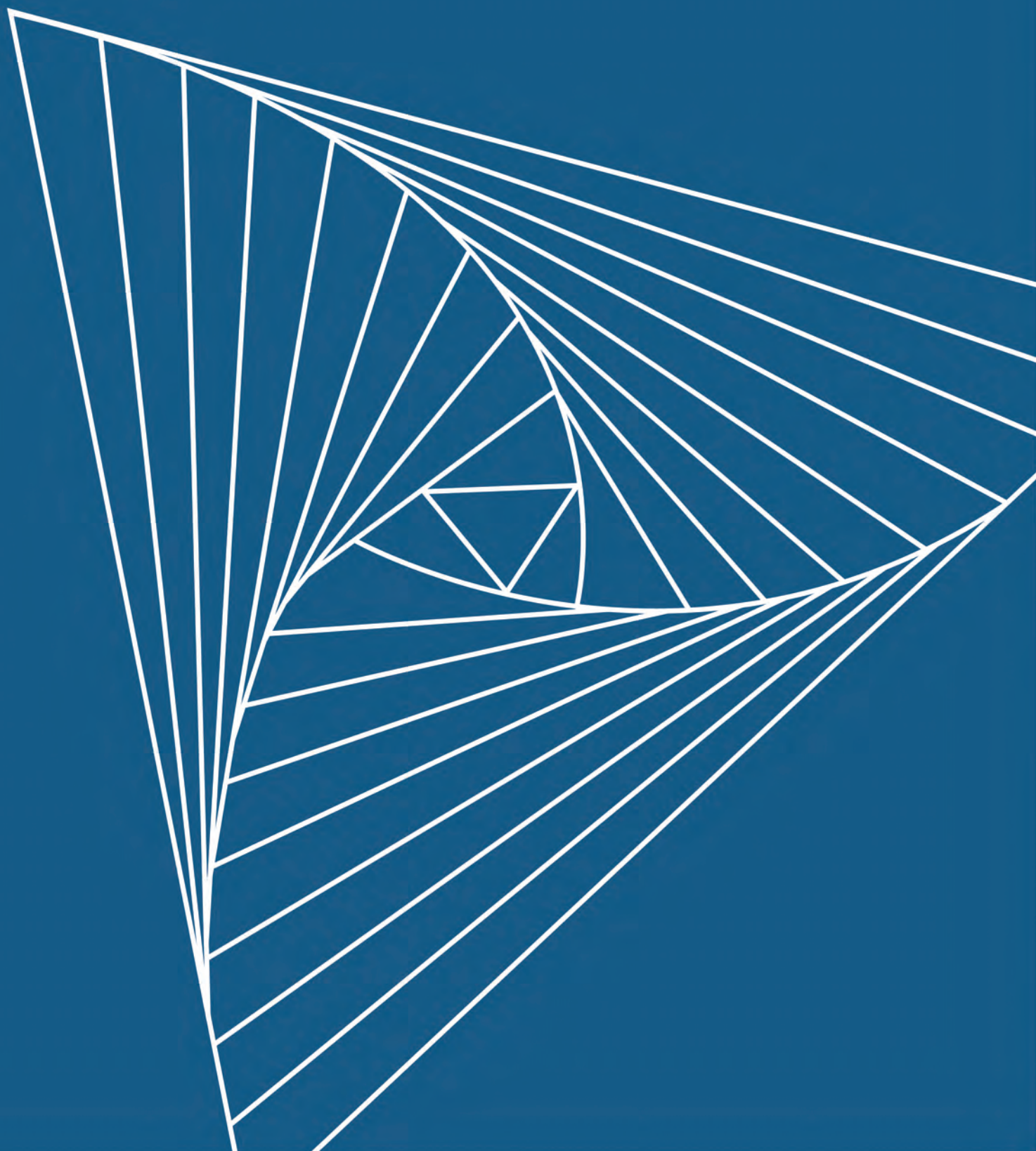




Victorian
Law Reform
Commission

Review of the Adoption Act 1984

REPORT FEBRUARY 2017



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Preface

Adoption law and practice deeply and intimately affects those to whom it applies. The effects are life-long. They do not cease upon the adopted child reaching adulthood. They have intergenerational impacts and consequences. The effects reverberate widely. They involve significant social and moral issues affecting society as a whole. Although the actual number of adoptions in contemporary times is small compared with half a century ago—in 1971–1972 in Australia there were almost 10,000 adoptions, whereas in 2015–2016 there were 45—each adoption is of profound significance.

In December 2015, the Victorian Attorney-General, the Hon. Martin Pakula MP referred to the Commission for consideration and report the modernisation of the *Adoption Act 1984* and the *Adoption Regulations 2008*.

The terms of reference state that it is timely to review the Adoption Act to ensure that the best interests of the child are paramount; there is consistency with contemporary law in relation to family and community; and it is in harmony with other relevant areas of law that have changed since 1984.

This the Commission has done. This report sets out the extensive consultations undertaken by the Commission, the valuable submissions received, the research undertaken, and the reasoning and recommendations of the Commission upon the reference.

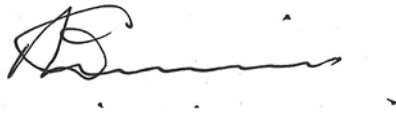
Unsurprisingly, adoption arouses strong views and passions, often of different or opposite purpose and direction. In conducting the reference, the Commission approached the issues with open mind and open ears. In particular, the Commission sought to listen to the voices of adopted people and persons affected by adoption, and to give them respect and care. The Commission expresses its thanks to the many persons and entities who made substantial contributions to this reference.

In consultations and submissions, four themes arose repeatedly. First, there was overwhelming support that adoption should be about the best interests of the child, and the adult the child becomes. It was recognised that determining a child's best interests can be a subjective as well as an objective assessment and is something about which decision makers should be given better guidance. Second, birth certificates are of major significance as documents of identity and history. Third, post-adoption support is important, including assistance in maintaining appropriate contact between natural and adoptive families and helping parties manage the effects of adoption. Fourth, access to information is inconsistent and needs to be more open and available.

The major recommendation of the report is that there should be a new Adoption Act. Piecemeal amendment is not enough. Modern knowledge, thinking and values require no less. Other recommendations aim to facilitate greater openness in the adoption process, while providing for appropriate protection for those who may be at risk of harm. The report also addresses the need for professional and financial support before, during and after the adoption process.

I express my warm thanks to the Commission's team leader on the reference, Helen Rechter; to policy and research officers Kirsten McKillop, Joanna Rolfe, and Lachlan Zangari, and to research assistants Claire Leyden-Duval and Jessica Valentine, all of whom worked assiduously on the reference and report; and to the other members of staff who contributed also. Once again, I express my debt to all Commissioners, who continue to guide, guard, and contribute to the ongoing work of the Commission, in this and in manifold other respects.

I commend the report to you.

A handwritten signature in black ink, appearing to read 'P. D. Cummins', with a stylized flourish at the end.

The Hon. P. D. Cummins AM

Chair, Victorian Law Reform Commission

February 2017

Terms of reference

[Matter referred to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* by the Victorian Attorney-General, the Hon. Martin Pakula MP on 18 December 2015.]

At the time of its introduction, the *Adoption Act 1984* represented a significant change in Victorian adoption policy.

The government recognises that adoption is complex, and past adoption practices have resulted in significant trauma for people affected by those practices. The government also acknowledges the positive experience of adoption for many Victorian children, adult adopted people and their families.

To ensure that the Adoption Act, now over 30 years old, meets the needs of the children and families it affects, it is time to review the Act to ensure:

- the best interests of the child are paramount
- it is consistent with contemporary law in relation to family and community
- it operates harmoniously with other relevant areas of law that have developed since the introduction of the Adoption Act
- it is structurally sound and in accordance with contemporary drafting practice.

Accordingly, the Victorian Law Reform Commission ('the Commission') is requested to provide recommendations to government on the modernisation of the *Adoption Act 1984* and the *Adoption Regulations 2008*.

The Commission should consider and provide recommendations to government on opportunities to amend adoption law to:

1. ensure the best interests and rights of the child are the foremost consideration in any decision made under the Adoption Act
2. better reflect community attitudes and contemporary law in relation to family, for example, the way a child's identity is reflected on a child's birth certificate, or ensuring requirements in relation to prospective parents' relationship status or living arrangements are consistent with current Victorian law
3. uphold principles set out in the *Charter of Human Rights and Responsibilities* and the *United Nations Convention on the Rights of the Child*

4. improve the operation of the Adoption Act and Adoption Regulations including, but not limited to:
 - a. addressing any gaps in current information provisions
 - b. clearly articulating legislative practice and procedural requirements, for example in relation to assessment of adoption applicants
 - c. ensuring the Act uses clear, contemporary language.

In making recommendations, the Commission should ensure amendments are capable of harmonious operation with other relevant Victorian and Commonwealth legislation.

The Commission should *not* consider:

1. intercountry adoption programs or commercial surrogacy: these matters are more appropriately considered at a national level
2. adoption by same-sex couples: the government made an election commitment to legislate to allow same-sex adoption. This commitment has been delivered by the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* and is not within the scope of this review
3. contact statements: the government made an election commitment to legislate to remove contact statements. This commitment has been delivered by the *Adoption Amendment Act 2015* and is not within the scope of this Review.

The Commission is asked to report by 28 February 2017.

Glossary

Adoption order	An order made by the court which finalises the adoption of a child.
Adoption and permanent care teams	Teams within DHHS and approved agencies which carry out all aspects of the adoption process.
Approved agency	Non-government organisation approved by the Secretary to arrange adoptions under section 22 of the Adoption Act.
BDM	The Victorian Registry of Births, Deaths and Marriages.
Child	A person under 18 years of age.
Closed adoption	A form of adoption in which no information is shared between adoptive and birth families. Closed adoption is no longer practised in Victoria.
DHHS	The Department of Health and Human Services (Victoria).
Domestic partner	A person in a domestic relationship or registered relationship.
Domestic relationship	A relationship between two people who are not married or in a registered domestic relationship who are living together as a couple on a genuine basis (irrespective of sex or gender).
Forced adoption	The term used to describe an adoption where a child’s natural parent, or parents, were compelled to relinquish a child for adoption. This included situations where no consent was given, alternatives to adoption were not explained, consent was given under duress, and where consent was revoked. ¹
Infant	A child under 12 months of age.
Integrated birth certificate	A birth certificate which records both the birth and adoptive parents of an adopted person.

Intercountry adoption	Adoptions involving children from countries other than Australia who are legally placed for adoption under the <i>Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption</i> or under separate agreements between Australia and other countries.
Known-child adoptions	Adoption of a child who was born or permanently resides in Australia, has a pre-existing relationship with the adoptive parent(s) and is generally not able to be adopted by anyone other than the adoptive parent(s).
Local adoption	Adoption of a child who was born or permanently resides in Australia who has generally had no previous contact or relationship with the adoptive parent(s).
Open adoption	A form of adoption that facilitates or allows information sharing or contact between the adoptive and birth parents, and may involve contact between the child and biological parents. Open adoption is mandated in the current Victorian Adoption Act.
Options counselling	Counselling which is provided to a person who is considering giving consent to adoption about the effects of adoption, exploring alternative care options and providing information about available support services. The term options counselling is not used by the Adoption Act.
Principal officer	Officer within an approved agency who has powers and responsibilities under the Adoption Act and Adoption Regulations.
Registered relationship	A domestic relationship registered under the <i>Relationships Act 2008</i> (Vic).
Secretary	The Secretary of the Department of Health and Human Services.
Special needs adoption	The adoption of children who are over the age of 12 months, and/or have complex needs, such as children with a disability or children who have experienced abuse or neglect.
Stolen Generations	A name commonly given to the generations of Aboriginal and Torres Strait Islander children who were removed from their families by compulsion, duress or undue influence.

Executive summary

Introduction

- 1 This report completes the Victorian Law Reform Commission's review of Victoria's adoption laws, referred by the Victorian Attorney-General, the Hon. Martin Pakula MP on 18 December 2015.
- 2 The terms of reference asked the Commission to make recommendations to modernise the *Adoption Act 1984* (Vic) and *Adoption Regulations 2008* (Vic).
- 3 The Commission was asked to make recommendations to ensure that:
 - the best interests and rights of the child are the foremost considerations in adoption law
 - they reflect community attitudes and contemporary law better
 - the law upholds the principles of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) and the United Nations *Convention on the Rights of the Child* (CRC).
- 4 The Commission was required *not* to consider:
 - intercountry adoption programs or commercial surrogacy
 - adoption by same-sex couples
 - contact statements.
- 5 At the time of its introduction, the Adoption Act represented a significant change in Victorian adoption policy, as it brought in open adoption. However, it is now over 30 years old, and in many respects out of step with modern understandings of the needs of children and contemporary law in relation to family and community. The language and structure of the Adoption Act are not in line with modern drafting, and amendments over time have made it complex and difficult to navigate.
- 6 The Commission published a consultation paper in August 2016, which set out its analysis of the law and issues arising from the terms of reference. The consultation paper posed a range of questions which guided the consultation process. Consultations were held in Melbourne and across regional Victoria. The Commission convened 27 meetings with individuals and groups and nine roundtable discussions. Sixty-one written submissions were received.
- 7 The Commission's conclusions and recommendations are summarised below and its 88 recommendations are listed at page xxvii.
- 8 The Commission acknowledges the harm caused by past forced adoptions. It has been mindful of the need to ensure that the mistakes of the past are never repeated.

- 9 Key themes emerged during the review and informed the Commission's analysis and recommendations:
- The effects of adoption are lifelong, and affect an adopted person's extended, past and future families.
 - The loss of family connection at the heart of adoption can cause ongoing psychological and emotional harm even where the adoption is 'successful' and happy.
 - A strong culture of confidentiality and sometimes secrecy remains around adoption. This is inconsistent with the principle of openness and not in the best interests of the adopted person.
 - While the child is the central figure in an adoption, current adoption law does not provide well for children's views to be considered.
 - All parties to an adoption need support to manage its effects at key points in their lives, before and after the adoption. As the state arranges adoptions, it is appropriate that it assume some responsibility for the needs and rights of these children.
 - Finally, the processes and the rules governing adoption in Victoria are hard to understand, because they are not clearly articulated or readily available to the public. The Commission makes a range of recommendations to promote clarity and transparency in adoption practice.

Chapter 2 A modern Adoption Act

- 10 Many users of the Adoption Act are not lawyers but people who want to access adoption information or find out how to adopt. Amendments to the Act have reduced its readability and made it hard to navigate. The current Act should be repealed and replaced by a new Adoption Act. This will enable the use of modern drafting practices to ensure it is clear and accessible to all.
- 11 The Commission recommends that the new Act include objects to clearly set out its overall aims. The Act should also include general principles to guide decision making about adoption and the provision of adoption services. The principles should apply to the Court, the Secretary, principal officers of approved agencies as well as any other persons and bodies involved in the administration of the Act.

Chapter 3 Participation of the child

- 12 While the child is the central figure in an adoption, current adoption law does not provide well for their views to be considered at key stages in the adoption process. The Commission makes recommendations that aim to increase children's participation in decision making about their adoptions, including about placement, contact with their family of origin, and whether an adoption order should be made.

Chapter 4 Contact and adoption plans

Preservation of sibling relationships

- 13 The Commission makes recommendations aimed at preserving sibling relationships after an adoption. This includes requirements that all reasonable steps be taken to place siblings together and that if siblings are separated through adoption, arrangements for contact be made.

Adoption plans

- 14 The Commission makes recommendations to help children to continue existing relationships with people of significance to them after an adoption. These recommendations aim to reduce trauma associated with adoption and assist with the development of a child's identity.
- 15 The Commission recommends that a written adoption plan should be made for each child who is to be placed for adoption. Adoption plans providing for information exchange and contact would replace the current limited ability of the Court to place conditions on an adoption order.
- 16 An adoption plan should be negotiated before a child is placed for an adoption. It may provide for contact with a broad range of people. In addition to detail about contact with natural parents it should always include detail about contact with siblings and grandparents.
- 17 All adoption plans should be approved and registered by the Court, becoming part of the adoption order and enforceable as an order of the Court.

Chapter 5 The best interests of the child

- 18 In accordance with the paramount principle for adoption, the Commission recommends that the best interests of the child concerned, both in childhood and in later life, must be the foremost consideration.
- 19 The Adoption Act does not provide guidance about the matters that should be considered in determining the best interests of the child. Submissions and consultations strongly supported the introduction of 'best interests' guidance.
- 20 The Commission recommends principles to guide decisions and actions in adoption to ensure that they are in the best interests of the child.
- 21 Best interests guidance should apply to all decision makers under the Adoption Act, including the Court, the Secretary, the principal officers of approved agencies and any other people and bodies involved in the administration of the Act.

Changing the adopted child's name

- 22 Identity and openness in adoption were key concerns of people who consulted with the Commission. A child's name is a key part of their identity and may provide important links to their culture. It may be the one thing a natural parent can give their child.
- 23 The Commission makes recommendations aimed at preserving a child's identity by limiting the situations in which a child's name may be changed.

Chapter 6 Birth certificates of adopted people

- 24 Adopted children are issued with new birth certificates which reflect their new, post-adoption identity. The new birth certificate looks like any other person's birth certificate, with the adoptive parents named as the child's parents. For many adopted people their amended birth certificate represents the erasure of their past, a re-writing of their identity and a falsehood which must be corrected.

- 25 The Senate Community Affairs References Committee report, *Inquiry into Commonwealth Contribution to Former Forced Adoption Policies and Practices*, recommended that:
- all jurisdictions adopt integrated birth certificates, that these be issued to eligible people upon request, and that they be legal proof of identity of equal status to other birth certificates.¹
- 26 An integrated birth certificate shows details of a child's birth and adoption, including both their adoptive and natural parents.
- 27 A fundamental question for the Commission was: 'What is the purpose of a birth certificate?' A birth certificate does not have one single purpose. A common theme in submissions and consultations was that a birth certificate should be a true record of a person's birth and, therefore, show a child's biological origins.
- 28 While acknowledging its symbolic value, the Commission concluded that the primary purpose of a birth certificate is legal. It establishes a person's legal identity and shows who a child's legal parents are. Across Australia, people named on birth certificates are presumed to be a child's parents.
- 29 An adopted person's original birth certificate cannot be maintained for legal use because it does not show a person's legal identity or who the legal parents are.
- 30 The Commission has recommended that, subject to security and cost implications, optional integrated birth certificates be introduced in Victoria, with equal legal status to regular birth certificates.

Chapter 7 Adoption of Aboriginal and Torres Strait Islander children

- 31 The Commission focused on three key ideas emphasised by Aboriginal and Torres Strait Islander groups and individuals:
- Statutory adoption is generally not a culturally appropriate option for Aboriginal and Torres Strait Islander children.
 - Any adoption must ensure that cultural connections for Aboriginal and Torres Strait Islander children are not merely preserved but also promoted and developed.
 - Aboriginal and Torres Strait Islander communities are the experts in what is best for their children. The law needs to ensure that Aboriginal and Torres Strait Islander communities are involved early and consistently in decisions about their children.
- 32 The Commission concludes that there should be special requirements and considerations for adoption of Aboriginal and Torres Strait Islander children. Recommendations include:
- a positive duty on the Secretary of DHHS or principal officer to make inquiries about whether a child whose parents are considering adoption is an Aboriginal or Torres Strait Islander child.
 - a requirement that more culturally appropriate options be used for the care of children who cannot be cared for by their parents. Statutory adoption is a last resort for providing for the care of Aboriginal and Torres Strait Islander children.
 - a requirement that an Aboriginal agency be involved in all aspects of the adoption process for Aboriginal or Torres Strait Islander children.
 - a revised Aboriginal and Torres Strait Islander Child Placement Principle and decision-making principles that align with those in the *Children, Youth and Families Act 2005* (Vic) (the CYF Act).
 - a requirement that a cultural support plan be developed for any Aboriginal or Torres Strait Islander child who is placed for adoption or for whom an adoption order is made.

¹ Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) Recommendation 13.

Chapter 8 Consent

- 33 Consent to an adoption is required from the child's mother and father. This requirement protects the rights of the natural parents. It also protects a child's right to know and be cared for by their parents. In the past, forced adoptions occurred without effective consent under then existing adoption legislation, despite those laws containing consent provisions.
- 34 The Commission makes recommendations to strengthen the consent process. These include new requirements for the independence, qualifications, and experience of counsellors involved in adoption.
- 35 The Commission recommends extending the timeframe for a parent to revoke consent to a child's adoption. The current timeframe does not provide a parent with adequate time to come to terms with the decision and consider alternatives. The recommendation balances the need to ensure that consent is informed and freely given with a child's need for timely decision making about their permanent placement.
- 36 Because of the importance to the child of knowing both their natural parents, the Commission proposes the introduction of a duty on the Secretary of DHHS to take reasonable steps to identify the father.

Dispensing with consent

- 37 The Commission recommends changes to the grounds for the Court to dispense with consent.
- 38 Consent to an adoption can currently be dispensed with on the basis of what may be summarised as 'child protection' grounds. These considerations are not appropriate in the adoption framework, as adoption is premised on consent. The child protection system is established to make decisions in relation to children at risk of harm.
- 39 The Commission recommends that the grounds for dispensing with consent be narrowed to exclude its use for child protection matters.
- 40 In some limited circumstances dispensing with consent should be allowed where it is in the best interests of the child. The Commission makes recommendations about what the grounds for dispensing with consent should be.

Chapter 9 Discrimination and equal opportunity in adoption

- 41 Adoption laws, policies and practices are discriminatory, in the ordinary sense of the word. Only certain people are eligible to adopt a child, based on their relationship status. Assessment of their suitability to adopt is based on their age, physical and mental health, financial circumstances and other personal characteristics. Selection of adoptive families is based on the natural parents' wishes about applicants' religion, race and ethnic background.
- 42 The law can place reasonable limits on Charter rights. Exceptions to the *Equal Opportunity Act 2010* (Vic) permit discrimination where it is authorised by another law or necessary to comply with another law.
- 43 Victoria's adoption laws, policies and practices are intended to protect the best interests of children by ensuring that they are adopted by the people who are best able to meet their needs. The right of a child to a safe, stable, family environment, in which they maintain their connection with their family of origin, may in some circumstances outweigh the rights of people who want to adopt.

Chapter 10 Eligibility to adopt

- 44 The Commission makes recommendations which widen the eligibility criteria in the Adoption Act. While every eligible person should be entitled to apply to the Secretary or principal officer to adopt, an application should not create an entitlement to be assessed. The Commission recommends that the Adoption Act require the Secretary to manage applications for approval to adopt, anticipating the number of children able to be adopted and their needs.

Cohabitation

- 45 To be eligible to adopt through the local adoption program, couples must have been married, in a registered domestic relationship or in a domestic relationship for no less than two years. Since 1 September 2016 this includes same-sex couples.
- 46 Couples in a domestic relationship must also be 'living together'. This is not required of couples who are married or in a registered domestic relationship. The cohabitation requirement discriminates against certain couples based on marital status and is inconsistent with Charter rights. Further, there is no evidence that the cohabitation requirement demonstrates the stability of a relationship. The assessment criteria under the Adoption Act and Regulations, together with the assessment process, provide a robust method of ensuring that only suitable people in a stable relationship are approved to adopt. The Commission recommends that the eligibility criteria under the Adoption Act should not require or imply that couples in a domestic relationship live together.

Adoption by a single person

- 47 Single people may only adopt a child where 'special circumstances exist in relation to the child which make it desirable so to do'. The Adoption Act does not define 'special circumstances'. In practice, it has been interpreted as meaning they may adopt children with 'special needs'.
- 48 The law in Victoria already recognises that single people are suitable parents who can provide children with a safe, stable and secure environment. Single people are eligible to care for a child under CYF Act orders and undertake IVF on their own.
- 49 The Commission considers differentiating between couples and single people on the basis of marital status is inconsistent with the Charter and the right to recognition and equality before the law. Marital status is not relevant to the safety, wellbeing and interests of a child to be adopted.
- 50 The Commission recommends that the Adoption Act apply the same eligibility criteria to single applicants as to couples.

Known-child adoption

- 51 The Adoption Act recognises two types of known-child adoption in Victoria: adoption by a step-parent and adoption by a relative of a child. 'Exceptional circumstances' must exist in relation to the child which make the adoption desirable. Additionally, parenting orders under the *Family Law Act 1975* (Cth) are preferred to adoption orders as they do not sever the legal relationship between the child and their parents, and expire when the child turns 18. There is also concern that when a relative adopts a child, it can distort family relationships. The Commission supports the preference for Family Law Act orders over adoption orders in relation to adoption by step-parents and relatives.
- 52 Adoption agencies told the Commission that they do not prioritise adoption applications by step-parents, due to funding constraints. Such applications are considered low-risk, in that they seek to formalise an existing relationship which will continue whether or not the child is adopted.

- 53 The Commission considers it is reasonable to expect a step-parent to contribute to the administrative cost of their application if they wish to adopt the child before the child turns 18. It makes a recommendation to this effect. At 18 years old a person can elect to be adopted by a step-parent or relative without the involvement of the Secretary or principal officer.

Adoption from care

- 54 In Victoria, permanent care orders under the CYF Act provide permanency for children in Victoria's child protection system. A permanent care order transfers parental responsibility for the child from the natural parents to the permanent care parents while maintaining the legal parental relationship. The Adoption Act does not provide a way for a person with responsibility for a child under a permanent care order to adopt that child.
- 55 The Commission recommends the creation of a pathway to adoption from permanent care in strictly limited circumstances.
- 56 The consent of a child's natural parents should remain the fundamental requirement. 'Child protection' grounds for dispensing with consent should not be available in granting an order for adoption from permanent care.
- 57 Eligibility should be limited to people applying to adopt a child who has been placed with the applicant under a permanent care order for at least two years. The two-year requirement ensures that children will not be quickly moved from permanent care to adoption.
- 58 As a form of known-child adoption, it is appropriate that 'exceptional circumstances' be demonstrated which make the adoption desirable. Lack of contact between a child and their natural parents should not of itself satisfy this requirement. The court should also be satisfied that an adoption order would make better provision for the child's welfare and best interests than continuation of the permanent care order, or an order under the Family Law Act.
- 59 As permanent care orders are under the Children's Court jurisdiction, discharge of a permanent care order is a decision of that Court. Leave from Children's Court should be granted before an application for an adoption order is made to the County Court.

Chapter 11 Assessment of applicants for adoption

- 60 The Adoption Act requires that all applicants be assessed as suitable to adopt against suitability criteria set out in the Adoption Regulations.

Suitability criteria

- 61 The criteria assess the 'suitability' of many aspects of an applicant's background, personality, capacities and circumstances, including emotional, physical and mental health, age and maturity, skills and life experience and financial circumstances. The Commission concludes that on the whole, the suitability criteria establish a reasonable framework for assessing a person's ability to bring up an adopted child, through to adulthood, in a positive, stable, family environment.
- 62 The Commission considers that one criterion encapsulates the overall purpose of the assessment: the applicants' 'capacity to provide a stable, secure and beneficial emotional and physical environment during a child's upbringing until the child reaches social and emotional independence'. It proposes that this criterion be elevated to become the overarching purpose of the suitability assessment process.
- 63 Additional requirements, including requirements relating to citizenship, fertility treatment and full-time care of a child, which are currently set out in policy, should be included in the Adoption Act or Adoption Regulations.

Assessment process

- 64 The Commission had difficulty determining the full extent of the requirements of the assessment process. The Commission heard complaints from adoptive parents and applicants about inconsistent practices across agencies relating to information, the amount of time taken, and assessment practices.
- 65 Any process which affects a person's eligibility to adopt should be included in the Adoption Act or Adoption Regulations. All applicants should receive the same information and training. Decision makers should take a consistent approach to assessments. Timeframes should be as consistent as possible.
- 66 DHHS should take steps to improve consistency across agencies. Information about the assessment steps should be provided to applicants and available to anyone who expresses an interest in adoption.
- 67 To increase clarity about the factors that decision makers may take into account, assessment guidelines should be developed. The guidelines should be easy to understand and used by all approved agencies. They should be published on the DHHS website and provided to any applicant who does not have access to the website.
- 68 As well as improving transparency, these measures would assist applicants' understanding and expectations of the assessment process, promote a transparent and consistent approach to decision making and increase the accountability of agencies.
- 69 Parents and applicants told the Commission they felt unable to give feedback about the process, including concerns about delays and lack of information, because they were worried it would affect their chances of being selected to adopt a child. The Commission recommends that the Secretary establish a mechanism that enables applicants to give anonymous feedback about their experience of the assessment process. This would inform improvements to adoption services in Victoria.

Chapter 12 Selection of adoptive parents

The matters parents may express wishes about

- 70 After assessment, approved applicants are added to a register of potential adoptive parents. To adopt a child, they must be selected for a child who needs a family. This process is called 'linking'. When making this decision, the Secretary or principal officer must consider the parents' wishes about the 'religion, race or ethnic background' of the adoptive parents.
- 71 On its face, the linking process infringes the principle of non-discrimination contained in the Charter and the Equal Opportunity Act.
- 72 While there is a tension between parents' ability to express wishes about the adoptive family and protecting applicants from discrimination, the overriding principle in adoption is that all decisions must be in the child's best interests.
- 73 The Equal Opportunity Act prohibits discrimination against a person based on particular attributes unless it is authorised by another law or necessary to comply with another law. Currently, the Adoption Act authorises parents to state preferences about applicants' religion, race and ethnic background.
- 74 The Commission considers parents should be able to participate in decision making about who adopts their children, because it increases the possibility that they will have ongoing contact with their child and the adoptive family.

- 75 The Commission recommends that the Adoption Act permit parents to express wishes about the full range of suitability criteria set out in the Adoption Regulations, replacing the factors currently specified in section 15(1)(b) of the Adoption Act. This would ensure parents' wishes focus on factors already established as relevant to applicants' ability to care and provide for a child and increase the chances of a successful open adoption.
- 76 However, parents' wishes should not decide the outcome. A wish that is contrary to a child's best interests should not be followed.
- 77 To ensure the Adoption Act and Equal Opportunity Act operate harmoniously, the Commission also recommends that the Equal Opportunity Act should not apply to the assessment of applicants reasonably based on the suitability criteria and decisions which give effect to parents' wishes in selecting parents in a child's best interests.

Adoption services—conflict of interest

- 78 The Adoption Act empowers the Secretary to approve agencies to 'make arrangements or enter into negotiations' towards an adoption. In each adoption, all services—options counselling, assessment of applicants, linking, placement, guardianship, monitoring of the placement and legalisation—may be managed by the same agency.
- 79 This situation creates a risk of actual or perceived conflict of interest for the social workers and counsellors involved in the adoption, where they may have conflicting duties to two or more clients or where a personal interest conflicts with a duty to a client. A second possible issue is that agencies placing a child may consider only applicants in their own region, whom they have assessed and approved, rather than considering the full range of approved applicants on the statewide register. This limits the range of families considered for a child, which is contrary to the child's best interests.
- 80 The Commission recommends that the Secretary be empowered to approve agencies to carry out discrete adoption services to enable them to be carried out by separate service providers. This would reduce the risk of conflict of interest. It also recommends that the Adoption Act establish a central, statewide register of approved applicants to be consulted when selecting prospective adoptive parents. This approach to linking would serve the best interests of children by maximising the number of applicants that can be considered to adopt a child.

Chapter 13 Adoption services and the Equal Opportunity Act

- 81 Adoption and permanent care teams provide services in geographical service regions of Victoria. CatholicCare provides a statewide adoption service. People who wish to apply to adopt are assigned to the adoption service in their local region. Applicants may not 'shop' between regional adoption services, but they may choose between their local service and the statewide service provided by CatholicCare.
- 82 LGBTI couples have been eligible to adopt since 1 September 2016 and may apply to their regional office for service. CatholicCare's information sheet for prospective adoptive parents states that it is able to assess and accredit LGBTI couples but not select them to adopt or proceed to legalisation through the court. LGBTI couples are referred to another approved adoption agency. While heterosexual couples may adopt through either their regional adoption service or the statewide service, this option is not available to LGBTI couples.

- 83 The Equal Opportunity Act prohibits discrimination on the basis of attributes including gender identity, marital status, sex and sexual orientation. However, the Act contains exceptions and exemptions that permit discrimination. Section 82(2) of the Equal Opportunity Act permits a religious body to act in discriminatory ways if the action conforms with the doctrines, beliefs or principles of the religion. Section 84 permits a person to discriminate against another person where the discrimination is reasonably necessary to comply with the doctrines, beliefs or principles of their religion. CatholicCare is relying upon an exception to refuse to provide adoption services to LGBTI applicants.
- 84 The Commission considers that a 'blanket' religious exception should not apply to the provision of adoption services under the Adoption Act. Discrimination should only be permissible to the extent that the Adoption Act provides, upon grounds that are in the best interests of children.
- 85 The Commission recommends that the religious exceptions under the Equal Opportunity Act not apply to approved adoption agencies providing publicly funded adoption services under the Adoption Act. This recommendation is consistent with the secular nature of adoption.

Chapter 14 The role of the court in the adoption process

- 86 The vast majority of adoption proceedings are heard in the County Court. Currently, the court's opportunity for engagement with the adoption process is limited. The Commission makes recommendations to facilitate a more meaningful role for the court throughout the adoption process.

Dispensing with consent

- 87 The court hears applications for an adoption order at the end of a long adoption process, when the child has been with the prospective adoptive family for around 12 months. Applications to dispense with consent tend to be determined late in the adoption process, often days prior or on the same day as the court makes the adoption order. This timing inevitably shifts the balance in favour of dispensing with consent to enable the making of an adoption order, to support the child's need for stability.
- 88 Because of its potentially drastic consequences, the Commission recommends the court hold a preliminary hearing to determine any application to dispense with consent, regardless of whether the application is contested. This should occur before the placement of a child with prospective adoptive parents.

Parties to proceedings

- 89 Currently, the court has a broad discretion to permit anyone it thinks fit to be a party to an adoption hearing. The Commission recommends that the Adoption Act define the parties to adoption hearings at each stage of the process.
- 90 In all adoption hearings, parties should include the child and the child's natural parents. This grants them the right to be heard by the court in decisions that affect them. However, they should not be obliged to participate.

Confidentiality

- 91 There is a presumption of confidentiality in adoption proceedings. This is not consistent with the principles of open adoption. It limits the transparency of the court process and the opportunity to understand the court's thinking. The Commission recommends that proceedings under the Adoption Act should be heard in open court.

- 92 The Adoption Act should require that judicial reasons be publicly available, unless an order has been made under section 17 of the *Open Courts Act 2013* (Vic), and should be anonymised to ensure confidentiality of any matters likely to enable the child, the adoptive parents, or natural parents, to be identified.
- 93 Publication of judicial reasons will provide greater understanding of adoption practice and jurisprudence, and facilitate and support much-needed open adoption research.

Representation of the child

- 94 The Commission considers that an independent children's lawyer should be appointed for all children in the adoption process. This should occur as early as possible, including during the development of an adoption plan, at a preliminary hearing, at a final hearing and at any subsequent hearings such as variation or revocation of the terms of an adoption plan.
- 95 The two key models used for the legal representation of a child in Australia are the 'best interests' model and the 'direct representation' model. The Commission recommends that independent children's lawyers act in accordance with the direct representation model for children aged over 10, that is, act on the child's instructions. If a child is under 10 or is not mature enough to give instructions, the best interests model should be used.
- 96 There are cost implications of appointing independent children's lawyers in adoption proceedings. However, the decisions under consideration by the court have great and lasting significance for the child. In view of the small number of adoptions in Victoria the Commission considers that the cost is justified.
- 97 The Adoption Act should also provide for the court to direct the Secretary or principal officer to appoint a person, such as a social worker or other person of expertise to support a child in proceedings, as well as a lawyer. This person should not be an employee of the Department or of an approved adoption agency.

Discharge of an adoption order

- 98 Currently an adoption order may be discharged where the order or consent was based on fraud, duress or other improper means, or where 'special circumstances' exist, such as irretrievable breakdown of the relationship between the adopted person and their adoptive parents. Additionally, the court must be satisfied that 'the welfare and interests of the child would be promoted by the discharge of the adoption order.'
- 99 A discharge order effectively reverses the legal effect of an adoption. It severs an adopted person's relationship with their adoptive family and reinstates their legal relationship with any biological parents or wider family.
- 100 From 2010 to 2016, 17 applications for discharge of an adoption order were made in Victoria. All 17 applications were made by adults.
- 101 The Commission considers that the current legal tests for discharge of an adoption order are appropriate in relation to an adopted child, and for any application brought by someone other than the adopted person.
- 102 However, the Adoption Act should not impose a barrier to an adult adopted person applying to the court for a discharge of an adoption order. The court should be satisfied that the discharge of an adoption order is appropriate and desirable in all the circumstances. The court should also ensure that all parties are advised of the legal effect of discharging an adoption order when they are notified of proceedings.

Chapter 15 Adoption support

- 103 In the past, support was not considered necessary after an adoption order was made. There is now recognition that adoption has lifelong, intergenerational effects and ongoing support is needed to help parties to adoption manage its effects at a range of times and key points in their lives.
- 104 Currently, the key form of post-adoption support is for people seeking access to adoption information. Grants of financial assistance are available in special circumstances.
- 105 The Commission was told of a need for a variety of services, tailored to meet the needs of people affected by adoption.
- 106 The Commission recommends the Secretary establish and maintain adoption and post-adoption services. The Commission considers that as the state is responsible for arranging adoptions it should also be responsible for post-adoption support. These services should include support provided by approved adoption agencies and other organisations, and specialised adoption support services, including specialist counselling, psychological and psychiatric services.
- 107 The people eligible for adoption support, including grants of financial assistance, should include adopted people, natural parents, adoptive parents, parties to an adoption plan, natural relatives, and the natural children of adopted people. This recognises the far-reaching effects of adoption and is consistent with access to adoption information rights under the Adoption Act.

Mediation

- 108 Currently, the only recourse for parties in conflict over contact and information conditions on an adoption order is application to the court, in limited circumstances. The Commission recommends that the Secretary develop a mediation service to assist families in negotiating conflict in relation to any adoption arrangements.

Data and research

- 109 Effective adoption support should be evidence-based. However, available adoption data in Victoria is limited. The Commission recommends that the Secretary maintain and annually report comprehensive, statewide data on the operation and delivery of adoption services at all stages of the adoption process, including support and mediation services. This would support the operation of the Adoption Act and enable effective provision of adoption services.

Chapter 16 Access to adoption information

- 110 Before 1984, adoption information was kept confidential. The current Adoption Act made some of this information available. Part VI of the Adoption Act regulates access to information held in records about adoptions that were negotiated or arranged by the Secretary, an approved agency, or a private adoption agency under the *Adoption of Children Act 1964* (Vic).
- 111 Part VI of the Adoption Act needs significant revision. The provisions do not set out clearly what information may be made available on request, and under what conditions. Nor do they incorporate the features of subsequent legislation that regulate the handling of personal information by government agencies and protect privacy, such as the Charter, the *Privacy and Data Protection Act 2014* (Vic), or the *Health Records Act 2001* (Vic).

A new access to information scheme

- 112 The Commission recommends that Part VI of the Adoption Act be replaced with a new access to information scheme, designed by DHHS in consultation with the Privacy and Data Protection Commissioner, the Health Services Commissioner and the Ombudsman. The new scheme should incorporate contemporary standards of transparency, accountability and fairness in the management of personal information by Victorian government agencies.
- 113 It should ensure that people about whom information is collected are aware of its collection, the purpose of collection, to whom information of that kind is usually disclosed, and their right to have access to the information and correct it if necessary.
- 114 The new scheme should apply to information in the possession or control of the Secretary or an agency that relates to an adoption that was negotiated or arranged at any time under current or corresponding previous legislation.
- 115 A new scheme provides an opportunity to address issues identified during the Commission's review.

Centralised administration

- 116 People seek access to information under the Adoption Act from Family Information Networks and Discovery (FIND) and three approved agencies. Each of these organisations assesses requests for access, locates the information, obtains it from the Registry of Births, Deaths and Marriages, courts or other organisations, and provides it to the applicant in accordance with the Adoption Act.
- 117 The Secretary has information-collection powers (exercised by FIND) that are not available to the other approved agencies. FIND and the approved agencies operate independently under different guidelines and procedures.
- 118 Many of the problems identified during consultations, such as delays in obtaining information and inconsistent decision making, arise from this devolved structure.
- 119 The Commission recommends that the Secretary be solely responsible for the new access to information provisions. This would address many of the problems raised during consultations. It would provide greater certainty and accountability, and is also a practical solution.

Information covered by the scheme

- 120 The new scheme should provide a simple yet comprehensive description of the information to which access may be granted that does not pre-empt decisions about how to respond to a request for access to it.

Protection of information

- 121 Part VI of the Adoption Act includes measures to balance one person's right to access information with another's right to privacy. These provisions can be very complex, and in some cases the people who have rights to apply for access are the same people as those whose information is protected from unreasonable disclosure.
- 122 The new access to information scheme should describe clearly the circumstances in which information may be released under the Adoption Act.

Eligibility to request information

- 123 The Adoption Act controls access to information about an adopted person by specifying who has a right to apply for access. Adopted people, adoptive parents, natural parents, natural relatives (a brother, sister, uncle, aunt and grandparent) and the natural adult children of adopted people have the right to apply.

- 124 The Commission recommends that the new scheme extend some rights to apply for adoption information, for example the rights of adopted children under 18 and natural relatives. It also recommends that eligible people be enabled to authorise another person to apply on their behalf in defined circumstances.

Access to medical information

- 125 Part VI of the Adoption Act permits disclosure to an adopted person of some medical information which is contained in the records relating to the adoption. However, where they do not have contact with their natural parents or natural relatives, they may not be able to obtain up-to-date family medical information. The new access to information provisions should enable adopted people to obtain non-identifying medical information from their natural parents and natural relatives through the Secretary.

Notification and disclosure

- 126 Generally there is no requirement for a person to be notified about a disclosure where their agreement or consent is not required.
- 127 It is likely that DHHS and approved agencies hold a great deal of personal information about people who are unaware that the records exist or what they contain. Much of this information does not require their consent for its disclosure.
- 128 The Commission considers the Secretary should be required to make all reasonable efforts to notify someone that information about them is going to be released, and give them a reasonable opportunity to correct or add comments to information that is wrong or misleading. This would be in accordance with good privacy practice and consistent with the requirements of the modern information privacy regimes.

Adoption Information Register

- 129 People who are entitled to apply for information under the Adoption Act are able to ask for certain details to be recorded in an Adoption Information Register maintained by DHHS and each approved agency. This includes their name, contact details and preferences about exchanging information with anyone else on the register. The new access to information scheme should specify the purpose of the Adoption Information Register and provide accurate and complete details about how it works.

Guidelines about information decisions

- 130 A request for access to information under the Adoption Act requires the decision maker to assess the relevance and sensitivity of the information and the likely effect on anyone that it identifies.
- 131 The Commission recommends that the Secretary develop clear, publicly accessible guidelines to promote consistent decision making about access to information.

Counselling

- 132 Access to information under Part VI of the Adoption Act is generally available only if the applicant has attended an interview with an approved counsellor. Mixed views were expressed about the value of this interview.
- 133 The Commission recommends that the interview be offered as an option to all applicants. The Secretary should advise an applicant if the information could reasonably be expected to be distressing to the applicant.

Review of decisions

- 134 The modernisation of the access to information scheme provides an opportunity to introduce internal and external review of decisions about those requests. No such reviews are currently provided by the Adoption Act.
- 135 A review process would also help to ensure that decision makers are accountable for how they respond to requests. It may identify the need for more training, guidance or resources or other actions to improve the consistency of decisions and the efficiency with which requests are handled.
- 136 Reviews should be inexpensive and accessible. The Victorian Civil and Administrative Tribunal (VCAT) is the appropriate external review body in Victoria. An internal review should be a pre-requisite to seeking external review.
- 137 The Commission recommends that decisions of the Secretary under the new access to information scheme relating to the disclosure of information be subject to internal review within DHHS and external review by VCAT.

Recommendations

A new Adoption Act: principles and modernisation

1. The *Adoption Act 1984* (Vic) should be repealed and replaced with a new Adoption Act that:
 - a. incorporates the legislative reforms recommended in this report
 - b. retains the content of provisions that have not been addressed in this report, and
 - c. is structured and expressed in accordance with contemporary drafting practice.
2. The Adoption Act should specify that the object of the Act is to provide for adoption in a way that:
 - a. ensures that the best interests of the child concerned, both in childhood and in later life, are the paramount consideration in adoption law and practice
 - b. ensures that adoption is regarded as a service for the child concerned which is centred on the needs of the child rather than those of an adult seeking to care for a child
 - c. ensures that appropriate adoption support is available to eligible people at all stages of an adoption and after adoption
 - d. promotes openness in adoption and assists a child to know and have access to their family of origin and cultural heritage
 - e. ensures that people involved in or affected by an adoption can have access to information about the adoption
 - f. complies with Australia's obligations under treaties and other international agreements, in particular the obligations arising under the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* and the *Convention on the Rights of the Child*.
3. The Adoption Act should include a suite of overarching principles which include general principles (described in Recommendation 4), the best interests principles (described in Recommendation 23), and the decision-making principles for Aboriginal and Torres Strait Islander children (described in Recommendation 29). The Adoption Act should specify that:
 - a. Decision makers and others providing services under the Adoption Act including the court, the Secretary, principal officers of approved agencies and any other persons and bodies involved in the administration of the Act are to have regard to the principles set out in the Act (where relevant) in making any decision or taking any action under the Act.
 - b. The principles give guidance in the administration of the Act and do not create, or confer on any person, any right or entitlement enforceable at law.

4. The general principles should specify that:
 - a. The best interests of the child concerned, both in childhood and in later life, must be the paramount consideration.
 - b. Adoption is a service for the child concerned and no adult has a right to adopt a child.
 - c. Consent to adoption must be fully informed and free from duress, pressure or coercion.
 - d. A child who is capable of forming their own views on a matter concerning their adoption must be given the opportunity to express them freely and these views are to be given due weight in accordance with the age and maturity of the child.
 - e. Anyone involved in the adoption process should be given the information that they reasonably need to participate effectively, in a manner and form that enables them to understand the relevant process.
 - f. A person or body exercising a function or power under this Act in relation to an Aboriginal or Torres Strait Islander child must observe the decision-making principles for Aboriginal and Torres Strait Islander children.
5. Where possible, the Adoption Act should use the term 'mother' to describe the person who gave birth to the child. If it is necessary to draw a distinction for clarity, the terms 'natural mother' and 'adoptive mother' should be used. Similar distinctions should be drawn where necessary between 'natural father' and 'adoptive father', and 'natural parents' and 'adoptive parents'.
6. The Adoption Act should avoid language that obscures the facts of the adoption or fails to recognise that the natural parents do not change, even though their legal status does. In particular, the explanation of the effect of an adoption order should:
 - a. avoid the use of the phrase 'as if the child had been born to'
 - b. focus on the permanent transfer of parental rights and responsibilities to the adoptive parents
 - c. specify that the child permanently ceases to be entitled to any legal benefits that flow from the relationship with their natural parents and instead becomes entitled to any legal benefits that flow from the relationship with their adoptive parents.
7. The Adoption Act should modernise or clarify other language and concepts including in the following ways:
 - a. Use the term 'parental responsibility' instead of 'guardians', 'guardianship' and 'custody', except when referring to guardianship under the *Immigration (Guardianship of Children) Act 1946* (Cth).
 - b. Clearly provide that the fact that someone other than the natural parents has parental responsibility for the child, including sole or exclusive parental responsibility, does not affect the requirement for the consent of the natural parents to the adoption.
 - c. Use the term 'contact' instead of 'access' to describe arrangements for contact with the child.
 - d. Ensure that the consent provisions provide for consent to adoptions by two parents who are of the same sex or gender as well as by a parent or parents who do not identify with a specific sex or gender.
 - e. When referring to either an Aboriginal or Torres Strait Islander person, use the terms 'Aboriginal or Torres Strait Islander person' and 'Aboriginal or Torres Strait Islander child' rather than the shorthand 'Aboriginal person' or 'Aboriginal child'.

- f. Define the terms 'parental responsibility', 'contact', 'Aboriginal or Torres Strait Islander person' and 'Aboriginal and Torres Strait Islander child' consistently with the definitions in the *Children, Youth and Families Act 2005* (Vic).

Participation of the child in adoption decision making

- 8. The Adoption Act should specify that the views of the child must be sought on any decision that has a significant impact on the child's life and that:
 - a. the child must have the opportunity to express their views freely
 - b. the decision maker must give these views due weight in accordance with the age and maturity of the child
 - c. the child is not required to express their views.
- 9. A decision that has a significant impact on the child's life should be defined as including but not limited to:
 - a. the development of the adoption plan concerning the child
 - b. the placement of the child for adoption
 - c. the application for an order for the adoption of the child
 - d. a decision about the child's name.
- 10. To ensure that the child is able to form and express their views on a decision, the Adoption Act should specify that the child must be provided with:
 - a. relevant and adequate information concerning the decision
 - b. any assistance that is necessary for the child to understand the information and to express their views
 - c. information about the child's rights
 - d. information about the outcome of the decision and an explanation of the reasons for the decision.
- 11. The requirements in section 14 of the Adoption Act that a child must receive counselling before an adoption order is made should be retained with the following modifications:
 - a. The 'child's views' should be sought rather than their 'wishes'.
 - b. The words 'at least 28 days before the day on which the adoption order is to be made' should be replaced with 'at least 28 days before the day of the hearing for the adoption order'.
 - c. The words 'age and understanding' should be replaced with 'age and maturity'.

Contact and adoption plans

- 12. The Adoption Act should specify that the written report provided to the court on behalf of the Secretary or principal officer to enable it to consider an application for an adoption order must include information about:
 - a. whether other siblings have been placed for adoption
 - b. what consideration was given to placing a child with their siblings
 - c. how sibling relationships will be preserved through contact arrangement or the reasons why this is not appropriate.

13. The Adoption Act should specify that one of the matters the court must be satisfied about before making an adoption order is that due consideration has been given to the preservation of sibling relationships and appropriate provision has been made for this.
14. A written adoption plan should be made for each child who is to be placed for adoption. An adoption plan should be approved and registered by the court. A registered adoption plan should become part of the adoption order and enforceable as an order of the court. This should replace the ability for the court to place contact and information conditions on an adoption order under section 59A.
15. Adoption plans should be negotiated:
 - a. after the necessary consents for a child to be adopted have been given or dispensed with and the period for consent to be revoked has passed
 - b. prior to the placement of the child for adoption.
16. The Adoption Act should set out the rights and responsibilities that are to be considered and weighed in the negotiation of an adoption plan. The provision should be modelled on schedule 2 of the *Adoption Act 1994* (WA).
17. The Adoption Act should provide the following detail about who is to be involved in the negotiation and agreement of an adoption plan:
 - a. An adoption plan should be negotiated between the natural parents, the adoptive parents, the Secretary or principal officer, and the child and/or their legal representative. Due regard should be given to the age and maturity of the child.
 - b. A parent whose consent has been dispensed with by the court may be involved in negotiating and agreeing on an adoption plan, unless the court orders that they may not be so involved.
 - c. The Secretary or principal officer should notify the parents and siblings of the natural parent or, if they cannot reasonably be located, an aunt or uncle of the natural parent who is 18 years and over, that the necessary consents have been given to place a child for adoption and give them the opportunity to be a party to the adoption plan when:
 - i. the natural parent is unable or does not wish to be involved in adoption planning and does not object to the relative being involved
 - ii. the natural parent's consent to the adoption is not required because they are deceased
 - iii. the natural parent died after consenting to the adoption
 - iv. the requirement for the natural parent's consent to the adoption has been dispensed with because they cannot be found or contacted.
18. The Adoption Act should define the parties to an adoption plan as the people who sign it.
19. Adoption plans should be able to provide for any other matters relating to the child but the Adoption Act should require that they include the following details:
 - a. contact arrangements with natural parents, siblings and grandparents, and any requirement that there not be contact
 - b. information exchange, and any requirement that information not be exchanged
 - c. how the child is to be assisted to develop a healthy and positive cultural identity
 - d. any financial and other assistance approved by the Secretary for the proposed adoptive parent(s)
 - e. the period of time over which the plan is to have effect.

Best interests of the child

20. The principle that the best interests of the child are the paramount consideration in adoption should be expressed consistently at all times in the Adoption Act or Regulations using the phrase 'best interests of the child concerned, both in childhood and in later life' rather than 'welfare and interests of the child'.
21. The Adoption Act should specify that on the making of an adoption order a child's given name should not be changed unless there are 'exceptional circumstances'. It should be possible to add given names.
22. The Adoption Act should provide for the court to decide on a child's surname on the making of an adoption order, which should be one of the following: the adoptive parents' surname, where they both have the same surname; the surname of the adoptive father; the maiden name or other surname of the adoptive mother; the surname or former surname of any previous parent of the adopted child; a surname formed by combining the adoptive parents' surnames or any previous parents' surnames.
23. The Adoption Act should provide principles which specify that in determining the best interests of the child the following matters should guide decisions and actions:
 - a. any views expressed by the child, given due weight in accordance with the age and maturity of the child
 - b. protection and promotion of the child's rights
 - c. the likely effect of the decision or action on the life course of the child
 - d. any wishes expressed by either or both natural parent(s)
 - e. the preservation, as far as possible, of the child's identity, including their given name, language and cultural and religious ties
 - f. the preservation of the relationship of the child with their natural parents and siblings (if any) and significant other people (including relatives) that the decision maker considers to be relevant
 - g. that it would ordinarily be in a child's best interests to be placed with the same family as any sibling of the child who is also to be adopted or has previously been adopted
 - h. the suitability and capacity of any proposed adoptive parent to meet the child's needs, take on the responsibilities of parenthood and provide for the development of the child's identity, including contact with their family of origin and significant other people
 - i. the family composition of any proposed adoptive family, including age gaps between any children, and the effect it may have on the ability of the proposed adoptive parents to provide the necessary care to the adopted child or children
 - j. the alternatives to an adoption order, and the likely short-term and long-term effects on the child of changes in their circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.

Birth certificates of adopted people

24. Subject to security and cost implications, integrated birth certificates should be introduced in Victoria. These should:
 - a. be available:
 - i. for future adoptions and all previous adoptions
 - ii. in addition to the amended birth certificate that is currently provided
 - iii. on application to the Registrar of Births, Deaths and Marriages
 - b. clearly show the person's legal identity
 - c. have the same legal status as the amended birth certificate.
25. Where an adopted child is under 18 years of age, their integrated birth certificate should be available, on application, to:
 - a. their adoptive parents, on the child's behalf
 - b. to the child:
 - i. with their adoptive parents' consent or
 - ii. after receiving counselling from a counsellor who assesses the child as mature enough to understand the consequences of receiving information about the identity of their natural parents.

Aboriginal and Torres Strait Islander children

26. The Adoption Act should require the Secretary or principal officer to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal or Torres Strait Islander child.
27. The Adoption Act should require that if a child is identified as an Aboriginal or Torres Strait Islander child, an Aboriginal agency be involved in all aspects of the adoption process. The requirements for status as an Aboriginal agency under the Adoption Act should be defined consistently with section 6 of the *Children, Youth and Families Act 2005* (Vic).
28. The Adoption Act should include a section stating that statutory adoption is not part of Aboriginal or Torres Strait Islander culture. It should provide that the court will not make an order for the adoption of an Aboriginal or Torres Strait Islander child unless satisfied that statutory adoption is clearly preferable to any alternative order that may be made under the laws of the State or the Commonwealth.
29. The Adoption Act should include an Aboriginal and Torres Strait Islander Child Placement Principle and decision-making principles. The wording should be consistent with sections 12, 13 and 14 of the *Children, Youth and Families Act 2005* (Vic). The Aboriginal and Torres Strait Islander Child Placement Principle should include a requirement that a cultural support plan is prepared for any Aboriginal or Torres Strait Islander child placed for adoption.
30. The Adoption Act should specify that an Aboriginal or Torres Strait Islander child cannot be placed for adoption and the court cannot make an adoption order unless:
 - a. the Secretary or principal officer has received a report from the Aboriginal agency recommending that the child be placed for adoption
 - b. a cultural support plan has been prepared for the child.

Consent

31. The Adoption Act should require that, where the father has not been identified, the Secretary must take reasonable steps, as specified in the Regulations, to establish the identity of the father. The Regulations should specify that:
 - a. the mother should receive counselling that encourages her to disclose as much information as possible to give to the child
 - b. if the mother is unwilling or unable to disclose details identifying the father, the certificate of compliance (currently provided for in regulation 26) should include a statement specifying that the counsellor gave the mother information relating to the following matters and the dates on which they were discussed:
 - i. the importance to the child of knowing that both parents have had the opportunity to participate in planning the adoptive placement
 - ii. the long-term rights and interests of the child in having knowledge of their origins, including the relevance of genetic and medical information and importance of this knowledge for the development of the child's identity
 - iii. the importance of the child's future rights as separate from the mother's own immediate needs and rights.
32. The Adoption Act should require that if the father is not identified the written report provided to the court concerning the proposed adoption (currently under section 15 of the Adoption Act) includes details about the efforts made to identify the father.
33. The Secretary should have a non-delegable power to dispense with the requirement to notify a man believed on reasonable grounds to be the father if:
 - a. the child's conception was the result of an offence committed by the person
 - b. the person is a lineal relative of the mother
 - c. there would be an unacceptable risk of harm to the child or mother if the person were made aware of the child's birth or proposed adoption.
34. The Adoption Act should replace the current requirements in section 5(2) of the Adoption Act for approved counsellors as follows:
 - a. Counsellors must be independent of the Department of Health and Human Services and approved agencies.
 - b. Counsellors must hold a relevant university degree that is prescribed in the Adoption Regulations.
 - c. Counsellors must be a member of a relevant professional body that is prescribed in the Adoption Regulations.
35. The Adoption Regulations should require that in addition to the current mandatory written information that is provided by the counsellor (under regulation 17), written information should also be provided about:
 - a. support (financial and otherwise) that may be available to the parent whether or not an adoption of the child proceeds
 - b. possible psychological effects for the parent, both short and long-term, of consenting to the adoption
 - c. possible psychological effects for the child, both short and long-term, of being adopted
 - d. the rights and responsibilities of the parties to an adoption, including those relating to adoption plans.

36. The Adoption Act should require the Secretary or principal officer to ensure that:
 - a. each person considering giving consent to an adoption is told that it may be advisable to seek legal advice; is given the details of at least one entity that generally provides free legal services; and is offered assistance in contacting a legal service
 - b. if the person does want assistance, a relevant legal service is contacted and the person is introduced to the service with an explanation of why they are seeking legal advice.
37. Court officials who witness adoption consents should receive training that:
 - a. emphasises the importance of the independent oversight that they provide
 - b. emphasises that they must not sign the witness statement unless they believe that the person understands the effect of an adoption order and the procedures for revoking consent to the adoption
 - c. provides guidance about the types of questions that should be asked to assess that the person providing consent understands these matters.
38. The Adoption Act should extend the timeframe in section 41(1) for revoking consent to provide that the period during which consent may be revoked is 90 days after the birth of the child, or 60 days from the day consent was given, whichever is the later.
39. The Adoption Act should require that, if a parent under 18 years of age is considering giving consent to the adoption of their child, the Secretary must have a 'qualified person' assess, and provide a report on, the parent's capacity to provide consent.
 - a. A 'qualified person' should be defined as 'a person who, if called as a witness in a proceeding, would be qualified to give expert evidence on the issue of whether a parent has capacity to give consent to an adoption of the child'.
 - b. The 'qualified person' must not be the same person who is providing or will provide counselling to the parent.
40. In place of sections 43(1)–(3) the Adoption Act should provide that the court should have the power to dispense with the consent of a person to adoption (other than a guardian under current section 33(6)) if satisfied:
 - a. The person cannot, after reasonable inquiry, be found. The Act should specify the steps required to demonstrate reasonable inquiry.
 - b. The person committed an offence which resulted in the child's conception.
 - c. There would be an unacceptable risk of harm to the child or mother if the person were made aware of the child's birth or proposed adoption.
 - d. The person is the father and he is a lineal relative of the mother.
 - e. There is evidence that the person is, and is unlikely to cease to be, in such a physical or mental condition as not to be capable of giving consent. The evidence required for this should be a certificate signed by no fewer than two medical practitioners registered under the Health Practitioner Regulation National Law.
 - f. There are any other exceptional circumstances by reason of which, in the best interests of the child, the consent may properly be dispensed with. This ground for dispensation with consent should be drafted to clarify that exceptional circumstances do not include any of the grounds currently contained in section 43(1)(c)–(g) of the *Adoption Act 1984* (Vic).

Eligibility to adopt

41. The eligibility criteria under the Adoption Act should not require or imply that couples in a domestic relationship live together.
42. The eligibility criteria under the Adoption Act should permit single people to adopt on the same basis as couples.
43. The Adoption Act should require the Secretary to manage the assessment of applications to adopt a child in a way that:
 - a. anticipates the number of children likely to be adopted and their particular needs
 - b. ensures that there is a wide range of prospective adoptive parents to select from, reflective of the wide range of people eligible to adopt (couples, same-sex couples and single people)
 - c. provides for ongoing monitoring and review of how the applications are processed to ensure that there are enough suitable prospective adoptive parents to meet the needs of children
 - d. ensures that the assessment process is both published and transparent to all persons wanting to adopt a child.
44. Where a step-parent wishes to adopt a child, the Adoption Act should:
 - a. reflect that leave from the Family Court of Australia must be granted before an application to adopt may be filed
 - b. permit the Secretary to charge a fee for the administrative cost of arranging a step-parent adoption.
45. The Adoption Act should permit the adoption of a child from permanent care only where the child has been living in the applicant's care under a *Children, Youth and Families Act 2005* (Vic) permanent care order for at least two years.
46. The Adoption Act should enable a permanent carer to be eligible to adopt if the court is satisfied that:
 - a. Leave to apply has been granted by the President of the Children's Court of Victoria or her nominee.
 - b. The natural parents, or appropriate persons, have provided specific consent to the adoption or the court has dispensed with consent in the circumstances recommended in Recommendation 40.
 - c. The terms of an adoption plan have been agreed on the same basis as any other application for adoption.
 - d. While caring for the child under a permanent care order, the person has demonstrated a willingness and capacity to meet the child's needs and preserve the child's identity and connection to their culture of origin and the child's relationship with their natural family, including wider family members.
 - e. The continuation of the permanent care order under the *Children, Youth and Families Act 2005* (Vic) or the making of an order under the *Family Law Act 1975* (Cth), would not make adequate provision for the best interests of the child and an adoption order would make better provision for the best interests of the child.
 - f. Exceptional circumstances exist which warrant the making of an adoption order.

47. The Adoption Act should not permit a permanent carer to adopt unless leave to apply has been granted by the President of the Children's Court of Victoria or her nominee. In determining an application for leave, the President of the Children's Court must be satisfied that:
- the making of an adoption order would be in the best interests of the child; and
 - an adoption order would be clearly preferable to the continuation of the permanent care order under the *Children, Youth and Families Act 2005* (Vic).

If leave of the Court is granted, a permanent care order should cease to have effect upon the making of an adoption order.

Assessment of applicants for adoption

48. A single 'suitability' assessment should replace the 'fit and proper person' approval requirement in sections 13 and 15 of the current Adoption Act. It should apply to all applicants other than permanent care parents who apply to adopt a child in their permanent care.
49. The Adoption Act should provide an overall 'suitability test' against which applicants are assessed. The prescribed requirements currently set out in regulation 35 of the Adoption Regulations should be the relevant considerations decision makers must take into account in assessing an applicant's or applicants' suitability to adopt a child.
50. Assessments of an applicant's or applicants' suitability to adopt a child should be carried out in accordance with guidelines issued by the Secretary. The guidelines should:
- set out relevant matters decision makers should consider
 - be published on the Department of Health and Human Services website
 - be reviewed by the Secretary every three years.
51. All policies, procedural requirements and processes that determine or affect whether a person is able to adopt should be included in the Adoption Act or Adoption Regulations. These include requirements relating to citizenship, fertility treatment and full-time care of a child.
52. Clear written information about assessment requirements and procedures should be published on the Department of Health and Human Services website and otherwise be readily available to applicants and any person who expresses interest in adopting a child. This should include information about eligibility for assessment, the suitability test and criteria and the assessment process.
53. The Secretary should implement measures to develop consistency across agencies in the assessment process.
54. The Secretary should introduce a feedback mechanism to enable applicants to provide anonymous feedback about their experience of the assessment process.

Selection of adoptive parents

55. The Adoption Act should provide that parents may express wishes about the factors in the prescribed requirements set out in regulation 35 of the Adoption Regulations. These should replace the factors currently specified in section 15(1)(b) of the Adoption Act.
56. The *Equal Opportunity Act 2010* (Vic) should not apply to:
 - a. assessment of applicants reasonably based on the prescribed requirements contained in regulation 35 of the Adoption Regulations
 - b. identification of prospective adoptive parents in the best interests of a child, who reflect wishes expressed by the child's parents
 - c. where a child's parents do not express wishes about the preferred characteristics of the adoptive parents—identification of prospective adoptive parents in the best interests of a child.
57. The Adoption Act should set out the main elements of the linking process, including any different procedures for the placement of children with special needs.
58. The Adoption Act should enable the Secretary to approve agencies to carry out discrete, rather than all, adoption services.
59. The Adoption Act should establish a central statewide register of approved applicants which the Secretary and principal officers must consult when selecting prospective adoptive parents for a child who needs a family (except where this would be impracticable when placing a child with special needs).

Adoption services and the Equal Opportunity Act

60. The religious exceptions under the *Equal Opportunity Act 2010* (Vic) should not apply to approved adoption agencies providing adoption services under the Adoption Act.

The role of the court in the adoption process

61. The Adoption Act should require the court to hold a preliminary hearing to determine any application to dispense with consent, prior to the placement of a child with prospective adoptive parents. A hearing should be held regardless of whether an application is contested.
62. The Adoption Act should define the parties to an adoption hearing in relation to a child:
 - a. Parties to a preliminary hearing should include the child, the natural parents, the Secretary or principal officer, and any other person the court thinks fit.
 - b. Parties to any other adoption hearing should include the child, the natural parents, the prospective adoptive parents, the Secretary or principal officer, any party to an adoption plan, and any other person the court thinks fit.
63. At an adoption hearing, the Adoption Act should require the court to:
 - a. decide any disputed matter in the best interests of the child if an adoption plan, or some aspect of an adoption plan, cannot be agreed upon
 - b. approve an adoption plan before an adoption order is made. The court should be satisfied that the parties to the adoption plan understand its provisions and have freely entered into it, and that the provisions of the plan are in the child's best interests.
 - c. vary, remove or add terms about contact to the adoption plan where it considers it is in the best interests of the child to do so

- d. register an approved adoption plan, which has the effect of making it part of the adoption order and enforceable as an order of the court.
64. The Adoption Act and *Supreme Court (Adoption) Rules 2015* (Vic) should not contain a presumption of confidentiality in adoption proceedings. Hearings under the Adoption Act should be heard in open court. The court should exercise its discretion in the usual way to determine that certain information is confidential, if disclosure of that information poses a risk to the child, the natural parents or the adoptive parents.
65. The Adoption Act should require that judicial reasons be given in all adoption proceedings. Judicial reasons should be publicly available, unless an order has been made under section 17 of the *Open Courts Act 2013* (Vic), and should be anonymised to ensure confidentiality of any matters likely to enable the child, the adoptive parents, or natural parents, to be identified.
66. The Adoption Act should require the court to appoint an independent children's lawyer in all adoption proceedings, regardless of whether the proceedings are contested. The Act should:
- a. provide for an independent children's lawyer to be appointed:
 - i. after the necessary consents for a child to be adopted have been given and the period for consent to be revoked has passed
 - ii. upon application to dispense with a parent's consent
 - b. permit the independent children's lawyer to represent the child in the development of an adoption plan
 - c. require the independent children's lawyer to act in accordance with the direct representation model for children over the age of 10 years. If a child is under the age of 10 or is aged 10 or over and not mature enough to give instructions, the best interests model of representation should be used.
67. The Adoption Act should provide for the court to direct the Secretary or principal officer to appoint a person to support a child in proceedings, if it is in the child's best interests. This person should not be an employee of the Department or an approved adoption agency.
68. The Adoption Act should permit an adopted child, a natural parent (including a natural parent whose consent was dispensed with and is not a party to an adoption plan), an adoptive parent, any party to an adoption plan, or any other person the court thinks fit, to apply to the court for variation or revocation of the terms or conditions of an adoption plan or conditions under an adoption order made under the Adoption Act. In considering an application, the court should:
- a. require certification from the mediation service developed by the Secretary, to the effect that mediation has been attempted or is not suitable, before considering an application
 - b. be satisfied that the wishes of the child have been ascertained and given due consideration, as far as practicable
 - c. be satisfied that any decision made is in the best interests of the child
 - d. be able to grant a person a right of contact or greater rights of contact with an adopted child, if it is in the best interests of the child.

69. The Adoption Act should:
- a. define the parties to an application to discharge an adoption order:
 - i. in relation to an adopted person over 18, to include the adopted person, the natural parents, the adoptive parents, and any other person the court determines has a sufficient interest in the matter
 - ii. in relation to an adopted child, to include the adopted child, the natural parents, the adoptive parents, the Secretary or principal officer, any party to an adoption plan, and any other person the court determines has a sufficient interest in the matter.
 - b. require that the parties are advised of the legal effect of discharging an adoption order, when they are notified of proceedings.
70. The Adoption Act should provide that an application to discharge an adoption order filed by an adopted person over the age of 18 should only require the court to be satisfied that the discharge of the order is appropriate and desirable in all the circumstances.

Adoption support

71. The Adoption Act and Adoption Regulations should extend the power of the Secretary to provide grants of financial assistance to adopted children and adults, natural parents, adoptive parents, parties to an adoption plan, natural relatives and natural children of adopted people.
- a. Eligible people should be able to apply for financial assistance either prior to, or at any time after, the making of an adoption order.
 - b. Any decision of the Secretary should be in writing with detailed reasons and subject to internal review.
 - c. The Adoption Act should allow a person whose interests are affected by a decision of the Secretary to apply to the Victorian Civil and Administrative Tribunal for review.
72. The Adoption Act should require the Secretary to establish and maintain adoption and post-adoption support services. These services should be accessible to adopted children and adults, natural parents, adoptive parents, parties to an adoption plan, natural relatives and natural children of adopted people. The Secretary should:
- a. establish and maintain, as relevant, adoption services, including:
 - i. adoption support services provided by approved adoption agencies and other appropriate organisations
 - ii. specialised adoption support services (including specialist counselling, psychological services, psychiatric services)
 - b. develop a specialist mediation service to assist families in negotiating conflict in relation to any adoption arrangements
 - c. maintain, and report annually, comprehensive, reliable, consistent, statewide data on the operation and delivery of adoption services, including support and mediation services.

Access to adoption information

73. The access to information scheme set out in Part VI of the Adoption Act should be replaced with a new scheme, designed by the Secretary in consultation with the Privacy and Data Protection Commissioner, the Health Services Commissioner and the Ombudsman, that incorporates contemporary standards of transparency, accountability and fairness in the management of personal information by Victorian government agencies.
74. The new access to information scheme should provide for the Secretary to be solely responsible for the powers and functions that are currently shared among multiple 'relevant agencies'.
75. The definition of the information to which access may be granted under the new access to information scheme should provide a simple yet comprehensive description that does not pre-empt decisions about how to respond to a request for access to it.
76. The new access to information scheme should enable people who are eligible to apply for information under the Adoption Act to authorise another person to apply on their behalf in specified circumstances.
77. The Adoption Act should require the Secretary to develop and publish guidelines on providing access to information under the new access to information scheme.
78. The new access to information scheme should describe more clearly the information that may be released under the Adoption Act, and the circumstances in which it may be released.
79. When providing access to information under the Adoption Act which does not require the consent of the person to whom the information relates, the Secretary should be required to:
 - a. make all reasonable efforts to give notice of the intended disclosure to the person to whom the information relates and
 - b. where practicable, give the person a reasonable opportunity before the information is disclosed to correct or add comments to any of the information that is inaccurate, incomplete, out of date or would give a misleading impression.
80. The new access to information scheme should enable an adopted child under 18 years of age to receive, on application:
 - a. non-identifying information about their natural parents without needing the agreement of their adoptive parents
 - b. information disclosing the identity of their natural parents, either:
 - i. with their adoptive parents' agreement, or
 - ii. after receiving counselling from a counsellor who assesses the child as sufficiently mature to understand the consequences of the disclosure.
81. The Adoption Act should provide that, after an adoption order is made, a copy of the child's original birth certificate is issued to the adoptive parents.

82. The new access to information scheme should enable:
- a. adopted children to obtain the child's original birth certificate and other information which identifies or may identify the natural parents without the natural parents' consent
 - b. adoptive parents to obtain the child's original birth certificate (consistently with the BDM access policy) and other information which identifies or may identify the natural parents without the natural parents' consent
 - c. natural parents to obtain information which identifies or may identify the adopted child and adoptive parents without the adoptive parents' consent. Before disclosing the information to the natural parent, the Secretary should seek the child's views and communicate them to the natural parent.
83. The new access to information scheme should provide natural relatives with easier access to information that discloses the identity of an adopted person who is 18 or older, including by removing the current requirement that a relevant authority must be satisfied that circumstances exist which make disclosure of the information desirable.
84. The new access to information scheme should provide a means by which the Secretary may facilitate exchange of non-identifying medical information between adopted people and their natural parents and natural relatives.
85. The new access to information scheme should enable the Secretary to give to an adopted person, on request, information contained in the records relating to the adoption concerning the identity of a man who may be the person's natural father but does not meet the definition of 'natural parent' currently set out in section 82 of the Adoption Act. The Secretary should be required to give the person a notice stating that the identity of the person's natural father is not confirmed and, if appropriate in the circumstances, the reasons why the information is not confirmed.
86. The current requirement for an applicant for access to information to be interviewed by an approved counsellor in section 87 of the Adoption Act should be replaced with an obligation on the Secretary to:
- a. offer applicants counselling before providing them with access to information
 - b. advise an applicant if the information could reasonably be expected to be distressing to the applicant.
87. Decisions of the Secretary under the new access to information scheme relating to the disclosure of information should be subject to internal review within the Department of Health and Human Services and external review by the Victorian Civil and Administrative Tribunal.
88. The provisions in the new access to information scheme concerning the Adoption Information Register should:
- a. specify the purpose of the register
 - b. provide accurate and complete details of its operation
 - c. require the Secretary to convey to a person who has requested access to information about a person whose details are on the register, the registered person's wishes about the disclosure of information and being contacted.

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1. Introduction

The process of this review

- 1.1 In December 2015 the Attorney-General asked the Commission to provide recommendations to government on the modernisation of the *Adoption Act 1984* (Vic) and the *Adoption Regulations 2008*.
- 1.2 The Chair of the Commission exercised his powers under section 13(1)(b) of the *Victorian Law Reform Commission Act 2000* to constitute a Division to guide and oversee the conduct of the reference. The Chair of the Commission was the Chair of the Division.
- 1.3 Commissioner Liana Buchanan was appointed Principal Commissioner for Children and Young People on 4 April 2016 and did not participate in the reference. Commissioner Eamonn Moran retired as a Commissioner on 3 September 2016. He took no part in the Commission's consideration of the *Adoption by Same Sex Couples Review*.
- 1.4 The Chair sought input from Professor Cathy Humphreys, Professor of Social Work at the University of Melbourne, and Professor John Tobin, Co-Director of Studies, Human Rights Law at Melbourne Law School at the University of Melbourne. They provided expert advice on the best interests of the child.
- 1.5 The Commission released a consultation paper on 10 August 2016, which provided background information, set out the legislative framework, and invited the public to respond.
- 1.6 The Commission received 61 submissions. Most are public and are on the Commission's website.¹ The submissions are listed at **Appendix A**.
- 1.7 The Commission held 38 public consultations from 10 August to 16 September 2016. The consultations are listed at **Appendix B**. Regional meetings were held in Bendigo, Geelong, Mildura and Shepparton. The Commission heard from a wide range of people, including:
 - individuals affected by adoption, either as adopted people or parents
 - groups representing adopted people, natural mothers and grandparents
 - families with young adopted children and children in care
 - legal practitioners with practices in adoption, permanent care and family law
 - young people who had been in care
 - adoption agencies and agencies that provide adoption parties with access to information
 - social workers involved in adoption

- members of culturally and linguistically diverse communities
 - organisations with responsibility for caring for vulnerable children
 - Aboriginal and Torres Strait Islander peak bodies
 - the Working Party for the Recognition of Torres Strait Islander Child Rearing Practices.
- 1.8 The Commission explored avenues to seek the views of children. The Commission did not meet directly with children because the reference timeframe did not permit appropriate ethical and procedural requirements to be fulfilled. The Commission conducted a roundtable discussion with youth leaders from Project Bounce, a program for young people who have left out-of-home care.²

The scope of this review

Matters included

- 1.9 The terms of reference asked the Commission to make recommendations to modernise and amend the Adoption Act and Adoption Regulations.
- 1.10 At the time of its introduction, the Adoption Act represented a significant change in Victorian adoption policy. However, it is now over 30 years old, and in many respects out of step with modern understanding of the needs of children and contemporary law in relation to family and community. The overall aim is to ensure that the best interests of the child are paramount. The Adoption Act should operate harmoniously with other laws that have come into force since 1984. It should be structurally sound and in accordance with the way laws are drafted today. The Commission's recommendations are directed towards these general outcomes.
- 1.11 The Commission identified areas in which the Adoption Act was in conflict or inconsistent with other Victorian or Commonwealth laws, for example:
- the limits on the right of single people to adopt
 - the right of natural parents to express preferences about the religion, race and ethnic background of the adoptive parents
 - the inconsistency between recent amendments to the Adoption Act allowing adoption by same-sex couples and an exemption in the *Equal Opportunity Act 2010* (Vic) which allows a religious body to discriminate as long as it acts in accordance with the 'doctrines, beliefs or principles' of the religion.
- 1.12 The terms of reference also required the Commission to look closely at specific aspects of adoption law, including:
- how a child's identity is recorded on a birth certificate
 - requirements about prospective parents' relationship status
 - addressing any gaps in the information provisions
 - ensuring that the Adoption Act upholds the principles of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *United Nations Convention on the Rights of the Child*.

Matters not included

- 1.13 Some matters, though relevant to the community and to adoption itself, are outside the scope of the review. Although the Commission acknowledges that they are matters of importance to many, the following could not be considered in this review:
- *Intercountry adoption programs and commercial surrogacy.* The Government sees these matters as more appropriately considered at a national level.
 - *Adoption by same-sex couples.* The *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) amended the Adoption Act to enable the adoption of children by same-sex couples and people who do not identify with a specific sex or gender. This legislation came into effect in September 2016. The Commission has considered some consequences of this legislation as part of its consideration of the Act's harmonious operation with other relevant areas of law.
 - *Contact statements.* Provisions relating to contact statements and the associated offence were removed by the *Adoption Amendment Act 2015* (Vic).
- 1.14 Some of those consulted believed the terms of reference should have included intercountry adoption programs and commercial surrogacy. It was observed that excluding intercountry adoption was artificial, as the Adoption Act provides for this form of adoption in Victoria. Others said expatriate adoptions should have been considered, as the children affected by this form of adoption are particularly vulnerable.³
- 1.15 Other matters were raised by the community but are not within scope of this review. These matters are briefly addressed in the following paragraphs:
- Should adoption exist?
 - Reforms to child protection and the *Children, Youth and Families Act 2005* (Vic) (CYF Act)
 - Should there be more adoptions?

The legal effect of adoption

- 1.16 Following birth, a child's natural parent or parents are the child's legal parents. An adoption order ends the legal relationship between the child and their parents.⁴ The law no longer recognises the natural parents as the parents of the child. The adoptive parents assume all the parental rights and responsibilities that belonged to the child's birth parents before the adoption order was made. The law views the child as the adoptive parents' child, as if the child had been born to them.⁵
- 1.17 This change is reflected in a number of ways. The child's surname generally changes to the adoptive family's surname. The child's given names may also change.⁶ A new birth certificate is created which replaces the original birth certificate and indicates that the child was born to the adoptive parents.⁷ The child's inheritance rights change.⁸
- 1.18 The change is permanent unless it is revoked by another order of the court, which 'discharges' the adoption.⁹

³ Expatriate adoptions occur when an Australian citizen or permanent resident living abroad for 12 months or more adopts a child through an overseas agency or government authority. Australian adoption authorities are not responsible for facilitating expatriate adoptions, and do not assess or approve applicants for such adoptions: Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 22.

⁴ *Adoption Act 1984* (Vic) s 53(1)(b).

⁵ *Ibid* s 53(1)(a).

⁶ *Ibid* s 56.

⁷ *Ibid* ss 70, 74, 78. See Chapter 6 for discussion of birth certificates.

⁸ *Ibid* ss 53, 54.

⁹ *Ibid* s 19.

- 1.19 Adoption is one of a number of ways that parental responsibility is transferred from a child's parents to other people. Two other main ways are:
- permanent care orders under the CYF Act
 - parenting orders under the *Family Law Act 1975* (Cth).
- 1.20 Unlike adoption orders, these orders do not extinguish the legal relationship between a child and the child's parents. Also unlike adoption orders, they expire when the child turns 18.
- 1.21 The overarching principle which governs adoption in Victoria is that the 'welfare and interests of the child' are the 'paramount consideration'.¹⁰ This puts the child's welfare and interests above the interests of the child's birth parents, people wanting to adopt and adoptive parents.

Should adoption exist?

- 1.22 Many people urged the Commission to consider whether adoption should continue to exist. They said it can never be in the best interests of a child to change their identity and sever their relationship with their natural family.
- 1.23 This view was often expressed by people who had experienced forced, closed adoption practices. The Commission heard the same reports about people who were adopted under an open adoption process,¹¹ who experienced a similar sense of loss and pain.
- 1.24 The terms of reference assume the ongoing existence of adoption in Victoria, so the Commission has not considered the option of abolishing adoption. While that question is outside the scope of the present review, it has been considered by other reviews of adoption law. None recommended that adoption should be abolished.¹²

Child protection and the Children, Youth and Families Act

- 1.25 There was community criticism that the terms of reference did not permit the Commission to consider the amendments to the CYF Act which came into effect on 1 March 2016.
- 1.26 A large number of people expressed the view that adoption should only be used in very limited circumstances, as a last resort.¹³ Many considered that permanent care orders under the CYF Act provide a preferable option in child protection situations. These orders do not legally sever existing family relationships. Currently, adoption is generally not used for child protection purposes in Victoria.
- 1.27 The CYF Act amendments introduced adoption as one of a list of 'permanency objectives' for children in the child protection system. The changes require the Department of Health and Human Services (DHHS) to consider adoption before other forms of permanent care.
- 1.28 The Commissioner for Children and Young People is reviewing the changes to the CYF Act, and is due to report in March 2017.

¹⁰ Ibid s 9.

¹¹ Consultation 10 (Confidential), 36 (Kylie Martens).

¹² See, eg, New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Discussion Paper No 34 (1994) 34, 37–38; Lorna Hallahan, *Adoption Act 1988 (SA) Review* (Flinders University, 2015) 12, 59; Adoption Legislative Review Committee, Family and Children's Services, Western Australia, *Adoption Legislative Review: Adoption Act (1994)*, Final Report (1997) [4.3], [2.2]; Standing Committee on Social Issues, Legislative Council of New South Wales, *Releasing the Past: Adoption Practices 1950–1998*, Final Report (2000) [10.93]–[10.97]; New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Report No 81 (1997) [2.2]–[2.4].

¹³ These views may not be representative of the general adoption community, as submitters to a review of this kind 'self-select'. This methodological shortcoming reinforces the Commission's observations about the need for research into the long-term effects of open adoption, discussed at [1.100]–[1.105].

Should there be more adoptions?

- 1.29 Concern was expressed during consultations that the changes to the CYF Act, and this review by the Commission, will be used to increase the number of adoptions of children in the child protection system.
- 1.30 Where adoption is the permanency objective of a case plan made under the CYF Act, the adoption would be carried out under the Adoption Act. Thus the provisions of the Act relating to consent and dispensing with consent are within the scope of the reference.
- 1.31 The Adoption Act requires parental consent to an adoption, or the court may dispense with consent for a wide range of reasons. Concern was expressed about whether the grounds for dispensation are sufficiently robust to prevent a 'new wave of forced adoptions'.¹⁴
- 1.32 The report considers these questions in context, for example in relation to consent and the grounds for dispensing with it in Chapter 8, and the role of the courts in Chapter 14.
- 1.33 The Commission makes no recommendations about whether the number of adoptions should increase or not. This is a matter of government policy, not a matter for the Commission.

The context of this review

Acknowledging the past

- 1.34 Many people have experienced adoption or been exposed to issues relating to adoption. The number affected (including natural parents, adoptive parents and the adopted person) has been estimated to be one in 15.¹⁵ Many of these experiences were of closed and 'forced' adoption practices, which resulted in significant trauma. These practices have been the subject of inquiries, which led to apologies by the Commonwealth Parliament and state and territory parliaments.¹⁶
- 1.35 The Commission acknowledges the harm caused by past forced adoptions. In making its recommendations, the Commission has been mindful of the urging of the Senate Community Affairs References Committee in its report into the Commonwealth contribution to former forced adoption policies and practices to ensure that the mistakes of the past are never repeated.¹⁷

The present era

- 1.36 The Adoption Act brought in open adoption, reflecting changes in social values and understanding. Since then, community attitudes and laws relating to family have developed further (the *Assisted Reproductive Treatment Act 2008*; *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter), and changes to the *Family Law Act 1975* (Cth)). Australia also ratified the *United Nations Convention on the Rights of the Child* in 1990.¹⁸

14 Submission 39 (ARMS (Vic)). One adoption agency is preparing for a possible increase in the number of older children available for adoption due to the changes to the CYF Act: Consultation 13 (Roundtable with approved adoption agencies).

15 Daryl Higgins, *Impact of Past Adoption Practices: Summary of Key Issues from Australian Research*, Final Report (Australian Institute of Family Studies, 2010) 7.

16 Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), which describes the forced adoption of Aboriginal children; Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012), which found that because of the Commonwealth's involvement in forced adoptions, it should help the states and territories address the consequences of past forced adoption practices.

17 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) [13.23].

18 *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, opened for signature 29 May 1993, 1870 UNTS 167 (entered into force 1 May 1995).

- 1.37 The Adoption Act has accommodated some of these changes through amendment, incorporating the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, gradually increasing the rights of access to information, introducing the right for de facto couples to adopt and most recently, the right for same-sex couples to adopt. The key amendments are set out in the Commission's consultation paper.¹⁹
- 1.38 Amendments have been piecemeal and have made the Adoption Act complex and difficult to navigate. In addition, the language is out of date and its structure is not in keeping with modern drafting.

Adoption laws around Australia

- 1.39 The states and territories have jurisdiction over adoption and child welfare laws. Some efforts have been made to harmonise national adoption policy and practice. Model adoption legislation was enacted in 1965 as an ordinance of the Australian Capital Territory,²⁰ and was implemented in Victoria in the *Adoption of Children Act 1964* (Vic). In 1993, National Principles in Adoption were developed through the Community and Disability Services Ministers' Conference. To date the National Principles have no legal standing.
- 1.40 Most Australian states and territories have conducted reviews of their adoption laws in recent years.²¹

Adoption numbers in Australia²²

- 1.41 Numbers of adoptions in Australia are at an all-time low. From a high in 1971–72 of almost 10,000 adoptions nationally, 45 local adoptions were finalised in Australia in 2015–16. Of these, 15 were in Victoria.²³
- 1.42 More males (28) were adopted than females (17). No siblings were adopted. All local adoptees were under five, with 47 per cent aged under 12 months.
- 1.43 The median age of mothers at the time of the child's birth was 26, with ages ranging from 14 to 42. Most (93 per cent) were not in a registered marriage. In contrast, almost all (96 per cent) of the adoptive parents involved in local adoptions in 2015–16 were in a registered marriage. One de facto couple (2.2 per cent) adopted a local child.
- 1.44 Nationally, 94 per cent of local adoptive parents were aged 30 or over.
- 1.45 For almost 64 per cent of local adoptions, consent for the adoption was given by the mother only. For the remaining 36 per cent, both parents provided consent, compared to 40 per cent in 2014–15 and 24 per cent in 2013–14.
- 1.46 At the time of finalising, a degree of contact or information exchange between families was agreed to in 89 per cent of local adoptions. Since 2001–02, the proportion of local adoptions where the birth and adoptive families agreed to allow some type of contact or information exchange has generally been well above 80 per cent.²⁴

19 Victorian Law Reform Commission, *Review of the Adoption Act 1984*, Consultation Paper (2016) [2.20]–[2.22].

20 *Adoption of Children Ordinance 1965* (ACT) pt III. By the end of the 1960s, the principles of the model ordinance had been implemented in adoption legislation in all Australian states and territories.

21 Queensland and South Australia passed new Adoption Acts in 2016. In Queensland the *Adoption and Other Legislation Amendment Bill 2016* (Qld) was passed by Parliament on 11 November 2016, with amendments being incorporated into the *Adoption Act 2009* (Qld). The *Adoption (Review) Amendment Act 2016* (SA) was assented to on 15 December 2016 but no commencement date has been fixed at the time of writing.

22 Data for this section is sourced from Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016).

23 The Australian Institute of Health and Welfare (AIHW) defines 'local adoptions' as 'adoptions of children who were born or permanently residing in Australia before the adoption, are legally able to be placed for adoption, but generally have had no previous contact or relationship with the adoptive parent(s)': Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 4.

24 Ibid 23–7.

- 1.47 During 2015–16, 151 known-child adoptions were finalised nationally.²⁵ While the overall number of adoptions continues to fall, known-child adoptions represent an increasing proportion of all adoptions (54 per cent in 2015–16, compared with 45 per cent in 2012–13). Of the known-child adoptions, 97 (64.2 per cent) were in New South Wales, 22 in Western Australia (14.6 per cent) and 10 (6.6 per cent) in Victoria. The Australian Institute of Health and Welfare (AIHW) reports that the numbers of known-child carer adoptions in New South Wales have reduced, reflecting in part the application of guardianship orders for children in out-of-home care, from late 2014.²⁶

Adoption numbers in Victoria²⁷

- 1.48 In Victoria in 2015–16, there were 15 local adoptions and 10 known-child adoptions.²⁸ In 2014–15, there were 24 local adoptions and five known-child adoptions.²⁹ For each of these periods, all known-child adoptions were adoptions by step-parents.
- 1.49 In relation to local adoptions in Victoria in 2014–15, slightly more females (13) were adopted than males (11). Their ages ranged from one to two years. The median age of mothers at the time of the child's birth was 23, with their ages ranging between 16 and 40 years. Almost all mothers (96 per cent) were not in a registered marriage. In contrast, all adoptive parents were in a registered marriage. Adoptive parents' ages ranged between 30 and 49 years. In 75 per cent of local adoptions (18), consent to the adoption was given by the mother only. At the time of finalising, almost 96 per cent of local adoptions involved agreement to a degree of contact or information exchange between parties.³⁰
- 1.50 Of the 24 local adoptions in 2014–15, five were arranged by DHHS Adoption and Permanent Care teams and 19 were arranged by a non-Government approved adoption agency.
- 1.51 The Commission reviewed and collected de-identified data from 244 County Court adoption matters from 1 July 2010 to 30 June 2016. In that period the court decided 168 applications for adoption orders in relation to children and 74 for adults.³¹ Two applications were contested. There were three applications to dispense with a mother's consent and 14 orders to dispense with a father's consent.³² The Court made 17 orders for discharge of an adoption order. All the applications for discharge were made by adults. No application was made for discharge on the grounds that the order had been obtained by fraud, duress or improper means.³³ There were 11 adult adoptions during 2014–15.³⁴

25 The AIHW defines 'known-child adoptions' as 'adoptions of children who were born or permanently residing in Australia before the adoption, who have a pre-existing relationship with the adoptive parent(s), and are generally not able to be adopted by anyone other than the adoptive parent(s). Known-child adoptions include adoptions by step-parents, other relatives and carers': Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 4.

26 Ibid 27, 47.

27 The majority of data from this section is derived from information provided to the Commission by the Department of Health and Human Services (DHHS). As the data provided to the Commission by DHHS for 2015–16 was incomplete, the Commission has used the data provided by DHHS for 2014–15. Some data was also obtained from the Commission's review of County Court adoptions.

28 Department of Health and Human Services, Victoria, *Data Collections for Australian Institute of Health and Welfare, Adoptions Australia (2015–16)*, provided to the Commission 29 July 2016.

29 Department of Health and Human Services, Victoria, *Data Collections for Australian Institute of Health and Welfare, Adoptions Australia (2014–15)*, provided to the Commission 29 July 2016.

30 This data reports agreements about contact arrangements. From the limited research available in relation to Victorian adoption it appears that agreements do not reflect how contact occurs in practice and over time.

31 In two applications age was not specified.

32 In 65 adoption matters no information was available in relation to the mother's consent. One dispensation order was made where the father was known but could not be found. Consent is not required for a parent who is not named on the birth certificate. In 72 matters there was no information available in relation to the father's consent.

33 See *Adoption Act 1984* (Vic) s19(1)(a).

34 County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission.

Open adoption

- 1.52 Severance of the legal relationship between the child and their natural parents is an essential characteristic of modern adoption legislation.
- 1.53 Victoria's first adoption legislation, the *Adoption of Children Act 1928* (Vic) introduced the amended birth certificate for adopted people. This was seen as necessary to 'cover up ... the fact of an adoption' and protect the child from the 'unfortunate stigma of illegitimacy'.³⁵ The *Adoption of Children Act 1964* imposed secrecy at all stages of the process. The practice of issuing an amended birth certificate was maintained, and the records of the adoption order were kept secret. The original birth certificate was only made available by court approval.³⁶
- 1.54 Over the 20th century, the focus and purpose of adoption legislation shifted. The *Adoption Act* made significant changes to practice and introduced open adoption.³⁷

What is open adoption?

- 1.55 Open adoption facilitates sharing of information and contact between the adoptive and biological parents of an adopted child, before and/or after the placement of the child, and perhaps ongoing.³⁸ At a minimum it allows an initial exchange of information between the adoptive and natural families, including information about the backgrounds of the parents. It may involve meetings between natural and adoptive parents, and periodic exchange of information. The type of contact varies, from face-to-face meetings to telephone calls or annual letters, reports and photos. If parties agree, identifying information may be exchanged and parties may have ongoing contact.³⁹
- 1.56 Typically, contact arrangements in Victoria commence as 'semi-open'.⁴⁰ Non-identifying information is given to the birth and adoptive parents by the agency at the beginning of the placement, and birth parents may have a role in selecting the adoptive parents from profiles.⁴¹ Contact may become 'fully open' over time as the families begin to feel confident to make and maintain direct contact.
- 1.57 At the time of the introduction of open adoption the level of openness was limited, due to fears that natural parents would intrude into the adoptive family, compete with the adoptive mother and confuse the child. Many believed that closed adoptions would still be possible and only a minority of adoptions would embrace openness. By 1997 it was reported that the majority of adoptions had some degree of openness.⁴² In 2014–15, 96 per cent of Victorian local adoptions agreed to a degree of contact or information exchange between families.⁴³
- 1.58 There is little research about the practice and effects of open adoption in the Victorian context. A 2005 study looked at the experience of 60 children aged between eight and 16 who were adopted in Victoria as healthy infants. It documented patterns of post-placement contact between the children and their birth families.

35 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 1928, 673 (William Slater, Attorney General).

36 See Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 172–4.

37 See Victorian Law Reform Commission, *Review of the Adoption Act 1984*, Consultation Paper (2016) ch 2 [2.4]–[2.41].

38 See Susan Tregeagle and Louise Voigt, 'Overcoming the Pain of Never Belonging: The Case for Open Adoption for Severely Abused and Neglected Children' (2014) 8(1) *Australian Journal of Adoption* 1.

39 Robyn Ball, *Open Adoption in Victoria, Australia: Adoptive Parents' Reports of Children's Experience of Birth Family Contact in Relation to Child Wellbeing* (PhD Thesis, Victoria University of Technology, 2005) [1.3].

40 Ibid.

41 John Triseliotis, 'Open Adoption' in Audrey Mullender (ed), *Open Adoption: The Philosophy and Practice* (British Agencies for Adoption and Fostering, Great Britain, 1991) 20.

42 Janet Allen and Helen Kane, 'Open Adoption Can Work!' (Paper presented at 7th Australian Conference on Adoption, Brisbane, June 1997) 206.

43 Department of Health and Human Services, *Data Collections for Australian Institute of Health and Welfare, Adoptions Australia (2014–15)* Table 19.

1.59 In summary, the study found that:

- Of the 60 children, 37 had some post-placement contact with their natural families, 19 experiencing regular, ongoing, in-person contact.
- Twenty three children had no contact with their natural family at all.
- Visiting was the primary form of contact when it did occur.
- Adoptive and birth families often had less contact than had been planned at the time of placement.
- Most contact was with the birth mother, but contact also occurred with other birth family members, particularly grandparents. There was a relatively low level of contact with birth fathers, particularly ongoing or substantial contact.
- Some children experienced emotional disturbance associated with their contact, or lack of it, with their natural family. For some children this disturbance took the form of sadness, anger, missing, yearning for, and worrying about the birth family. Others experienced feelings of rejection, confusion and pain over separation from the birth mother.
- No matter what pattern of contact children had, a minority of them were troubled by their contact situation. Common experiences reported by parents of these children included emotional distress associated with feelings of rejection, missing the birth family, and concern for them.
- Even for the children troubled by their contact situation, contact was seen to satisfy their desire for information about their origins, and gave them a feeling of being reconnected with their birth family. It also seemed to have a positive effect on their identity and self-esteem.
- Adoptive parents felt the contact itself was a positive experience for the child, and usually for themselves as well.
- Children seemed to benefit most from ongoing, regular contact with their natural family. It was important that contact was stable and predictable rather than intermittent and unpredictable.⁴⁴

1.60 Another study, in 2007–2008, explored the experiences of mandated contact arrangements from the natural parents' perspective. The study interviewed 15 Victorian mothers who had relinquished a child for adoption under the Adoption Act.⁴⁵ At the time of interview, the women were aged between 21–50 years.

1.61 The study found that:

- Court-ordered openness does not seamlessly translate into regular contact between the mother and her relinquished child.
- Only seven of the 15 mothers experienced ongoing face-to-face contact with their adopted child. Two had suspended contact themselves, three had experienced complete contact breakdowns with the child, and three had information-only exchange mandated in their adoption order.
- Generally the mental health of the mothers was significantly poorer than that of the general population, demonstrating elevated levels of anxiety and depressive symptoms.
- At the time of setting the contact conditions, the mothers had not understood what their contact needs would be, or what their child's contact needs would be.

⁴⁴ Robyn Ball, *Open Adoption in Victoria, Australia: Adoptive Parents' Reports of Children's Experience of Birth Family Contact in Relation to Child Wellbeing* (PhD Thesis, Victoria University of Technology, 2005) [1.2], [6.2], [6.4], [8.2], [8.3], [9.2], [10.1].

⁴⁵ Phillipa Castle, 'Current Open Adoptions: Mother's Perspectives' in Alan Hayes and Darryl Higgins (eds), *Families, Policy and the Law* (Australian Institute of Family Studies, 2014) 47.

- The mothers felt a reduced sense of entitlement and reluctance to intrude on the adoptive family's life. They did not generally enforce contact where it diminished or broke down.
- Generally mothers valued the existence of an enforceable condition, despite not enforcing it.
- All found contact difficult and traumatic but overall felt contact was better than no contact.

1.62 From these studies it can be seen that even where openness is mandated and attempted, it is not always achieved, and that open adoption is not able to provide an unqualified solution for a child's loss of connection with their biological family, or a mother's loss of her child.

Adoption in practice

1.63 Broadly speaking, there are three main stages in the adoption process:

- 1) A child's parents (or parent) make a decision to have their child adopted (or a court decides that an adoption should proceed without the agreement of the parents or parent).
- 2) The child is placed with new parents who have been approved to adopt a child.
- 3) A court makes an order which finalises the adoption.

1.64 The legal requirements and procedures are set out in Victoria's adoption legislation and court rules:

- the *Adoption Act 1984* (Vic)
- the *Adoption Regulations 2008* (Vic)
- the *Supreme Court (Adoption) Rules 2015* (Vic).

1.65 Both the Supreme Court of Victoria and County Court of Victoria have jurisdiction to make adoption orders.⁴⁶ In practice the County Court makes most of the adoption orders in Victoria.

1.66 DHHS is responsible for the adoption system.⁴⁷ Adoptions are arranged by adoption and permanent care teams within DHHS and approved non-government agencies. These teams are involved in all aspects of the adoption process. They assist parents who are considering having their child adopted, assess and approve people who want to adopt a child, facilitate and monitor placements of children with the adoptive parents, and provide reports to the court when it is deciding whether to make an adoption order. They also run adoption information services which assist adopted people and family members seeking information about past and current adoptions.

1.67 Applicants are required to apply to the agency in their region. The exception is CatholicCare, which has statewide coverage.

1.68 The adoption process is set out in detail in Chapter 3 of the Commission's consultation paper.

⁴⁶ *Adoption Act 1984* (Vic) s 6.

⁴⁷ The DHHS was established on 1 January 2015. The Department of Human Services (DHS) preceded DHHS. Many of the Victorian government documents about adoption referred to in this paper were produced by DHS and are available on its website. See Department of Human Services, Victoria, *Adoption and Permanent Care* (31 August 2016) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care>>.

Adoption as ownership

- 1.69 The transfer of legal parenthood resembles the transfer of ownership of property, in which the legal rights of adoptive parents prevail over biological reality.⁴⁸ This was consistent with contemporary understanding of the family at the time adoption legislation was developed in Australia, when ‘ownership’ of a person was not foreign to the law.⁴⁹ The concept of children as property is inherent in the processes of adoption, with transfer of ownership, naming rights and indefeasibility of title.
- 1.70 These concepts no longer sit comfortably with the modern understanding of adoption. However, while adoption discourse focuses on the best interests of the child and openness has been introduced, the overall legal framework has not changed.
- 1.71 Adoption continues to create a new legal parentage for the adopted child, who receives a new birth certificate which features the names of their adoptive parents ‘as if the child had been born’ to them,⁵⁰ and legally severs them forever from their natural family. It is difficult to reconcile these effects with current understanding of the best interests of children, which emphasises as a need and a right their continued relationship with their family of origin.⁵¹
- 1.72 Adoption has been seen historically as a private family matter in which the state should not be involved once an adoption order is legalised.⁵² Contemporary values emphasise the purpose of adoption as a service for children whose family are not able to care for them. The Commission considers that as the state arranges their adoption, it is appropriate that it assume some responsibility for the needs and rights of these children. This view has informed the Commission’s recommendations in relation to adoption support, discussed in Chapter 15.

Themes and issues

- 1.73 Overarching themes and issues emerged from research and community consultations, which informed the Commission’s analysis and recommendations, and are introduced in the following paragraphs:
- lifelong effects of adoption
 - trauma
 - identity
 - openness and barriers to it
 - participation of the child
 - support
 - transparency and clarity.

48 Submissions 16 (Name withheld), 26 (Adoption Origins Victoria Inc.), 33b (Name withheld), 34 (VANISH), 39 (ARMS (Vic)).

49 Until the Married Women’s Property Acts were passed, a woman was legally considered the chattel of her husband. Her property became her husband’s, and she had no legal right to appear in court, sign contracts or do business, draft wills or dispose of any property without her husband’s consent. See Andrew James Cowie, ‘A History of Married Women’s Real Property Rights’ (2009) 6 *Australian Journal of Gender and Law* 1. See *Married Women’s Property Act 1893* (NSW); *Married Women’s Property Act 1890* (Qld); *Married Women’s Property Act 1893* (SA); *Married Women’s Property Act 1893* (TAS); *Married Women’s Property Act 1884* (Vic); *Married Women’s Property Act 1892* (WA).

50 *Adoption Act 1984* (Vic) s 53(1)(a).

51 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 3, 21.

52 In 1906, the inspector from the State Children’s Relief Board supervised adoptions to ‘ascertain the condition of the adoptions are being performed’ and to protect against the maltreatment of dependent children and prevent them being used as unpaid servants. Adoptive parents objected to these ‘friendly visits’ as an intrusion. See Michael Horsburgh, ‘Insecure Families: Early Adoption Practices in New South Wales’ (1978) 3(1) *Australian Child and Family Welfare* 17, 21–2.

Lifelong effects of adoption

- 1.74 Consultations and submissions emphasised the lifelong effects of adoption. The focus of decision making needs to shift to consider the effects on the adopted person as an adult, not just as a child. Discussion and recommendations in this report take into account the understanding that adoption is permanent, that an adopted person becomes an adopted adult, and adoption affects an adopted person's extended, past and future families.

Trauma

- 1.75 It is now accepted that people affected by past forced adoption practices have experienced trauma.⁵³ However, some people who have experienced 'successful' adoptions with happy, loving adoptive families have also experienced trauma. Adopted people have described psychological and emotional harm to the child and parent, and the ongoing, intergenerational effects of changing a person's identity and severing their legal relationship with their family. Research also points to genealogical confusion in adopted people, particularly where information about and contact with natural parents has not been exchanged.

Identity

- 1.76 Identity formation can be problematic for adopted people, leading to a range of difficulties during childhood and in later life.⁵⁴ While there are divergent views on the causes and possible solutions for these issues, it is clear that a lack of genuine openness in many adoptions compounds this problem.

Openness

- 1.77 When open adoption was introduced under the Adoption Act, it opened up access to information about past adoptions. It was also intended to enable ongoing contact and information exchange between the adopted child and their family of origin.
- 1.78 However, it is clear to the Commission that open adoption is not entirely effective in practice in Victoria. A strong culture of confidentiality and sometimes secrecy remains. Some confidentiality is justified to protect parties' psychological or physical safety. However, there is a continuation of historical legislative provisions which are not consistent with the principle of openness and not in the best interests of the adopted person.
- 1.79 The benefits of openness for all parties are now sufficiently established to enable the Adoption Act to take steps towards greater openness.

Barriers to openness

- 1.80 Secrecy still pervades the adoption process.
- 1.81 Many provisions in the Adoption Act impose barriers to openness which are not justified or necessary. For example:
- Records relating to adoption are closed and access to adoption information is restricted and regulated.
 - The child is given a new identity and name on the making of the adoption order.⁵⁵

⁵³ In speaking about the new access to information provisions being introduced by the Adoption Bill, Pauline Toner described 'a significant minority of adopted people who experience trauma and anguish because they are not able to establish their origins'. See Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4251 (Pauline Toner, Minister for Community Welfare Services). 'Significant minority' understates the proportion of this group, even on research available at the time. See John Triseliotis, *In Search of Origins: The Experiences of Adopted People* (Routledge & Kegan Paul, Great Britain, 1973). More recent research also identifies the unresolved grief and loss of natural parents, whose symptoms have been likened to post-traumatic stress disorder. See Daryl Higgins, *Impact of Past Adoption Practices: Summary of Key Issues from Australian Research*, Final Report (Australian Institute of Family Studies, 2010) 13.

⁵⁴ A large body of research demonstrates that adoption can lead to identity confusion, due to a person's lack of knowledge about or contact with their family of origin and behavioural and personality differences from members of their adoptive family. This can affect an adopted person's psychological and social welfare, self-acceptance and esteem. See Murray Ryburn, *Open Adoption: Research, Theory and Practice* (Avebury, 1994) 21–2, 44, 51.

⁵⁵ *Adoption Act 1984* (Vic) s 56.

- Natural parents and adoptive parents are not told each other's full names. The proposed adoptive parents (the applicants for the adoption order) never see the child's birth certificate⁵⁶ and do not know the child's surname. Searching for adoption information and contact must be mediated by the agency or Adoption Information Service. Adoptive parents are not able to include the name of the child's family of origin in their adopted identity.
 - Adoptive parents are not required to tell their child they are adopted.
 - Adoption proceedings are heard in closed court.⁵⁷
- 1.82 A range of provisions inhibits openness in relation to birth certificates. The birth certificates of adopted people are discussed in Chapter 6.
- 1.83 Likewise, openness is compromised by a range of provisions in relation to access to information:
- Before the age of 18, an adopted child is not entitled to apply for information through an adoption information service without their adoptive parents' agreement.⁵⁸
 - An adoption information service cannot give the child any information which would reveal the natural parents' identities without their consent (or evidence of their death).⁵⁹
 - An adoption information service cannot give an adoptive parent information which would reveal the identity of a natural parent without that person's consent.⁶⁰
 - Records relating to adoptions cannot be made available to anyone in most circumstances.
 - All documents filed in court are confidential⁶¹ and must be kept secret.
- 1.84 During consultations, great sadness was expressed by those affected by past adoption practices, and by adoptive parents whose efforts to maintain contact with natural parents and siblings are frustrated by the requirements of confidentiality.
- 1.85 Additionally, the preservation of secrecy in the adoption process sits uncomfortably with reforms to other laws relating to family and children, which provide greater rights to extended family to be informed of events and involved in decision making affecting a child.
- 1.86 While submissions and consultations expressed widespread general support for the principle of openness in adoption, there remain concerns about its practical implementation.⁶² Some consider it is not open enough, but others raised concerns about the effect of openness on individual privacy.⁶³
- 1.87 Throughout this report the Commission makes recommendations to facilitate greater openness in the adoption process. In formulating its recommendations, the Commission has been mindful that some confidentiality remains appropriate, to protect those who may be at risk of harm.

56 This is a practice for which no legislative basis has been identified. Note that r 13 of the *Supreme Court (Adoption) Rules 2015* (Vic) requires the applicants (ie the proposed adoptive parents seeking the adoption order) to 'cause to be served ... on the guardian' (ie the Secretary or principal officer) a copy of the birth certificate and notice of identification, which includes the child's name. It appears applicants' compliance with this rule is not possible.

57 *Adoption Act 1984* (Vic) s 107.

58 *Ibid* s 94(2).

59 *Ibid* s 94(3).

60 *Ibid* s 98.

61 Subject to *Supreme Court (Adoption) Rules 2015* (Vic) r 46.

62 Submissions 13 (Dr Catherine Lynch JD), 36 (Child & Family Services Ballarat Inc.), 58 (Name withheld); Consultations 2 (Grandparents Victoria), 13 (Roundtable with approved adoption agencies).

63 Submissions 24 (Independent Regional Mothers Combined), 61 (Name withheld); Consultations 13 (Roundtable with approved adoption agencies), 14 (Roundtable discussion with agencies involved in providing adoption information), 20 (Brenda Coughlan, Spokesperson for Independent Regional Mothers), 25 (VANISH).

Participation of the child

- 1.88 Adopted people told the Commission that the needs of prospective parents have taken precedence over their interests too often. They pointed out that often the person to be adopted is the object of the decision, not an informed and active participant.
- 1.89 While the child is the central figure in an adoption, current law does not provide well for children's views to be considered at key stages. The 'best interests of the child' principle requires that the child be informed and participate in decisions as much as possible.
- 1.90 In this report the Commission has tried to ensure that the voices of adopted people are heard.

Support

- 1.91 It was traditionally assumed that support is not necessary after an adoption. Now it is known that support is needed to help all parties affected by adoption at key points in their lives. This includes natural parents and their families, siblings, children and subsequent generations. For open adoption to be effective, all parties to an adoption need support, before and after the adoption.

Transparency and clarity

- 1.92 The community and stakeholders spoke about the need for greater transparency and clarity in the expression of the legislation. There was consensus that the best interests principle should be clarified, and the objects of the Adoption Act expressed. Adoption agencies want clarity in a range of decision making contexts. Adoption information services want clarity about release of adoption information. Applicants for adoption asked for more information about the rules and processes of adoption. These matters are addressed throughout the report.

Challenges for the Commission

- 1.93 In conducting this review, the Commission has extensively researched the law and practice of adoption in Victoria and other jurisdictions, and has consulted widely with the community. However, it has faced certain challenges during its inquiries, in particular:
- lack of data
 - limited research.

The lack of data

- 1.94 To inform the review, the Commission sought detailed data from DHHS in relation to adoption numbers, practices and services.
- 1.95 DHHS provides data annually to the Australian Institute of Health and Welfare (AIHW), for publication in its report *Adoptions Australia*.⁶⁴ However, because the AIHW does not report on a range of matters which the Commission sought to investigate, the Commission sought additional data from DHHS.
- 1.96 There were difficulties obtaining some of the data the Commission sought, as Victorian agencies do not maintain consistent, comprehensive statewide data on adoption services. In some cases manual review of files was undertaken to provide information requested by the Commission.

- 1.97 The Commission negotiated with Statutory and Forensic Services in DHHS's Community Services Programs & Design Branch to determine which data could feasibly be made available. In answer to specific questions agreed between DHHS and the Commission, data was provided to Statutory and Forensic Services by the regional agencies which provide adoption services. Overall, the data was inconsistent and unclear and the Commission was not able to rely on it.
- 1.98 The Commission considers DHHS should maintain comprehensive, reliable and consistent statewide data on the operation and service delivery of adoption services. Data collection should not simply comply with national reporting requirements but should be designed to assist the Department to understand how the services are being provided and evaluate whether they meet the needs of children and other clients, and to provide an evidence base to improve policy and performance in this area.
- 1.99 Likewise, comprehensive data is not available about adoption matters heard in the County Court. Limited data is provided in the Court's annual reports. The Commission collected de-identified data from a review of County Court adoption files from 1 July 2010 to 30 June 2016. The team reviewed all applications related to adoptions made in that period. Generally, judicial reasons for the making of an adoption order are not published. The role of the court is discussed in Chapter 14.

Research—the effects of adoption

- 1.100 Research has demonstrated the harmful effects of placement instability, and the importance of timely decisions to meet children's needs for permanency when they are separated from a parent. Research also shows that delay and 'drift' cause both short-term and lifelong damage. However, there is a lack of empirical evidence to support the assumption that adoption is the most beneficial form of permanent care.
- 1.101 Assertions and arguments about the superior outcomes of adoption focus on its short-term benefits without addressing its lifelong effects.⁶⁵ Research has not explored or compared particular permanency solutions over the long term.⁶⁶
- 1.102 Almost all the evidence about the long-term effects of adoption is based on experiences of forced, closed adoption practices. Early support for open adoption assumed that the harm of adoption was caused by lack of information and contact between the adopted person and their natural family. It was not considered whether adoption itself might be part of the problem.
- 1.103 During the review process the Commission was told of the long-term damage caused by adoption as a result of past adoption practices. People adopted under an open adoption system also told the Commission about similar damage. One parent spoke about adoptive parents generally observing that their adopted children and adults appeared to have less resilience when faced with life's challenges.⁶⁷ Adopted people described a sense of loss of identity and connection with their natural family.⁶⁸
- 1.104 There is limited research into open adoption in Australia, and questions remain about how it works in practice over the life of an adopted person. While some research is emerging from the United States and the United Kingdom, the different policy and legislative environments in these jurisdictions make its application to the Victorian context doubtful.⁶⁹

⁶⁵ Submissions 27 (Institute of Open Adoption Studies, University of Sydney), 50 (Barnardos Australia); Susan Tregeagle and Louise Voigt, 'Overcoming the Pain of Never Belonging: The Case for Open Adoption for Severely Abused and Neglected Children' (2014) 8(1) *Australian Journal of Adoption* 1.

⁶⁶ For further discussion of this issue, see Stephen Gay, 'The Choice Between Adoption and Foster Care as Child Protection Responses' (2015) 1 *UniSA Student Law Review* 138, 145–9.

⁶⁷ Consultation 16 (Professor Meredith Temple-Smith).

⁶⁸ Submission 43 (Thomas Graham); Consultation 25 (VANISH).

⁶⁹ See, eg, Dr Briony Horsfall's observation that: 'Independent empirical evidence is desperately needed... for research into adoption proceedings and the need for independent, academically rigorous longitudinal studies with children and families who have experienced adoption. This gap in knowledge has become even more urgent to address since the new pro-adoption wave emerged over the last decade, and now that adoption is unfortunately prioritised for out-of-home care in Victoria and other jurisdictions. Changes to the Adoption Act should be subject to independent long term empirical evaluation, similar to the Australian Institute of Family Studies suite of evaluations of various amendments to the [Family Law Act 1975 (Cth)] since 2006...'. See Submission 45 (Dr Briony Horsfall).

- 1.105 This gap should be rectified before policy is formulated on the basis of an assumption that adoption is the best form of care to provide permanency for children who cannot live with their parents. This assumption is not supported by sound evidence.
- 1.106 The Commission acknowledges that the child protection system in Victoria struggles to manage the growing number of children requiring out-of-home care. However, it has come to the view that caution is needed before embracing adoption as a solution to the needs of children in out-of-home care.⁷⁰

Other forms of care

- 1.107 As observed above, many people expressed disappointment that the terms of reference did not permit the Commission to consider adoption in the context of other options for the care of children.
- 1.108 The following section provides a brief outline of other forms of orders and discusses the issue of permanency in the context of this review.

Permanent care orders

- 1.109 The AIHW observed in its annual report, *Adoptions Australia 2015–16*⁷¹ that some Australian jurisdictions have focused on improving stability and permanency for children ‘through long-term care and protection orders that transfer guardianship and custody of a child’.⁷² As an example, the AIHW refers to the use of permanent care orders in Victoria as ‘an alternative to adoption’.⁷³ The report also includes data in relation to permanent care orders made in Victoria.⁷⁴
- 1.110 Permanent care orders were introduced in Victoria in 1992.⁷⁵ The intention of a permanent care order is to provide a permanent substitute family and to create enduring bonds for a child who is not able to live with their biological family and for whom there is no consent to adoption. Permanent care orders are made in relation to children in Victoria’s child protection system.⁷⁶
- 1.111 Unlike an adoption order, a permanent care order does not extinguish the legal relationship between the child and their natural parents. A permanent carer is required to preserve the child’s identity and connection to their culture of origin, and the child’s relationships with their birth family.⁷⁷ A permanent care order usually includes conditions about ongoing contact between the child and members of their birth family.⁷⁸

70 See also Stephen Gay, ‘The Choice Between Adoption and Foster Care as Child Protection Responses’ (2015) 1 *UniSA Student Law Review* 138, 145–9.

71 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016).

72 Ibid 2.

73 Ibid.

74 Ibid 47–8.

75 Under the *Children and Young Person’s Act 1989* (Vic). See also Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 47.

76 The circumstances when the Children’s Court can make a permanent care order are set out in the *Children, Youth and Families Act 2005* (Vic) s 319.

77 The Act requires such a condition, in the best interests of the child and unless the court otherwise provides. See *Children, Youth and Families Act 2005* (Vic) s 321(1)(ca).

78 Ibid ss 321(1)(ca)–(e).

- 1.112 A permanent care order is also more open to challenge by the child's parents than an adoption order.⁷⁹ This is said to create uncertainty about the permanence of the placement, which can affect a child's sense of security and act as a barrier to the recruitment of prospective permanent care families.
- 1.113 Permanent care orders are made by the Children's Court of Victoria under the CYF Act. They grant a person 'parental responsibility' for the child 'to the exclusion of all other persons', including the child's parents.⁸⁰ Parental responsibility encompasses 'all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children'.⁸¹ A permanent care order remains in force until the child turns 18 or marries.⁸²
- 1.114 Today, substantially more permanent care orders are made in Victoria than adoption orders. In 2015–16, 503 permanent care orders were made, compared to 15 orders for local adoption and 10 orders for known-child adoption. In 2014–15, 277 permanent care orders were made, compared to 24 orders for local adoption and five orders for known-child adoption.⁸³ While the number of permanent care orders made each year in Victoria has fluctuated year-to-year since their introduction in 1992, the number of orders has continued to increase over time.⁸⁴ The Children's Court of Victoria has granted 4466 permanent care orders since 1992.⁸⁵

Adoption as a source of permanency

- 1.115 Placement instability and 'drifting' in out-of-home care leads to poor mental health outcomes and ever-increasing state expenditure.⁸⁶ Adoption is promoted by some as a solution to problems in the child protection area. This view assumes that adoption is the most beneficial form of permanent care for a child who is not able to live with their parents.
- 1.116 The Commission recognises the importance of timely decisions to meet children's needs for permanency. However, a range of options is available. The question to be asked is: what is the best form of care for each child in their particular circumstances?
- 1.117 A 2005 report by the Standing Committee on Human and Family Services, *Overseas Adoption in Australia: Report on the Inquiry into Adoption of Children from Overseas*⁸⁷ criticised an 'anti-adoption' culture in Australia and advocated a revision of the approach to adoption. The committee expressed its concern that 'due to past practices, adoption generally has become the poor relation of child protection in Australia'.⁸⁸
- 1.118 As discussed above, in Victoria, permanent care orders provide a long-established alternative to adoption. While foster care is a temporary arrangement that aims to reunite children with their birth parents, permanent care orders are made when reunification is not possible. The order is usually made after a child has spent some time in foster care, and expires when the child turns 18.⁸⁹

79 While adoption orders can also be challenged by the child's parents, the grounds are very limited, eg, fraud, duress or other improper means: *Adoption Act 1984* (Vic) s 19(1).

80 *Children, Youth and Families Act 2005* (Vic) s 321(1)(a).

81 *Adoption Act 1984* (Vic) s 3 (definition of 'parental responsibility'). This definition is similar to the definition of 'parental responsibility' in the *Family Law Act 1975* (Cth).

82 Whichever happens first: *Children, Youth and Families Act 2005* (Vic) s 321(1)(c).

83 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series No 62 (2015) 23, 27, 47–8.

84 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 47–8.

85 *Ibid* 48.

86 Submissions 27 (Institute of Open Adoption Studies, University of Sydney), 41 (Adopt Change), 50 (Barnardos Australia).

87 House of Representatives Standing Committee on Family and Human Services, Parliament of Australia, *Overseas Adoption in Australia: Report on the Inquiry into Adoption of Children From Overseas* (2005).

88 *Ibid* 4.

89 Department of Human Services, Victoria, *Become a Permanent Care Parent* (31 August 2016) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/become-a-permanent-care-parent>>.

- 1.119 A group of young people who had experienced a range of out-of-home care situations told the Commission that children want to feel that they belong:⁹⁰
- Belonging means a sense of love, a family unit; love from them, trusting them, bonding with them, knowing they'll be by your side, nurturing. You feel like someone 'has your back' and can't just throw up their hands and say, 'not my problem'.
- 1.120 These young people did not identify adoption as providing a different sense of belonging than permanent care.⁹¹
- 1.121 A report for the Australian Institute of Family Studies in 2007 reviewed 21 studies researching outcomes for children and young people in care.⁹² The authors drew a range of conclusions:
- The majority of children in care obtain a stable and suitable placement within their first 12 months in care. Ongoing and severe placement disruption affects a relatively small sub-group of children in care.⁹³
 - Placement disruption extending beyond 12 months should be closely monitored.
 - Children with a history of placement disruption experienced an average of 11 placements during their time in care. The study showed a strong coincidence of early trauma and abuse and subsequent placement instability.
 - Children with a history of placement disruption tend to have a family history characterised by significant trauma.
 - Foster care appears to be unsuitable for a small sub-population of young people in care. There is an urgent need for a wider range of placement options for this sub-group.
- 1.122 In relation to the last point, the options include family-like placement, intensive therapeutic support and group residential accommodation. The authors do not mention adoption.⁹⁴
- 1.123 The Commission does not regard adoption as the solution to problems in the child protection area, but as one of a range of options, to be considered for each child in their particular circumstances.

Structure of this report

- 1.124 Adoption law and practice are complex and multi-layered. The terms of reference for this review did not lend themselves to neat partition. The report follows as closely as possible the sequence of the adoption process. It commences with analysis of the way the Adoption Act might be modernised and the principles that should apply to the practice of adoption.
- 1.125 Chapters 3–5 broadly focus on the adopted child, covering their participation in the process, post-adoption contact arrangements between the child and their natural parents, and the paramount principle guiding adoption decisions: the best interests of the child.
- 1.126 Chapter 6 discusses the birth certificates of adopted people. Adopted people are issued with new birth certificates which identify the people who have adopted them as their parents.
- 1.127 Chapter 7 looks at how the law should provide for the adoption of Aboriginal and Torres Strait Islander children. Chapter 8 discusses the natural parent's consent to the adoption of their child, which is the starting point of adoption.

⁹⁰ Consultation 1 (Bounce Youth Leaders).

⁹¹ Ibid.

⁹² Alexandra Osborn and Leah Bromfield, 'Outcomes for Children and Young People in Care' (NCPC Brief No 3, Australian Institute of Family Studies, 2007) 2.

⁹³ Ibid 3.

⁹⁴ Ibid 8.

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- 1.128 The focus then turns to applicants for adoption. Chapter 9 discusses the difficult question of discrimination in adoption law, policy and practice, in which decisions made in the best interests of the child may conflict with the rights of others. Chapters 10–12 discuss eligibility to adopt, assessment and suitability and the selection of adoptive parents. Chapter 13 examines exceptions in the *Equal Opportunity Act 2010* (Vic) which may permit a faith-based organisation to refuse to provide adoption services to particular people.
 - 1.129 An adoption becomes final when the court makes an adoption order. Chapter 14 discusses the role of the court in adoption.
 - 1.130 Chapter 15 considers whether the Adoption Act provides sufficient support for people affected by adoption, including not only the adopted person but also their natural parents and adoptive parents.
 - 1.131 Chapter 16 explores people's rights to adoption information. Many people who were adopted under previous, closed adoption practices are affected by these rules as well as those adopted under the current legislation.
 - 1.132 Chapter 17 concludes the report.

A new Adoption Act: principles and modernisation

- 22** Introduction
- 22** A new Adoption Act
- 23** An objects section for the Adoption Act
- 27** Principles for the Adoption Act
- 33** Terminology in the Adoption Act

2. A new Adoption Act: principles and modernisation

Introduction

- 2.1 This chapter provides the Commission's recommendations for the structure and key features of a new Adoption Act designed to meet the needs of Victorians in the 21st century.
- 2.2 The need for greater transparency and clarity in the expression of the legislation was a key theme from consultations and is an overarching aim for the recommendations of the Commission to modernise adoption law. Fae Cuff captured this view succinctly and precisely with her comment that 'the Adoption Act needs to be clear and in language that is understood by all not just academics'.¹
- 2.3 This chapter provides recommendations to ensure the aims, structure and language of the Adoption Act are clear and accessible.
- 2.4 Modern Victorian legislation often includes objects and principles. An objects section clarifies the aims or goals of the Act and provides a framework for what the Act aspires to do. Principles help decision makers to implement the objects by providing guidance about the things they should consider. Adoption legislation in some other Australian jurisdictions includes objects and principles.²
- 2.5 The Commission considers that a new Adoption Act should include both objects and principles.
- 2.6 This chapter considers the objects and overarching principles that should be included in new adoption legislation. It also makes some observations and recommendations about changes to terminology to ensure that language used is clear, contemporary and in harmony with other legislation.
- 2.7 Chapter 5 provides recommendations about specific principles to guide the assessment of the best interests of the child, and Chapter 7 provides recommendations about more detailed decision-making principles for Aboriginal and Torres Strait Islander children.

A new Adoption Act

- 2.8 The Adoption Act became law in 1984. Since that time there have been numerous and significant amendments to it.³ The amendments have reduced the readability of the Act. It is now difficult to understand and navigate.
- 2.9 In addition to the reduction in clarity due to amendments, drafting practice has also changed.

¹ Submission 23 (Fae Cuff).

² See *Adoption Act 2000* (NSW) ss 7, 8; *Adoption Act 2009* (Qld) ss 5, 6; *Adoption (Review) Amendment Act 2016* (SA) s 4.

³ For a summary of these amendments see Victorian Law Reform Commission, *Review of the Adoption Act 1984*, Consultation Paper (2016) 11.

- 2.10 Features of modern drafting that help improve the clarity and accessibility of legislation, such as the inclusion of objects and principles, the use of plain English, shorter sections, and greater use of headings have only become common since the Adoption Act became law.

Commission's conclusion

- 2.11 The report provides recommendations for modernising adoption legislation. It is clear from consultations that people find the Adoption Act difficult to work with and understand; any further amendment would compound these problems.
- 2.12 Amending the current Act would require the Office of the Chief Parliamentary Counsel to use an existing structure that is now 33 years old and reflects drafting practice from 1984.
- 2.13 Rather than making further amendments to the existing Act, a new Adoption Act should be created. It would be preferable for the Office of the Chief Parliamentary Counsel to make a fresh start, enabling it to structure a new Adoption Act in accordance with contemporary drafting practice to ensure that the Act is clear and accessible.
- 2.14 Consultation revealed that some parts of the Adoption Act are difficult for decision makers or people involved in adoption to understand or work with. Some parts of the Act are out of date or lack clarity, some do not work as well as they could, and some are viewed as inappropriate for people who need to use the Act, such as adopted people, natural parents, adoptive parents and other family members.
- 2.15 The Commission notes that matters excluded by the terms of reference will also need to be considered to ensure that the legislation is cohesive and coherent.
- 2.16 The Commission acknowledges that if a new Adoption Act is drafted, the Office of the Chief Parliamentary Counsel will work with the instructing officer from DHHS to determine if some matters are more appropriately placed in the Act or in subordinate legislation. In some cases, the Commission's recommendations indicate that it considers a matter is more appropriately included in the Regulations than the Act.

Recommendation

- 1 The *Adoption Act 1984* (Vic) should be repealed and replaced with a new Adoption Act that:
 - a. incorporates the legislative reforms recommended in this report
 - b. retains the content of provisions that have not been addressed in this report, and
 - c. is structured and expressed in accordance with contemporary drafting practice.

An objects section for the Adoption Act

Current law

- 2.17 Some Victorian legislation includes an objects or objectives section.⁴
- 2.18 The objects or objectives section provides guidance about the aims or goals of the Act. It provides a reference framework for what the Act aspires to do.

4 See, eg, *Guardianship and Administration Act 1986* (Vic) s 4; *Equal Opportunity Act 2010* (Vic) s 3; *Disability Act 2006* (Vic) s 4.

- 2.19 The Adoption Act does not include an object or objectives section. This means that there is nothing in the Act that clearly sets out the overall aims.
- 2.20 The *Interpretation of Legislation Act 1984* (Vic) provides that:
- In the interpretation of a provision of an Act or subordinate instrument—a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.⁵
- 2.21 An object section may assist in the interpretation of the Act.⁶ It may be used by a court to resolve ambiguity or uncertainty.
- 2.22 However, courts have said that there are limits on the use of purposes or objectives sections.⁷

Responses

- 2.23 The consultation paper asked whether the Adoption Act should include a section identifying the main object of the Act. It also asked how the main object should be described.
- 2.24 There is not universal agreement about the goals or aims of the Adoption Act or whom the Act is designed to serve. A number of people thought that the Adoption Act would be improved by a section that clarified the objects of the Act.⁸ The Centre for Excellence in Child and Family Welfare suggested that ‘an “object” ... would be helpful in making the purpose of the adoption legislation concrete and unambiguous’.⁹
- 2.25 Ideas about the objects of the Act included:
- the best interests as a key objective and detail in the Act about what the term means¹⁰
 - consideration of how adoption will affect a child’s future life¹¹
 - placing the child and their needs at the centre of any decision making¹²
 - adoption as a service for the child¹³
 - ensuring openness in adoption¹⁴
 - providing access to information¹⁵
 - compliance with Australia’s obligations under the United Nations *Convention on the Rights of the Child*¹⁶
 - reference to consistency with the *Charter of Human Rights and Responsibilities Act 2006* (Vic)¹⁷
 - ensuring access to cultural heritage¹⁸
 - making the child’s safety and long-term stability the basis of decision making¹⁹

⁵ *Interpretation of Legislation Act 1984* (Vic) s 35(a).

⁶ See generally Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 195–6.

⁷ For a useful summary of the limits on the use of objects in legislation, see *Lynn v New South Wales* (2016) 91 NSWLR 636 [54].

⁸ Submissions 34 (VANISH), 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 49 (Office of the Public Advocate), 51 (Law Institute of Victoria), 56 (Centre for Excellence in Child and Family Welfare Inc.).

⁹ Submission 56 (Centre for Excellence in Child and Family Welfare Inc.).

¹⁰ Submissions 21 (Name withheld), 36 (Child & Family Services Ballarat Inc.).

¹¹ Submission 49 (Office of the Public Advocate).

¹² Submission 36 (Child & Family Services Ballarat Inc.).

¹³ Submission 56 (Centre for Excellence in Child and Family Welfare Inc.).

¹⁴ Submissions 36 (Child & Family Services Ballarat Inc.), 49 (Office of the Public Advocate), 56 (Centre for Excellence in Child and Family Welfare Inc.).

¹⁵ Submissions 36 (Child & Family Services Ballarat Inc.), 49 (Office of the Public Advocate), 56 (Centre for Excellence in Child and Family Welfare Inc.).

¹⁶ Submissions 45 (Dr Briony Horsfall), 56 (Centre for Excellence in Child and Family Welfare Inc.).

¹⁷ Submission 45 (Dr Briony Horsfall).

¹⁸ Submission 56 (Centre for Excellence in Child and Family Welfare Inc.).

¹⁹ Submission 36 (Child & Family Services Ballarat Inc.).

- attaining permanency and respect for existing attachments of the child to their adoptive family.²⁰
- 2.26 VANISH submitted that there needs to be a clarification of the different parties served by the Adoption Act. Its submission identified the groups that are, or may be, served by the Adoption Act and suggested that the focus of adoption law should shift. It proposed that:
- Victoria's adoption legislation be amended so as to properly reflect and respect the needs of the majority of people directly affected by adoption in the state, rather than favour the interests of an anticipated, but unknown and likely relatively small, number of people affected by future adoptions.²¹
- 2.27 Two submissions suggested that an adapted version of the objects in the New South Wales legislation would be appropriate.²²
- 2.28 The Office of the Public Advocate supported the inclusion of an objects section. It suggested the following, which it based on the Queensland legislation:
- To provide for the adoption of children in Victoria and for the access to information about parties to adoption in a way that:
- (a) Promotes the well-being, rights and best interests of adopted persons throughout their lives,
 - (b) Supports efficient, accountable, accessible, compassionate and respectful practice in the delivery of adoption services,
 - (c) Complies with the Victorian Charter of Human Rights
 - (d) Complies with Australia's obligations under the Hague Convention and under international Conventions, including the Convention on the Rights of the Child
 - (e) Ensures openness in adoption.²³

Commission's conclusion

- 2.29 The Commission considers that a new Adoption Act should set out clearly what its aims are. The need for greater transparency and clarity in the legislation was a key theme from consultations. A section that clearly sets out the objects of the Act in one place would improve transparency and clarity.
- 2.30 The adoption legislation in the Australian Capital Territory, New South Wales and Queensland includes an objects section.²⁴
- 2.31 Adoption law and practice should comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, it is not necessary to include this as an object in adoption legislation because the Charter is part of Victorian law. Making compliance with the Charter one of the objects of the Act would not add anything to the rights and responsibilities that already exist.
- 2.32 The Commission has identified six goals that it considers should be listed as objects in providing for adoption in Victoria.
- 2.33 A key theme that emerged from the Commission's consultation was that adoption has lifelong effects. Therefore, the focus of decision making needs to shift to consider the impact of the decision on the life of the adopted person as an adult, not just as a child. The Act should include an object to ensure that the best interests of the child concerned, both in childhood and in later life, must be paramount.

20 Submission 50 (Barnardos Australia).

21 Submission 34 (VANISH).

22 Submissions 35 (OzChild), 50 (Barnardos Australia).

23 Submission 49 (Office of the Public Advocate).

24 *Adoption Act 1993* (ACT) s 4; *Adoption Act 2000* (NSW) s 7; *Adoption Act 2009* (Qld) s 5; *Adoption (Review) Amendment Act 2016* (SA) s 4, which has not yet commenced, provides for an objects section to be included in the *Adoption Act 1988* (SA).

- 2.34 Ensuring the focus is not just on the short term will help provide for better decision making in the best interests of the child. This is not intended to suggest that people who have been adopted as children are subject to best interests considerations as adults.
- 2.35 Responses to the consultation paper, discussed below at [2.53], forcefully made the point that adoption is a service to the child; its purpose is not to form families. This fundamental idea should be emphasised through the inclusion of an object to ensure that adoption is to be regarded as a service for the child and that adoption is centred on the needs of the child rather than an adult wanting to care for a child.
- 2.36 Many people involved in adoption told the Commission that there is a greater need for adoption support services, including post-adoption support. This is discussed in detail in Chapter 15. Adoption has lifelong effects and a variety of needs may arise for those involved in an adoption. In light of this ongoing need, an object of the Act should be to ensure that appropriate adoption support services are available to eligible people at all stages of adoption, including after adoption.
- 2.37 A clear theme that arose in consultation was the need to provide for more openness. An object of the Adoption Act should be that it promotes openness and assists a child to know and have access to his or her birth family and cultural heritage.
- 2.38 A key purpose of the Adoption Act is to provide adopted people and people closely affected by an adoption with access to information. This part of the Adoption Act is discussed in Chapter 16. An object of the Act should be to ensure that people involved in or affected by adoption can have access to information about the adoption.
- 2.39 Adoption law and practice should comply with Australia's obligations under treaties and other international agreements. The United Nations *Convention on the Rights of the Child* (CRC) and the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* specifically address adoption. They should be referenced expressly in an object. However, a range of other international agreements are relevant and the Commission draws particular attention to the *Declaration on the Rights of Indigenous Peoples* and the *Convention on the Rights of Persons with Disabilities*.
- 2.40 While the drafting of the objects of any new laws will ultimately be a matter for the Victorian Parliament and the Office of Chief Parliamentary Counsel, the Commission has proposed objects for new adoption laws.

Recommendations

- 2** The Adoption Act should specify that the object of the Act is to provide for adoption in a way that:
- ensures that the best interests of the child concerned, both in childhood and in later life, are the paramount consideration in adoption law and practice
 - ensures that adoption is regarded as a service for the child concerned which is centred on the needs of the child rather than those of an adult seeking to care for a child
 - ensures that appropriate adoption support is available to eligible people at all stages of an adoption and after adoption

- d. promotes openness in adoption and assists a child to know and have access to their family of origin and cultural heritage
- e. ensures that people involved in or affected by an adoption can have access to information about the adoption
- f. complies with Australia's obligations under treaties and other international agreements, in particular the obligations arising under the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* and the *Convention on the Rights of the Child*.

Principles for the Adoption Act

Current law

- 2.41 Principles provide guidance for decision makers about the things they should consider in carrying out the objects of the Act.
- 2.42 Principles sections are used reasonably frequently in contemporary Victorian legislation.
- 2.43 Some Victorian legislation includes an objects or objectives section, and principles.²⁵
- 2.44 The Adoption Act does not include a principles section. It includes the overarching 'paramount consideration', which could be described as the core principle: 'In the administration of this Act, the welfare and interests of the child concerned shall be regarded as the paramount consideration.'²⁶
- 2.45 There is also a secondary principle stated in the Adoption Act that 'In all matters relating to the exercise of powers and the performance of duties under this Act, the Secretary and the principal officer of an approved agency shall have regard to adoption as a service for the child'.²⁷ Because this is located well into the Act (section 32) rather than with the 'paramount consideration' (section 9), some people may not be aware of this principle.
- 2.46 Other guidance is included but this is scattered throughout the Act. There is no comprehensive statement providing principles.

The Children, Youth and Families Act

- 2.47 The *Children, Youth and Families Act 2005* (Vic) (the CYF Act) includes:
 - best interests principles²⁸
 - decision-making principles²⁹
 - additional decision-making principles for Aboriginal children³⁰
 - an Aboriginal child placement principle³¹
 - further principles for placement of an Aboriginal child.³²

²⁵ See, eg, *Disability Act 2006* (Vic) ss 4, 5.

²⁶ *Adoption Act 1984* (Vic) s 9.

²⁷ *Ibid* s 32.

²⁸ *Children, Youth and Families Act 2005* (Vic) s 10.

²⁹ *Ibid* s 11.

³⁰ *Ibid* s 12.

³¹ *Ibid* s 13.

³² *Ibid* s 14.

- 2.48 The CYF Act includes a requirement that decision makers ‘must have regard to the principles set out in this Part (where relevant) in making any decision or taking any action under this Act’.³³ It also details who the decision makers are who must have regard to the decision-making principles: the court, the Secretary of the Department, and community services.³⁴
- 2.49 The CYF Act states that the decision-making principles are ‘intended to give guidance in the administration of this Act’.³⁵

Responses

- 2.50 The consultation paper asked whether the Adoption Act should include general principles to guide the exercise of power. It also asked what any principles should be.
- 2.51 Many people thought that the Adoption Act would benefit from the inclusion of principles to guide decision makers.³⁶
- 2.52 People considered a range of matters to be important in decisions about adoption. Many of these matters are discussed in detail in other chapters. In summary they are:
- that principles should relate directly to the United Nations *Convention on the Rights of the Child*³⁷
 - the child’s best interests as an overarching paramount principle³⁸ (considered in detail in Chapter 5)
 - separate decision-making principles about the adoption of Aboriginal and Torres Strait Islander children³⁹ (considered in detail in Chapter 7)
 - that adoption is a service for the child and not a ‘family-forming’ service⁴⁰
 - that all parties and families should be treated with respect and understanding⁴¹
 - that stability and permanency are important for children⁴²
 - that adoption should be a last resort and a range of other options should be considered first, for example, care by extended family⁴³
 - that extended family should have a role in decision making about adoption wherever possible⁴⁴
 - that consent to an adoption must be free from duress, pressure or coercion⁴⁵ (considered in detail in Chapter 8)

33 Ibid s 8. This language is slightly modified in relation to each decision maker to reflect their different decision-making roles. The different language reflects the fact that courts do not provide services but the Secretary and community services do. This means that the principles apply to decisions, actions and services of the Secretary and community services but only apply to decisions and actions of the Court.

34 Ibid.

35 Ibid s 9(1).

36 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 20 (Name withheld), 36 (Child & Family Services Ballarat Inc.), 34 (VANISH), 43 (Thomas Graham), 46 (Australian Psychological Society), 49 (Office of the Public Advocate).

37 Submissions 20 (Name withheld), 45 (Dr Briony Horsfall), 60 (Berry Street); Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

38 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 26 (Adoption Origins Victoria Inc.), 39 (ARMS (Vic)), 46 (Australian Psychological Society), 48 (Victorian Council of Social Service), 49 (Office of the Public Advocate), 56 (Centre for Excellence in Child and Family Welfare Inc.), 60 (Berry Street).

39 Submissions 45 (Dr Briony Horsfall), 53 (SNAICC—National Voice for our Children), 60 (Berry Street).

40 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 26 (Adoption Origins Victoria Inc.), 34 (VANISH).

41 Submission 49 (Office of the Public Advocate).

42 Submissions 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 38 (Women’s Forum Australia), 42 (Australian Association of Social Workers), 50 (Barnardos Australia); Consultation 30 (Jillian Ebbott).

43 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 23 (Fae Cuff), 26 (Adoption Origins Victoria Inc.), 31 (Name withheld), 33a (Name withheld), 34 (VANISH), 43 (Thomas Graham), 45 (Dr Briony Horsfall); Consultation 32 (Ann Jukes and Gabrielle Hitch).

44 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 49 (Office of the Public Advocate).

45 Submission 49 (Office of the Public Advocate).

- that siblings should remain together where possible and that consideration should be given to siblings' connections as part of any contact arrangements⁴⁶ (considered in detail in Chapter 4)
- the child's right to participation in decision making about adoption⁴⁷ (considered in detail in Chapter 3)
- the maintenance of the child's identity such as their name or names, identity, language, culture and religious ties⁴⁸ (considered in detail in Chapter 5)
- openness in adoption and rights of the child to have ongoing connection and contact with their extended family, culture and community⁴⁹ (considered in detail in Chapter 4).

Adoption is a service for the child not a family forming service

- 2.53 Many people emphasised that adoption should be viewed as a service for the child not a family-forming service. The submission of Adoption Origins Victoria captures the key ideas: 'Adoption is a help line for a child not a service for adults wishing to create a family. [N]o adult has a right to adopt a child, nor should adoption be used as a supply chain for family formation.'⁵⁰
- 2.54 Women's Forum Australia suggested that: 'Adoption as an institution is first and foremost a response to a need (being the needs of vulnerable women facing a crisis pregnancy and vulnerable children in need of a stable, loving and permanent family), and only a means of family formation for adoptive parents in the second place'.⁵¹

Stability or permanency—adoption as a last resort

- 2.55 There was broad support for the idea that stability or permanency is very important for a child or young person.⁵² Participants from Bounce Youth Leaders, a peer leadership training program for young people who have personally experienced out-of-home care, emphasised the importance of safety and stability.⁵³ Some of them said that a feeling of belonging to a family is important because 'you are more secure and comfortable taking opportunities'.⁵⁴
- 2.56 While it was widely agreed that stability or permanency are important for a child or young person, there was a divergence of views about whether or not adoption is an appropriate way to achieve stability or permanency. Some people considered that adoption provides well for stability or permanency. Barnardos Australia told the Commission that 'the Victorian government should be moving to ensure many more Victorian children are adopted from care each year'.⁵⁵
- 2.57 Strong views were expressed by a large number of people that adoption is not a good way to achieve stability or permanency. Many people considered that adoption should not be used at all, or that it should be a last resort.⁵⁶ A range of reasons were given for

46 See, eg, Submissions 3 (Leilani Hannah), 7 (Name withheld), 9 (Australian Adoptee Rights Action Group), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 30 (Name withheld), 34 (VANISH), 37 (Permanent Care and Adoptive Families), 39 (ARMS (Vic)), 49 (Office of the Public Advocate), 56 (Centre for Excellence in Child and Family Welfare Inc.).

47 See, eg, Submissions 26 (Adoption Origins Victoria Inc.), 45 (Dr Briony Horsfall), 48 (Victorian Council of Social Service), 56 (Centre for Excellence in Child and Family Welfare Inc.).

48 Submissions 26 (Adoption Origins Victoria Inc.), 34 (VANISH), 45 (Dr Briony Horsfall), 53 (SNAICC—National Voice for our Children).

49 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 26 (Adoption Origins Victoria Inc.), 34 (VANISH), 39 (ARMS (Vic)), 45 (Dr Briony Horsfall), 53 (SNAICC—National Voice for our Children).

50 Submission 26 (Adoption Origins Victoria Inc.).

51 Submission 38 (Women's Forum Australia).

52 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 34 (VANISH), 35 (OzChild), 44 (Victorian Gay & Lesbian Rights Lobby), 53 (SNAICC—National Voice for our Children).

53 Consultation 1 (Bounce Youth Leaders).

54 Ibid.

55 Submission 50 (Barnardos Australia).

56 Submissions 3 (Leilani Hannah), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 16 (Name withheld), 23 (Fae Cuff), 26 (Adoption Origins Victoria Inc.), 31 (Name withheld), 33a (Name withheld), 34 (VANISH), 39 (ARMS (Vic)), 43 (Thomas Graham), 45 (Dr Briony Horsfall), 56 (Centre for Excellence in Child and Family Welfare Inc.); Consultations 7 (Bobby Richards), 31 (SS), 32 (Ann Jukes and Gabrielle Hitch).

this including: the ‘lie’ of adoption;⁵⁷ trauma caused by adoption;⁵⁸ identity issues arising from adoption;⁵⁹ the availability of other options to provide permanency or security for the child or young person, which better acknowledge their existing and ongoing relationship with their natural family;⁶⁰ and the desirability of a child remaining with their parents where possible, and where this is not possible, within kinship networks.⁶¹

2.58 In relation to identity VANISH commented:

Adoption legally removes one set of parents and replaces them with another set of parents, and the child is recognised in law ‘as if born to’ the new parents. This compounds the child’s loss of family by violating their rights to preservation of name, heritage, identity, and often also family relationships, across the life cycle. This is inappropriate and unnecessary, and it can and does occur even in ‘open’ adoptions. Research findings and personal testimonies over several decades demonstrate that these factors negatively impact the adopted person’s identity development and well-being throughout their entire life, not just during childhood, and inter-generationally.⁶²

2.59 Many submissions emphasised the other options for providing security to a child, such as parenting orders made under the *Family Law Act 1975* (Cth) or permanent care orders made under the CYF Act for children who are in the child protection system.⁶³

Extended family

2.60 Numerous people identified the importance of extended family and the desirability of retaining the child within their extended family wherever possible.

2.61 Submissions identified three ways in which decision makers should consider extended family when making decisions about adoption. The first, which relates to the above discussion of adoption as a last resort, was that options for care by the extended family should be fully explored and ruled out before adoption is considered.⁶⁴ Grandparents Victoria submitted that:

Adoption should never be applied if the extended family is willing and able to raise the child and in all cases the extended family of the child should have the right to prove their capacity and willingness to raise the child. The application of extended family to raise the child must be given priority consideration, even if the parent initially approves the adoption. In the cases where members of the biological family other than the parents want to raise the child, adoption should not proceed because parenting orders are sufficient to provide permanency and stability to the child’s life.⁶⁵

2.62 The second type of involvement suggested for extended family was that they should be involved in decision making about adoption.⁶⁶

2.63 The third role suggested for extended family was in relation to openness in adoption and rights of the child to have ongoing connection and contact with their extended family, culture and community.⁶⁷

57 Submission 43 (Thomas Graham); Consultation 31 (SS).

58 Submissions 3 (Leilani Hannah), 26 (Adoption Origins Victoria Inc.), 43 (Thomas Graham).

59 Submission 26 (Adoption Origins Victoria Inc.), 34 (VANISH), 43 (Thomas Graham).

60 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 26 (Adoption Origins Victoria Inc.), 34 (VANISH).

61 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 16 (Name withheld), 23 (Fae Cuff), 31 (Name withheld), 56 (Centre for Excellence in Child and Family Welfare Inc.).

62 Submission 34 (VANISH).

63 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 23 (Fae Cuff), 26 (Adoption Origins Victoria Inc.), 34 (VANISH), 39 (ARMS (Vic)), 43 (Thomas Graham), 45 (Dr Briony Horsfall), 49 (Office of the Public Advocate), 60 (Berry Street).

64 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 16 (Name withheld), 23 (Fae Cuff), 31 (Name withheld), 56 (Centre for Excellence in Child and Family Welfare Inc.).

65 Submission 11a (Grandparents Victoria Inc./Kinship Carers Victoria).

66 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 21 (Name withheld), 56 (Centre for Excellence in Child and Family Welfare Inc.).

67 Submission 53 (SNAICC—National Voice for our Children).

Commission's conclusion

- 2.64 The Commission considers that the inclusion of principles to guide decision making about adoption would assist with implementing the objects of the Act. The objects and principles should be collected in one place near the start of the Act rather than scattered throughout as they currently are.
- 2.65 The inclusion of both objects and principles is consistent with contemporary adoption legislation in other states and territories.⁶⁸ It is a legislative response to the theme, which resonated through consultations, of a need for greater transparency and clarity in adoption law.
- 2.66 There are four parts to the Commission's recommended new legislative principles:
- a statement of objects that clearly outlines the key goals of adoption legislation (Recommendation 2 discussed above at [2.29])
 - general principles to guide decision making about adoption (Recommendations 3 and 4 below)
 - best interests principles to provide guidance about the matters for decision makers to consider in determining a child's best interests (Recommendation 23 discussed in Chapter 5 at [5.126])
 - additional decision-making principles for Aboriginal and Torres Strait Islander children incorporating the Aboriginal Child Placement Principle (Recommendation 29 discussed in Chapter 7 at [7.116]).
- 2.67 For principles to be effective the legislation needs to specify to whom they apply. It is important to emphasise that decision-making principles apply to all decision makers in adoption, not just the court. The Act should specify that decision makers are to have regard to the principles (where relevant) in making any decision or taking any action under the Act. This should apply to the court, the Secretary, principal officers of approved agencies and any other persons and bodies involved in the administration of the Act.
- 2.68 The Act should clarify that the role of the principles is to give guidance in the administration of the Act. It should state that the principles do not create, or confer on any person, any right or entitlement enforceable at law.
- 2.69 The Commission has considered responses to the consultation paper as well as the guiding principles included in the adoption legislation of other Australian jurisdictions. It has identified six matters that should be included as general principles to guide decision making about adoption.
- 2.70 Principle 1: The best interests of the child concerned, both in childhood and in later life, must be the paramount consideration. This principle was strongly supported in responses to the consultation paper, and is required by the terms of reference. It reflects the requirements of the CRC and, in particular, article 21, which requires that: 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration'.⁶⁹ These considerations are at the heart of the Adoption Act and should be at the forefront of the mind of all people involved in making decisions under the Act.
- 2.71 Principle 2: Adoption is a service for the child concerned and no adult has a right to adopt a child. Recommendation 2(b) is that an object of the Adoption Act should be to provide for adoption in a way that ensures that adoption is regarded as a service for the child concerned which is centred on the needs of the child rather than those of an adult seeking to care for a child. This is a key principle of adoption and a protective factor for ensuring that decisions are made with the best interests of the child as the paramount consideration.

⁶⁸ *Adoption Act 2000* (NSW) ss 7, 8; *Adoption Act 2009* (Qld) ss 5, 6; *Adoption (Review) Amendment Act 2016* (SA) s 4.
⁶⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 21.

- 2.72 Principle 3: Consent to adoption must be fully informed and free from duress, pressure or coercion. Consent is discussed in detail in Chapter 8 and recommendations are made to improve the consent process and ensure that consent is freely given on an informed basis. Throughout the review the Commission heard from many people who were subject to forced adoptions. The immense grief and trauma associated with forced adoptions means that the attention of decision makers should be focused on ensuring that consent is informed and free. The apologies given by both the Australian and Victorian Parliaments, and commitments to ensure that this does not occur again, reinforce the importance of this aspect of adoption.
- 2.73 Principle 4: If a child is capable of forming their own views on a matter concerning their adoption, they must be given the opportunity to express those views freely. These views are to be given due weight in accordance with the age and maturity of the child. This principle reflects the right provided by article 12 of the CRC.⁷⁰ The Commission was told that while the child is the central figure in the adoption, current adoption law does not provide well enough for their views to be considered at key stages in the adoption process. The child's right to participation should be included as a principle to ensure that the person whom the decision most affects has an opportunity to be heard.
- 2.74 Principle 5: Anyone involved in the adoption process should be given the information that they reasonably need to participate effectively in a manner and form that enables them to understand. This means that information may need to be provided in different forms for different people. For example, someone who does not speak English as their first language may require an interpreter. This principle is important in order for people involved in adoption to participate effectively, to help ensure consent is freely given on an informed basis, and to help ensure that those involved in adoption are treated with respect and retain their dignity.
- 2.75 Principle 6: A person or body exercising a function or power under this Act in relation to an Aboriginal or Torres Strait Islander child must observe the decision-making principles for Aboriginal and Torres Strait Islander children.
- 2.76 The Commission's proposed principles to guide decision making about the best interests of the child are discussed in Chapter 5 and Recommendation 23.
- 2.77 The Commission's proposed decision-making principles for Aboriginal and Torres Strait Islander children are discussed in Chapter 7 and Recommendation 29.

Recommendations

- 3** The Adoption Act should include a suite of overarching principles which include general principles (described in Recommendation 4), the best interests principles (described in Recommendation 23), and the decision-making principles for Aboriginal and Torres Strait Islander children (described in Recommendation 29). The Adoption Act should specify that:
- Decision makers and others providing services under the Adoption Act including the court, the Secretary, principal officers of approved agencies and any other persons and bodies involved in the administration of the Act are to have regard to the principles set out in the Act (where relevant) in making any decision or taking any action under the Act.

- b. The principles give guidance in the administration of the Act and do not create, or confer on any person, any right or entitlement enforceable at law.
- 4** The general principles should specify that:
- a. The best interests of the child concerned, both in childhood and in later life, must be the paramount consideration.
 - b. Adoption is a service for the child concerned and no adult has a right to adopt a child.
 - c. Consent to adoption must be fully informed and free from duress, pressure or coercion.
 - d. A child who is capable of forming their own views on a matter concerning their adoption must be given the opportunity to express them freely and these views are to be given due weight in accordance with the age and maturity of the child.
 - e. Anyone involved in the adoption process should be given the information that they reasonably need to participate effectively, in a manner and form that enables them to understand the relevant process.
 - f. A person or body exercising a function or power under this Act in relation to an Aboriginal or Torres Strait Islander child must observe the decision-making principles for Aboriginal and Torres Strait Islander children.

Terminology in the Adoption Act

Responses

- 2.78 The consultation paper asked if there was terminology that should be changed because it is unclear, outdated or inconsistent with other law.

Adopted child or adopted person

- 2.79 Some people said that the term 'child' is problematic because it fails to account for the effects of adoption over the lifetime of a person and is infantilising.⁷¹
- 2.80 The Australian Association of Social Workers 'supports the use of the term "best interests" of the adoptee, and not just "child's best interest", as it refers and better captures the effect of key decisions throughout the [person's] life ... not just childhood'.⁷²
- 2.81 Another submission stated that: 'Adoption needs to be viewed as an act that is done to a child, that not only effects them as a child, but also as an adult. So the terminology should read something like "the best interests of the child, including the best interests of the adult they become"'.⁷³
- 2.82 The use of the term 'best interests of the child' was described as problematic when the adopted person is no longer a child.⁷⁴

71 Submission 42 (Australian Association of Social Workers); Consultations 10 (Confidential), 31 (SS).
 72 Submission 42 (Australian Association of Social Workers).
 73 Submission 33a (Name withheld).
 74 Consultation 31 (SS).

Description of parents

2.83 Strong views were expressed about the terminology that should be used to describe mothers and fathers from the family of origin. A number of people considered that ‘birth mother’ is disrespectful and that ‘natural mother’ is a preferable term.⁷⁵ Alternatively, people considered that no adjective should be applied to the parents from the family of origin; they should be described as ‘mother’ or ‘father’ with no adjective attached.⁷⁶

2.84 Adoptions Origins Victoria submitted that it:

rejects the use of ‘birth’ as a qualifier of Mother or Father and prefers either that there be no qualifier accorded to the parent or the word ‘natural’ be used. We believe that the term ‘birth mother’ is linked to the practice of forced adoption and as such is a traumatising phrase and should be abandoned. Adoption Origins Victoria understands that the term ‘birth mother’ was originally used by social workers in the USA to distance the child from its mother of origin and we seek the immediate abolition of the use of that term.⁷⁷

2.85 VANISH considered that the terms ‘birth mother’ and ‘birth father’ fail to acknowledge the person’s ongoing role in the adopted person’s life:

The terms frequently used in the adoption sector for the natural parents are ‘birth mother’ and ‘birth father’. This implies that their role was and remains related to the birth of the child. However, in reality when a child is relinquished or removed, the familial relationships already in place do not cease to exist. Whether or not contact is ongoing or frequent, the child is still genetically and psychologically connected to his or her parents, siblings, grandparents and ancestors. This does not change, even when the relationships are legally severed.⁷⁸

2.86 Independent Regional Mothers Combined submitted that ‘the terminology *birth mother* indicates the womb of a woman is used as a breeding commodity’.⁷⁹ It stated that ‘Natural mothers are natural mothers—adoptive mothers are unnatural mothers—they did not give birth to the stolen child and cannot cover up these crimes by demanding natural mothers to be referred to as birth mothers’.⁸⁰

2.87 Professor the Hon. Nahum Mushin, chair of the Forced Adoptions Apology Reference Group and the Forced Adoptions Implementation Working Group, emphasised that adoption law must be sensitive to the needs of people affected by forced adoption. He described the terminology used to refer to biological parents in the area of forced adoptions, indicating that they are referred to as the ‘parents’ without any adjective preceding the noun. If there is a need to distinguish between parents, adjectives are used for the adoptive family; for example, ‘adoptive mother’. He expressed the view that adoption law should use this language.⁸¹

‘As if the child had been born to’

2.88 The Adoption Act uses the term ‘as if the child had been born to’ to describe the legal effect of an adoption order providing that:

Subject to this Act and to the provisions of any other Act that expressly distinguishes in any way between adopted children and children other than adopted children, upon the making of an adoption order—

75 Submissions 3 (Leilani Hannah), who also considered that ‘first mother’ is acceptable, 26 (Adoption Origins Victoria Inc.), 24 (Independent Regional Mothers Combined), 34 (VANISH).

76 Submissions 23 (Fae Cuff), 26 (Adoption Origins Victoria Inc.); Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

77 Submission 26 (Adoption Origins Victoria Inc.).

78 Submission 34 (VANISH).

79 Submission 24 (Independent Regional Mothers Combined).

80 Ibid.

81 Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

- (a) the adopted child shall be treated in law as a child of the adoptive parent or adoptive parents, and the adoptive parent or adoptive parents shall be treated in law as the parent or parents of the child, as if the child had been born—
 - (i) to the adoptive parent; or
 - (ii) to the adoptive parents.
 - (b) the adopted child shall be treated in law as if the adopted child were not a child of any person who was a parent (whether natural or adoptive) of the child before the making of the adoption order, and any such person shall be treated in law as if the person were not a parent of the child.⁸²
- 2.89 Some submissions suggested that the use of the phrase ‘as if the child had been born to’, is unnecessary.⁸³ ARMS (Vic) submitted that:
- There is no need to say ‘as if born to’ in legislation as that is obviously part of their parental rights, duties, obligations and liabilities. Adding ‘as if born to’ is superfluous and creates a false impression in the minds of the adoptive parents. This is a legal and actual lie. The law should not support this lie. How we describe adoption is important. The reality is that they are parenting another family’s child and the relationship will never be ‘as if born to’.⁸⁴

Terminology that is inconsistent with other legislation or outdated

- 2.90 The consultation paper noted that some terminology in the Adoption Act was inconsistent with other legislation and suggested it may be appropriate to update the language used in the Adoption Act to ensure consistency and clarity.
- 2.91 Child & Family Services Ballarat and the Law Institute of Victoria submitted that the terms ‘guardianship’ and ‘custody’ should be updated to align with other legislation.⁸⁵ The Law Institute of Victoria referred to the terminology used in the Family Law Act, which uses the terms “spends time with”, “lives with” and “parental responsibility” ... in place of “contact”, “custody” and “guardianship”.⁸⁶
- 2.92 OzChild submitted that the use of the term ‘whole blood’ or ‘half-blood’ should be removed when defining a relative. It also considered that the term ‘Aborigine’ is offensive towards Aboriginal people and should no longer be used.⁸⁷

Commission’s conclusions

Adopted child or adopted person

- 2.93 Adoption decisions have lifelong effects and an adopted person is an adult for much longer than they are a child. Adoption legislation should use the term ‘adopted person’ rather than ‘adopted child’ wherever reference is to the person as an adult.⁸⁸
- 2.94 In some instances it is necessary to use the term ‘child’, primarily in reference to the best interests concept. Best interests decision making can take into account the interests of the child both in childhood and in later life. The language used to guide best interests decision making should focus decision making on future, not just immediate, consequences. However, the term ‘best interests of the person’ would be undesirable because it would be inappropriate for decisions to be made in the ‘best interests’ of an adult. Generally, legal adults are free to make their own decisions, good or bad, and it is not the role of the state to intervene to make decisions for adults in their ‘best interests’.

82 *Adoption Act 1984* (Vic) s 53(1).

83 Submissions 21 (Name withheld), 39 (ARMS (Vic)).

84 Submission 39 (ARMS (Vic)).

85 Submissions 36 (Child & Family Services Ballarat Inc.), 51 (Law Institute of Victoria).

86 Submission 51 (Law Institute of Victoria).

87 Submission 35 (OzChild).

88 The term ‘adopted person’ is used in some parts of the *Adoption Act 1984* (Vic). See, eg, ss 78(1), 79, 82.

Description of parents

- 2.95 At times it is necessary to distinguish between the various parties to an adoption in order to define and protect their rights and duties.
- 2.96 The Commission has considered the responses to the consultation paper, the approach taken by the Senate Community Affairs Reference Committee in its report, *Commonwealth Contribution to Former Forced Adoption Policies and Practices*, and approaches taken in other jurisdictions to the language used to describe parents.⁸⁹
- 2.97 The Adoption Act uses the terms ‘adopted child’ or ‘adopted person’, ‘adoptive parent(s)’ and ‘natural parent(s)’ to differentiate between the parties to an adoption. Terminology used in adoption legislation in other states and territories includes ‘natural parents’,⁹⁰ ‘birth parents’⁹¹ and ‘biological parents’.⁹²
- 2.98 The language of adoption is a disputed area that elicits strong reactions. The Commission recognises the extreme trauma and distress resulting from forced adoptions and the ongoing effects of this trauma on parents and children who were subject to forced adoptions.
- 2.99 The Commission also acknowledges the argument that terms such as ‘birth mother’, ‘birth father’ or ‘biological parents’ may minimise the idea that the parents will have an ongoing role in the adopted person’s life, and may suggest that the role of the parents is limited to providing the genetic material for the child.
- 2.100 The use of the term ‘natural parent’ is also problematic and may cause distress because it may suggest that the adoptive parent is an ‘unnatural parent’ and that the relationship is ‘unnatural’.
- 2.101 The Commission’s recommendations aim to reduce any trauma associated with adoption. Terms such as ‘birth parent’ may retraumatise those involved in forced adoptions and may have the effect of making the person who gave birth to a child feel like a commodity.
- 2.102 On balance, the Commission considers that the language used in adoption legislation should be ‘mother’ to describe the person who gave birth to the child wherever possible. If it is necessary to draw a distinction for clarity, the terms ‘natural mother’ and ‘adoptive mother’ should be used. Similar distinctions should be drawn between ‘natural father’ and ‘adoptive father’, and ‘natural parents’ and ‘adoptive parents’, where necessary.
- 2.103 Those involved in adoptions are free to describe themselves in any way they wish. The way individuals involved in adoption describe their relationships with each other will not necessarily correspond with the language used in adoption legislation.

‘As if the child had been born to’

- 2.104 The Commission has considered the strong views expressed about the lack of openness in adoption and the ‘lie of adoption’. A new description of the legal effect of an adoption order should remove the words ‘as if the child had been born to the adoptive parent; or to the adoptive parents’.
- 2.105 The Commission has considered the approach taken in other states and territories to describing the legal effect of an adoption.⁹³ In all states and territories, the legal effect of an adoption is to sever the legal rights and responsibilities of the natural parents and give the adopting parents these legal rights and responsibilities. The phrase ‘as if the child

⁸⁹ Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 2–3.

⁹⁰ See, eg, *Adoption Act 1988* (Tas) ss 3, 18, 20(6), 22.

⁹¹ See, eg, *Adoption of Children Act* (NT) ss 27, 28; *Adoption Act 1994* (WA) s 4; *Adoption Act 2000* (NSW) ss 45A, 124, 133E.

⁹² See, eg, *Adoption Act 2009* (Qld) sch 3 dictionary, which defines ‘birth parent’ to include both biological parents and someone who was a parent of the adopted person under a previous adoption.

⁹³ *Adoption Act 1993* (ACT) s 43(1); *Adoption Act 2000* (NSW) s 95; *Adoption of Children Act* (NT) s 45(1); *Adoption Act 2009* (Qld) s 214; *Adoption Act 1988* (SA) s 9(1); *Adoption Act 1988* (Tas) s 50(1); *Adoption Act 1994* (WA) s 75.

had been born to the adoptive parents' is only used in Victoria and the Australian Capital Territory.⁹⁴ The other states and territories use a variety of terminology.

- 2.106 One approach is to describe the child as becoming the child of the adoptive parents and ceasing to be the child of the natural parents. Some jurisdictions describe both parts of this changed relationship as a factual status,⁹⁵ while some describe the first part as a change in legal status (with a phrase like 'becomes in law a child of the adopted person') but describe the second part as a factual status (with a phrase like 'ceases to be a child of the birth parents'), without expressly acknowledging that this is the legal relationship.⁹⁶
- 2.107 The current description used in Victoria does touch on the legal effects of the adoption, using the phrase 'shall be treated in law as the parent or parents of the child, as if the child had been born to the adoptive parent or to the adoptive parents'. While this construction reflects how the child will be treated in law, it does so with a legal fiction that the child was born to the adoptive parents.
- 2.108 A description of the legal effect of adoption should avoid the unqualified use of phrases like 'ceases to be a child of'⁹⁷ or 'stops being a child of a former parent'.⁹⁸ These phrases perpetuate the legal fiction that the child is no longer a child of the natural parents. Although the legal effect of an adoption order is to permanently transfer full parental responsibility to the adoptive parent(s), this does not erase the facts of their birth and links with their family of origin.
- 2.109 The description should define the effect of an adoption in a way that focuses on its legal effects. The focus of the definition should be on the permanent transfer of parental responsibilities to the adoptive parents and ending of parental responsibilities for the natural parents. It should incorporate the changes in entitlements to legal benefits that flow from these changes to legal parenthood.
- 2.110 It should do so in a way that avoids legal fiction and provides the best chance of effective open adoption by acknowledging that the change in legal parenthood does not alter the facts of the child's birth. The child remains 'a child' of the natural parents even though the parents no longer have legal parental rights and responsibilities. Emotional ties remain, as does the possibility that practical ties will continue through ongoing contact between the child and their family of origin.
- 2.111 The New South Wales Law Reform Commission considered similar issues in its 1997 review of adoption law.⁹⁹ It recommended that legislation should 'avoid language which fosters notions of "ownership" of children, while recognising the profound and permanent changes in legal status which occur'.¹⁰⁰
- 2.112 The exact wording to achieve this desired legal policy outcome is a matter for the Office of the Chief Parliamentary Counsel. The *Adoption Act 2000* (NSW) may provide a useful model.¹⁰¹ It accurately describes the permanent change in legal parenthood. At the same time, it avoids language that obscures the facts of the adoption or fails to recognise that the natural parents will always be parents of the adopted child, although adoption means that they are not the legal parents.

94 *Adoption Act 1984* (Vic) s 53(1)(a); *Adoption Act 1993* (ACT) s 43(1)(a), which uses 'adopted person'.

95 *Adoption of Children Act* (NT) s 45; *Adoption Act 2009* (Qld) s 214.

96 *Adoption Act 1993* (ACT) s 43(1).

97 *Adoption of Children Act* (NT) s 45(1)(b).

98 *Adoption Act 2009* (Qld) s 214(3).

99 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 22–3.

100 *Ibid* 23.

101 *Adoption Act 2000* (NSW) s 95.

Terminology that is inconsistent with other legislation or outdated

- 2.113 The Commission considers that terminology in adoption legislation should be updated to align with other legislation.
- 2.114 The Adoption Act uses the terms ‘guardianship’ and ‘custody’.¹⁰² These concepts were removed from both the CYF Act as part of amendments made in 2014, and from the *Family Law Act 1975* (Cth) as part of amendments made in 1995.¹⁰³ These terms were replaced with ‘parental responsibility’ which is defined in the CYF Act and the Family Law Act as ‘all the duties, powers, responsibilities and authority which, by law (or custom), parents have in relation to children’.¹⁰⁴ This change was intended to displace the idea that parents have rights over children and instead focus attention on the responsibilities that parents have towards their children.¹⁰⁵
- 2.115 A number of other Australian states and territories use the concept of ‘parental responsibility’.¹⁰⁶
- 2.116 Subject to the two limitations discussed below, the ‘guardianship and custody’ terminology in the adoption legislation should be replaced with the term ‘parental responsibility’. This would align it with the CYF Act and the Family Law Act, which is likely to make it easier for decision makers to work with. It would also align it better with contemporary views and the CRC by focusing attention on the responsibilities adoptive parents have towards adopted children rather than on rights that they have over children.
- 2.117 There are two important clarifications to the recommendation. First, any changes to the adoption legislation to use the term ‘parental responsibility’ must ensure that the general requirement for the consent of natural parents to an adoption (or in limited cases that their consent is dispensed with by the court) is clearly retained. This needs to be clear because of the interactions between the Adoption Act and other Acts such as the CYF Act, which may allocate sole parental responsibility to someone other than the natural parents.¹⁰⁷ Even if someone other than the natural parents has sole or exclusive parental responsibility for a child, the legislation should clarify that consent of the natural parents to their child’s adoption is still required.
- 2.118 The other clarification is that the various references in the Adoption Act to a ‘guardian’ for a non-citizen child under the *Immigration (Guardianship of Children) Act 1946* (Cth) should be retained to ensure consistency with this legislation.¹⁰⁸
- 2.119 The term ‘access’, which is used in the Adoption Act to describe arrangements for various people with whom the child is not living to have contact with the child, should be replaced with ‘contact’.¹⁰⁹ Amendments to the CYF Act in 2013 replaced the term ‘access’ with ‘contact’ because access was considered to be ‘outdated’.¹¹⁰ The term ‘contact’ should be used for consistency with the CYF Act and it should be defined in the same way.¹¹¹ The term ‘contact’ is not used in the Family Law Act, which refers to people with whom the child ‘is to spend time’ and people ‘with whom the child is to communicate’.¹¹²

¹⁰² See, eg, *Adoption Act 1984* (Vic) ss 45, 46, 53(1)(d).

¹⁰³ *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic) s 4, amending *Children, Youth and Families Act 2005* (Vic) s 3(1); *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic) s 5, repealing *Children, Youth and Families Act 2005* (Vic) ss 4–5; *Family Law Reform Act 1995* (Cth) s 31, repealing and substituting *Family Law Act 1975* (Cth) pt VII.

¹⁰⁴ *Children, Youth and Families Act 2005* (Vic) s 3(1); *Family Law Act 1975* (Cth) s 61B.

¹⁰⁵ Anthony Dickey, *Family Law* (Law Book, 6th ed, 2014) 251.

¹⁰⁶ *Adoption Act 1994* (WA) s 4(1); *Adoption Act 2000* (NSW) dictionary.

¹⁰⁷ See, eg, *Children, Youth and Families Act 2005* (Vic) s 172.

¹⁰⁸ See, eg, *Adoption Act 1984* (Vic) ss 33(6), 36.

¹⁰⁹ See, eg, *Ibid* ss 37(1), 59, 59A(c), 60(5), 62(2).

¹¹⁰ *Children, Youth and Families Amendment Act 2013* (Vic) s 4, repealing and inserting *Children, Youth and Families Act 2005* (Vic) s 3(1); Explanatory Memorandum, *Children, Youth and Families Amendment Bill 2013* (Vic) 2.

¹¹¹ *Children, Youth and Families Act 2005* (Vic) s 3(1) defines contact, unless the context requires otherwise, to mean ‘the contact of a child with a person who does not have care of the child by way of—(a) a visit by or to that person, including attendance for a period of time at a place other than the child’s usual place of residence; or (b) communication with that person by letter, telephone or other means—and includes overnight contact’.

¹¹² See, eg, *Family Law Act 1975* (Cth) ss 60B(2)(b), 64B(2)(e), 65NA.

However, it is preferable to provide for consistency with the state legislation, because many of those involved in providing services and in making decisions about adoption are familiar with the definition of 'contact' used in the CYF Act.

- 2.120 Recent amendments to the Adoption Act mean that same-sex couples and people who do not identify with a particular sex or gender are eligible to adopt in Victoria. There were no corresponding changes to the consent provisions. The existing consent provisions do not anticipate a situation where the parents who would provide consent to an adoption are, for example, two fathers or two mothers.¹¹³ The consent provisions should be amended to clearly provide for parents who are same-sex couples or parents who do not identify with a specific sex or gender to provide consent to adoption.
- 2.121 The term 'Aborigine', which is used throughout the Adoption Act, is often considered inappropriate and may cause offence.¹¹⁴ The term 'Aboriginal person' or 'Aborigine' does not include Torres Strait Islander people, although it has been defined to do so in the Adoption Act.¹¹⁵ The Commission recognises that Torres Strait Islanders are a separate people in origin, history and way of life.
- 2.122 Adoption legislation in Queensland, Western Australia, New South Wales and the Australian Capital Territory acknowledges that Torres Strait Islanders are a separate people in origin, history and way of life.¹¹⁶
- 2.123 The Adoption Act should use the terms 'Aboriginal or Torres Strait Islander person' or 'Aboriginal or Torres Strait Islander child'. This should be defined in a way that is consistent with the definition in the CYF Act but the term 'Aboriginal or Torres Strait Islander person' should be used in full throughout the Act rather than the shorthand 'Aboriginal person' to refer to both Torres Strait Islander people and Aboriginal people.¹¹⁷
- 2.124 Consideration should also be given to removal of the terms 'whole blood' or 'half-blood' from the definition of relative. These terms may be outdated and are potentially offensive because they may be seen as pejorative terms. In Wales, for example, concerns were raised when a 2013 Bill included the term half-blood in a definition of family. It was revised to remove this term.¹¹⁸ However, the Commission notes that this terminology is used in other Victorian Acts. Harmonisation of legislation and avoidance of unintended consequences may require that this term be retained, until such time as it may be reviewed in all Victorian legislation.¹¹⁹

113 *Adoption Act 1984* (Vic) s 33(2)–(3).

114 See, eg, Oxfam Australia, *Aboriginal and Torres Strait Islander Cultural Protocols* (1 December 2007) <<http://resources.oxfam.org.au/pages/view.php?ref=223&k=>>>; Reconciliation Queensland, *Appropriate Terminology Use in Reconciliation Groups* (November 2008) <rqri.org.au/wp-content/uploads/2012/01/appropriate_terminology.pdf>.

115 See, eg, Oxfam Australia, *Aboriginal and Torres Strait Islander Cultural Protocols* (1 December 2007) <<http://resources.oxfam.org.au/pages/view.php?ref=223&k=>>>; Reconciliation Queensland, *Appropriate Terminology Use in Reconciliation Groups* (November 2008) <rqri.org.au/wp-content/uploads/2012/01/appropriate_terminology.pdf>.

116 See, eg, *Adoption Act 2009* (Qld) ss 7, 25, 46, 118, 131, 163, 172, 318; *Adoption Act 1994* (WA) s 4(1); *Adoption Act 2000* (NSW) s 4(1), 33–39; *Adoption Act 1993* (ACT) ss 6, 39G, dictionary.

117 *Children, Youth and Families Act 2005* (Vic) s 3(1). Aboriginal person means a person who—(a) is descended from an Aborigine or Torres Strait Islander; and (b) identifies as an Aborigine or Torres Strait Islander; and (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community.

118 *Mobile Homes (Wales) Act 2013* (UK) ss 55(3). See controversy at Graham Henry, *Concern after 'Half-blood' and 'Illegitimate' Included in Welsh Law as Definitions of Family*, *Wales Online* (online), (25 August 2014) <<http://www.walesonline.co.uk/news/wales-news/concern-after-half-blood-illegitimate-included-7669139>>.

119 See, eg, *Administration and Probate Act 1958* (Vic) s 52(1)(f)(vii); *Children's Services Act 1996* (Vic) s 3 (definition of relative); *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 61(3); *Education and Care Services National Law Act 2010* (Vic) s 5(1); *Family Violence Protection Act 2008* (Vic) s 10(1)(a); *Guardianship and Administration Act 1986* (Vic) s 3(2)(a); *Human Tissue Act 1982* (Vic) s 3(3); *Meat Industry Act 1993* (Vic) s 16(4); *Property Law Act 1958* (Vic) s 244; *Children, Youth and Families Act 2005* (Vic) s 3 (definition of relative).

Recommendations

- 5 Where possible, the Adoption Act should use the term 'mother' to describe the person who gave birth to the child. If it is necessary to draw a distinction for clarity, the terms 'natural mother' and 'adoptive mother' should be used. Similar distinctions should be drawn where necessary between 'natural father' and 'adoptive father', and 'natural parents' and 'adoptive parents'.
- 6 The Adoption Act should avoid language that obscures the facts of the adoption or fails to recognise that the natural parents do not change, even though their legal status does. In particular, the explanation of the effect of an adoption order should:
 - a. avoid the use of the phrase 'as if the child had been born to'
 - b. focus on the permanent transfer of parental rights and responsibilities to the adoptive parents
 - c. specify that the child permanently ceases to be entitled to any legal benefits that flow from the relationship with their natural parents and instead becomes entitled to any legal benefits that flow from the relationship with their adoptive parents.
- 7 The Adoption Act should modernise or clarify other language and concepts including in the following ways:
 - a. Use the term 'parental responsibility' instead of 'guardians', 'guardianship' and 'custody', except when referring to guardianship under the *Immigration (Guardianship of Children) Act 1946* (Cth).
 - b. Clearly provide that the fact that someone other than the natural parents has parental responsibility for the child, including sole or exclusive parental responsibility, does not affect the requirement for the consent of the natural parents to the adoption.
 - c. Use the term 'contact' instead of 'access' to describe arrangements for contact with the child.
 - d. Ensure that the consent provisions provide for consent to adoptions by two parents who are of the same sex or gender as well as by a parent or parents who do not identify with a specific sex or gender.
 - e. When referring to either an Aboriginal or Torres Strait Islander person, use the terms 'Aboriginal or Torres Strait Islander person' and 'Aboriginal or Torres Strait Islander child' rather than the shorthand 'Aboriginal person' or 'Aboriginal child'.
 - f. Define the terms 'parental responsibility', 'contact', 'Aboriginal or Torres Strait Islander person' and 'Aboriginal and Torres Strait Islander child' consistently with the definitions in the *Children, Youth and Families Act 2005* (Vic).

Participation of the child in adoption decision making

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3. Participation of the child in adoption decision making

Introduction

- 3.1 This chapter provides recommendations to increase the participation of children in decision making about adoptions.
- 3.2 A key theme from consultation was that the central figure in adoption—the child—is not heard. Article 12 of the United Nations *Convention on the Rights of the Child* (CRC) requires that children be heard in all matters affecting them. It emphasises that they are rights holders, not just the object of protection from adults.
- 3.3 Although children are sometimes too young to express a view, the current opportunities for the child to participate are inadequate. The fact that a child's views may not decide the outcome does not mean that the child should not be given an opportunity to express their views. In addition to contributing to the decision, the child is more likely to respect a decision that they participated in and understand the reasons for, even if the result is not what they wished for.
- 3.4 Recommendations in this chapter aim to ensure that the child has the maximum opportunity to participate in decision making about their adoption, including decisions about placement, contact with the family of origin, changes of name, and whether an adoption order should be made.

United Nations Convention on the Rights of the Child

Child's right to be heard—Article 12

- 3.5 Article 12 of the CRC provides a right for a child who is capable of forming their own views to express those views freely in all matters affecting them. It requires that the views of the child are given due weight in accordance with the age and maturity of the child.¹
- 3.6 This right, often described as the right to be heard or the right to participation, has been identified by the Committee on the Rights of the Child as one of the four general principles of the CRC which 'highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights'.²

1 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.

2 United Nations Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [2].

- 3.7 The Committee on the Rights of the Child has discounted the view that young children are not capable of forming views:

Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.³

- 3.8 A child is not obliged to express their views:

Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests.⁴

- 3.9 Age alone is not determinative of the weight to be given to the views of the child. Article 12 also requires consideration of the maturity of the child:

Children's levels of understanding are not uniformly linked to their biological age. Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination.⁵

- 3.10 The Committee on the Rights of the Child has stated that maturity 'refers to the ability to understand and assess the implications of a particular matter, and must therefore be considered when determining the individual capacity of a child'.⁶ It has also indicated that:

The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child.⁷

- 3.11 Article 12 stipulates that 'simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views'.⁸

- 3.12 The Committee on the Rights of the Child also commented specifically on the right to be heard in relation to adoption, identifying that the child should be heard both when they are to be placed for adoption and before an adoption is finalised:

When a child is to be placed for adoption ... and finally will be adopted ... it is vitally important that the child is heard. Such a process is also necessary when step-parents or foster families adopt a child, although the child and the adopting parents may have already been living together for some time.⁹

- 3.13 The Committee on the Rights of the Child has stated that in adoption decisions 'the "best interests" of the child cannot be defined without consideration of the child's views'.¹⁰ It has urged that, if possible, the child is informed about the effects of adoption and that legislation ensures that the views of the child are heard.¹¹

3 Ibid [21].

4 Ibid [16].

5 Ibid [29].

6 Ibid [30].

7 Ibid.

8 Ibid [28].

9 Ibid [55].

10 Ibid [56].

11 Ibid.

- 3.14 Gerison Lansdown summarises research into children’s capacity from the perspective and experience of children. She concludes that ‘it is increasingly clear ... that adults consistently underestimate children’s capacities’.¹² Lansdown suggests:
- Children’s physical immaturity, relative inexperience and lack of knowledge do render them vulnerable and necessitate specific protections ... However, in many cases, children are denied opportunities for decision making in accordance with their evolving capacities. Neither legal frameworks, nor policy and practice in most countries throughout the world give sufficient consideration to the importance of recognising and respecting the capacities of children.¹³
- 3.15 Claire Fenton-Glynn argues that the right of the child to be heard in adoption proceedings is of substantive value, procedural value and symbolic value.¹⁴
- 3.16 The substantive value is that better decisions are made: ‘Without hearing the views of the child ... and taking them into consideration, it is not possible to determine the content of the child’s best interests.’¹⁵
- 3.17 The procedural value is that it increases the chances that the child will respect the decision:
- The success of an adoption depends heavily on the attitude of the child, and his or her willingness to integrate into a new environment. Where the child is unhappy with the decision taken, he or she may cause difficulties in the placement, and pose a bar to its success. Even where the decision taken is against the child’s wishes, the participation of the child can help him or her understand the process, and why that particular decision has been made.¹⁶
- 3.18 The symbolic value is that it recognises children as active rights holders, who are empowered to participate in decision making:
- The recognition of the autonomy of children was one of the most important features of the UNCRC ... the right of a child to participate was a landmark change in the way in which children were viewed before the law ... Children’s views are not listened to simply because it helps a decision to be made, but because they come from someone who has a right to be heard.¹⁷
- 3.19 In 2012, the United Nations Committee on the Rights of the Child expressed concern ‘that only three out of eight jurisdictions in [Australia] require the consent of the adopted child (as of 12 years of age) prior to adoption’.¹⁸ However, as Fenton-Glynn observes:
- Article 12 of the UNCRC requires that a child’s opinions be given due weight according to his or her age and maturity, and as such there is no obligation under the Convention that the child be able to definitively determine whether he or she will be adopted.¹⁹

12 Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF, 2005) 30–1.

13 Ibid 31.

14 Claire Fenton-Glynn, ‘The Child’s Voice in Adoption Proceedings: A European Perspective’ (2013) 21 *International Journal of Children’s Rights* 590, 592–3. See also Baroness Hale of Richmond, ‘Children’s Participation in Family Law: Lessons from Abroad’ (2006) 20 *Australian Journal of Family Law* 119, 119.

15 Claire Fenton-Glynn, ‘The Child’s Voice in Adoption Proceedings: A European Perspective’ (2013) 21 *International Journal of Children’s Rights* 590, 592.

16 Ibid 593.

17 Ibid.

18 *United Nations Committee on the Rights of the Child*, 60th sess, 1725 mtg, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [53].

19 Claire Fenton-Glynn, ‘The Child’s Voice in Adoption Proceedings: A European Perspective’ (2013) 21 *International Journal of Children’s Rights* 590, 593. Lansdown argues similarly: ‘Article 12 asserts the child’s right to be involved in a process of participation in all matters affecting him or her, but adults retain responsibility for the outcome. The outcome will be decided by adults but informed and influenced by the views of the child.’ See Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF, 2005) 4.

- 3.20 To give effect to the right for children to express views in all matters affecting them, article 12 provides that:
- For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²⁰
- 3.21 This means that in some cases a child may be heard through a representative. Recommendations about legal representation for children in adoption are provided in Recommendation 66 in Chapter 14.

Evolving capacity of the child—Article 5

- 3.22 Article 5 of the CRC provides for recognition of a child's evolving capacity:
- States Parties shall 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, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.²¹
- 3.23 Article 5 'establishes that as children acquire enhanced competencies, there is a reduced need for direction and a greater capacity to take responsibility for decisions affecting their lives'.²² It 'implies a transfer of responsibility for decision-making from responsible adults to children, as the child acquires the competence, and of course, willingness to do so'.²³ The parents of children are entrusted with powers to make decisions on their behalf 'either until they judge it appropriate to hand over responsibility to the child or until a prescribed age-limit determined by law'.²⁴
- 3.24 Lansdown comments that 'children must not be forced against their will to take decisions they do not feel competent or willing to take', suggesting that 'it is one of the rights of childhood that children are not burdened with inappropriate levels of responsibility'.²⁵
- 3.25 Similarly, Taylor, Tapp and Heneghan have argued that:
- it is unethical to give the child the opportunity to express their views in the form of a choice or preference between the options before the Court *unless* the child is able to understand the Court process, the role they are being offered in the process and the potential consequences of expressing a choice or preference.²⁶

Age-based approach to rights

- 3.26 The law sometimes draws a 'bright line' to determine when someone has capacity to make a particular decision based on their age—for example, the age for voting, marriage, or consent to sexual relations. This avoids the need to make an individual assessment on capacity in each case. However, in areas such as consent to medical treatment, the common law does not draw a 'bright line', recognising that young people have the capacity to make decisions at different ages and requiring that each situation be assessed on its merits.

20 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12(2).

21 *Ibid* art 5.

22 Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF, 2005) ix.

23 *Ibid* 4.

24 *Ibid*.

25 *Ibid*.

26 Nicola Taylor et al, 'Respecting Children's Participation in Family Law Proceedings' (2007) 15(1) *International Journal of Children's Rights* 61, 74.

- 3.27 There are advantages and disadvantages of using an age-based approach to the acquisition of rights. A fixed age provides certainty and consistency but sacrifices flexibility, adaptability and an ability to respond to the specific factual circumstances.²⁷ Fenton-Glynn suggests that a fixed age for a child to participate in adoption decision making ‘fails to respond to the evolving capacities of the child’.²⁸ She suggests that the ‘capability, understanding and intelligence of the child should be viewed as working on a spectrum, not as a dichotomy’.²⁹
- 3.28 The use of a fixed age to provide a right is an accepted part of daily life. It is appropriate in situations where it would be impractical and too costly to assess each person’s decision-making capacity on a case-by-case basis. Examples of these types of fixed age rights include the age of sexual consent, the voting age, and the age at which someone may buy alcohol or tobacco. As Fenton-Glynn suggests:
- Prospective adoptive children are a much smaller subset of the population, however, and the potential impact on their lives of an adoption order is far greater. Although it may be easier and cheaper for states to use an inflexible limit, it clearly disregards the requirements of the UNCRC and more nuanced systems should be implemented.³⁰
- 3.29 The Committee on the Rights of the Child has stated in its General Comment on article 12 that domestic authorities:
- cannot begin with the assumption that a child is incapable of expressing his or her own views. On the contrary, States parties should presume that a child has the capacity to form his or her own views and recognize that she or he has the right to express them; it is not up to the child to first prove ... capacity.³¹
- 3.30 *Gillick v West Norfolk*, a medical consent case in England, provided recognition of the evolving capacity of young people.³² The case said that the ability to provide consent to medical procedures is not age-based but requires that the person has ‘sufficient understanding and intelligence to enable him or her to understand fully what is proposed’.³³
- 3.31 In *Marion’s Case*, the majority of the High Court of Australia approved this principle, stating that:
- This approach, though lacking the certainty of a fixed age rule, accords with experience and with psychology. It should be followed in this country as part of the common law.³⁴
- 3.32 In the 2004 case *Re Alex*, which considered whether Alex was competent to consent to hormone treatment, Chief Justice Nicholson observed that, following *Marion’s Case*, the *Gillick* approach had been accepted and applied in Australia:
- Even though the question of *Marion’s Gillick* competency was not, in fact, an issue in that case, given the degree of *Marion’s* disability, the ... statement by the High Court majority has been applied by this Court in special medical procedure cases...³⁵

27 See generally Gerison Lansdown, *The Evolving Capacities of the Child* (UNICEF, 2005) 49–53; Claire Fenton-Glynn, ‘The Child’s Voice in Adoption Proceedings: A European Perspective’ (2013) 21 *International Journal of Children’s Rights* 590, 594–602.

28 Claire Fenton-Glynn, ‘The Child’s Voice in Adoption Proceedings: A European Perspective’ (2013) 21 *International Journal of Children’s Rights* 590, 595.

29 Ibid.

30 Ibid 597.

31 United Nations Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [20].

32 *Gillick v West Norfolk* [1986] AC 112.

33 Ibid 189 (Lord Scarman).

34 *Marion’s Case* (1992) 175 CLR 218, 237–8 (Mason CJ, Dawson, Toohey and Gaudron JJ).

35 *Re Alex* (2004) 180 FLR 89, 116–7 [155].

Current law

- 3.33 In Victoria a child is not required to consent to their adoption. Instead, children must receive counselling subject to their age and understanding, and consideration must be given to their wishes.
- 3.34 In general, counselling must be provided to the child a minimum of 28 days before the adoption order is to be made.³⁶ Counselling is not required if the court is satisfied that it would not be appropriate considering the age and understanding of the child.³⁷
- 3.35 The counsellor must counsel the child about the effects of the adoption and provide a written report to the court.³⁸
- 3.36 The court must be satisfied that the wishes of the child have been ascertained and have been given due consideration. There are no age requirements but the age and understanding of the child is taken into account.³⁹
- 3.37 The child's views are also sought when the court is considering varying the conditions about contact arrangements. An order may not be made 'to grant a person a right of access, or greater rights of access, to an adopted child' unless the court is satisfied that, as far as practicable, the wishes of the child have been ascertained and considered, having regard to the age and understanding of the child.⁴⁰

Consent, views or wishes of the child

- 3.38 The *Adoption of Children Act 1964* (Vic) included a general requirement for a child from the age of 12 to consent to their adoption.⁴¹ In the Adoption Act this was replaced with the current requirements for mandatory counselling and consideration of the child's wishes.
- 3.39 One reason for this change was the view that a child's signature on a consent form does not necessarily demonstrate that the child understands the implications of adoption or of consent.⁴²
- 3.40 A second concern was that requiring a child's consent places a heavy responsibility on a child and 'may subject the child to unwarranted pressure and manipulation from the parents'.⁴³
- 3.41 The approach taken in other Australian jurisdictions varies. The Northern Territory, South Australia, Western Australia and New South Wales require the consent of a child to their adoption if the child is aged 12 or older.⁴⁴
- 3.42 The Australian Capital Territory, Tasmania, and Queensland do not include requirements that a child consent to an adoption, irrespective of their age.

36 *Adoption Act 1984* (Vic) s 14(1)(a).

37 *Ibid* s 14(2).

38 *Ibid* ss 14(1)(a), 14(3).

39 *Ibid* s 14(1)(b).

40 *Ibid* s 60(5)(b).

41 *Adoption of Children Act 1964* (Vic) s 30. The court could decide it was not required if it was satisfied that there were 'special reasons, related to the welfare and interests of the child, why the order should be made notwithstanding that the child has refused to consent to the adoption or his consent has not been sought'.

42 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 157.

43 *Ibid*.

44 *Adoption of Children Act* (NT) s 10(2); *Adoption Act 1988* (SA) s 16; *Adoption Act 1994* (WA) s 17(1)(c)(ii); *Adoption Act 2000* (NSW) s 55.

- 3.43 The *Adoption Act 2009* (Qld) removed a previous requirement that a child aged 12 or older consent to an adoption. This was replaced with requirements to provide information to help the child form their own views about the proposed adoption; counselling; and a requirement that the court consider the child's views before deciding whether or not to make an adoption order.⁴⁵
- 3.44 The new requirements aimed to:
- balance a child's right to participate in the decision making with ensuring the child does not feel responsible for the decision and is not under undue pressure, particularly where the decision involves choosing between a birth parent and the person who is caring for the child.⁴⁶
- 3.45 Similar provisions in the Family Law Act were also removed. Prior to 1983, the Family Law Act included a requirement that the court did not make an order contrary to the child's wishes if the child was aged 14 or older, unless there were special circumstances that made it necessary to do so.⁴⁷
- 3.46 This requirement was removed in 1983. There were concerns that it sometimes had the effect of forcing a child to express a preference in favour of one parent, which many children did not want to do.⁴⁸ There was also concern that pressure was sometimes placed on the child and that the wish expressed was not their genuine wish.⁴⁹
- 3.47 It was replaced with a requirement that the court consider any wishes expressed by the child and give the wishes the weight that the court considers appropriate in the circumstances of the case.⁵⁰ A provision was also included to clarify that no one may require a child to express their wishes.⁵¹
- 3.48 The current formulation requires that one of the best interests considerations is 'any views 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 views'.⁵² No one may require a child to express their views.⁵³

Responses

- 3.49 There was very strong support for the idea that children should be involved in decision making about adoption to the maximum degree possible. There were mixed views on whether this should include requirements that a child consent to their adoption.
- 3.50 Responses to the issue of whether a child should consent to their adoption fell into three main categories:
- Those who considered a child's consent to their adoption should not be required, but rather that consultation with the child should occur and that their views and wishes should be considered.⁵⁴
 - Those who considered a child's consent to their adoption should be required. A number of these people considered that the age for consent should not be fixed but instead should be determined on a case-by-case basis, or that if the age is fixed, it should be lower than 12.⁵⁵

⁴⁵ *Adoption Act 2009* (Qld) ss 44, 45, 179(2).

⁴⁶ Department of Communities, Queensland, *Future Adoption Laws for Queensland* (2008) 11.

⁴⁷ *Family Law Act 1975* (Cth) s 64(1)(b), later amended by the *Family Law Amendment Act 1983* (Cth) s 29.

⁴⁸ Anthony Dickey, *Family Law* (Law Book, 6th ed, 2014) 336.

⁴⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1983, 1914 (Cecil Blanchard).

⁵⁰ *Family Law Amendment Act 1983* (Cth) s 29(b).

⁵¹ *Ibid* s 29(d).

⁵² *Family Law Act 1975* (Cth) s 60CC(3)(a).

⁵³ *Ibid* s 60CE.

⁵⁴ Submissions 34 (VANISH), 35 (OzChild), 57 (Patricia Harper); Consultations 4 (ARMS (Vic)), 15 (Roundtable with culturally and linguistically diverse representative agencies), 34 (Elaine Taylor).

⁵⁵ Submissions 9 (Australian Adoptee Rights Action Group), 16 (Name withheld), 26 (Adoption Origins Victoria Inc.), 50 (Barnardos Australia), 54 (Australian Christian Lobby).

- Those who suggested a third option that the child should be able to withhold consent, object,⁵⁶ or neither consent nor refuse consent, which was described as ‘unopposed’ adoption.⁵⁷
- 3.51 Many people commented on the need for legal representation to ensure that the child has the opportunity to be heard. Legal representation for the child, including consideration of responses to this issue, is discussed in Chapter 14 and Recommendation 66.
- 3.52 The following concerns were raised about requiring a child’s consent to an adoption:
- the potential for duress or for a child to be manipulated, including through unequal power relationships between children and adults who are caring for them⁵⁸
 - that having to express a view for or against adoption may place undue pressure on a child and cause conflicted loyalties⁵⁹
 - that requiring a child’s consent may cause them fear, including fear that if they do not consent they will not be able to stay with the family they are placed with⁶⁰
 - that a child does not have the same decision-making capabilities as an adult.⁶¹
- 3.53 One submission suggested that requiring a child’s consent to an adoption could make a child very fearful:
- Children under care of adults are not in an equitable relationship. They cannot speak their truth without being afraid of the repercussions. They should not be placed in that predicament. At 12 I was terrified, at 50 I am still terrified, of offending in any way my adoptive mother. The fear, terror, of repeating the original trauma is pathological and deep.⁶²
- 3.54 VANISH considered that a child’s wishes should always be sought and considered in adoption proceedings and that their involvement should be facilitated to the fullest extent possible. However, it opposed:
- any provision that places the onus on the child/young person to have to consent to being adopted—given adoption is a legal institution with a more profound influence throughout the adoptee’s adulthood than marriage.⁶³
- 3.55 Berry Street submitted that requiring the child’s consent ‘creates a scenario where the child is forced to express a view either in favour of or against the adoption and that this can place undue pressure on children’.⁶⁴ It supported a requirement that a child aged 12 and over cannot be adopted where the child withholds their consent to the adoption. It defined withholding consent as declining to express a view. It considered that this ‘would lessen the pressure on children while preserving their rights within the decision making process’.⁶⁵
- 3.56 Participants at a roundtable with the disability and mental health sector expressed concern that requirements to consent to their adoption might place pressure on a child. Some participants said that this would raise concerns about whether any consent given by a child was genuine consent. A related concern was the potential pressure on a child if their consent was required in situations where a parent’s consent had been dispensed with. The child could be in a position where they are choosing against a natural parent’s wishes. One participant suggested that a better approach would be to assess the child’s needs and wishes.⁶⁶

56 Submissions 6 (Name withheld), 60 (Berry Street).

57 Submission 45 (Dr Briony Horsfall).

58 Submissions 3 (Leilani Hannah), 16 (Name withheld); Consultation 4 (ARMS (Vic)).

59 Submissions 35 (OzChild), 60 (Berry Street); Consultations 5 (Roundtable with disability and mental health sector), 15 (Roundtable with culturally and linguistically diverse representative agencies), 32 (Ann Jukes and Gabrielle Hitch).

60 Submission 3 (Leilani Hannah); Consultation 5 (Roundtable with disability and mental health sector).

61 Submission 6 (Name withheld).

62 Submission 3 (Leilani Hannah).

63 Submission 34 (VANISH).

64 Submission 60 (Berry Street).

65 Ibid.

66 Consultation 5 (Roundtable with disability and mental health sector).

- 3.57 The key reasons given for requiring a child's consent to an adoption were:
- providing self-determination for the child⁶⁷
 - the serious consequences of an adoption, including the loss of some entitlements and rights⁶⁸
 - harmonisation with other legislation.⁶⁹
- 3.58 Fae Cuff submitted:
- I think had I been asked at 12 y[ea]rs of age I could have made an informed decision about my adoption. A case conference discussing the child, the family or extended family needs to happen to consider all aspects. A child could have representation if he/she was mature enough to verbalise concerns. A non-legal support or advocate could also represent [the] child. This could be a close relative or friend. Often workers who have had long term involvement with a family are seen as a trustworthy and important part of the child's life, and therefore make an excellent advocate.⁷⁰
- 3.59 The Australian Association of Social Workers highlighted self-determination as a reason for requiring a child's consent.⁷¹
- 3.60 Barnardos Australia also highlighted issues relating to the autonomy and self-determination of children:
- Children over age twelve being able to consent to their own adoption (given an existing relationship), is very important and endorsed by the many children in NSW who use this provision ... many children find it very important to be able to consent to who their family should be.⁷²
- 3.61 The Australian Adoptee Rights Action Group expressed the strong view that a child's consent to adoption should be required, noting the effect on the inheritance rights of the child:
- Adoption disinherits a child for life. It is arguable that disinheritance without consent is a violation of the rights of the child so really there should be no adoption without consent unless you allow retention of inheritance rights as well as assuming enhanced rights within the adoptive family whom you can inherit off anyway as anyone can inherit off those they are dependent on.⁷³
- 3.62 A number of responses noted that a child's age does not necessarily determine their capacity to understand and make decisions. They suggested that a fixed age for requiring a child's consent is problematic because some children under that age may be able to understand and consent to being adopted. Equally, some children older than the fixed age may not have the capacity to consent⁷⁴
- 3.63 The Australian Association of Social Workers said that 'the focus on a specific age does not appreciate all the varying factors that contribute to a child being able to provide an informed decision'.⁷⁵ It suggested that the Gillick approach would be more appropriate than specifying an age at which a child can consent.⁷⁶ *Gillick* is discussed above at [3.30].
- 3.64 Some people observed that the age of criminal responsibility in Victoria is 10 years of age and suggested that, as a matter of consistency, a child's consent to adoption should be

67 Submissions 42 (Australian Association of Social Workers), 50 (Barnardos Australia); Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

68 Submission 9 (Australian Adoptee Rights Action Group).

69 Submission 41 (Adopt Change).

70 Submission 23 (Fae Cuff).

71 Submission 42 (Australian Association of Social Workers).

72 Submission 50 (Barnardos Australia).

73 Submission 9 (Australian Adoptee Rights Action Group).

74 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 27 (Institute of Open Adoption Studies, University of Sydney), 29 (Connections UnitingCare), 42 (Australian Association of Social Workers), 45 (Dr Briony Horsfall).

75 Submission 42 (Australian Association of Social Workers).

76 Ibid.

required from the age of 10 upwards.⁷⁷ They considered that it would be problematic if one Act treats children as having capacity to make decisions when they are aged 10 and another Act requires them to be aged 12.⁷⁸

- 3.65 Connections Uniting Care told the Commission that it 'is committed to listening to the voices of children and, where children are able to provide informed consent, firmly believes that their wishes should be upheld'.⁷⁹ In relation to the organisation's current practice regarding children consenting to their adoption it said:

The majority of adoptions involve younger children ... If the child was old enough to understand adoption and provide informed consent, their consent would be sought. However, determining competency to provide informed consent has been challenging in recent times for children aged 11–12. Connections currently seeks the views of children in step-adoption matters, which are the majority of cases where children older than 12 years of age are adopted.⁸⁰

- 3.66 Some people considered that children should be able to consent to their own adoption where there is an existing relationship with the proposed adoptive parents.⁸¹
- 3.67 Some people considered alternative options to a requirement that a child must consent to their adoption. Berry Street submitted that an adoption should not proceed if a child over 12 declines to express a view.⁸² Another submission suggested that rather than a right or requirement to consent, a child should have a right to object, with a supporting rationale for the objection.⁸³
- 3.68 Dr Briony Horsfall submitted that in addition to the options of consenting or opposing an adoption:

a third option of unopposing an application for adoption would enable children to continue participating in the process, to the extent that they wished to do so, without having to publically consent or oppose or if they do not have a clear view either way. Access to independent legal advice and representation would be necessary to support children in the decision to consent, oppose or not oppose adoption.⁸⁴

Commission's conclusions

- 3.69 As the person most affected by a decision about adoption, the child should have the maximum opportunity to participate in the decision. The Adoption Act should provide greater opportunity for the child to participate in adoption decisions.
- 3.70 A key component of modernisation of Victoria's adoption law is providing for the participation of the child in adoption decisions. Understanding of the capacities and rights of children has evolved since 1984 and adoption law should reflect this. Significantly, the ratification of the CRC by Australia in 1990 recognises children as rights holders. Articles 5 and 12 recognise the child's right to be heard and that as their capacity evolves, their ability to make decisions increases.
- 3.71 The Adoption Act provides very limited opportunity for the child to participate. It provides for consideration of the wishes of the child before an adoption order is made⁸⁵ and before changes to an order to provide greater rights of contact with an adopted child.⁸⁶

77 Submissions 26 (Adoption Origins Victoria Inc.), 45 (Dr Briony Horsfall); Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

78 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

79 Submission 29 (Connections UnitingCare).

80 Ibid.

81 Submissions 7 (Name withheld), 50 (Barnardos Australia).

82 Submission 60 (Berry Street).

83 Submission 6 (Name withheld).

84 Submission 45 (Dr Briony Horsfall).

85 *Adoption Act 1984* (Vic) s 14.

86 Ibid s 60(5)(b).

- 3.72 Language used in the Adoption Act to describe the participation rights of the child in adoption decisions should mirror the language used in article 12 of the CRC. This will better reflect the intention of article 12 and ensure consistency throughout the Adoption Act. This view is reflected in recommendations throughout the report relating to the participation of a child in adoption decisions.
- 3.73 The Adoption Act should retain the requirement for the child to be counselled a minimum of 28 days before the adoption order is to be considered. A child's 'views' should be sought rather than their 'wishes'. This is not intended to prevent a child from expressing wishes if they want to do so. It replicates the language used in article 12 of the CRC. It also aligns with the Family Law Act, which was amended in 2006 to replace 'wishes' with 'views'. This change was aimed at enabling 'a child's perceptions and feelings' to be considered 'and ... for any decision to be made in consultation with the child without the child having to make a decision or express a "wish"'.⁸⁷
- 3.74 The words 'at least 28 days before the adoption order is to be made' should be replaced with 'at least 28 days before the day of the hearing for the adoption order'. This wording better reflects the fact that the court has a discretion to decide whether or not to make an adoption order.
- 3.75 The phrase 'age and maturity' should be used rather than 'age and understanding' to mirror the wording of article 12 of the CRC.
- 3.76 At the time counselling is required, the child would have been placed with the adoptive parents for almost 12 months. Limiting a child's right to be heard to this stage in the process does not accord well with a child's rights to participate in decisions affecting them. The child should be able to be heard and be an active participant in decisions about their adoption at a much earlier stage.
- 3.77 The Committee on the Rights of the Child has commented that it is 'vitally important' that the child should be heard both when they are to be placed for adoption and before an adoption is finalised, and that this applies to adoption by step-parents or foster families too.⁸⁸
- 3.78 The Commission considered whether a child should be required to consent to their adoption, and if so, whether there should be a fixed age for this.
- 3.79 On balance, the Commission considers that a child should not be required to consent to an adoption, irrespective of their capacity to do so. It acknowledges that in 2012 the Committee on the Rights of the Child expressed concern 'that only three out of eight jurisdictions in [Australia] require the consent of the adopted child (as of 12 years of age) prior to adoption'.⁸⁹ However, requiring a child's consent to an adoption places the child in the position of being required to express an opinion. The Committee on the Rights of the Child has stated that '[e]xpressing views is a choice for the child, not an obligation'.⁹⁰
- 3.80 The Adoption Act should require that a child have the opportunity to be heard in relation to any decision that has a significant impact on the child's life. Decisions with a significant impact should be defined to include the development of an adoption plan, placement for adoption, an application for an adoption order and a decision about a child's name.⁹¹
- 3.81 A child's views should also be sought during the 12-month period that the child is placed with a proposed adoptive family.
- 3.82 The Act should specify that a child not be required to express their views.

87 Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth) 15.

88 United Nations Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [55].

89 United Nations Committee on the Rights of the Child, 60th sess, 1725 mtg, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [53].

90 United Nations Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [16].

91 This approach is taken in New South Wales. See *Adoption Act 2000* (NSW) s 9.

- 3.83 Adoption plans providing for contact, which are discussed in Chapter 4, should be made *with* rather than *for* the child wherever possible. In accordance with article 5 of the CRC, they should evolve as the child matures and is able to take on more responsibility for managing contact and determining what is best for them. Currently, the Adoption Act requires a child's wishes to be sought if an increase in contact is contemplated.⁹² The child's views should be sought on contact arrangements generally, not just if increased contact is contemplated.
- 3.84 There should not be a fixed age for a child's participation in adoption decisions. The combined effect of the CRC's article 12 (right to be heard) and article 5 (recognition of a child's evolving capacity) requires that a case-by-case approach be taken. This acknowledges that capacity exists on a spectrum, rather than a hard-line separation between capacity and incapacity. Providing a fixed age at which a child is able to express their views thwarts the intention of articles 5 and 12.
- 3.85 The starting presumption should be that a child is capable of forming their own views on a matter concerning their adoption. The Committee on the Rights of the Child has emphasised that 'article 12 imposes no age limit on the right of the child to express her or his views'⁹³ and discouraged States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard.⁹⁴
- 3.86 A decision about what weight to place on the child's views requires a decision maker to consider the 'age and maturity of the child'. This must occur on a case-by-case basis. If there is doubt about the maturity of the child, then expert opinion should be sought from a suitably qualified professional with expertise in childhood development, such as a child psychologist.
- 3.87 The views of a child who is strongly objecting to a particular decision or strongly in favour of a particular decision should weigh heavily with a decision maker. If a child has strong views, it is likely to influence the success of any decision.⁹⁵
- 3.88 To ensure that the child is able to participate in decisions and express their views if they wish, the Act should provide guidance about what information must be provided to them and the manner in which it should be provided.
- 3.89 Consideration should be given to producing practice guidelines and training about the type of information that should be provided. The *Adoption Act 2009* (Qld) provides a useful guide about the type of information that should be provided to a child before an application for an adoption order is made.⁹⁶ Both the type of information and the manner in which it is provided should be tailored to the decision being made and the age and maturity of the child.
- 3.90 A child should also be provided with information about why a particular decision has been made. The child should be given assistance to understand the information, if required. This aligns with the comments by the Committee on the Rights of the Child that:

Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.⁹⁷

92 *Adoption Act 1984* (Vic) s 60(5)(b).

93 United Nations Committee on the Rights of the Child, *General Comment No 12* (2009): *The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [21].

94 *Ibid.*

95 See *Pini v Romania* (2005) 40 EHRR 132, which demonstrates the risks of not involving a child in decision making and trying to enforce decisions that a child strongly objects to.

96 *Adoption Act 2009* (Qld) s 44(3).

97 United Nations Committee on the Rights of the Child, *General Comment No 12* (2009): *The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [45].

Recommendations

- 8** The Adoption Act should specify that the views of the child must be sought on any decision that has a significant impact on the child's life and that:

 - a. the child must have the opportunity to express their views freely
 - b. the decision maker must give these views due weight in accordance with the age and maturity of the child
 - c. the child is not required to express their views.
- 9** A decision that has a significant impact on the child's life should be defined as including but not limited to:

 - a. the development of the adoption plan concerning the child
 - b. the placement of the child for adoption
 - c. the application for an order for the adoption of the child
 - d. a decision about the child's name.
- 10** To ensure that the child is able to form and express their views on a decision, the Adoption Act should specify that the child must be provided with:

 - a. relevant and adequate information concerning the decision
 - b. any assistance that is necessary for the child to understand the information and to express their views
 - c. information about the child's rights
 - d. information about the outcome of the decision and an explanation of the reasons for the decision.
- 11** The requirements in section 14 of the Adoption Act that a child must receive counselling before an adoption order is made should be retained with the following modifications:

 - a. The 'child's views' should be sought rather than their 'wishes'.
 - b. The words 'at least 28 days before the day on which the adoption order is to be made' should be replaced with 'at least 28 days before the day of the hearing for the adoption order'.
 - c. The words 'age and understanding' should be replaced with 'age and maturity'.

Contact and adoption plans

- 56** Introduction
- 57** Child's relationships with siblings
- 61** Contact with the family of origin and other people of significance after the adoption

4. Contact and adoption plans

Introduction

- 4.1 This chapter addresses the ways that adoption law should provide for the many important relationships and connections that a child has before an adoption, and which are not extinguished by an adoption order.
- 4.2 Many people told the Commission that adopted people do without things that most people take for granted. These included growing up with your biological siblings, seeing people who look like you, knowing your family's medical history and genetics, knowledge of your culture, and knowing where various traits come from.
- 4.3 People told the Commission that contact and information help an adopted person make sense of their life and identity. It helps the person know what their life would have been like if they had not been adopted, understand why they were adopted, allows the continuation of existing relationships with parents, siblings, grandparents, carers or other people of significance, and helps with grief and loss.
- 4.4 Adoption law must provide better for existing relationships that the adopted person has before their adoption. Decision makers should consider existing relationships and provide for them to continue after adoption. A failure to do so poses risks for the identity formation of the adopted child and increases the chance of trauma for the child and their family of origin.
- 4.5 Nor is this limited to adoptions involving older children. All adoptions in Victoria between 2012 and 2015 were of infants under two years old.¹ However, the fact that someone is adopted at a young age does not mean that they are a 'clean slate' with no need to know where they come from or have contact with their family of origin. The adopted person's ability to take their own responsibility for contact increases as they mature. Adoption law should recognise this.
- 4.6 This chapter makes recommendations about the ways that adoption law should provide for relationships with relatives from the family of origin and other people of significance in the adopted person's life. These include recommendations about better provision for sibling relationships, and the use of adoption plans. Adoption plans provide an ability to negotiate contact arrangements but also provide for the court to make decisions about contact arrangements in the best interests of the child.

Child's relationships with siblings

- 4.7 This section considers the way that adoption law should provide for relationships between an adopted child and their siblings. It focuses on recommendations for placing siblings together and providing for contact between siblings where they are not placed together.
- 4.8 The recommendations in this section provide for siblings as defined by the *Adoption Act 1984* (Vic). It defines a relative of a child as:
- a grandparent, brother, sister, 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.²
- 4.9 The Commission notes that legal definitions of siblings may not match with the child's identification of who is a sibling because '[c]hildren are less formal than adults in their view of who is a brother or sister'. The term 'fictive kin' describes 'relationships in a child's life where there is no legal or biological tie, but a strong, enduring bond exists'.³
- 4.10 This section makes recommendations relating to siblings who fit within the legal definition of relative in the Adoption Act. The Commission recommends adoption plans which may provide for the relationships a child has with people of significance, who may not fit within the Adoption Act's definition of relative (Recommendations 14 to 19).

Current law

- 4.11 The Adoption Act does not provide any specific requirements to consider the importance of sibling relationships to an adopted person or the preservation of sibling relationships.
- 4.12 Chapter 16 discusses the limited rights to information about an adopted person that a sibling has and makes recommendations that limitations be removed.

Responses

- 4.13 There was strong support for making the preservation of sibling relationships a key consideration in adoption decision making.⁴
- 4.14 Many people emphasised the importance of sibling relationships. Responses included:
- It is one of the longest lasting relations a person has.⁵
 - Separation from siblings through adoption causes additional trauma and keeping siblings together helps reduce this trauma.⁶
 - It is cruel to separate siblings who are losing their parents.⁷
 - Biological links are important and placing siblings together helps with security and continuity of family bonds.⁸
 - If the relationship with the adoptive family ends at least the siblings have each other.⁹
 - Placing siblings together is a resilience factor.¹⁰

2 *Adoption Act 1984* (Vic) s 4(1).

3 Children's Bureau, Administration for Children and Families, U. S. Department of Health and Human Services, *Sibling Issues in Foster Care and Adoption* (2013) 2 <<https://www.childwelfare.gov/pubs/siblingissues/>>. See also Joseph J McDowall, *Sibling Placement and Contact in Out-Of-Home Care* (CREATE Foundation, 2015).

4 Submissions 3 (Leilani Hannah), 7 (Name withheld), 9 (Australian Adoptee Rights Action Group), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 16 (Name withheld), 20 (Name withheld), 21 (Name withheld), 30 (Name withheld), 33a (Name withheld), 34 (VANISH), 35 (OzChild), 45 (Dr Briony Horsfall), 48 (Victorian Council of Social Service), 50 (Barnardos Australia), 51 (Law Institute of Victoria), 55 (CREATE Foundation), 57 (Patricia Harper); Consultations 7 (Bobby Richards), 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 22 (Fae Cuff), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative), 36 (Kylie Martens).

5 Submission 34 (VANISH).

6 Submissions 45 (Dr Briony Horsfall), 48 (Victorian Council of Social Service).

7 Submission 9 (Australian Adoptee Rights Action Group).

8 Submissions 3 (Leilani Hannah), 20 (Name withheld), 21 (Name withheld), 33b (Name withheld), 57 (Patricia Harper).

9 Submission 20 (Name withheld).

10 Submission 34 (VANISH).

- 4.15 At a roundtable discussion with Bounce Youth Leaders, which is a youth peer leadership training program for young people who have left out-of-home care, participants had varied views on the importance of contact with siblings.¹¹
- 4.16 One participant told the Commission that their brothers had 'been there for them' and the fact that they were family made a big difference. Another participant thought the biological connection was not very important and the feeling of having two families can be problematic.¹²
- 4.17 Many people said that decision makers should be required to consider placing siblings for adoption in the same family.¹³ Some people considered there should be a stronger requirement than this, that siblings must be placed together.¹⁴
- 4.18 Bobby Richards, an adopted person, told the Commission that 'it would have made a difference if we'd been adopted together ... we're two people that looked the same, did the same and grew together in life'.¹⁵ He said that a mother's wish to put her children in separate families is not in the children's best interests and should be overridden.
- 4.19 CREATE Foundation submitted that young people with a lived experience of care often regard sibling relationships as some of their most important relationships. They contact their siblings more often than other people in their families and desire more frequent contact with their siblings than others.¹⁶
- 4.20 VANISH submitted that placing siblings together should always be prioritised:
sibling relationships are often the longest and most significant relationships that people have in their lives ... research indicates that placement with siblings is a resilience factor for vulnerable children ... The need for siblings to stay together is well researched and well understood by the agencies concerned.¹⁷
- 4.21 Grandparents Victoria and ARMS (Vic) both considered that if an adoptive family cannot take siblings then the adoption should not proceed. Instead, a family who can take the siblings should be found.¹⁸
- 4.22 Other responses emphasised a need for flexibility.¹⁹ Child & Family Services Ballarat submitted that a principle about placing siblings together should be:
sufficiently flexible to weigh up the best interests of individual children with the sibling relationship, and consider the appropriateness of them being placed together, based upon their individual developmental needs, the capacity of the adoptive family and the assessment of the adoptive family's suitability.²⁰
- 4.23 A significant number of people considered that if siblings are not placed together, arrangements should be made for contact to occur.²¹ Some people suggested that this should include siblings who may not be born at the time one sibling is adopted.²²

11 Consultation 1 (Bounce Youth Leaders).
12 Ibid.
13 Submissions 6 (Name withheld), 7 (Name withheld), 30 (Name withheld), 33a (Name withheld), 34 (VANISH), 35 (OzChild), 39 (ARMS (Vic)), 45 (Dr Briony Horsfall), 48 (Victorian Council of Social Service), 50 (Barnardos Australia), 51 (Law Institute of Victoria), 55 (CREATE Foundation), 57 (Patricia Harper); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 22 (Fae Cuff), 23 (Wathaurong Aboriginal Co-operative), 36 (Kylie Martens).
14 Submissions 3 (Leilani Hannah), 9 (Australian Adoptee Rights Action Group), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 16 (Name withheld), 20 (Name withheld), 21 (Name withheld).
15 Consultation 7 (Bobby Richards).
16 Submission 55 (CREATE Foundation).
17 Submission 34 (VANISH).
18 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 39 (ARMS (Vic)).
19 Submissions 36 (Child & Family Services Ballarat Inc.), 48 (Victorian Council of Social Service), 50 (Barnardos Australia).
20 Submission 36 (Child & Family Services Ballarat Inc.).
21 Submissions 23 (Fae Cuff), 30 (Name withheld), 33b (Name withheld), 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 39 (ARMS (Vic)), 45 (Dr Briony Horsfall), 48 (Victorian Council of Social Service), 50 (Barnardos Australia), 55 (CREATE Foundation); Consultations 7 (Bobby Richards), 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 29 (Staff at the Bendigo and District Aboriginal Co-operative).
22 Submissions 33a (Name withheld), 45 (Dr Briony Horsfall); Consultation 7 (Bobby Richards).

- 4.24 Bobby Richards told the Commission that sibling contact is essential. He said it should be available when siblings are adopted into different families, and when one child is adopted and another is not.²³
- 4.25 Participants at a roundtable with approved agencies told the Commission that they had experienced situations where a natural mother does not want siblings to know about each other or be placed with each other.²⁴ A participant said that it would help agencies to make decisions if the Adoption Act stated that connections with siblings is a priority.
- 4.26 A participant at a roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies said that the focus has to be on the best interests of the child, rather than the wishes of a natural parent. They thought that in most cases, connection of a child with their siblings is in the child's best interests.²⁵

Commission's conclusions

- 4.27 The Adoption Act should provide better for sibling relationships to continue after an adoption. The responses to the consultation paper emphasised the importance of sibling relationships. This is supported by research.²⁶
- 4.28 Other states and territories provide stronger obligations to consider the relationship of the child with their siblings.²⁷
- 4.29 A number of commentators have urged for sibling bonds to be better recognised by the law.²⁸
- 4.30 Jill Hasday describes the historical premise of adoption law and its treatment of siblings in the United States, which parallels the Australian situation, as follows:
- Adoption law historically did not create a 'presumption' in favor of keeping siblings together, much less impose an 'affirmative duty' ... to do so. If siblings were adopted into separate families ... the law considered their relationship severed and made no provision for contact, visitation, or even the opportunity to learn of a sibling's existence. The operative premise was that biological siblings were legally connected through their relationship with a shared parent or parents. Once a child's legal relationship with her birth parents ended, siblings no longer had any legally recognised ties to each other.²⁹
- 4.31 Hasday argues that 'despite the potential significance and value of sibling bonds, legal interest in sibling relationships is radically underdeveloped'.³⁰ She suggests that 'family law envisions children almost entirely in terms of their relationships with adults—their parents—rather than in terms of their relationships with other children—their siblings'.³¹
- 4.32 The effect of adoption law's failure to provide for sibling relationships can be devastating. Siblings separated by adoption have written and spoken about the pain and complete shock that such a separation can inflict. Some people spend decades searching for siblings.³²

23 Consultation 7 (Bobby Richards).

24 Consultation 13 (Roundtable with approved adoption agencies).

25 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

26 For an overview of the social science literature relating to sibling bonds, see Randi Mandelbaum, 'Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain their Relationships Post-Adoption' (2011) 41 *New Mexico Law Review* 1, 29–36; Jill Elaine Hasday, 'Siblings in Law' (2012) 65(3) *Vanderbilt Law Review* 896, 899–902; William Wesley Patton and Sarah Latz, 'Severing Hansel from Gretel: An Analysis of Siblings' Association Rights' (1994) 48 *University of Miami Law Review* 745, 760–8; Children's Bureau, Administration for Children and Families, U. S. Department of Health and Human Services, *Sibling Issues in Foster Care and Adoption* (2013) 4–7 <<https://www.childwelfare.gov/pubs/siblingissues/>>.

27 *Adoption Act 1993* (ACT) s 5(2)(e); *Adoption Act 2000* (NSW) s 8(2)(f); *Adoption Act 2009* (Qld) s 160; *Adoption Act 1994* (WA) s 52(1)(d)–(e).

28 See, eg, Jill Elaine Hasday, 'Siblings in Law' (2012) 65(3) *Vanderbilt Law Review* 896; Kristen L Settlemire, 'Post-Adoption Contact Between Siblings: Is "Avoidance of Harm" the Right Standard for New Jersey Siblings Adopted From Foster Care Parents?' (2011) 36(1) *Seton Hall Legislative Journal* 165; Josh Gupta-Kagan, 'Non-Exclusive Adoption and Child Welfare' (2015) 66(4) *Alabama Law Review* 715, 738–40; Randi Mandelbaum, 'Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain their Relationships Post-Adoption' (2011) 41 *New Mexico Law Review* 1.

29 Jill Elaine Hasday, 'Siblings in Law' (2012) 65(3) *Vanderbilt Law Review* 896, 906.

30 Ibid 902.

31 Ibid 903.

32 Ibid 903–4.

- 4.33 Adoption law should provide for sibling relationships in two key ways. First, every effort should be made to keep siblings together. Secondly, if siblings are not kept together, contact arrangements should be made.
- 4.34 The guidance on best interests should specify that it would ordinarily be in a child's best interests to be placed with the same family as any of the child's siblings who is also to be adopted or has previously been adopted. (See Recommendation 23(g) in Chapter 5.)
- 4.35 All reasonable steps should be taken to place siblings together. The onus should be on the Secretary or principal officer to thoroughly explore this option. This should include investigating whether any of the child's siblings have been adopted.
- 4.36 Any policy relating to age spacing between children in adoptive families should not apply where siblings are placed together with one family.
- 4.37 In some situations it may not be appropriate or possible to place siblings together. The focus of decision making must be the best interests of the child. If placing siblings together for adoption would not be in the best interests of the child, it should not occur—for example, if there is evidence of violence or abusive behaviour between the siblings, or other severe dysfunction, they should not be placed together.
- 4.38 There are also situations where the adoptive family may be unwilling or unable to adopt the child's sibling. There should not be any pressure placed on parents who have adopted a child to also adopt their sibling.
- 4.39 The views of natural parents on placing siblings together should be considered but should not be decisive. The focus of decision making must be the best interests of the child. In some cases, placing siblings together could pose a risk to one of the siblings or to the natural mother. These factors may be raised by a natural parent and should be taken into account.
- 4.40 If siblings are separated through adoption, including situations where a sibling is born after an adoption, contact arrangements should be considered as part of the adoption planning process discussed below at [4.89].
- 4.41 There should be a presumption that siblings will have contact because it is in their best interests. This presumption should be able to be displaced.
- 4.42 The written report provided to the court on behalf of the Secretary or the principal officer about the proposed adoption should address the preservation of sibling relationships.³³ This should include detail about whether other siblings have been placed for adoption, whether consideration was given to placing the child with the family that adopted their sibling, and the proposed provision for preserving these relationships through contact arrangements, or the reasons why this is not appropriate.

Recommendations

- 12** The Adoption Act should specify that the written report provided to the court on behalf of the Secretary or principal officer to enable it to consider an application for an adoption order must include information about:
- whether other siblings have been placed for adoption
 - what consideration was given to placing a child with their siblings
 - how sibling relationships will be preserved through contact arrangements or the reasons why this is not appropriate.

- 13** The Adoption Act should specify that one of the matters the court must be satisfied about before making an adoption order is that due consideration has been given to the preservation of sibling relationships and appropriate provision has been made for this.

Contact with the family of origin and other people of significance after the adoption

- 4.43 The previous section discussed and made recommendations on how adoption law should provide for contact between siblings after an adoption.
- 4.44 There are many other people whose role should be considered in any decision about the best interests of the child. They include the adopted person's grandparents, aunts and uncles, and carers. They may also include the extended family and the child's cultural and linguistic community.
- 4.45 This section considers the way that adoption law should provide for contact with the family of origin and other people of significance to the child after an adoption.
- 4.46 The Adoption Act provides for the child to maintain connection to these people and for the interests of these people in the following ways:
- requirements that the people seeking to adopt the child have a suitable appreciation of the importance of contact with parents and family and exchange of information about the child with the child's parent and family³⁴
 - the ability, in some circumstances, for the court to place conditions on an adoption order that provide for parents to receive information about the child and for parents and relatives of the child to have contact with the child (discussed below at [4.48])³⁵
 - an ability to make consent to the adoption of an Aboriginal or Torres Strait Islander child subject to conditions that the relevant parent, specified relatives, and members of the Aboriginal or Torres Strait Islander community to which the child belongs have rights to have contact with the child (discussed in Chapter 7).³⁶
- 4.47 There are also rights for various people with a legitimate interest in an adoption, including relatives, to access information about the adoption.³⁷ The information provisions and the Commission's recommendations for improvement are discussed in Chapter 16.

Current law

Conditions on an adoption order

- 4.48 An adoption order may be made subject to conditions relating to contact with the child or the provision of information about the child.³⁸
- 4.49 The ability for the court to place conditions on an adoption order only applies to adoption orders made with the consent of the parent or parents.³⁹ It does not apply to situations where consent was dispensed with by the court.

³⁴ Ibid s 15(1)(a); *Adoption Regulations 2008* (Vic) reg 35(g).

³⁵ *Adoption Act 1984* (Vic) s 59A.

³⁶ Ibid ss 37, 59.

³⁷ Ibid pt VI.

³⁸ Ibid s 59A. Section 40 of the *Adoption Act 1993* (ACT) provides for conditions on an adoption order in almost identical terms.

³⁹ Consideration was given to this provision in *Re Adoption of J* [2009] ACTSC 49 (6 May 2009).

³⁹ *Adoption Act 1984* (Vic) s 59A(b).

- 4.50 Conditions relating to contact with the child and information about the child may be made where the court is satisfied that:
- circumstances exist which make it desirable to do so, whether by reason of the age of the child or otherwise⁴⁰
 - after consent to the adoption, the birth parent(s) and the adoptive parent(s) have agreed that the adoption order should be made subject to certain conditions.⁴¹
- 4.51 Two types of condition may be made on the adoption order. The first provide that specified people have the right to have contact with the child. This may be the child's parents or other relatives.⁴²
- 4.52 The other type of condition requires the adoptive parent(s) to provide information about the child. In this case, the Adoption Act provides for the Secretary or principal officer of an approved agency to act as an intermediary. Information is provided to the Secretary or principal officer and passed on to the parent(s).⁴³
- 4.53 It is possible to add the conditions described above to an adoption order after an adoption.⁴⁴ It is also possible for the court to vary or revoke conditions after an adoption.⁴⁵ The court must be satisfied that it is in the 'best interests of the welfare of the adopted child'.
- 4.54 An application for the addition, variation, or revocation of conditions can be made by an adoptive parent, a natural parent if they consented, or the child (this can also be made on their behalf).⁴⁶ It must be accompanied by a report from an approved counsellor.
- 4.55 An order cannot be made granting a person a right of contact or greater rights of contact with an adopted child unless the adoptive parent(s) agree and the court is satisfied that 'as far as practicable, the wishes of the child have been ascertained and due consideration is given to them, having regard to the age and understanding of the child'.⁴⁷
- 4.56 Special provisions in the Adoption Act enable the parents of Aboriginal and Torres Strait Islander children to give conditional consent to an adoption, providing that consent is only given subject to conditions about ongoing contact with the child.⁴⁸ These provisions are discussed in Chapter 7.

Adoption plans

- 4.57 In some states and territories, negotiated adoption plans are used to provide for contact and information exchange after adoption. The Australian Capital Territory,⁴⁹ Queensland,⁵⁰ Western Australia⁵¹ and New South Wales⁵² all provide for adoption plans.
- 4.58 Western Australia and New South Wales provide for adoption plans that are enforceable by the court.
- 4.59 Enforceable adoption plans offer a significantly different approach to the limited ability to place conditions on an order under section 59A of the Adoption Act. The next sections describe the key features of adoption plans in Western Australia and New South Wales.

40 Ibid s 59A(a).
41 Ibid s 59A(b).
42 Ibid s 59A(c).
43 Ibid s 59A(d).
44 Ibid s 60(1).
45 Ibid s 60(2).
46 Ibid s 60(3).
47 Ibid s 60(5).
48 Ibid s 59.
49 *Adoption Act 1993* (ACT) s 39D(2)(c).
50 *Adoption Act 2009* (Qld) s 165.
51 *Adoption Act 1994* (WA) s 46.
52 *Adoption Act 2000* (NSW) s 46(1).

Who negotiates an adoption plan?

- 4.60 In Western Australia adoption plans are negotiated (if possible) between natural parents who consented to the adoption and the prospective adoptive parent(s). If the CEO of the department thinks it is appropriate, the child's representative may also be involved in negotiation.⁵³
- 4.61 The court may allow someone who is not a party to the proposed adoption to become a party to an adoption plan.⁵⁴ The parties to an adoption plan may include anyone who is a party to the proceedings and various relatives if a natural parent is deceased or cannot be found.⁵⁵
- 4.62 In New South Wales, an adoption plan is agreed by two or more of the parties to the adoption of a child.⁵⁶ Parties to an adoption are generally defined in the Act as the child, natural parent(s) who have consented to the child's adoption, the proposed adoptive parent(s), the Secretary and the appropriate principal officer.⁵⁷ A natural parent who has not consented to the adoption of a child is, as far as possible, to be given the opportunity to participate in the development of, and to agree to, an adoption plan.⁵⁸

When is an adoption plan negotiated?

- 4.63 In Western Australia an adoption plan is negotiated once the period for revocation of consent has passed but before the child is placed for adoption.⁵⁹
- 4.64 The court may dispense with the requirement for an adoption plan or that a particular natural parent be a party to the plan if a natural parent is unable or unwilling to participate, or incapable of participating; or cannot be found or contacted.⁶⁰
- 4.65 New South Wales provides that an adoption plan may be agreed before the making of an adoption order.⁶¹

What does an adoption plan provide for?

- 4.66 In Western Australia an adoption plan may provide for information exchange or contact including that there will be no information exchange or contact. It may also provide for any other matters relating to the child and a process for reviewing the adoption plan.⁶²
- 4.67 New South Wales requires that an adoption plan contain detail about:
- the type of information to be exchanged and the frequency of exchange
 - how contact between the child and the child's family and siblings is to be maintained, including people authorised to have contact with the child, purposes, frequency and location of contact
 - how the child is to be assisted to develop a healthy and positive cultural identity and how links with the child's cultural heritage are to be fostered⁶³
 - details of financial and other assistance arrangements that the Secretary has agreed be included

53 *Adoption Act 1994* (WA) s 46(1)(c).

54 *Ibid* s 70.

55 *Ibid* ss 59(2), 70(1). Section 59(1)–(2) requires that if a natural parent dies without giving consent, dies after giving consent, or their consent is dispensed with because they cannot be found, an application for adoption cannot be made unless written notice of the intention to file an application order is given to various relatives specified in the Act 30 days before the application is made. Section 70(1) provides that a relative notified under s 59(2) may become a party to the adoption plan. Section 60 gives the court the ability to vary or override these notification requirements.

56 *Adoption Act 2000* (NSW) s 46(1).

57 *Ibid* dictionary.

58 *Ibid* s 46(2A).

59 *Adoption Act 1994* (WA) ss 46(1), 48.

60 *Ibid* s 73.

61 *Adoption Act 2000* (NSW) s 47(1). In some circumstances the parties must agree to an adoption plan.

62 *Adoption Act 1994* (WA) s 46(2). Section 46(6) provides that a provision that purports to prevent, restrict or make conditional the movement (whether within or out of Australia) of a party to the adoption, is of no effect.

63 *Adoption Act 2000* (NSW) s 47(2); *Adoption Regulation 2015* (NSW) reg 75(b). Section 46(4) requires that for an Aboriginal or Torres Strait Islander child, any provisions relating to cultural identity and heritage should be made after consultation with a local, community-based and relevant Aboriginal or Torres Strait Islander organisation.

- the period for which the plan is to have effect.⁶⁴

What must be considered in developing an adoption plan?

- 4.68 Western Australia requires that people negotiating an adoption plan consider a set of rights and responsibilities corresponding with four developmental stages: infancy, childhood, adolescence and adulthood. The changing needs and evolving capacity of the child, and the changing rights and responsibilities of the natural parents, adoptive parents and adopted person are described at each stage of development (see Appendix D).

What if an adoption plan can't be agreed on?

- 4.69 In Western Australia the CEO must provide assistance and mediation to people in the process of negotiating, varying or reviewing an adoption plan.⁶⁵ The CEO must establish and maintain mediation services for negotiations about contact and matters arising between parties to an adoption or an adoption plan.⁶⁶ If there is a dispute in negotiating an adoption plan, the court has powers to make an order about the disputed matter. The terms of the order are treated as the provision of the adoption plan in relation to that matter.⁶⁷

What happens once an adoption plan is made?

- 4.70 In Western Australia an adoption order cannot be made unless the court approves the adoption plan.⁶⁸ The court has a range of enforcement powers.⁶⁹
- 4.71 In New South Wales the parties to the adoption who have agreed to an adoption plan may apply to the court for it to be registered.⁷⁰ A non-consenting natural parent may also apply for the adoption plan to be registered.⁷¹
- 4.72 The court may register an adoption plan if it is satisfied that:
- the plan does not contravene the adoption principles
 - the parties to the adoption understand the provisions of the plan and have freely entered into it
 - the provisions of the plan are in the child's best interests and are proper in the circumstances.⁷²
- 4.73 If an adoption plan is registered, it is treated as if it were part of the adoption order. This means that it is enforceable as an order of the Supreme Court of New South Wales.⁷³

Variation to an adoption plan

- 4.74 In Western Australia the court may vary the adoption plan after an adoption order is made. The people who may apply for a variation are a party to the adoption plan and a person who is a party to the adoption (the adoptee, the adoptee's natural parents, and the adoptee's adoptive parent).⁷⁴ This includes a parent whose consent was dispensed with and a person who was not a party to the approved adoption plan.⁷⁵ Mediation must be undertaken before an application to vary an adoption plan is made.⁷⁶

64 *Adoption Regulation 2015* (NSW) reg 75(f).

65 *Adoption Act 1994* (WA) s 47.

66 *Ibid* s 79(1)(d). Section 79(1)(h)(iii) requires the CEO to develop and supervise the implementation of codes of practice in relation to the mediation of disputes between the parties to an adoption or an adoption plan, or negotiations of parties to an adoption as to those parties' wishes in relation to contact between them.

67 *Ibid* s 50(2). Section 50(1) provides the CEO or any of the parties to the proposed adoption plan may apply for an order about the disputed matter.

68 *Ibid* s 72(1). Except in cases where the court has dispensed with the requirement for an adoption plan.

69 *Ibid* s 72(2).

70 *Adoption Act 2000* (NSW) s 50.

71 *Ibid* s 46(2B).

72 *Ibid* s 50(3).

73 *Ibid* s 50(4).

74 *Adoption Act 1994* (WA) s 76.

75 *Ibid* s 76(1)(b).

76 *Ibid* s 76(2).

- 4.75 In New South Wales a party to the adoption plan may apply to the court for a review of the plan.⁷⁷ The court may make changes to the provisions, revoke or confirm the plan.⁷⁸ It may only take any of these actions if it is satisfied that it is in the best interests of the child and proper in the circumstances.⁷⁹
- 4.76 An adoption plan that is changed by an order of the court has effect as if it were the plan originally agreed to by the parties.⁸⁰

Responses

- 4.77 Many people thought that there should be greater provision for contact in the Adoption Act.⁸¹
- 4.78 Professor the Hon. Nahum Mushin considered that there should be no fetters to the court's discretion about contact and that every case should be considered on its own facts.⁸²
- 4.79 A range of benefits of contact were identified:
- The child does not have to wonder what their life would have been like if they were not adopted because they can see this; reality replaces speculation and a child's need for information can be met.⁸³
 - The natural family has information about things like family medical history and genetics, which play an important role in a person's life.⁸⁴
 - It assists the child to understand their identity, their sense of self and cultural connections.⁸⁵
 - Research studies suggest that contact assists the child to come to terms with some of the difficult aspects of their past life.⁸⁶
 - The child can get an understanding of who they are and where particular traits came from.⁸⁷
 - It can help both the adoptive family and the adopted person to understand who the adopted person is.⁸⁸
 - The child needs to know who their family of origin is and know that family in order to grow up as emotionally healthy as possible.⁸⁹
 - It can help avoid trauma in the child's life. Contact with siblings and other key people in an adopted person's life can alleviate grief associated with separation from their natural parents.⁹⁰

77 *Adoption Act 2000* (NSW) s 51(1).

78 *Ibid* s 51(3).

79 *Ibid* s 51(4).

80 *Ibid* s 51(5).

81 Submissions 3 (Leilani Hannah), 6 (Name withheld), 7 (Name withheld), 9 (Australian Adoptee Rights Action Group), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 16 (Name withheld), 17 (Name withheld), 21 (Name withheld), 23 (Fae Cuff), 29 (Connections UnitingCare), 33a (Name withheld), 33b (Name withheld), 34 (VANISH), 36 (Child & Family Services Ballarat Inc.), 39 (ARMS (Vic)), 45 (Dr Briony Horsfall), 49 (Office of the Public Advocate), 51 (Law Institute of Victoria), 55 (CREATE Foundation), 57 (Patricia Harper); Consultations 5 (Roundtable with disability and mental health sector), 12 (Adoption Origins Victoria Inc.), 15 (Roundtable with culturally and linguistically diverse representative agencies), 32 (Ann Jukes and Gabrielle Hitch), 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

82 Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

83 Submission 27 (Institute of Open Adoption Studies, University of Sydney); Consultation 16 (Professor Meredith Temple-Smith).

84 Consultation 32 (Ann Jukes and Gabrielle Hitch).

85 Submissions 56 (Centre for Excellence in Child and Family Welfare Inc.), 57 (Patricia Harper).

86 Submission 27 (Institute of Open Adoption Studies, University of Sydney).

87 Consultations 16 (Professor Meredith Temple-Smith), 32 (Ann Jukes and Gabrielle Hitch).

88 Consultation 16 (Professor Meredith Temple-Smith).

89 Submission 3 (Leilani Hannah).

90 Submissions 16 (Name withheld), 56 (Centre for Excellence in Child and Family Welfare Inc.).

- It can help the natural parents to resolve their grief and loss⁹¹—‘most studies indicate that the overwhelming need of birth parents is to know their child is well and happy. Without contact the parents may experience the living death of the child who is developing in ways they can only imagine’.⁹²
 - When the child wants to know their story, the adoptive parents cannot provide all the answers; some of these answers come from the natural parents.⁹³
- 4.80 Some people said that contact can be frightening for adoptive parents. They may fear that the child will have a special connection with the natural parents which will take away from their own connection with the child.⁹⁴
- 4.81 Others thought that contact may be painful or distressing for natural parents⁹⁵ and disruptive for the child and the adoptive family.⁹⁶ Some people suggested that there is a need for post-adoption support to help people manage contact and increase its chances of success.⁹⁷
- 4.82 Professor Meredith Temple-Smith suggested that contact would function better in practice and have a greater chance of success if there was better information and education prior to adoptions about what contact will involve, and if support was provided both before and after adoptions. Some of the challenges that she suggested might be addressed through information, education and support were:
- the expectations of adoptive families and natural families may not match
 - clarifying expectations about the purpose of contact—for example, a condition on an adoption order about information exchange does not clarify the purpose of the information exchange
 - different cultural expectations of how the family works, which may need to be considered in contact arrangements
 - potential distress for those involved in contact.⁹⁸
- 4.83 Post-contact support is discussed in Chapter 15.
- 4.84 The Institute of Open Adoption Studies submitted that:
- The belief underpinning past adoption practices that favoured secrecy was that all ties with a child’s family should be severed in order to foster a secure attachment in his new family. This belief has not been supported by evidence. The largest survey of adoption and permanent foster care placements ever undertaken in the UK, involving 1,165 placements, found that birth family contact was the single factor which could be identified as enhancing the stability of placements.⁹⁹
- 4.85 A number of people suggested that any provisions about contact in the Act need to be flexible. Reasons identified for providing flexibility included that:
- decisions about contact need to be made on the basis of the best interests and needs of the specific child¹⁰⁰
 - it should be possible for contact arrangements to vary over time to suit changing circumstances, in particular to enable the child to participate in decisions about contact in a way that recognises their evolving capacity¹⁰¹

91 Submission 27 (Institute of Open Adoption Studies, University of Sydney); Consultation 4 (ARMS (Vic)).

92 Submission 27 (Institute of Open Adoption Studies, University of Sydney).

93 Consultation 19 (Chrissie Davies).

94 Consultations 16 (Professor Meredith Temple-Smith), 36 (Kylie Martens).

95 Consultations 16 (Professor Meredith Temple-Smith), 36 (Kylie Martens).

96 Consultations 9 (Roundtable with legal sector), 18 (Fiona De Vries).

97 Submissions 11b (Grandparents Victoria Inc./Kinship Carers Victoria), 12 (Dorothy Long), 37 (Permanent Care and Adoptive Families), 45 (Dr Briony Horsfall); Consultation 16 (Professor Meredith Temple-Smith).

98 Consultation 16 (Professor Meredith Temple-Smith).

99 Submission 27 (Institute of Open Adoption Studies, University of Sydney) citing Jane Rowe and June Thoburn, in Joan Fratter (ed), *Permanent Family Placement: A Decade of Experience* (British Agencies for Adoption and Fostering, Great Britain, 1991) 7–57.

100 Submissions 45 (Dr Briony Horsfall), 56 (Centre for Excellence in Child and Family Welfare Inc.), 57 (Patricia Harper); Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

101 Submissions 33a (Name withheld), 45 (Dr Briony Horsfall), 50 (Barnardos Australia), 57 (Patricia Harper).

- to allow for the possibility of contact with future siblings or other natural family members after an adoption¹⁰²
 - the imposition of a rigid formula can reduce the ability of the adults to allow arrangements to develop organically because a desire to change arrangements is viewed negatively as breaking the rules.¹⁰³
- 4.86 Some people emphasised that the child should be involved in decisions about contact and that contact arrangements should be able to change over time to reflect the child's evolving capacity to determine what contact they wish to have.¹⁰⁴
- 4.87 Dr Briony Horsfall drew on her PhD research to emphasise the importance of a court's power to order safe contact conditions according to each individual child's best interests.¹⁰⁵
- 4.88 The Commission heard that contact with people other than the natural parents is important and that when adoption decisions are made, consideration should be given to contact with a range of people.¹⁰⁶ They included siblings (and possibly future siblings), grandparents, other family members, other significant people in the adopted child's life, such as teachers, carers, family friends, neighbours and other community members.

Commission's conclusions

- 4.89 The question of how the law should provide for existing relationships after adoption draws together many of the key themes that emerged in consultations.
- 4.90 Appropriate provision for existing relationships after an adoption and more openness in adoption helps to support the best interests of the child. It addresses:
- the impact of adoption on identity formation—by helping a child to understand where they come from, their cultural heritage, why they look like they do, and where various traits come from
 - trauma caused by adoption—by providing for the natural parents and other people of significance to know that the child is well and happy and for the child to have contact with people who are important in their life
 - the lifelong effects of adoption—by acknowledging that the child will always have two families, and providing for existing relationships, including preservation of sibling relationships
 - the need for greater participation of the child in decisions about their adoption—by providing the child with the opportunity to express their views freely and for these views to be given due weight in accordance with the age and maturity of the child. This is a key part of providing adequately for the needs of the central figure in an adoption, the child, and ensuring that decisions are in their best interests.
- 4.91 The Commission considers that the best way to provide for successful contact and information exchange is for a written adoption plan to be developed for each adoption placement. An adoption plan can provide for contact and information exchange with the family of origin and significant others.
- 4.92 An adoption plan should be able to provide for any other matters relating to the child. It should always include detail about:
- contact arrangements with natural parents, grandparents and siblings and any requirement that there not be contact

102 Submission 33a (Name withheld).

103 Submission 57 (Patricia Harper).

104 Submissions 45 (Dr Briony Horsfall), 50 (Barnardos Australia), 55 (CREATE Foundation) 57 (Patricia Harper).

105 Submission 45 (Dr Briony Horsfall).

106 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 33a (Name withheld), 33b (Name withheld), 45 (Dr Briony Horsfall), 55 (CREATE Foundation), 57 (Patricia Harper); Consultation 15 (Roundtable with culturally and linguistically diverse representative agencies).

- information exchange, and any requirement that information not be exchanged
 - how the child is to be assisted to develop a healthy and positive cultural identity
 - any financial and other assistance approved by the Secretary for the proposed adoptive parent(s)
 - the period of time over which the plan is to have effect.
- 4.93 The court should be required to approve an adoption plan before an adoption order is made. This independent oversight will help ensure that any arrangements in an adoption plan are in the best interests of the child. An approved adoption plan should be registered by the court. Registration should have the effect of making the plan part of the adoption order and enforceable as an order of the court.
- 4.94 The court should be satisfied that the people who signed the adoption plan understand its provisions, have freely entered into it, and that the provisions of the plan are in the child's best interests. The court should have powers to vary, remove or add terms to the adoption plan where satisfied that it is in the best interests of the child to do so.
- 4.95 Adoption plans that are approved and registered by the court should replace the current provision under section 59A of the Adoption Act for the court to place conditions on an adoption.
- 4.96 Adoption plans are a preferable option to the current limited provision in section 59A for contact conditions to be placed on an adoption order because:
- they place more power in the hands of those most affected by an adoption to negotiate contact arrangements that work for them in their specific situation. This provides an increased likelihood of successful contact.
 - they allow the court to have oversight of arrangements and make a determination about contact in the best interests of the child where agreement cannot be reached. Section 59A of the Adoption Act only allows the court to place contact conditions on an adoption order if the relevant parent has consented to an adoption and the adoptive parents and natural parents have agreed to the conditions.
- 4.97 The adoption planning document used by New South Wales (Appendix C) provides a useful template. These could be used as a guide to develop appropriate documentation for Victorian adoption plans.
- 4.98 The adoption plan should be tailored to address the individual circumstances. Depending on the relationship between the natural parents, separate maternal and paternal adoption plans may be required.
- 4.99 An adoption plan should not be developed until after consent to an adoption has been given and the period to revoke consent has passed, or consent has been dispensed with. It should be negotiated after the prospective adoptive parents have been chosen but before the placement of the child for adoption. This timing ensures that an adoption is actually in contemplation while minimising the chances for pressure to be placed on any of the parties.
- 4.100 The people who should always ideally be involved in negotiation of an adoption plan are: the child and/or their independent legal representative, the natural parents, the adoptive parents, and the Secretary or principal officer. The Adoption Act should define the parties to an adoption plan as the people who sign it.
- 4.101 Western Australian adoption law requires that in particular circumstances, 'close relatives' are notified 30 days before an application for an adoption order is made. The circumstances are: where a parent's consent is not required because they are deceased; where a parent has died after providing consent; and where the parent's consent has been dispensed with because the natural parent cannot be found or contacted.¹⁰⁷

- 4.102 It is valuable to have a requirement to notify close relatives about a proposed adoption in these circumstances. The Commission considers that notification of close relatives should occur prior to placing the child for adoption. Waiting until 30 days before an application for an adoption order means the child would already be placed with the prospective adoptive family. Earlier notification is preferable because a relative may be able to provide a better care option for the child than adoption.
- 4.103 Close relatives should be defined to include the parent and siblings of the child's parent. If no 'close relative' can reasonably be located, notification should be given to an aunt or uncle of the parent who is 18 years or over and reasonably available at the relevant time. These relatives should have the opportunity to be involved in negotiating and agreeing to an adoption plan.
- 4.104 Western Australia allows the natural parents to select another prospective adoptive parent if the adoption plan cannot be agreed upon.¹⁰⁸ The Commission sees this option as risking the unintended effect of encouraging potential adoptive parents to agree to contact arrangements or other features of an adoption plan that they are not genuinely committed to. This could occur because the proposed adoptive parents may fear that if they do not agree, the natural parents will choose new prospective adoptive parents.
- 4.105 If there is a dispute in negotiating an adoption plan, a preferable approach is for the court to make a decision about the disputed matter based on the best interests of the child. The terms of the decision should be treated as the terms of the adoption plan in relation to that matter (Chapter 14, Recommendation 63(a)).
- 4.106 Responses to the consultation paper emphasised the importance of contact to an adopted person's identity, to help address the lifelong effects of adoption, and to minimise trauma. For these reasons, the Commission considers that there should be a general presumption that a parent may be involved in negotiating and agreeing to an adoption plan even where their consent has been dispensed with.
- 4.107 As outlined in Chapter 14, Recommendation 61, a decision to dispense with a natural parent's consent should happen prior to a child being placed for adoption. The court should also have the power to decide that a parent whose consent has been dispensed with should not be involved in adoption planning. This decision should be made at the same time that consent is dispensed with.
- 4.108 The rights and responsibilities that people negotiating an adoption plan in Western Australia are required to consider (Appendix D), provide a useful guide to the shifting rights and responsibilities of the natural parents, adoptive parents and adopted person as the child grows up. It recognises that as the adopted person gets older, they increasingly take control of any contact arrangement and information exchange. A similar document should be included in a new Adoption Act to guide the negotiation of adoption plans in Victoria.
- 4.109 Any conditions in an adoption plan relating to contact or information exchange would cease at the time the adopted person turns 18. Once the adopted person is 18 years old (the age of majority)¹⁰⁹ any decisions about contact or information exchange would be a matter for the adopted person and their family of origin to determine.
- 4.110 An adoption plan should include sufficient detail about contact to ensure it is clear to all parties what contact will involve and to be enforceable if it is registered. This should include detail about: who is to have contact with the child, the purpose of the contact, how contact is to occur, the frequency of contact, and the location for face-to-face contact.

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Ibid s 46(3).
The *Age of Majority Act 1997* (Vic) s 3(1) provides that once a person is 18 years of age they attain 'full age and full capacity'.

- 4.111 An adoption plan should also include sufficient detail about information exchange to ensure it is clear to all parties what this will involve. This should include detail about: the type of information that is to be exchanged, the purpose of the exchange of information, how and how often information is to be exchanged, and who is to receive the information.
- 4.112 In situations where the child's paternity is unknown, a statement should be included about what would occur if a person who claims to be the child's biological father requests contact or information. The New South Wales adoption plan templates (**Appendix C**) provide a suggested statement. A similar statement could be usefully included in Victorian adoption plan templates.
- 4.113 New South Wales adoption planning documentation (**Appendix C**) includes a statement that the adoptive parents agree to support and facilitate contact with any siblings born after their adoption. To provide adequately for sibling relationships, an equivalent statement about contact with any future siblings should be included in any Victorian adoption plan templates.
- 4.114 A key aim of the proposed adoption planning process is to provide for a successful ongoing relationship and contact between the adopted person, the adoptive family and the family of origin. For this reason, it is vastly preferable for non-court-based review and renegotiation to occur, rather than resorting to court enforcement, which is likely to harm ongoing relationships.
- 4.115 A recommendation is made in Chapter 15 that the Secretary develop a specialist mediation service to assist families in negotiating conflict in any adoption arrangements (Recommendation 72(b)). In Chapter 14 a recommendation is made to the effect that mediation should occur before any court proceedings relating to an adoption plan (Recommendation 68(a)).
- 4.116 Chapter 14 also proposes that any new agreement that parties want reflected in the adoption plan should be filed with the court. Unless the court is not satisfied that the terms are in the best interests of the child, this should not require an appearance by the parties at court. If agreement cannot be reached, access to the court should be available for all parties.

Recommendations

- 14** A written adoption plan should be made for each child who is to be placed for adoption. An adoption plan should be approved and registered by the court. A registered adoption plan should become part of the adoption order and enforceable as an order of the court. This should replace the ability for the court to place contact and information conditions on an adoption order under section 59A.
- 15** Adoption plans should be negotiated:
- after the necessary consents for a child to be adopted have been given or dispensed with and the period for consent to be revoked has passed
 - prior to the placement of the child for adoption.
- 16** The Adoption Act should set out the rights and responsibilities that are to be considered and weighed in the negotiation of an adoption plan. The provision should be modelled on schedule 2 of the *Adoption Act 1994* (WA).

- 17** The Adoption Act should provide the following detail about who is to be involved in the negotiation and agreement of an adoption plan:
- a. An adoption plan should be negotiated between the natural parents, the adoptive parents, the Secretary or principal officer, and the child and/or their legal representative. Due regard should be given to the age and maturity of the child.
 - b. A parent whose consent has been dispensed with by the court may be involved in negotiating and agreeing on an adoption plan, unless the court orders that they may not be so involved.
 - c. The Secretary or principal officer should notify the parents and siblings of the natural parent or, if they cannot reasonably be located, an aunt or uncle of the natural parent who is 18 years and over, that the necessary consents have been given to place a child for adoption and give them the opportunity to be a party to the adoption plan when:
 - i. the natural parent is unable or does not wish to be involved in adoption planning and does not object to the relative being involved
 - ii. the natural parent's consent to the adoption is not required because they are deceased
 - iii. the natural parent died after consenting to the adoption
 - iv. the requirement for the natural parent's consent to the adoption has been dispensed with because they cannot be found or contacted.
- 18** The Adoption Act should define the parties to an adoption plan as the people who sign it.
- 19** Adoption plans should be able to provide for any other matters relating to the child but the Adoption Act should require that they include the following details:
- a. contact arrangements with natural parents, siblings and grandparents, and any requirement that there not be contact
 - b. information exchange, and any requirement that information not be exchanged
 - c. how the child is to be assisted to develop a healthy and positive cultural identity
 - d. any financial and other assistance approved by the Secretary for the proposed adoptive parent(s)
 - e. the period of time over which the plan is to have effect.

Best interests of the child

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5. Best interests of the child

Introduction

- 5.1 This chapter provides recommendations about the matter at the heart of adoption—ensuring that the best interests and rights of the adopted child are the foremost consideration in any decision under the Adoption Act.
- 5.2 A view expressed in a submission captures what the Commission considers the aim for anyone taking an action or making a decision under the Adoption Act should be: ‘You want those children to look back as adults and be content with the decisions that were made on their behalf ... so put yourself in their shoes’.¹
- 5.3 Past decision making about adoption has not always had this focus. The history of forced adoption and the Stolen Generations in Victoria clearly demonstrate the detrimental consequences of adoption decision making that did not focus on the best interests and rights of the child. These events denied adopted people the chance to grow up in their family and culture.
- 5.4 The Commission recognises that the trauma and loss caused by forced adoption and the Stolen Generations are not ‘finished’. They are ongoing and ripple through generations.
- 5.5 The recommendations in this chapter aim to ensure that the best interests of the child, both in childhood and in later life, are the paramount considerations in adoption decision making. The recommendations reflect a contemporary understanding of the best interests of the child.
- 5.6 The recommendations made in this chapter address the need to use consistent terminology to describe the best interests concept; the situations in which a change of name should be permitted for an adopted child; and the matters that should be considered in determining the best interests of the child.

United Nations Convention on the Rights of the Child

- 5.7 The principle that children hold rights and that decision makers are required to make decisions in their best interests to help uphold these is well established in international law.²
- 5.8 Australia’s endorsement of children’s rights and the best interests concept as a key mechanism for giving expression to these rights is demonstrated by its ratification of the *United Nations Convention on the Rights of the Child* (CRC) on 17 December 1990.

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Submission 23 (Fae Cuff).

See generally Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 36; United Nations Committee on the Rights of the Child, *General Comment No 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration* (Art. 3, Para 1), CRC/C/GC/14 (29 May 2013) [1]–[3].

- 5.9 Article 3 of the CRC provides a general ‘best interests of the child’ principle:
- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.³
- 5.10 Article 21 of the CRC provides specifically for the best interests of the child in an adoption.⁴ The wording is stronger than the general best interests of the child principle in article 3. It stipulates that in an adoption, the best interests of the child are to be the ‘paramount consideration’, rather than only a primary consideration:
- States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.⁵
- 5.11 This requires that in adoption decisions, the best interests of the child take precedence over all other interests, including those of birth parents, adoptive parents and political, state security or economic interests.⁶ It calls for the child and their needs to be at the centre of any decisions about adoption.
- 5.12 The United Nations Committee on the Rights of the Child describes the best interests concept as a mechanism for ensuring the full expression of a child’s rights:
- The concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child ... ‘an adult’s judgment of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention.’ ... there is no hierarchy of rights in the Convention; all the rights provided for therein are in the ‘child’s best interests’ and no right could be compromised by a negative interpretation of the child’s best interests.⁷
- 5.13 An adopted child is entitled to all the rights in the CRC. The specific rights provided in relation to adoption should be read in the context of all the rights provided in the CRC.⁸ These include:
- the principle of non-discrimination⁹
 - the right for the child to preserve their identity, including nationality, name and family relations¹⁰
 - the right, as far as possible, for the child to know and be cared for by his or her parents¹¹
 - the right for the child not to be arbitrarily separated from his or her parents and to be raised by them¹²
 - the right for the child to be heard in matters affecting them.¹³

3 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

4 See generally Sylvain Vité and Hervé Boéchat, *Article 21: Adoption* (Martinus Nijhoff, 2008).

5 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 21(a).

6 Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 295; Sylvain Vité and Hervé Boéchat, *Article 21: Adoption* (Martinus Nijhoff, 2008) 24.

7 United Nations Committee on the Rights of the Child, *General Comment No 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para 1)*, 62nd sess, CRC/C/GC/14 (29 May 2013) [4].

8 See Sylvain Vité and Hervé Boéchat, *Article 21: Adoption* (Martinus Nijhoff, 2008) 8; Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 303.

9 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2.

10 Ibid art 8(1).

11 Ibid art 7(1).

12 Ibid art 9.

13 Ibid art 12.

- 5.14 There is also a ‘presumption within the Convention that children’s best interests are served by being with their parents wherever possible’.¹⁴

Consistent ‘best interests’ terminology

Current law

- 5.15 The terms of reference ask the Commission to review the *Adoption Act 1984* (Vic) to ensure that the best interests and rights of the child are the foremost consideration in any decision under the Adoption Act.
- 5.16 The Adoption Act includes an overarching provision which requires that ‘In the administration of this Act, the welfare and interests of the child concerned shall be regarded as the paramount consideration’.¹⁵ The wording used for this overarching provision does not include the words ‘best interests’.
- 5.17 The provision requiring that the welfare and interests of the child are the paramount consideration was introduced by the *Adoption of Children Act 1964* (Vic).¹⁶ The Second Reading Speech described it as ‘the keynote of this proposed legislation. All else in this Bill really stems from the primary consideration that the welfare and interests of the child are paramount’.¹⁷
- 5.18 The Adoption Act and the *Adoption Regulations 2008* (Vic) use inconsistent terminology to refer to the idea that the best interests of the child are the paramount consideration. In addition to the phrase ‘welfare and interests of the child’, the following phrases are used: ‘best interests of the child’,¹⁸ ‘best interests of the welfare of an adopted child’¹⁹ and ‘child’s interests’.²⁰
- 5.19 In its 1997 *Review of the Adoption of Children Act 1965* (NSW), the New South Wales Law Reform Commission considered the difference between the terms ‘welfare and interests of the child’ and ‘best interests of the child’. It concluded that these terms are interchangeable. It recommended use of the term ‘best interests of the child’.²¹
- 5.20 Both the *Children, Youth and Families Act 2005* (Vic) (the CYF Act) and the *Family Law Act 1975* (Cth), which are key pieces of legislation in decision making about Victorian children, use the term ‘best interests of the child’ rather than ‘welfare and interests of the child’ or the other formulations of this idea provided in the Adoption Act or Adoption Regulations.²²
- 5.21 The change in wording from ‘welfare’ to ‘best interests’ was made to the Family Law Act in 1994 to align the terms of the principle with the CRC.²³ The explanatory memorandum to the Family Law Reform Bill 1994 indicates that the aim of this change was to ensure consistency with the CRC but that there was no intention to change the substantive law.²⁴ Case law has treated this terminology as having the same meaning, accepting that no change to the substantive law was intended.²⁵

14 Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 296; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 7, 9, preamble.

15 *Adoption Act 1984* (Vic) s 9.

16 *Adoption of Children Act 1964* (Vic) s 8. Prior to this, s 6(b) of the *Adoption of Children Act 1958* (Vic) required that consideration be given to the welfare of the infant but it was not the paramount consideration: ‘the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant.’

17 Victoria, *Parliamentary Debates*, Legislative Council, 24 March 1964, 3284 (Rupert Hamer).

18 *Adoption Act 1984* (Vic) ss 42(3), 46(4), 69(1)–(2), 69W(1).

19 *Ibid* ss 60(1)–(2).

20 *Adoption Regulations 2008* (Vic) sch 7 form 2 (b).

21 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Report No 81 (1997) 16.

22 *Children, Youth and Families Act 2005* (Vic) s 10; *Family Law Act 1975* (Cth) s 60CA.

23 Explanatory Memorandum, Family Law Reform Bill 1994 (Cth) 75 [329]–[330].

24 *Ibid* 75 [330]. This was accepted in *In Marriage of B* (1997) 140 FLR 11, 69.

25 See *In Marriage of B* (1997) 140 FLR 11, 69. *Bondelmonte v Bondelmonte* [2016] FamCAFC 48 (8 April 2016) [166]. It was suggested in *Re Z* (1996) 134 FLR 40, 43 that ‘best interests’ may be a ‘more all embracing concept than welfare’ (Nicholson CJ and Frederico J). However, subsequent case law did not pursue this matter, treating the terminology as synonymous. See generally Anthony Dickey, ‘Family Law’ (*Law Book*, 6th ed, 2014) 305.

- 5.22 Adoption law in all other states and territories includes the principle that the best interests of the child are paramount. This principle is expressed variously as the best interests of the child,²⁶ welfare of the child,²⁷ welfare and interests,²⁸ welfare and best interests,²⁹ best interests of the child, both in childhood and in later life,³⁰ and wellbeing and best interests of an adopted child, both through childhood and the rest of his or her life.³¹ The South Australian *Adoption (Review) Amendment Act 2016* uses the phrase ‘best interests, welfare and rights of the child’.³²

Responses

- 5.23 Responses to the consultation paper said that consistent terminology should be used to describe the best interests principle throughout the adoption legislation.³³
- 5.24 Those who expressed a view on the terminology considered that ‘best interests of the child’ should be used consistently in preference to the current variable terms.³⁴ Reasons included aligning the language in the adoption legislation with other legislation such as the CYF Act, the Family Law Act and with international agreements such as the CRC.³⁵
- 5.25 A concern raised about the phrase ‘best interests of the child’ is that it fails to account for the lifelong effects and take a sufficiently lifelong view of adoption.³⁶ Sharyn White suggested that:
- what needs to be taken into account is that the person adopted does not remain a child. The wording has been aimed at children, not acknowledging that adoption does not end. It affects the person over their whole lifespan, and beyond, as the adopted person’s children are also attached to a false ‘family’ tree.³⁷

Commission’s conclusion

- 5.26 Consistent terminology should be used in adoption legislation to ensure clarity for decision makers, as well as consistency with international conventions and other legislation.
- 5.27 The current formulation that ‘the welfare and interests of the child concerned shall be regarded as the paramount consideration’³⁸ should be replaced with the requirement that the ‘best interests of the child concerned, both in childhood and in later life, must be the paramount consideration’. This formulation brings the terminology in line with the CRC and harmonises with the ‘best interests’ terminology used in the CYF Act and the Family Law Act.³⁹
- 5.28 The Commission considered including the words ‘rights of the child’ to emphasise that the child is a rights holder. However, it decided that this was unnecessary and potentially confusing. The United Nations Committee on the Rights of the Child has emphasised that:
- the concept of the child’s best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognised in the Convention

²⁶ *Adoption Act 1993* (ACT) s 5(1).

²⁷ *Adoption Act 1988* (SA) s 7.

²⁸ *Adoption of Children Act* (NT) s 8 (1).

²⁹ *Adoption Act 1988* (Tas) s 8; *Adoption Act 1994* (WA) s 3(1)(a). The *Adoption Act 1994* (WA) has three paramount considerations.

³⁰ *Adoption Act 2000* (NSW) s 8(1)(a).

³¹ *Adoption Act 2009* (Qld) s 6 (1).

³² *Adoption (Review) Amendment Act 2016* (SA) s 4.

³³ Submissions 6 (Name withheld), 7 (Name withheld), 9 (Australian Adoptee Rights Action Group), 20 (Name withheld), 21 (Name withheld), 27 (Institute of Open Adoption Studies, University of Sydney), 34 (VANISH), 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 41 (Adopt Change), 54 (Australian Christian Lobby), 57 (Patricia Harper).

³⁴ Submissions 9 (Australian Adoptee Rights Action Group), 21 (Name withheld), 36 (Child & Family Services Ballarat Inc.), 41 (Adopt Change), 54 (Australian Christian Lobby), 57 (Patricia Harper).

³⁵ Submissions 54 (Australian Christian Lobby), 57 (Patricia Harper).

³⁶ Submissions 19 (Sharyn White), 33a (Name withheld), 34 (VANISH).

³⁷ Submission 19 (Sharyn White).

³⁸ *Adoption Act 1984* (Vic) s 9.

³⁹ *Children, Youth and Families Act 2005* (Vic) s 10; *Family Law Act 1975* (Cth) s 60CA.

- all the rights provided for in the CRC are ‘in the “child’s best interests”’⁴⁰
 - children’s rights are ‘universal, indivisible, interdependent and interrelated’.⁴¹
- 5.29 A key theme that emerged from consultation was that adoption has lifelong effects and that the focus of decision making needs to shift to consider the entire life of the adopted person. The United Nations Committee on the Rights of the Child has commented that in giving full effect to the child’s best interests, one of five parameters to bear in mind is the ‘short-, medium- and long-term effects of actions related to the development of the child over time’.⁴²
- 5.30 The inclusion of the words ‘both in childhood and in later life’ in the recommendation aims to ensure the decision maker focuses on the long-term best interests of the adopted person, rather than taking a short-term perspective.

Recommendation

- 20** The principle that the best interests of the child are the paramount consideration in adoption should be expressed consistently at all times in the Adoption Act or Regulations using the phrase ‘best interests of the child concerned, both in childhood and in later life’ rather than ‘welfare and interests of the child’.

Changing the adopted child’s name

Current law

- 5.31 An adopted child’s given names and surnames may be changed when they are adopted.
- 5.32 The child’s surname usually changes to the surname of the adoptive parent(s) or, where a couple are adopting and they have different surnames, one of those surnames, provided the court approves.⁴³ The court may also decide that a different surname is appropriate.⁴⁴
- 5.33 The child’s given names may also change if the adoptive parents request it in the application for the adoption order and the court approves.⁴⁵
- 5.34 Before approving a change of given name, the court must be satisfied that, as far as practicable depending on the child’s age and understanding, the wishes and feelings of the child have been found out and considered.⁴⁶
- 5.35 The Adoption Act specifies that it does not prevent a change to the adopted child’s name after the adoption in accordance with any other law.⁴⁷

40 United Nations Committee on the Rights of the Child, *General Comment No 14 (2013): The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para 1)*, 62nd sess, CRC/C/GC/14 (29 May 2013) [4].

41 Ibid [16(a)].

42 Ibid [16(e)].

43 *Adoption Act 1984* (Vic) s 56(1); *Adoption Regulations 2008* (Vic) sch 6.

44 *Adoption Act 1984* (Vic) s 56(1).

45 Ibid s 56(1)(b).

46 Ibid s 56(2).

47 Ibid s 56(3). The issue of changing a child’s surname has been considered in cases in the Family Court of Australia. These cases usually arise in the context of injunctions to restrain one parent from causing or allowing the child to be known by a new name. For a summary of the relevant matters considered by the court, see *Director-General, Dept of Community Services (NSW) v D* (2007) 37 Fam LR 595, 669 [259].

Responses

- 5.36 There were strong views about changing a child's name when they are adopted. Views varied widely from those that considered that names, including surnames, should never be changed⁴⁸ through to those that considered that the child's names should always be able to be changed by the adoptive parents.⁴⁹ Many people emphasised the importance of a child's name to their identity.⁵⁰
- 5.37 A small number of people submitted that it should always be possible for the adoptive parents to change an adopted child's given name.⁵¹
- 5.38 Others said that there was a need for flexibility about changes of name.⁵² One submission suggested that 'encouraging the inclusion of an original name somewhere into the child's new name would be more realistic than legislating against changing a name outright'. It explained that:
- there are occasions when new adoptive parents may struggle to 'bond' with a child whose name they cannot associate positively with, or indeed whose name they may have a negative past association with. For some families giving a child a new name may be an important way of embracing and claiming that child in their new family.⁵³
- 5.39 Some people proposed education for prospective adoptive parents about the importance of retaining a child's name. This might include its links to a child's family of origin and culture and its potential to enhance contact.⁵⁴
- 5.40 The Law Institute of Victoria submitted that the court should make a decision about changes of name on the basis of the child's best interests, taking account of the specific facts and needs of that child. It submitted that the Adoption Act 'should not prescribe any default position regarding the name of a child'.⁵⁵
- 5.41 Many people expressed the view that changing a child's given names is not in the best interests of the child.⁵⁶ The key reasons people gave for not changing a child's given names were the importance of maintenance of identity, identity confusion caused by changing a child's given names, and potential trauma to the child caused by changing their name.⁵⁷
- 5.42 One submission said 'a child might feel coerced into changing their name to feel accepted, a decision they may one day come to regret'.⁵⁸
- 5.43 Grandparents Victoria submitted:
- A child's name is one of the first words they learn to recognise ... the older a child gets, the more he or she learns to associate their own name with their sense of identity. To change a child's given names because they have been adopted by a new family can cause unnecessary confusion and loss of connection with their biological identity.⁵⁹

48 See, eg, Submission 34 (VANISH).

49 See, eg, Submission 8a (Name withheld).

50 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 29 (Connections UnitingCare), 34 (VANISH), 35 (OzChild), 39 (ARMS (VIC)), 41 (Adopt Change), 51 (Law Institute of Victoria), 56 (Centre for Excellence in Child and Family Welfare Inc.); Consultation 7 (Bobby Richards).

51 See, eg, Submissions 8a (Name withheld), 20 (Name withheld). Submission 20 considered that this should be the case in relation to a baby who is adopted but not an older child who has built an identity with their name.

52 Submissions 30 (Name withheld), 32 (Name withheld).

53 Submission 30 (Name withheld).

54 Submissions 29 (Connections UnitingCare), 30 (Name withheld).

55 Submission 51 (Law Institute of Victoria).

56 Submissions 3 (Leilani Hannah), 7 (Name withheld), 9 (Australian Adoptees Rights Action Group), 16 (Name withheld), 26 (Adoption Origins Victoria Inc.), 33a (Name withheld), 34 (VANISH), 39 (ARMS (VIC)).

57 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 16 (Name withheld), 29 (Connections UnitingCare), 34 (VANISH), 35 (OzChild), 39 (ARMS (Vic)), 41 (Adopt Change).

58 Submission 31 (Name withheld).

59 Submission 11a (Grandparents Victoria Inc./Kinship Carers Victoria).

- 5.44 ARMS (VIC) emphasised the importance of a name to a child's identity:
- ... there is no reason to change a child's name. This takes away a child's identity ... It's about identity and connection. Changing an adopted child's name harks back to the 'clean slate' and 'clean break' theories. These have both been shown to be erroneous ... We respect the right of others to parent a child but they have no right to change that child's identity.⁶⁰
- 5.45 The Australian Adoptee Rights Action Group considered that name changes are 'to pretend the child was "born to" the adoptive parents' and is 'a remnant of [the use of] adoption to hide illegitimacy'.⁶¹
- 5.46 Some people suggested that changing a child's name reflects a desire to claim 'ownership of the child'.⁶² One submission stated:
- The adoptive parents are not buying a product and then changing the brand name. They are being permitted to legally parent a child who is already named and this name should not be removed or altered. If the new parents wish to use their surname, this can be done by common usage, without altering the child's truthful birth certificate.⁶³
- 5.47 Some people said that a name is very important as it is something that the natural parents gave to their child.⁶⁴ Bobby Richards told the Commission that he likes to use the name his natural mother gave him to honour and thank his mother. He said:
- Robert is what my mother named me: that is very personal. That is me owning me. It's who I am from the person who brought me into the world. It's a way of saying thank you to her for the gift of life and acknowledging her and the pain she had to go through in giving me away.⁶⁵
- 5.48 A number of people said that, generally, a child's name should not be changed but in limited circumstances a change of name may be appropriate. The circumstances identified were if not doing so puts the child in danger,⁶⁶ if the name has an offensive meaning,⁶⁷ or if the child is very young and their birth parents did not give them a name.⁶⁸
- 5.49 The importance of the child's views in decisions about their name was highlighted.⁶⁹ OzChild submitted that 'sometimes children themselves want their names changed and their wishes need to be considered'.⁷⁰ Others submitted that a name change should never be possible without a child's consent.⁷¹ The age of the child was identified as relevant to a child's ability to express their views on the name that they want.⁷²
- 5.50 Many people considered that the age of the child was relevant to change of name decisions.⁷³ A number of people considered that it is acceptable to change the name of a newborn child but not an older child. This was because of the view that for 'older children ... the child has already built his or her identity with that name. It is psychologically and emotionally important to maintain the child's identity with that name.'⁷⁴

60 Submission 39 (ARMS (Vic)).

61 Submission 9 (Australian Adoptee Rights Action Group).

62 Submissions 21 (Name withheld), 31 (Name withheld); Consultations 25 (VANISH), 31 (SS).

63 Submission 21 (Name withheld).

64 Submission 16 (Name withheld); Consultation 7 (Bobby Richards).

65 Consultation 7 (Bobby Richards).

66 Submissions 7 (Name withheld), 9 (Australian Adoptee Rights Action Group), 31 (Name withheld), 35 (OzChild).

67 Submission 35 (OzChild).

68 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 29 (Connections UnitingCare).

69 Submissions 15 (Jeremy Orchard), 35 (OzChild), 37 (Permanent Care and Adoptive Families).

70 Submission 35 (OzChild).

71 Submissions 13 (Dr Catherine Lynch JD), 14 (Samuel Morley).

72 Submissions 15 (Jeremy Orchard), 37 (Permanent Care and Adoptive Families).

73 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 12 (Dorothy Long), 15 (Jeremy Orchard), 20 (Name withheld), 29 (Connections UnitingCare), 35 (OzChild), 37 (Permanent Care and Adoptive Families), 50 (Barnardos Australia).

74 Submission 20 (Name withheld).

Commission's conclusion

- 5.51 The Commission considered the approach taken in other Australian jurisdictions. All states and territories allow for changes to both the surname and given names of a child when they are adopted, with varying levels of guidance or restrictions.⁷⁵ Some jurisdictions require that a child over 12 consent to a change of name.⁷⁶
- 5.52 The Australian Capital Territory specifies that the court may approve the following surnames: the adoptive parents' surname, where they both have the same surname; the surname of the adoptive father; the maiden name or other surname of the adoptive mother; the surname or former surname of any previous parent of the adopted child; a surname formed by combining the adoptive parents' surnames or any previous parent's surnames.⁷⁷
- 5.53 The Australian Capital Territory also provides a general presumption against changing a child's given name. The court must retain the child's given name unless there are 'exceptional circumstances'.⁷⁸ It may give the child additional given names.⁷⁹ The Act provides the following example of 'an exceptional circumstance':
- An exceptional circumstance would be if the given name is likely to make the child or young person vulnerable to ridicule or teasing in everyday life in Australian society.⁸⁰
- 5.54 A recent amendment to the South Australian adoption legislation prohibits changes to the child's first name in all cases unless it is 'offensive or unsuitable' or another child of the adoptive parents has the same first name.⁸¹
- 5.55 A child's name is a key part of their identity and may provide important links to their culture. This is acknowledged in the right for the child to preserve their identity, including nationality, name and family relations in article 8 of the United Nations *Convention on the Rights of the Child*.⁸²
- 5.56 A child's name may be the only thing a natural parent is able to give their child. As such, it can be of great significance both to the child and the natural parents.
- 5.57 Changing a child's given name may affect the likelihood of successful open adoption and contact. It may be difficult for a natural parent, siblings or other people of significance to the child to adjust to a child's name being changed and may affect relationships if they feel that the child has a new identity.
- 5.58 Identity and openness in adoption were key concerns of people who consulted with the Commission. The Commission's recommendations aim to address these matters.
- 5.59 The court should decide the names of the child (both given and surname) when making an adoption order. Adoptive parents should continue to have the right to apply for the child's name to be changed as part of the application for the adoption order. To provide better for the continuation of the child's identity, the circumstances in which a child's name may be changed should be more limited.
- 5.60 The importance of a child's name to their identity means that the child's given names should only be changed if there are exceptional circumstances. The Adoption Act should

75 The legislation in all states and territories specifies that the provisions in the adoption legislation about changing a child's name as part of an adoption do not prevent later name changes after the adoption under other laws. See *Adoption Act 1993* (ACT) s 45(7); *Adoption Act 2000* (NSW) s 101(6); *Adoption of Children Act* (NT) s 48(4); *Adoption Act 2009* (Qld) s 215(6); *Adoption Act 1988* (SA) s 23(4); *Adoption Act 1988* (Tas) s 54(4); *Adoption Act 1994* (WA) s 74(4).

76 *Adoption Act 2000* (NSW) s 101(4); *Adoption Act 1988* (SA) s 23(3); *Adoption Act 1994* (WA) s 74(3).

77 *Adoption Act 1993* (ACT) s 45(3).

78 *Ibid* s 45(5)(b).

79 *Ibid*.

80 *Ibid* s 45(5) 'Example—par (b)'. A 'note' at the end of section 45(5) specifies that '[a]n example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears'.

81 *Adoption (Review) Amendment Act 2016* (SA) s 16. See also *Adoption Act 2009* (Qld) ss 215(1)(a), (2) which require that the child's first given name is retained as their first given name unless the Court is satisfied that there are exceptional circumstances. In this case, the final adoption order may include an order that the child have another first given name agreed by the child's adoptive parents.

82 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 8(1).

provide some examples of exceptional circumstances, for example that a given name is offensive or is likely to make the child vulnerable to ridicule.

- 5.61 In deciding a child's given name, the court should consider the best interests of the child. One of the matters that should guide best interests decision making is the preservation, as far as possible, of the child's identity, including their given name (Recommendation 23(e)). The Commission considers that it should be possible to give a child additional given names.
- 5.62 The Adoption Act should expressly provide for the court to decide on a surname other than one that is associated with the adoptive parents. Possible surnames should include surnames which provide for the continuation of the child's identity.
- 5.63 The Adoption Act should specify that a surname should be one of the following: the adoptive parents' surname, where they both have the same surname; the surname of the adoptive father; the maiden name or other surname of the adoptive mother; the surname or former surname of any previous parent of the adopted child; a surname formed by combining the adoptive parents' surnames or any previous parents' surnames.
- 5.64 Chapter 3 makes recommendations to increase the participation of the child in decisions about their adoption. A decision about a child's name is a 'significant matter'. If a child is able to form and express views on their name, they should be considered and given due weight in accordance with the age and maturity of the child.
- 5.65 The court's role in determining an adopted person's name is limited to the time that an adoption order is made. Rights to change the name of an adopted person after the making of an adoption order, in accordance with any other Act or law should be retained.⁸³

Recommendations

- 21 The Adoption Act should specify that on the making of an adoption order a child's given name should not be changed unless there are 'exceptional circumstances'. It should be possible to add given names.
- 22 The Adoption Act should provide for the court to decide on a child's surname on the making of an adoption order, which should be one of the following: the adoptive parents' surname, where they both have the same surname; the surname of the adoptive father; the maiden name or other surname of the adoptive mother; the surname or former surname of any previous parent of the adopted child; a surname formed by combining the adoptive parents' surnames or any previous parents' surnames.

Best interests guidance

Current law

- 5.66 The Adoption Act does not provide explicit guidance about the matters that should be considered in determining the best interests of the child.⁸⁴
- 5.67 In contrast, other Acts that provide for decision making about Victorian children give explicit guidance about how to decide what is in a child's best interests. Both the CYF Act and the Family Law Act include guidance.⁸⁵

⁸³ See *Adoption Act 1984* (Vic) s 56(3).

⁸⁴ It does include various features that protect the rights and interests of all parties in an adoption, to ensure it is in a child's best interests. See Victorian Law Reform Commission, *Review of the Adoption Act 1984*, Consultation Paper (2016) 54.

⁸⁵ *Children, Youth and Families Act 2005* (Vic) ss 10(2)–(3); *Family Law Act 1975* (Cth) s 60CC.

- 5.68 Adoption legislation in other states and territories also includes guidance about how to determine the best interests of the child.⁸⁶

Responses

- 5.69 There was very strong support for providing guidance in the Adoption Act about how to decide what is in a child's best interests.⁸⁷
- 5.70 A range of matters was proposed including:
- that all options other than adoption should be considered and that adoption should be a last resort⁸⁸
 - promotion of a child's long-term stability⁸⁹
 - supporting and maintaining the child's connection to their culture⁹⁰
 - the importance of a child's name to their identity and in what circumstances, if any, changes should be made to a child's given names (discussed above at [5.51])
 - protection of a child from harm, their safety and wellbeing⁹¹
 - that adoption is a decision for life, not just childhood, and that consideration should be given to how adoption will affect a child's future life⁹²
 - promotion of a child's developmental needs, including consideration of needs associated with a disability⁹³
 - the importance of considering natural parents' wishes and their input into decisions about the best interests of the child⁹⁴
 - the benefits for the child of meaningful relationships with adoptive parents⁹⁵
 - the importance of the participation of the child in decision making and provision for their evolving capacity (discussed in Chapter 3)
 - preservation of sibling relationships (discussed in Chapter 4)
 - an adopted person's right to know and have contact with their family or with other people of significance to them (discussed in Chapter 4).

⁸⁶ *Adoption Act 1993* (ACT) s 5(2); *Adoption Act 2000* (NSW) s 8(2); *Adoption of Children Act* (NT) s 8(2), sch 1.

⁸⁷ Submissions 6 (Name withheld), 8a (Name withheld), 9 (Australian Adoptee Rights Action Group), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 12 (Dorothy Long), 15 (Jeremy Orchard), 19 (Sharyn White), 20 (Name withheld), 21 (Name withheld), 29 (Connections UnitingCare), 30 (Name withheld), 32 (Name withheld), 33b (Name withheld), 34 (VANISH), 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 38 (Women's Forum Australia), 39 (ARMS (Vic)), 41 (Adopt Change), 42 (Australian Association of Social Workers), 43 (Thomas Graham), 45 (Dr Briony Horsfall), 46 (Australian Psychological Society), 47 (Youth Disability Advocacy Service), 51 (Law Institute of Victoria), 54 (Australian Christian Lobby), 55 (CREATE Foundation), 56 (Centre for Excellence in Child and Family Welfare Inc.), 57 (Patricia Harper), 60 (Berry Street).

⁸⁸ Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 23 (Fae Cuff), 26 (Adoption Origins Victoria Inc.), 31 (Name withheld), 33a (Name withheld), 34 (VANISH), 43 (Thomas Graham), 45 (Dr Briony Horsfall); Consultation 32 (Ann Jukes and Gabrielle Hitch).

⁸⁹ Submissions 36 (Child & Family Services Ballarat Inc.), 42 (Australian Association of Social Workers), 50 (Barnardos Australia); Consultation 6 (Roundtable with Permanent Care and Adoptive Families).

⁹⁰ Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 30 (Name withheld), 36 (Child & Family Services Ballarat Inc.), 42 (Australian Association of Social Workers), 45 (Dr Briony Horsfall), 56 (Centre for Excellence in Child and Family Welfare Inc.); Consultations 13 (Roundtable with approved adoption agencies), 15 (Roundtable with culturally and linguistically diverse representative agencies); 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 26 (Roundtable with groups and individuals representing children's interests), 29 (Staff at the Bendigo and District Aboriginal Co-operative), 34 (Elaine Taylor).

⁹¹ Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 30 (Name withheld), 32 (Name withheld), 38 (Women's Forum Australia), 41 (Adopt Change), 46 (Australian Psychological Society), 51 (Law Institute of Victoria); Consultations 9 (Roundtable with legal sector), 15 (Roundtable with culturally and linguistically diverse representative agencies), 16 (Professor Meredith Temple-Smith).

⁹² Submissions 39 (ARMS (Vic)), 42 (Australian Association of Social Workers), 51 (Law Institute of Victoria), 56 (Centre for Excellence in Child and Family Welfare Inc.); Consultations 4 (ARMS (Vic)), 26 (Roundtable with groups and individuals representing children's interests).

⁹³ Submissions 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 38 (Women's Forum Australia), 47 (Youth Disability Advocacy Service), 50 (Barnardos Australia); Consultations 9 (Roundtable with legal sector), 13 (Roundtable with approved adoption agencies).

⁹⁴ Submissions 51 (Law Institute of Victoria), 56 (Centre for Excellence in Child and Family Welfare Inc.); Consultations 13 (Roundtable with approved adoption agencies), 15 (Roundtable with culturally and linguistically diverse representative agencies).

⁹⁵ 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 36 (Child & Family Services Ballarat Inc.).

Adoption as a last resort

- 5.71 As discussed in Chapter 2 at [2.55], a large number of people said that adoption should be a last resort and all other options should be thoroughly explored first. A number of people supported the complete ending of future adoptions.⁹⁶
- 5.72 A significant number of people considered that the preference should be for the child to remain within the extended family or for another legal arrangement to be used which does not sever legal relationships with the family of origin. This type of legal arrangement could include parenting orders under the Family Law Act or permanent care orders under the CYF Act.
- 5.73 VANISH submitted:
- The primary consideration in any potential adoption proceeding should be whether any other less drastic legal order could achieve a stable long-term family placement for the child/young person until they achieve adulthood. If the child/young person and their permanent care family wish to make their family arrangement endure after the child reaches 18 ... adoption remains an option for them at that time – when the young person is ... an adult and able to make an informed decision in relation to the lifelong ramifications of being legally adopted.⁹⁷
- 5.74 Another submission stated:
- Decision makers should have to justify why and when adoption is more preferable for a child compared to other care options ... if a child cannot live with their natural parents, there is a course of action that needs to be followed to find another biological relative to care for that child. Stranger adoption should be so rare that it's unheard of. The rights of a child to love and be loved by their natural family should be paramount.⁹⁸
- 5.75 Thomas Graham, an adopted person, submitted that the focus should be on strengthening and improving the alternatives to adoption.⁹⁹ He commented on the long-term impacts of adoption:
- Adoption is built on deception. The notion that your first identity is flawed, your parents are flawed, and that these need to be wiped clean ... legislators and pro-adoptionists often lose sight of the long-term impacts that bear heavily on the child who eventually grows into an adult. Little thought is given to the relational and identity needs of this person, long term. Children are not frozen in time, they become adults who have to deal with the consequences of those who made irreversible decisions, supposedly in their best interests. Adoption is permanent. It's a life sentence.¹⁰⁰
- 5.76 Thomas Graham also submitted on identity issues and trauma for adopted people:
- Adoption orders force children to navigate through minefields of split identities and dual families—with one denied or pushed aside and another newly created and elevated in importance...
- Once the adoption threshold is crossed the adopted person is handed a complex network of factors they have to battle through, often with hurtful and harmful effects. Separation. Loss. Guilt. Shame. Mistrust. Identity confusion. Intimacy withdrawal. Rejection and divided loyalty. Factors that when not adequately addressed manifest into negative beliefs and behaviour patterns leading to self harm, substance abuse, broken relationships and in the worst cases, suicide.¹⁰¹

96 Submissions 3 (Leilani Hannah), 16 (Name withheld), 23 (Fae Cuff), 26 (Adoption Origins Victoria Inc.), 31 (Name withheld), 34 (VANISH), 39 (ARMS (Vic)), 43 (Thomas Graham); Consultation 31 (SS).

97 Submission 34 (VANISH).

98 Submission 33a (Name withheld).

99 Submission 43 (Thomas Graham).

100 Ibid.

101 Ibid.

- 5.77 Others echoed these concerns, suggesting that family or extended family should be the first preference.¹⁰²

The child's long-term stability

- 5.78 There was widespread agreement that best interests decision making should promote a child's long-term stability.
- 5.79 However, there was a sharp divergence of views about how long-term stability is best achieved. Many people considered that adoption is not the best option to achieve long-term stability (discussed at [5.71]).
- 5.80 Others considered that adoption is a good option for long-term stability and is preferable to options such as parenting orders or permanent care orders.
- 5.81 Barnardos Australia submitted:
- Barnardos experience is that 'third party orders' (such as Permanent Care Orders) are inferior to adoption in relation to ongoing security for children. This is because Permanent Care Orders stop at age eighteen and young people's best interests are served by having lifelong connections beyond age eighteen and into adulthood. Furthermore, adoption is superior to 'third party orders' as these orders can be much more easily challenged than Adoption Orders. Barnardos experience is that threats to challenge third party orders in NSW can destabilise placements and lead to a breakdown of important relationships, even though these challenges are rarely successful.¹⁰³
- 5.82 The Institute of Open Adoption Studies submitted:
- The need for security in all its forms (e.g., food security, security of tenure, secure attachment) and the search for meaning, are universal human drivers, not limited to children who are not able to live with their biological families. It is precisely these children in the care system, however, who have often been subjected to the insecurities of temporary placements, temporary attachments, and the vagaries of political and professional ideology in decision making concerning permanency.¹⁰⁴

Maintenance of identity through culture and name

- 5.83 Maintenance of an adopted person's identity was a key issue raised with the Commission. This included the importance of a person's name, contact with the family of origin, and maintenance of language and cultural connections.
- 5.84 The issue of changing a child's name if they are adopted, including the importance of name to maintenance of an adopted person's identity, was discussed above at [5.36]. Recommendations 21 and 22 propose limiting the circumstances in which a child's names may be changed.
- 5.85 Chapter 4 made recommendations about the use of adoption plans to provide for contact with the child's family of origin.
- 5.86 Many people emphasised the significance of culture to the formation of a person's identity and the importance of maintaining a child's connection to their culture.¹⁰⁵
- 5.87 VANISH described the child's connections to their natural family members, community and culture as 'a birthright and foundation to their identity'.¹⁰⁶

¹⁰² Submissions 3 (Leilani Hannah), 16 (Name withheld), 23 (Fae Cuff), 31 (Name withheld).

¹⁰³ Submission 50 (Barnardos Australia).

¹⁰⁴ Submission 27 (Institute of Open Adoption Studies, University of Sydney).

¹⁰⁵ Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 30 (Name withheld), 34 (VANISH), 36 (Child & Family Services Ballarat Inc.), 42 (Australian Association of Social Workers), 45 (Dr Briony Horsfall); Consultations 13 (Roundtable with approved adoption agencies), 15 (Roundtable with culturally and linguistically diverse representative agencies), 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative), 34 (Elaine Taylor).

¹⁰⁶ Submission 34 (VANISH).

- 5.88 Participants at a roundtable with culturally and linguistically diverse representative agencies said that identity, culture and belonging are important factors in the assessment of a child's best interests.¹⁰⁷ They said that research shows that having a strong identity is a protective factor, even for those children who experience discrimination.¹⁰⁸ Participants said that 'connectivity back' to culture is very important if an adoption does occur. If an adopted child has a connection back to their heritage they can make the decision whether to embrace it or not.¹⁰⁹

Safety, wellbeing and protection from harm

- 5.89 Many people considered that the safety and wellbeing of the child and protection from harm should be a key focus of best interests decision making.¹¹⁰
- 5.90 One submission suggested that:
- Important principles for consideration should include secure and stable placement of each child as soon as possible—the importance of a child being emotionally protected from harm and feeling 'claimed' in a permanent family is critical in the protection of a child's best interest.¹¹¹
- 5.91 Grandparents Victoria submitted that a primary consideration in best interests decision making should be protecting children from physical or psychological harm.¹¹²
- 5.92 Professor Meredith Temple-Smith told the Commission that the idea of 'cumulative harm' should be part of a best interests consideration. She described the concept as 'the accumulation of small injuries or harms' and indicated that it can arise in a variety of ways.¹¹³

Consideration of lifelong effects of adoption decision

- 5.93 Many consultations and submissions raised the need to consider the best interests both in childhood and later life. They stressed that adoption is a decision for life, not just childhood, and emphasised that consideration should be given to how adoption will affect a child's future life.¹¹⁴
- 5.94 The Law Institute of Victoria submitted:
- decision makers should be able to consider factors which are relevant not only to the child's welfare in childhood, but whether an order or process under the Adoption Act is likely to be in their best interests throughout their life.¹¹⁵
- 5.95 The Centre for Excellence in Child and Family Welfare submitted that 'what constitutes best interests changes over the life course. The needs of a young child may differ significantly from those of an adolescent.'¹¹⁶ It submitted that 'consideration should be given to the best interests of the child throughout their lifetime' and that 'the Adoption Act should provide a framework for how a long-term perspective can be taken in regards to the best interests of the child'.¹¹⁷

107 Consultation 15 (Roundtable with culturally and linguistically diverse representative agencies).

108 Ibid.

109 Ibid.

110 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 30 (Name withheld), 32 (Name withheld), 41 (Adopt Change), 46 (Australian Psychological Society), 51 (Law Institute of Victoria); Consultations 9 (Roundtable with legal sector), 16 (Professor Meredith Temple-Smith).

111 Submission 30 (Name withheld).

112 Submission 11a (Grandparents Victoria Inc./Kinship Carers Victoria). The other three matters it suggested be given primary consideration were the views of the child, even from an early age; the benefit of the child having a meaningful relationship with both their biological and adoptive families; and the need of the child to maintain close relationships with siblings.

113 Consultation 16 (Professor Meredith Temple-Smith).

114 Submissions 39 (ARMS (Vic)), 42 (Australian Association of Social Workers), 51 (Law Institute of Victoria), 56 (Centre for Excellence in Child and Family Welfare Inc.); Consultation 26 (Roundtable with groups and individuals representing children's interests).

115 Submission 51 (Law Institute of Victoria).

116 Submission 56 (Centre for Excellence in Child and Family Welfare Inc.).

117 Ibid.

- 5.96 A participant at a roundtable with groups and individuals representing children's interests said that best interests decision making often focuses on the immediate consequences of the decision. They said that it would be good to see a 'life-course approach' reflected in the Adoption Act. This means decision makers should focus on the probable impact of a decision on the lifelong wellbeing of this child.¹¹⁸
- 5.97 ARMS (Vic) stressed that adoption is not a static concept. Adoption affects an adoptee when they are a child and at all stages of their life. It said that consideration needs to be given to whether a long-term decision like adoption is the best response to what might be a short-term problem.¹¹⁹

Promotion of developmental needs

- 5.98 A number of people said that the promotion of a child's developmental needs is an important consideration in adoption decisions.¹²⁰
- 5.99 Some participants at a roundtable with representatives from the legal sector said that the need to promote a child's development (taking into account their age and stage of development) should always be considered. They said that this enables consideration of future needs and that these considerations work for older children who are adopted.¹²¹
- 5.100 A participant at a roundtable with approved agencies said that if the child has specific developmental needs, the agency will look for a family that can best provide for those needs. The participant said that decision making is problematic if the child's needs and birth parents' wishes collide. They said that the Adoption Act needs to be clearer that best interests are about the child's developmental needs and the type of family that meets these needs.¹²²
- 5.101 OzChild made a similar point. It submitted that the weighting of each factor should 'be individually influenced based on the child's needs and wishes. For example if the child is a baby or if the child has a significant disability.' It submitted that the suitability and capacity of the proposed adoptive parents to meet the child's emotional, developmental and social needs should be heavily weighted.¹²³
- 5.102 A participant at a roundtable with the disability and mental health sector suggested that the 'best interests' concept is subjective, particularly when it comes to disability. They said that parents who do not have a proper understanding of disability will not understand what is in the best interests of a child with a disability.¹²⁴
- 5.103 The Youth Disability Advocacy Service submitted that to counter subjectivity, additional guidance should be followed when considering placement options for children with disability. The guidance 'should aim to put a range of pre- and post-placement supports in place to ensure the child's rights are adequately upheld and that they are able to flourish in their new home environment to the fullest extent possible'.¹²⁵ It recommended that such guidance be developed in close consultation with people with disability and disability advocates.

118 Consultation 26 (Roundtable with groups and individuals representing children's interests).

119 Consultation 4 (ARMS (Vic)).

120 Submissions 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 38 (Women's Forum Australia), 50 (Barnardos Australia); Consultations 9 (Roundtable with legal sector), 13 (Roundtable with approved adoption agencies).

121 Consultation 9 (Roundtable with legal sector); *Children, Youth and Families Act 2005* (Vic) s 10(2).

122 Consultation 13 (Roundtable with approved adoption agencies).

123 Submission 35 (OzChild).

124 Consultation 5 (Roundtable with disability and mental health sector).

125 Submission 47 (Youth Disability Advocacy Service).

Age differences between adoptee and other children in family

- 5.104 The Adoption Act does not include any requirements about age differences between the child placed for adoption and other children in the family.
- 5.105 As a matter of policy, spacing of children is considered as part of the assessment process for determining whether someone is suitable to adopt.¹²⁶ The *Adoption and Permanent Care Procedures Manual* stipulates that consideration be given to:
- [t]he extent of 'space' in the family for another child to be placed ... with regard to the ages and developmental needs of existing children. There should be at least two years between an existing child and a new child.¹²⁷
- 5.106 Some people considered that there should be no requirements about age differences.¹²⁸
- 5.107 Other people considered that there should be an age difference of at least two years between the adopted child and any other children in the house.¹²⁹ Reasons given included avoiding competition between children for the adoptive parents' attention¹³⁰ and ensuring adoptive parents are able to focus fully on the adopted child or children.¹³¹
- 5.108 VANISH supported the inclusion of legislative requirements relating to spacing of children.¹³² It submitted that:
- notions that adopted children can be successfully interspersed with existing children in the family; or that it is in a child's best interests to have a same-age sibling, to be as close as possible in age to siblings, or to be adopted together with another child befriended in out-of-home care ('bonded pair'), are populist notions. In reality, such practices often present unfair challenges to the child and create difficulties with their integration into the family.¹³³
- 5.109 Two approved agencies submitted that they supported current practice that a child placed for adoption is the youngest child by two years and that further children are not introduced to the family for a period of two years.¹³⁴
- 5.110 The two approved agencies, as well as others, suggested a need for flexibility about spacing of children. They suggested that this should either be determined on a case-by-case basis or that there should be an ability to displace a general age gap requirement in 'exceptional circumstances'.¹³⁵ An example given of 'exceptional circumstances' was placing siblings for adoption.¹³⁶
- 5.111 Some submissions emphasised that the focus should be on the best interests of the child and that this is not ensured by a rigid standard.¹³⁷ One submission stated:
- there is a wait period before a couple can adopt again ... I feel this should be reconsidered, e.g. if an adoptive child's sibling is born and up for adoption it would be important to consider that child be placed with the family where the first sibling is already placed (providing best interest principles are considered and [the] first placement is going well).¹³⁸

¹²⁶ Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 54–5.

¹²⁷ Ibid 54.

¹²⁸ Submissions 20 (Name withheld), 35 (OzChild), 51 (Law Institute of Victoria).

¹²⁹ Submissions 29 (Connections UnitingCare), 33a (Name withheld), 34 (VANISH), 50 (Barnardos Australia).

¹³⁰ Submissions 34 (VANISH), 50 (Barnardos Australia).

¹³¹ Submission 34 (VANISH).

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Submissions 29 (Connections UnitingCare), 36 (Child & Family Services Ballarat Inc.).

¹³⁵ Submissions 6 (Name withheld), 29 (Connections UnitingCare), 30 (Name withheld), 32 (Name withheld), 36 (Child & Family Services Ballarat Inc.).

¹³⁶ Submissions 29 (Connections UnitingCare), 36 (Child & Family Services Ballarat Inc.).

¹³⁷ Submissions 30 (Name withheld), 51 (Law Institute of Victoria).

¹³⁸ Submission 32 (Name withheld).

5.112 The Institute of Open Adoption Studies submitted:

There is a lack of sound evidence to guide decision[s] in relation to the ages of children in families considering adoption. In an editorial Bullock (2014) cites a study conducted by Roy Parker nearly 50 years ago which found that foster care placements were especially vulnerable to disruption if there were birth children of a similar age in the host family. Four years later, a study by Victor George contradicted this. There have been no further studies published in this area, yet Bullock points out this is a hypothesis that could be readily tested given the information available in modern child protection data sets.¹³⁹

The child's rights

- 5.113 Many people identified protection and promotion of the rights of the child as a key matter for inclusion in best interests guidance.¹⁴⁰
- 5.114 At a roundtable with the legal sector, some participants said that one of the primary matters in best interests decision making in adoption should be 'the need to protect the child's rights'.¹⁴¹
- 5.115 A number of people suggested that best interests guidance should be based on or refer to the CRC.¹⁴²
- 5.116 Berry Street submitted that the Adoption Act should 'make a specific reference to relevant United Nations human rights instruments to which Australia is a signatory', in particular the CRC. It noted that the CYF Act requires decision makers to take into account the rights of children but provides no reference or details on what constitutes a child's rights. It suggested that '[a] specific reference to the UN Convention on the Rights of the Child [...] would provide clarity regarding the rights of children to be considered by decision makers'.¹⁴³

Elements of the CYF Act or Family Law Act

- 5.117 Some people suggested replicating in the Adoption Act the best interests guidance from either the Family Law Act or the CYF Act.¹⁴⁴
- 5.118 Some participants at a roundtable with the legal sector suggested that the Adoption Act should include three elements of best interests decision making from the CYF Act.¹⁴⁵ The three elements are: the need to protect the child from harm; the need to protect the child's rights; and the need to promote the child's development, taking into account the child's age and stage of development.¹⁴⁶

Bond between the natural mother and the child

- 5.119 The importance of the bond between the natural mother and infant was emphasised.¹⁴⁷
- 5.120 Dr Catherine Lynch suggested a principle that 'recognises and gives all due respect to the rights, interests, needs and desires of the infant to remain with the woman who gives birth to him or her'.¹⁴⁸ She submitted that this principle should be incorporated into the concept of the best interests of the child.

139 Submission 27 (Institute of Open Adoption Studies, University of Sydney).

140 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 15 (Jeremy Orchard), 29 (Connections UnitingCare), 32 (Name withheld), 33a (Name withheld), 38 (Women's Forum Australia), 42 (Australian Association of Social Workers), 43 (Thomas Graham), 45 (Dr Briony Horsfall), 46 (Australian Psychological Society), 47 (Youth Disability Advocacy Service), 55 (CREATE Foundation), 56 (Centre for Excellence in Child and Family Welfare Inc.), 60 (Berry Street); Consultations 5 (Roundtable with disability and mental health sector), 9 (Roundtable with legal sector), 26 (Roundtable with groups and individuals representing children's interests).

141 Consultation 9 (Roundtable with legal sector).

142 Submissions 15 (Jeremy Orchard), 43 (Thomas Graham), 45 (Dr Briony Horsfall), 47 (Youth Disability Advocacy Service), 56 (Centre for Excellence in Child and Family Welfare Inc.), 60 (Berry Street); Consultations 5 (Roundtable with disability and mental health sector), 9 (Roundtable with legal sector), 26 (Roundtable with groups and individuals representing children's interests).

143 Submission 60 (Berry Street).

144 Consultations 9 (Roundtable with legal sector), 13 (Roundtable with approved adoption agencies).

145 Consultation 9 (Roundtable with legal sector).

146 *Children, Youth and Families Act 2005* (Vic) s 10(2).

147 Submissions 9 (Australian Adoptee Rights Action Group), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 13 (Dr Catherine Lynch JD), 14 (Samuel Morley), 26 (Adoption Origins Victoria Inc.); Consultation 32 (Ann Jukes and Gabrielle Hitch).

148 Submission 13 (Dr Catherine Lynch JD).

5.121 Adoption Origins Victoria submitted:

Women are not informed about the suffering that premature maternal separation inflicts on newborn babies, damaging their emotional and psychological makeup, and causing long-term trauma. Nor are they informed about the mental health consequences to themselves of rupturing the post-partum relationship with their new-born baby and the long-term trauma of living with the knowledge of having abandoned their own baby to a system that disinherits their child and strips them of their true identity by forcing them to use a second falsified birth certificate ... Medical studies back up ... that the stress caused to the baby in removal impacts babies' brain chemistry and their emotional and psychological wellbeing.¹⁴⁹

Natural parents' wishes and input

5.122 Many people thought that the wishes and views of the natural parents should be considered in making a decision about the best interests of the child.¹⁵⁰

5.123 Independent Regional Mothers Combined submitted that:

It must be mandatory for a mother to be first and foremost seen as of paramount importance under any Adoption Act. She is the mother of the child and any decision regarding her child's welfare must be enacted by her and her extended family. A child at risk from their parents must be seen as part of extended family and their input must also be paramount.¹⁵¹

5.124 A number of people stated that, while natural parents should be able to express their views, they should not be determinative.¹⁵² For example, the specific developmental needs of the child or the benefits of them being placed with a sibling may mean that it is not in their best interests to be placed in accordance with the wishes of their natural parents. In this case the child's needs should outweigh a parent's wishes.¹⁵³

5.125 Chapter 12 outlines the benefits of allowing natural parents to express wishes about the adoptive parents. It concludes that allowing parents to express wishes increases the chances of successful open adoption. It recommends that natural parents should be able to express wishes about factors in the suitability criteria for adoptive parents. It also concludes that while natural parents should be able to express their views, these should not decide the outcome.

Commission's conclusions

5.126 The best interests concept has been criticised as:

- indeterminate and subject to the values and views of the decision maker¹⁵⁴
- paternalistic and paying insufficient attention to the rights of children as human beings with agency and views of their own¹⁵⁵
- susceptible to being used as a vehicle for political or ideological views.¹⁵⁶

149 Submission 26 (Adoption Origins Victoria Inc.).

150 Submissions 24 (Independent Regional Mothers Combined), 34 (VANISH), 39 (ARMS (Vic)), 51 (Law Institute of Victoria), 56 (Centre for Excellence in Child and Family Welfare Inc.); Consultations 13 (Roundtable with approved adoption agencies), 15 (Roundtable with culturally and linguistically diverse representative agencies).

151 Submission 24 (Independent Regional Mothers Combined).

152 Submissions 29 (Connections UnitingCare), 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 51 (Law Institute of Victoria); Consultation 13 (Roundtable with approved adoption agencies).

153 Submissions 29 (Connections UnitingCare), 35 (OzChild), 36 (Child & Family Services Ballarat Inc.); Consultation 13 (Roundtable with approved adoption agencies).

154 See, eg, Robert H Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226.

155 See, eg, Nicola Ross, 'Images of Children: Agency, Art 12 and Models for Legal Representation' (2005) 19 *Australian Journal of Family Law* 94, 96–7; David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 *International Journal of Children's Rights* 1.

156 See, eg, John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994) 42, 44.

- 5.127 The current lack of guidance in the Adoption Act about what matters are important in best interests decisions adds to the potential for subjective and paternalistic decision making. Guidance about the matters that must be considered would help ensure decisions about the best interests of the child are made in the most objective manner possible.
- 5.128 The guidance on the best interests and rights of the child should reflect the United Nations *Convention on the Rights of the Child*. It should be compatible with other legislation that provides for the best interests of the child in Victoria.
- 5.129 The Commission does not consider that the best interests guidance in the Adoption Act should be identical to that provided in the CYF Act. The different context and legal consequences of decision making in adoption require that the guidance is compatible but not identical.
- 5.130 Decisions under the CYF Act focus on whether a child is in need of protection or what arrangements should be made for the care of a child who has been found to be in need of protection. This child protection focus means that the need to protect the child from harm is always considered. In contrast, adoption decisions are not focused on child protection.
- 5.131 The legal consequences of decisions under the CYF Act are also different. Orders under the CYF Act do not result in a permanent severance of the child's legal relationship with their family of origin, whereas adoption does.
- 5.132 The Commission considered whether best interests guidance should be weighted to require that some matters are prioritised over others. It considers that the preferable approach is to provide unweighted guidance. This provides direction about what matters are important while allowing sufficient flexibility for the decision to be tailored to the individual circumstances of the child. Different factors weigh more heavily in different circumstances. The key is that the decision maker turns their mind to all relevant factors and then weighs them up based on the facts before them.
- 5.133 As outlined in Chapter 2 Recommendation 3(a), the guidance about best interests decision making should apply to all decision makers under the Adoption Act, not just the court. This includes the Secretary, principal officers of approved agencies and any other persons and bodies involved in the administration of the Act.
- 5.134 The matters proposed to guide decision makers in determining the best interests of the child, both in childhood and later life, synthesise the key issues dealt with throughout the report. Consideration was given to the guidance provided in other legislation about best interests decision making.
- 5.135 The proposed factors provide for a contemporary approach to decision making about the best interests of the child in adoption. They provide a focus on some matters that have been historically underemphasised including:
- the role of the child in decision making about matters that affect them
 - the lifelong effects of adoption
 - the preservation of the child's identity
 - the ongoing psychological connection of the child with their family of origin after adoption in spite of the legal severance of this relationship
 - the importance of sibling relationships
 - appropriate exploration of all alternatives to adoption.

- 5.136 The Commission considered providing for mandatory age gaps between children in the Adoption Act or Regulations. This approach is taken in Queensland.¹⁵⁷ In Queensland, these requirements were previously matters 'taken into account by the Department when selecting a couple to be the prospective adoptive parents for a child'.¹⁵⁸ They were included in the 2009 Adoption Act as 'indicators of a couple's current ability to focus their attention primarily on an adopted child for at least the first 12 months of the placement'.¹⁵⁹
- 5.137 A 2013 international literature review on the impact of fostering on foster carers' children considered the impact of age on relationships between carers' children and fostered children.¹⁶⁰ While fostering does not equate with adoption, it seems likely that similar factors would apply in adoption. The review concluded:
- it was evident that the age difference between foster carers' children and the foster child often has an impact on their relationship. However, individual differences in experiences suggest that rigid application of age boundaries in the approval of carers may be unhelpful.¹⁶¹
- 5.138 Practice-based comments from service providers involved in adoption supported a minimum of two years age gap between children in a family where a child is adopted.¹⁶²
- 5.139 The Commission considers that, while current practice relating to age gaps between children should continue, there is a lack of clear evidence to support including a fixed requirement about age gaps in the legislation. For this reason, the composition of the family and age gaps between children should not be specified in the Adoption Act. Instead, these considerations should be included as part of the best interests guidance as a factor for decision makers to consider.
- 5.140 The Commission for Children and Young People observed that providing guidance about best interests is in itself insufficient if decision makers, such as social workers, are not supported with appropriate training, education, and opportunities to develop their skills and experience.¹⁶³ The Commission agrees that training and education should be provided as part of the introduction of any new adoption legislation. There should also be ongoing training and education opportunities about best interests decision making for those involved in adoption decision making and service provision.

¹⁵⁷ The *Adoption Act 2009* (Qld) ss 76(1) (g), (2), provides eligibility criteria requiring that anyone seeking to adopt does not have custody of a child under one year old or a child who has been in their custody for less than one year. This does not include children of whom the person is an approved carer. Section 161 requires the department to consider that it would ordinarily be in a child's best interests to be the youngest child in their adoptive family by at least two years at the time of the placement, and that no other children should join the adoptive family for at least one year after the placement. These considerations do not apply where siblings are placed together with the same family.

¹⁵⁸ Department of Communities, Queensland, *Future Adoption Laws for Queensland* (2008) 13.

¹⁵⁹ *Ibid.*

¹⁶⁰ Ingrid Höjer et al, *The Impact of Fostering on Foster Carers' Children: An International Literature Review* (Rees Centre, Research in Fostering and Education, University of Oxford, 2013) 15.

¹⁶¹ *Ibid.*

¹⁶² Submissions 29 (Connections UnitingCare), 36 (Child & Family Services Ballarat Inc.), 50 (Barnardos Australia).

¹⁶³ Submission 52 (Commission for Children and Young People).

Recommendation

- 23** The Adoption Act should provide principles which specify that in determining the best interests of the child the following matters should guide decisions and actions:
- a. any views expressed by the child, given due weight in accordance with the age and maturity of the child
 - b. protection and promotion of the child's rights
 - c. the likely effect of the decision or action on the life course of the child
 - d. any wishes expressed by either or both natural parent(s)
 - e. the preservation, as far as possible, of the child's identity, including their given name, language and cultural and religious ties
 - f. the preservation of the relationship of the child with their natural parents and siblings (if any) and significant other people (including relatives) that the decision maker considers to be relevant
 - g. that it would ordinarily be in a child's best interests to be placed with the same family as any sibling of the child who is also to be adopted or has previously been adopted
 - h. the suitability and capacity of any proposed adoptive parent to meet the child's needs, take on the responsibilities of parenthood and provide for the development of the child's identity, including contact with their family of origin and significant other people
 - i. the family composition of any proposed adoptive family, including age gaps between any children, and the effect it may have on the ability of the proposed adoptive parents to provide the necessary care to the adopted child or children
 - j. the alternatives to an adoption order, and the likely short-term and long-term effects on the child of changes in their circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.

Birth certificates of adopted people

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6. Birth certificates of adopted people

Introduction

- 6.1 Birth certificates are important documents.¹ As one submission stated:
- As well as a record of the child's origins, they are a legal document essential to a variety of legal transactions; from obtaining a passport or visa to other processes that require proof of identity.²
- 6.2 When a child is adopted, a new birth certificate is issued. It shows the child's date of birth, states the child's new name and identifies the people who adopted them as the child's parents. The name the child was given at birth and the parents to whom the child was born are not mentioned. The amended certificate makes it appear that the child was born to the people who adopted them.
- 6.3 Amended birth certificates have always been part of Victoria's adoption law.³ The system was established in 1928 to 'cover up ... the fact of an adoption'.⁴
- 6.4 Amended birth certificates do not represent the facts of an adopted person's birth or reflect the reality that adopted people 'have two sets of parents' and 'two sets of family backgrounds'.⁵ At the same time, the documents are consistent with the legal effect of adoption: the adoptive parents become the child's legal parents and the law treats the child 'as if the child had been born' to them.⁶
- 6.5 For many people affected by past closed and forced adoptions, the amended birth certificate symbolises the serious problems they see with adoption.⁷ Their birth certificates represent erasure of their past and fabrication of their birth; a re-writing of their identity;⁸ and dishonesty and injustice which must be corrected.⁹ The Commission was told 'adult adoptees have to live with [this] on a day to day basis'.¹⁰

1 Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report No 25 (2013) 2, 56–7; Paula Gerber et al, 'Does the Right to Birth Registration Include a Right to a Birth Certificate?' (2011) 29 *Netherlands Quarterly of Human Rights* 434, 435.

2 Submission 58 (Name withheld). See also Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report No 25 (2013) 2, 56–7; Paula Gerber and Melissa Castan, 'The Right to Universal Birth Registration in Australia' in Melissa Castan and Paula Gerber (eds), *Proof of Birth* (Future Leaders, 2015) 3–4, 11–12; Alannah Calabrò, 'Registering the Births of Indigenous Australians in New South Wales' in Melissa Castan and Paula Gerber (eds), *Proof of Birth* (Future Leaders, 2015) 21, 21; Paula Gerber and Phoebe Lindner, 'Modern Families: Should Children Be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victoria University Law and Justice Journal* 34, 35; Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *NYU Journal of Legislation and Public Policy* 225, 235.

3 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 73; *Adoption of Children Act 1928* (Vic) ss 17–18.

4 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 September 1928, 1868 (Mr Macfarlan); Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 1928, 680 (Mr Slater, Attorney General).

5 Adoption Legislation Review Committee, Family and Children's Services, Western Australia, *Adoption Legislative Review: Adoption Act (1994)*, Final Report (1997) 7.

6 *Adoption Act 1984* (Vic) s 53. Chapter 2 discusses the concerns people raised and the issues with this language in the legislation and recommends that it be amended.

7 See, eg, Submission 26 (Adoption Origins Victoria Inc.).

8 Submission 19 (Sharyn White).

9 Submissions 1 (Name withheld), 31 (Name withheld).

10 Submission 19 (Sharyn White).

- 6.6 The Commission was asked to make recommendations about ‘the way a child’s identity is reflected on [their] birth certificate’ to ‘better reflect community attitudes and contemporary law in relation to family’.¹¹ The issue was raised in over 70 per cent of submissions and discussed in over 60 per cent of consultations.
- 6.7 Most people said the law must change, to ensure birth certificates reflect ‘the truth’ of an adopted child’s identity. However, views differed on which ‘truth’ the birth certificate should reflect and, therefore, on how the child’s identity should be reflected. Two main suggestions were put forward. One was that adoption should never change a child’s birth certificate. The other was that ‘integrated’ birth certificates, which show details of a child’s birth and adoption, should be introduced. In 2012, the Senate Community Affairs References Committee report, *Inquiry into Commonwealth Contribution to Former Forced Adoption Policies and Practices*, recommended that:
- all jurisdictions adopt integrated birth certificates, that these be issued to eligible people upon request, and that they be legal proof of identity of equal status to other birth certificates.¹²
- 6.8 The Commission considered whether and how Victorian law can meet the desire in the community for change. It examined all suggestions and arguments raised in consultations and submissions.
- 6.9 The ‘best interests of the child’ was the guiding principle. Natural parents and adoptive parents’ interests were considered. The Commission reviewed laws in other states and territories and children’s rights under the United Nations *Convention on the Rights of the Child*, and considered the work of other reviews.¹³ It examined a fundamental question ‘What is a birth certificate for?’ Ensuring the recommendation was consistent with the legal effect of adoption and compatible with laws across Australia was a key consideration. It needed to be practical, given the many everyday uses birth certificates have,¹⁴ and to avoid security risks.
- 6.10 The Commission concluded that reform should occur, and that only one option is viable. It recommends that, subject to security and cost considerations, integrated birth certificates should be available to all children who are adopted, and all people who have been adopted, in Victoria. It sees no legal reason why integrated certificates should not have the same legal status as other birth certificates. However, there are practical matters which may affect whether it is feasible to use integrated birth certificates as valid identity documents. These matters could not be resolved in this review and should be examined by the Victorian Government. In the meantime, ‘commemorative’ integrated birth certificates should be made available.
- 6.11 The Commission acknowledges that not everyone will be happy with this recommendation. In particular, people affected by past forced adoptions who want their original birth certificate ‘restored’, will be disappointed. The Commission investigated this option but concluded that it is not viable. The Commission’s reasoning is set out in this chapter.

11 Terms of reference. The terms of reference are reproduced at the front of this report.

12 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) Recommendation 13.

13 The Review Committee, Parliament of South Australia, *Adoption Policy and Practice in South Australia*, Report (1986); Adoption Legislative Review Committee, Family and Children’s Services, Western Australia, *Final Report: A New Approach to Adoption* (1991); New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997).

14 See fn 2 above.

Current law and practice

- 6.12 Each state and territory issues birth certificates.¹⁵ In Victoria, they are issued by the Registry of Births, Deaths and Marriages (BDM). The main legislation relating to birth certificates is the *Births, Deaths and Marriages Registration Act 1996* (Vic) (BDMR Act).
- 6.13 The Registrar of BDM registers all births in Victoria.¹⁶ To register a child's birth, the parents submit a 'birth registration statement' which contains details, called 'particulars', about the birth.¹⁷ The Registrar enters these particulars in the BDM Register.¹⁸ The birth certificate is a document that certifies 'particulars in an entry' in the BDM Register.¹⁹ It shows:
- a person's current name, name at birth, sex, and date and place of birth
 - their parents' family names, occupations, ages and place of birth
 - information about the parents' relationship and any previous children of the relationship.
- 6.14 The document has legal status. It can be presented to the world as an official and correct record and admitted in court as evidence of the facts stated in the document.²⁰
- 6.15 Children who are adopted have two birth certificates. Their births are registered like everyone else's under the BDMR Act. A birth certificate certifying the particulars of the birth is issued, on application to BDM. This must be included in the application for the adoption order.²¹ When the adoption order is made, the *Adoption Act 1984* (Vic) requires steps to be taken which result in the replacement of the original birth certificate with an amended one.
- 6.16 The court sends a record of the adoption (a 'memorandum of an adoption order') to the Registrar of BDM.²² The particulars in this form parallel those included in the 'birth registration statement' submitted when a child is born.²³ The Registrar of BDM registers the court record and enters the particulars in the BDM Register, including:
- the child's date and place of birth
 - the child's name under the adoption order
 - the adoptive parents' given and family names, ages when the child was born and usual occupations
 - the date and place of the adoptive parents' marriage or registered relationship (if applicable)
 - the names of any children of the adoptive parents, and their ages when the adopted child was born.²⁴
- 6.17 This information parallels the information that is entered in the BDM Register when a child's birth is registered.²⁵ The new entry supersedes the original birth registration and becomes the current record of the child's birth. It provides the information that goes onto the child's new birth certificate, which certifies the particulars in the entry.²⁶ The new certificate looks no different from any other person's birth certificate. It reflects the child's new, post-adoption identity and is silent about the identity with which they were born.

¹⁵ It is a state, rather than federal, responsibility.

¹⁶ *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 3, 13, 14, 18, 19.

¹⁷ *Ibid* ss 14, 15, 18.

¹⁸ *Ibid* s 19; *Arc-Dekker v Registrar of Births, Deaths and Marriages (Review and Regulation)* [2016] VCAT 1529 (13 September 2016) [54].

¹⁹ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 46.

²⁰ *Ibid*; see also *Family Law Act 1975* (Cth) s 102.

²¹ *Supreme Court (Adoption) Rules 2015* (Vic) rr 13, 23.

²² *Adoption Act 1984* (Vic) s 70(1)(a).

²³ *Adoption Regulations 2008* (Vic) sch 21; *Births, Deaths and Marriages Registration Act 1996* (Vic) s 14; *Births, Deaths and Marriages Registration Regulations 2008* (Vic) reg 7.

²⁴ *Adoption Act 1984* (Vic) s 70(1)(b); *Adoption Regulations 2008* (Vic) reg 38(3).

²⁵ *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 14, 19; *Births, Deaths and Marriages Registration Regulations 2008* (Vic) reg 7.

²⁶ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 46.

- 6.18 Some adoptive mothers told the Commission about their reactions when they saw their children's new birth certificates. One was 'shocked' that it was 'backdated' and that she and her husband were listed as her son's parents.²⁷ Another mother 'found [the new birth certificate] quite unsettling':

It felt to me like it had erased his past, including all evidence of his parents, and had replaced them with a fabrication. It labelled me as his mother and specified that the 'age of the mother' was 38. I was 38 when he was born, but I was not 38 when I became his mother.²⁸

- 6.19 The new birth certificate replaces the original birth certificate, which is no longer legally valid and cannot be used as proof of identity. The original birth registration entry is marked with the word 'adopted'.²⁹ This closes the entry.³⁰ The Registrar must not 'issue an extract from, or copy of the entry' except where permitted by the Adoption Act or the court.³¹ An adopted person can obtain a copy of the original birth certificate when they turn 18.³²
- 6.20 Only the amended birth certificate can be used for identification purposes. The Commission heard from people adopted before 1984 whose original birth certificates were stamped 'CANCELLED'.³³ One person told the Commission he was 'dismayed' and 'offended' by 'the way in which [his] original birth certificate had been invalidated'.³⁴

Previous adoption reviews

- 6.21 Previous adoption reviews in Australia recommended the introduction of integrated birth certificates.
- 6.22 In 1986, a South Australian review recommended that 'Official documentation relating to the identities of children' should reflect both their birth and their adoption:³⁵
- a legal document which purports to contain a true and correct record of the circumstances of the birth of a child should indeed be true and correct.
- 6.23 A 1991 review in Western Australia recommended 'the use of one full birth certificate ... which records details of both birth and adoptive parents'.³⁶ In 1997, New South Wales Law Reform Commission stated 'it is unsatisfactory for a document to portray that a child was born to two people when this is in fact not true'³⁷ and recommended that adopted people have the option of an integrated birth certificate. It concluded this was 'the only practicable solution to an unsatisfactory system'.³⁸
- 6.24 Forms of integrated birth certificates are available in South Australia, Western Australia and New South Wales, based on these recommendations.³⁹
- 6.25 Further changes were enacted in South Australia in 2016, following a recommendation of a 2015 review that an adopted person's birth certificate 'reflect the "truest possible" account' of a child's birth history.⁴⁰ The new arrangements:

27 Consultation 33 (Confidential).

28 Submission 58 (Name withheld).

29 Adoption Act 1984 (Vic) s 74.

30 See *Arc-Dekker v Registrar of Births, Deaths and Marriages (Review and Regulation)* [2016] VCAT 1529 (13 September 2016) [96].

31 Adoption Act 1984 (Vic) ss 74(3).

32 Ibid s 92. This is discussed in Chapter 16.

33 Submission 1 (Name withheld); Consultation 31 (SS). See also Penny Mackieson, *Adoption Deception: A Personal and Professional Journey* (Spinifex Press, 2015) 138.

34 Submission 1 (Name withheld).

35 The Review Committee, Parliament of South Australia, *Adoption Policy and Practice in South Australia*, Report (1986) 61.

36 Adoption Legislative Review Committee, Family and Children's Services, Western Australia, *Final Report: A New Approach to Adoption* (1991) 6, 84 Recommendation 48.

37 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 282 Recommendation 63.

38 Ibid 282.

39 Adoption Act 1988 (SA) s 41; Adoption Regulations 2004 (SA) reg 21; Adoption Act 2000 (NSW) s 133C; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 49(4); Department for Child Protection, Western Australia, *Obtaining Adoption Information* (2010) <<http://www.dcp.wa.gov.au/FOSTERINGANDADOPTION/Pages/PastAdoptionInfo.aspx>>.

40 Lorna Hallahan, *Adoption Act 1988 (SA) Review* (Flinders University, 2015) 15, 66–7.

will enable the Registrar of Births, Deaths and Marriages to register an adopted child's birth to reflect the 'truest possible' account of their biological parentage and at the same time ensure any certificates produced make clear who is the child's legal parent.⁴¹

6.26 Integrated birth certificates will be available to people adopted in the past in South Australia. In the Second Reading Speech to Parliament, the Minister noted 'this is in line with' the Senate Committee recommendation.⁴²

6.27 The Victorian Government responded to the Senate Committee's recommendation in 2012 with 'support for the development of an integrated birth certificate in conjunction with national reforms relating to documentation and provisions of birth and adoption records'.⁴³ Some people told the Commission they were disappointed the recommendation has not been implemented. One person asked the Commission to 'address this injustice' and keep 'the politicians to their pledge to adoptees'.⁴⁴ Thomas Graham urged the Commission:

to investigate further and find a solution where integrated birth certificate[s] serve as an official form of identification AND a record and acknowledgment of [a] person's biological heritage so that they don't have to live the lie that they are born to someone else when this is not the case. Living with a fractured identity is a burden adopted people shouldn't have to bear, as seldom, if ever, have they consented to this name or identity change.⁴⁵

Responses

6.28 While a range of people and groups commented on birth certificates, the views that matter most are those of people who were adopted.⁴⁶

6.29 Sixteen adopted people and three groups representing adopted people spoke about birth certificates.⁴⁷ All participants were born and adopted before 1984. Some were affected by closed and forced adoptions.

6.30 One person submitted the current system must continue, due to legal reasons relating to inheritance.⁴⁸ Another person said he was comfortable with his birth certificate:

It doesn't change me. I am who I am. My family is my family.⁴⁹

6.31 Everybody else wanted change. A strong theme in their views was that birth certificates must be 'truthful'.⁵⁰

A true and honest birth certificate should be available to everyone.⁵¹

Truth is core to adoptees.⁵²

Birth certificates need to reflect the honesty of what adoption is. Birth certificates should be honest.⁵³

The adoptive parents were not at the birth ... The birth certificate should be accurate.⁵⁴

A birth certificate should be just that.⁵⁵

41 South Australia, *Parliamentary Debates*, House of Assembly, 21 September 2016, 6882 (John Rau, Minister for Child Protection Reform).
42 Ibid.

43 Ted Baillieu and Mary Wooldridge, 'Parliament Apologises for Past Adoption Practices' (Media Release, 25 October 2012).

44 Submission 2 (Ellena Dorothy Helen Stewart Biggs).

45 Submission 43 (Thomas Graham). Also see Penny Mackieson, *Adoption Deception: A Personal and Professional Journey* (Spinifex Press, 2015) 135.

46 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 281; Submissions 32 (Name withheld), 39 (ARMS (Vic)), 41 (Adopt Change), 58 (Name withheld); Consultation 35 (Confidential).

47 Some submissions may not have identified that they were made by a person who was adopted.

48 Submission 20 (Name withheld).

49 Consultation 11 (Trevor Smith).

50 Submission 21 (Name withheld); Consultations 12 (Adoption Origins Victoria Inc.), 25 (VANISH).

51 Submission 10 (Confidential).

52 Consultation 12 (Adoption Origins Victoria Inc.).

53 Consultation 31 (SS).

54 Consultation 25 (VANISH).

55 Submission 19 (Sharyn White).

- 6.32 Participants who were not adopted expressed similar views.⁵⁶ An adoptive mother said:
It is important that there be a document which reflects the truth of a child's birth and therefore identifies his/her birth parents ...⁵⁷
- 6.33 Among the people who were adopted, there were two views about how the truth should be reflected on the birth certificate. Most supported integrated birth certificates.⁵⁸ Others argued that a child's birth certificate should never be altered; the original should be used throughout the person's life.⁵⁹ Some proposed that these options should apply differently to children adopted in future and to people who have been adopted.
- 6.34 VANISH submitted that integrated birth certificates should be available to people affected by past adoptions and that 'original unaltered birth certificates' should be maintained in all future adoptions.⁶⁰ It said there is 'substantial agreement in the adoption community' about the second point.
- 6.35 A person adopted in the 1960s proposed that integrated birth certificates should be available to people adopted in the past and mandatory for future adoptions.⁶¹ Another person adopted in the 1960s told the Commission integrated birth certificates are 'fundamental to restoring the rights and dignity of people who have been adopted'.⁶²
- 6.36 Other people affected by past adoptions wanted their original birth certificate restored as valid identity documents, because they do not identify with their adoptions.⁶³ One submission explained:
I identify as the person I was when I was born, with the ancestry I had when I was born. As an adopted person, I am prevented legally from using my true birth certificate because of an arrangement for my care as a minor which I did not give consent to as an adult.⁶⁴
- 6.37 A submission by Adoption Origins Victoria (AOV) included statements from 37 people affected by past adoptions who want to use their original birth certificate. It argued for use of original birth certificates by all children adopted in future, as well as people adopted in the past.⁶⁵ AOV submitted that adoptive parents 'have no right to be on the adopted child's birth certificate'.⁶⁶ Instead, they should use a certificate of adoption, issued by the court when the adoption order is made,⁶⁷ as proof of their parental responsibility.⁶⁸
- 6.38 The Australian Adoptee Rights Action Group, ARMS (Vic), Berry Street and Dr Briony Horsfall made similar suggestions.⁶⁹ Two mothers whose children were adopted and one mother who adopted a child said birth certificates should never be amended.⁷⁰
- 6.39 AOV did not oppose integrated birth certificates being available to people affected by past adoptions.⁷¹ However, it stated that they should not have legal status as a primary form of identification.⁷² AOV opposed integrated birth certificates for future adoptions as they would not 'resolve the issue of true identity for future adoptees'.⁷³

56 Submission 39 (ARMS (Vic)); Consultations 2 (Grandparents Victoria), 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

57 Submission 30 (Name withheld).

58 Submissions 1 (Name withheld), 2 (Ellena Dorothy Helen Stewart Biggs), 5 (Confidential), 10 (Confidential), 16 (Name withheld), 23 (Fae Cuff), 43 (Thomas Graham); Consultations 7 (Bobby Richards), 10 (Confidential), 31 (SS).

59 Submissions 3 (Leilani Hannah), 13 (Dr Catherine Lynch JD), 14 (Samuel Morley), 19 (Sharyn White), 26 (Adoption Origins Victoria Inc.), 31 (Name withheld).

60 Submission 34 (VANISH).

61 Consultation 31 (SS).

62 Submission 1 (Name withheld).

63 Submission 31 (Name withheld).

64 Submission 19 (Sharyn White).

65 Submission 26 (Adoption Origins Victoria Inc.).

66 Ibid.

67 *Adoption Act 1984* (Vic) s 52.

68 Submission 26 (Adoption Origins Victoria Inc.).

69 Submissions 9 (Australian Adoptee Rights Action Group), 45 (Dr Briony Horsfall), 60 (Berry Street); Consultation 4 (ARMS (Vic)).

70 Submissions 33a (Name withheld), 59 (Karleen Gribble BRurSc PhD); Consultation 35 (Confidential).

71 Submission 26 (Adoption Origins Victoria Inc.); Consultation 12 (Adoption Origins Victoria Inc.).

72 Consultation 12 (Adoption Origins Victoria Inc.).

73 Submission 26 (Adoption Origins Victoria Inc.).

- 6.40 Identity was a central theme in arguments for both original and integrated certificates.⁷⁴ Penny Mackieson was adopted in Victoria in 1963 and argues that integrated birth certificates should be implemented. She writes in her book *Adoption Deception*:
- I question the point of having an identity document that does not accurately reflect one's identity. I feel no shame for having been adopted, so why should I have to continue the charade of invisibility regarding my family origins?⁷⁵
- 6.41 A number of organisations expressed support for integrated birth certificates.⁷⁶ Some adoptive parents stated natural parents should be recognised on birth certificates, while others were not opposed to it, to reflect the reality of the child's situation.⁷⁷ Grandparents Victoria supported both options proposed by adopted people, as either would ensure a child would know their biological origins.⁷⁸
- 6.42 A common theme in submissions and consultations was that adopted people should not be required to reveal they were adopted whenever they have to present their birth certificate.⁷⁹ Many people said disclosure of this private information is an individual choice.⁸⁰ One person adopted in the 1970s told the Commission:
- It's something everybody close to me knows but it's not as if I'd go into a job interview and say, "Hi ... I'm adopted"... It's not anybody else's business.⁸¹
- 6.43 Adopt Change reported feedback from its community that adopted people's birth certificates should look no different from other people's birth certificates, 'to avoid unwanted disclosure'.⁸² Others expressed this view.⁸³ An adoptive mother submitted that all birth certificates should be the same, so a person is not 'labelled' as adopted.⁸⁴ A youth leader in the Project Bounce program made this point.⁸⁵ Barnardos Australia told the Commission that many children it has placed for adoption 'are comfortable with the existing situation' and want 'to be "normal" i.e. not have officials have information on their background unnecessarily'.⁸⁶
- 6.44 Some participants thought the current system should continue.⁸⁷ An adoptive mother with three children conveyed the children's views that they do not want their families of origin listed on their birth certificates, because this would single them out as 'different'.⁸⁸ She reported that one of her children considered that how they joined their family is not anyone else's business. Another of her children thought a child should be able to have both families recorded on the birth certificate if that is what they wanted, but it should not be mandatory.
- 6.45 Adoption Origins Victoria and ARMS (Vic) objected to integrated birth certificates because they would single out adopted people.⁸⁹ An adopted person submitted that integrated certificates should be optional, because, while they 'would be of great psychological benefit [for some] and allow them to integrate their identities', other people would not want to share their personal information:

74 Submissions 39 (ARMS (Vic)), 41 (Adopt Change), 60 (Berry Street); Consultation 26 (Roundtable with groups and individuals representing children's interests).

75 Penny Mackieson, *Adoption Deception: A Personal and Professional Journey* (Spinifex Press, 2015) 136.

76 Submissions 35 (Ozchild), 37 (Permanent Care and Adoptive Families), 49 (Office of the Public Advocate), 51 (Law Institute of Victoria), 54 (Australian Christian Lobby), 56 (Centre for Excellence in Child and Family Welfare Inc.), 41 (Adopt Change); Consultation 23 (Wathaurong Aboriginal Co-operative).

77 Submissions 30 (Name withheld), 32 (Name withheld); Consultations 18 (Fiona de Vries), 19 (Chrissie Davies), 33 (Confidential).

78 Submission 11a (Grandparents Victoria Inc./Kinship Carers Victoria).

79 See, eg, Submissions 30 (Name withheld), 32 (Name withheld), 34 (VANISH).

80 See, eg, Submissions 22 (Confidential), 61 (Name withheld); Consultations 11 (Trevor Smith), 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

81 Consultation 11 (Trevor Smith).

82 Submission 41 (Adopt Change).

83 Submissions 37 (Permanent Care and Adoptive Families), 44 (Victorian Gay & Lesbian Rights Lobby).

84 Submission 22 (Confidential).

85 Consultation 1 (Bounce Youth Leaders).

86 Submission 50 (Barnardos Australia).

87 Two adoptive parents considered the current system should continue.

88 Consultation 16 (Professor Meredith Temple-Smith).

89 Submissions 26 (Adoption Origins Victoria Inc.), 39 (ARMS (Vic)).

Every time you used your birth certificate you would need to explain why there are two sets of names [and] which one relates to your current identity ...⁹⁰

- 6.46 Others submitted that a person might not want to produce all of the information on an integrated birth certificate every time 'identification is required'.⁹¹ VANISH proposed that a separate 'legal identity document that provides an extract of [a person's] identifying details' should be available for 'routine identification purposes'.⁹²
- 6.47 Other people proposed that adopted people have separate documents for public purposes and personal use.⁹³ Some proposed a two-sided document, with details about the birth on one side and the adoption on the other, would allow a person to control disclosure of information and 'their own identity'.⁹⁴
- 6.48 The Victorian Gay and Lesbian Rights Lobby (VGLRL) submitted that the birth certificates issued to donor-conceived people provide a model which protects people's privacy and ensures they know their biological origins.⁹⁵ Adopt Change also supported this option.
- 6.49 These birth certificates are indistinguishable from other birth certificates but include an 'addendum' (extra page) stating that 'further information' about the person's birth is available.⁹⁶ This is intended to encourage parents to be open with their children about the child's origins.⁹⁷ The Registrar must not issue the addendum to any person other than the person conceived by a donor treatment procedure named in the entry.⁹⁸
- 6.50 Some people submitted that adopted people should have options regarding what is recorded on their birth certificates. Permanent Care and Adoptive Families proposed that individuals could choose between an integrated birth certificate or amended birth certificate, with the option of a separate document showing 'family of origin details'.⁹⁹ Berry Street submitted original birth certificates should be maintained but proposed adopted people aged 12 years or older could have the choice of an integrated birth certificate.¹⁰⁰ Barnardos observed that a person's 'feelings about [their] birth certificates may change over the course of their life' and proposed that 'older age children' could have 'a range of options' regarding what is recorded on their birth certificates.
- 6.51 Many adoptive parents said adopted people should be able to choose how their identity is reflected on their birth certificate and whether they disclose they were adopted.¹⁰¹ One mother stated it is 'difficult to create a blanket rule' because the 'differing views' about birth certificates 'are all really valid points'.¹⁰² Another mother submitted:

I believe that the power to decide what information is on an adopted person's birth certificate should reside solely with the adopted person and their right to privacy should be respected.

... While he is a treasured part of our family and he is my son and I am his mother, he has another mother who is as important, and he is another mother's son. It bothers me that this is not reflected anywhere on his birth certificate. At the same time, this is his

90 Submission 7 (Name withheld).
 91 Submission 34 (VANISH); Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).
 92 Submission 34 (VANISH). BDM no longer issues extracts. They are no longer sufficient for identification purposes: Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report No 25 (2013) 52. Abridged certificates 'have become increasingly inadequate for most of the purposes for which they were previously used': Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report No 25 (2013) 69.
 93 Submission 30 (Name withheld); Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).
 94 Submissions 30 (Name withheld), 31 (Name withheld); Consultation 6 (Roundtable with Permanent Care and Adoptive Families).
 95 Submission 44 (Victorian Gay & Lesbian Rights Lobby).
 96 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B.
 97 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 2008, 4013 (Robert Hudson), 4014–15 (Robert Clark), 4015–16 (Christine Campbell), 4016–17 (Telmo Languiller), 4017–18 (Denis Napthine), 4018 (Robert Hudson), 4019 (Robert Clark); 4 December 2008, 5050 (Robert Clark), 5053 (Robert Hudson).
 98 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B.
 99 Submission 37 (Permanent Care and Adoptive Families).
 100 Submission 60 (Berry Street).
 101 Submissions 30 (Name withheld), 32 (Name withheld), 37 (Permanent Care and Adoptive Families), 58 (Name withheld), 61 (Name withheld); Consultation 33 (Confidential).
 102 Consultation 33 (Confidential).

story, not mine, and I don't want his private story becoming the business of any clerk who needs to see his birth certificate.¹⁰³

Options: analysis

6.52 Thirteen different options were proposed to the Commission:

- 1) A child's birth certificate should never change on adoption. People who are adopted should continue to use their original birth certificate and their adoptive parents should use an adoption or parenting certificate to establish their legal parentage.
- 2) People affected by past forced adoption practices should be able to have their original birth certificate restored as a valid identity document without having to go to court to have their adoption discharged.
- 3) Integrated birth certificates with equal legal status to regular birth certificates should be available to people affected by past forced adoption practices.
- 4) Integrated birth certificates with non-legal status should be available to people affected by past forced adoption practices.
- 5) Integrated birth certificates with equal legal status to regular birth certificates should be issued in all future adoptions.
- 6) Integrated birth certificates with equal legal status to regular birth certificates should be optional for all people who have been adopted and are adopted in future.
- 7) Integrated birth certificates with non-legal status should be available to all people who have been adopted and are adopted in future.
- 8) Adopted people could have an integrated birth certificate for personal use and an abridged document for public uses.
- 9) Adopted people could have a two-sided document, showing details of their birth and adoption on different sides.
- 10) The system used for donor-conceived people should be used. Amended birth certificates should be used with an addendum alerting the person that there is further information about their birth.
- 11) Adopted people should be able to choose between an integrated birth certificate and an amended birth certificate with an optional separate document showing details of the family of origin.
- 12) Original birth certificates should be maintained in all future adoptions but children aged 12 years or older could choose to have an integrated birth certificate.
- 13) There should be no change to the current system of issuing amended birth certificates.

6.53 The issue came down to whose names should appear on a birth certificate:

- only the parents to whom the child was born
- only the parents who adopted the child
- both groups of parents.

6.54 The relevant considerations were:

- the best interests of the child
- the purpose of a birth certificate
- practical issues raised with the Commission.

6.55 Each consideration is discussed below.

The best interests of the child

- 6.56 When the *Adoption of Children Act 1928* (Vic) introduced amended birth certificates, adoptive parents' interests were dominant. It was thought that children should be protected from the 'unfortunate stigma of illegitimacy'.¹⁰⁴ The 1928 Act enabled a 'fresh entry' of a child's birth to be made and stated 'the adopters shall be designated father and mother respectively',¹⁰⁵ and made 'evidence of adoption free from disclosure'.¹⁰⁶
- 6.57 Reviews in recent decades recommended changes to birth certificates to reflect modern understanding of adoption and children's best interests.
- 6.58 The 1986 South Australian review recommended an integrated certificate¹⁰⁷ based on:
the principles of a modern adoption service, which place the child's interests as paramount, and which focus on openness and honesty in adoption practices.¹⁰⁸
- 6.59 The review found 'the misleading practice of issuing a new birth certificate' did not serve 'the needs of the child'.¹⁰⁹
- 6.60 The 1991 Western Australian review recommended that adopted people have one integrated certificate to maintain a child's connection with their family of origin and based on the principle that children should know the truth about their origins.¹¹⁰
- 6.61 A 2015 South Australian review reported that people have experienced identity confusion, anguish and 'pain' due to their birth certificates.¹¹¹ People affected by past forced and closed adoptions told the Senate Committee that 'the truthful recording of a birth was fundamental to a person's identity'.¹¹² Penny Mackieson—who knew she was adopted and had a happy upbringing—recently wrote that the identity 'fragmentation' that adopted people experience:
is a lifelong challenge, including a source of re-traumatisation every time they are required to produce their state-falsified birth certificate as proof of identity.¹¹³

The best interests of the child: responses

- 6.62 The Commission was told that in the past, amended birth certificates have enabled the truth about adopted children's origins and identity to be hidden from them.¹¹⁴ ARMS (Vic) said there should be no secrecy and 'it is important to eliminate the element of shame'.¹¹⁵ VANISH and AOV submitted that amended birth certificates have no place in open adoption.¹¹⁶
- 6.63 A participant at a roundtable with agencies representing culturally and linguistically diverse communities noted:
Secrecy is a problem for a child when they have no connections back to their home or country of origin—changing a person's birth certificate and erasing their past causes real belonging and identity issues for some children. This can have long-term issues ...¹¹⁷

104 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 1928, 673 (Mr Slater, Attorney General). See also The Review Committee, Parliament of South Australia, *Adoption Policy and Practice in South Australia*, Report (1986) 61.

105 *Adoption of Children Act 1928* (Vic) s 18.

106 Victoria, *Parliamentary Debates*, Legislative Assembly, 26 September 1928, 1868 (Mr Slater, Attorney General).

107 The review recommended that the birth certificate remain 'a true record of the birth of the child' and include the names of the adoptive parents: The Review Committee, Parliament of South Australia, *Adoption Policy and Practice in South Australia*, Report (1986) 62 Recommendation 56.

108 Ibid 62.

109 Ibid 61.

110 Adoption Legislative Review Committee, Family and Children's Services, Western Australia, *Final Report: A New Approach to Adoption* (1991) 79–81, 84.

111 Lorna Hallahan, *Adoption Act 1988 (SA) Review* (Flinders University, 2015) 15, 66.

112 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 250.

113 Penny Mackieson, 'Birth Certificates: The Elephant in the Room in Gender and Adoption Debates', *New Matilda* (online), 20 October 2016 <<https://newmatilda.com/2016/10/20/birth-certificates-the-elephant-in-the-room-in-gender-and-adoption-debates/>>. See also Penny Mackieson, *Adoption Deception: A Personal and Professional Journey* (Spinifex Press, 2015).

114 Consultations 25 (VANISH), 31 (SS).

115 Consultation 4 (ARMS (Vic)).

116 Submissions 26 (Adoption Origins Victoria Inc.), 34 (VANISH).

117 Consultation 15 (Roundtable with culturally and linguistically diverse representative agencies).

- 6.64 Some submissions referred to children's rights to know their parents and to preservation of their identity under articles 7 and 8 of the United Nations *Convention on the Rights of the Child* (CRC).¹¹⁸ Article 7 states that every child 'shall be registered immediately after birth' and has 'as far as possible, the right to know ... his or her parents'.¹¹⁹ Article 8 states that every child has the right 'to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference'.¹²⁰
- 6.65 AOV submitted that the Adoption Act breaches articles 7 and 8.¹²¹ Dr Briony Horsfall submitted that original birth certificates 'should be maintained' as this 'would be consistent with' articles 7 and 8 and 'the right to universal birth registration in Australia'.¹²²
- 6.66 Grandparents Victoria saw birth certificates as 'safeguards' to secure children's entitlement 'to the truth about their birth' and to 'protect a child's identity'.¹²³ Others said birth certificates should provide knowledge about, and official acknowledgement of, children's origins.¹²⁴ Some youth leaders in the Project Bounce program thought it was important that natural parents are named on birth certificates because it 'makes it easier to locate and contact them' and omitting the information can cause 'loss of identity'.¹²⁵
- 6.67 Many regarded birth certificates as integral to a person's identity.¹²⁶ AOV submitted that amended birth certificates perpetrate 'a profound denial of a child's identity'.¹²⁷ It stated integrated birth certificates do 'not go far enough to respect the adoptee's right to his or her true identity'.¹²⁸ Berry Street's general view was that a 'child's birth certificate is their identity document' and 'should not be altered'.¹²⁹
- 6.68 Berry Street recognised that adoptive parents need 'legal documentation that makes clear that they have full parental responsibility for a child'.¹³⁰ It submitted:
- Permanent carers are provided with specific documentation to fulfil this need without the amendment of the birth certificate of the child or children in their care. Berry Street suggests that adoptive parents be provided with a similar form of documentation.¹³¹
- 6.69 Children's birth certificates do not change when permanent care orders are made under the *Children, Youth and Families Act 2005* (Vic) (the CYF Act).¹³² The natural parents remain on the birth certificate, and remain the child's parents, but the permanent care parents have full parental responsibility 'to the exclusion of' every other person, including the child's parents.¹³³ Permanent care parents must use the permanent care order to demonstrate their legal responsibility for the child. As Dan Barron, a permanent care parent of two children, explained:
- We have to show [the permanent care order] in all our dealings with government departments etc to prove our link to our child.¹³⁴

118 Submissions 35 (OzChild), 56 (Centre for Excellence in Child and Family Welfare Inc.).
119 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7.
120 *Ibid* art 8(1).
121 Submission 26 (Adoption Origins Victoria Inc). Penny Mackieson made a similar argument in Penny Mackieson, 'Birth Certificates: The Elephant in the Room in Gender and Adoption Debates', *New Matilda* (online) 20 October 2016 <<https://newmatilda.com/2016/10/20/birth-certificates-the-elephant-in-the-room-in-gender-and-adoption-debates/>>.
122 Submission 45 (Dr Briony Horsfall).
123 Consultation 2 (Grandparents Victoria). See also Submission 26 (Adoption Origins Victoria Inc).
124 Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).
125 Consultation 1 (Bounce Youth Leaders).
126 See also Penny Mackieson, *Adoption Deception: A Personal and Professional Journey* (Spinifex Press, 2015) 139.
127 Submission 26 (Adoption Origins Victoria Inc.).
128 *Ibid*.
129 Submission 60 (Berry Street).
130 *Ibid*.
131 *Ibid*.
132 Permanent care orders do not have the same legal effect as adoption orders. They do not sever the legal relationship between a child and their parents.
133 *Children, Youth and Families Act 2005* (Vic) s 321(1)(a). Parental responsibility encompasses 'all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children': s 3 (definition of 'parental responsibility'). A permanent care parent does not have parental status and is not entitled to be named on a child's birth certificate.
134 Submission 18 (Dan Barron).

- 6.70 Mr Barron informed the Commission that confusion about who has legal responsibility for his two children arises because he and his wife are not named on their children's birth certificates:

I would hate for adoptive parents to be placed in the position we find ourselves in as permanent care parents, where we find, especially when dealing with Federal departments, that there is misunderstanding as to who has the legal authority to sign which form, or who is liable for which payment, or who is eligible for which benefit.

- 6.71 Mr Barron explained that obtaining a passport for the children is 'highly problematic' and 'school will only complete all official documentation in whatever name is on the birth certificate'. He said the difficulties he and his wife encounter are common among permanent care parents and work against his children's best interests. He submitted that 'a more honest birth certificate for adopted people is clearly warranted' but this should not create confusion about 'who is the legal parent':

In my opinion what is in the best interests of the child is that whoever is looking after that child on a permanent basis, whether they be adoptive or permanent care parents, should be recognised as legal parents, in order that they can provide the best possible childhood for them.

This is not to deny birth family or biological heritage for one minute. My name is not on my sons' birth certificate, and this is not a problem in itself for him. What is a problem for us both, is that the document that does link me to him (the PCO) does not recognise me as his legal parent, Australia-wide.¹³⁵

- 6.72 While the Commission's review did not include the issues permanent care families face, this information was relevant.

The best interests of the child: Commission's conclusions

- 6.73 The Commission's assessment of children's best interests supports introduction of optional integrated birth certificates and retention of amended birth certificates.
- 6.74 Adopted people's birth certificates should be consistent with modern, open adoption to the extent legally and practically possible. Naming natural parents on birth certificates would support children's rights to know their origins,¹³⁶ is likely to encourage openness within the adoptive family and may encourage ongoing relationships with natural parents.¹³⁷ The New South Wales Law Reform Commission noted in 1997 that the information on the birth certificates of adopted people 'has become a central issue in promoting openness in adoption'.¹³⁸
- 6.75 Allowing children to have their identities as adopted people and the reality of their family relationships reflected on their birth certificates is in their best interests.¹³⁹ However, this should not be forced on people.
- 6.76 While some adopted people do and will want a birth certificate which expresses the truth of their birth and adoption, others will not want to disclose they were adopted when

¹³⁵ Ibid.

¹³⁶ Article 7 of the United Nations Convention on the Rights of the Child states that every child has a right to know his or her parents: *Convention on the Rights of the Child* 1990, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1). Children's rights to know their origins are reflected in *Adoption Act 2000* (NSW) s 7(c), *Adoption Act 1993* (ACT) s 4(b)(iii), the *Family Law Act 1975* (Cth) s 60B(2)(a) and *Assisted Reproductive Treatment Act 2008* (Vic) s 5(c). See also J E Doek, 'Article 8: The Right to Preservation of Identity, and Article 9: The Right Not to Be Separated from His or Her Parents' in A Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 11–12. The Commission does not suggest that integrated birth certificates are necessary to give effect to children's rights to know their origins. This can be achieved in other ways, such as openness with children about the adoption, open adoption arrangements and access to the child's original birth certificate (discussed in Chapter 16).

¹³⁷ See Chapter 16.

¹³⁸ New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Report No 81 (1997) 278.

¹³⁹ The Commission's 2013 report on birth registration and birth certificates noted 'the critical role a birth certificate plays in helping form a child's personal identity': Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report No 25 (2013) 65. See also Paula Gerber and Phoebe Lindner, 'Modern Families: Should Children Be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victoria University Law and Justice Journal* 34, 37, 46–7; Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *NYU Journal of Legislation and Public Policy* 225, 236–7, 245, 274.

using their birth certificate for everyday purposes. Some people would prefer to have a birth certificate which looks no different from anyone else's. This option should remain available. The 1991 Western Australian review recognised this and recommended that:

a certified copy of the Registration of Birth which does not include reference to birth parents or adoptive status, be available to the adoptee and/or adoptive parents on request for use as required.¹⁴⁰

- 6.77 Being adopted is nothing to feel ashamed of or keep secret. At the same time, adoption is a private matter. People generally should be entitled to disclose their private information when and how they choose.¹⁴¹ Allowing a child to decide if, when and how they disclose they were adopted is in their best interests. Requiring a child to disclose this personal information every time they present their birth certificate is not in their best interests.
- 6.78 This means integrated birth certificates should not be mandatory. Maintaining original birth certificates and requiring adoptive parents to use an adoption or parenting certificate or adoption order to establish their parental responsibility, would immediately disclose that the child was adopted. Children's ability to control their private information would be taken away.
- 6.79 It must also be clear who a child's legal parents are.¹⁴² Ensuring legal parents—and therefore adoptive parents—are clearly recognised as such is in children's best interests.¹⁴³
- 6.80 Confusion about parents' legal status is not in children's best interests. It is likely that adoptive parents would face similar problems to permanent care parents if they were not named on their children's birth certificates. Making adoptive parents' role difficult would ultimately disadvantage their children.¹⁴⁴ This would be inconsistent with article 2 of the CRC which states children should not be discriminated against based on their parents' 'status'.¹⁴⁵
- 6.81 Articles 7 and 8 provide limited guidance about how a child's identity should be reflected on their birth certificate.¹⁴⁶ They impose obligations on governments to:
 - reflect 'the true nature of a child's family relations' in birth registrations¹⁴⁷
 - provide 'children with access to information about their biological parents'¹⁴⁸
 - create and preserve records 'establishing a child's identity', including 'information about the identity of a child's parents—gestational, genetic and social'.¹⁴⁹

140 Adoption Legislative Review Committee, Family and Children's Services, Western Australia, *Final Report: A New Approach to Adoption* (1991) 81 Recommendation 48.

141 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 31.

142 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 120, 145–6; Olivia Rundle and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No One at All' (2012) 26(2) *Australian Journal of Family Law* 116. See discussion below starting at [6.97].

143 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, 2004) 30–1; Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 120, 143. See also Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *NYU Journal of Legislation and Public Policy* 225, 241.

144 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, 2004) 30–1; Victoria, *Parliamentary Debates*, Legislative Assembly, 10 September 2008, 3455 (Rob Hulls, Attorney-General).

145 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2. See generally, Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *NYU Journal of Legislation and Public Policy* 225, 250–1.

146 As Paula Gerber and Phoebe Lindner state, 'international law is silent as to who should be registered on a child's birth certificate as the parents of a child': Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *NYU Journal of Legislation and Public Policy* 225, 244.

147 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, 2004) 31. See also John Tobin, 'Recognising Same-Sex Parents: Bringing Legitimacy to the Law' (2008) 33(1) *Alternative Law Journal* 34, 38.

148 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, 2004) 37. See also Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 105–6; Ineta Ziemele, 'Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents' in A Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2007) 26–27.

149 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, 2004) 32, 34, 38. See also John Tobin, 'Recognising Same-Sex Parents: Bringing Legitimacy to the Law' (2008) 33(1) *Alternative Law Journal* 34, 38; Jaap E Doek, 'Article 8: The Right to Preservation of Identity, and Article 9: The Right Not to Be Separated from His or Her Parents' in A Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006) 8–9.

- 6.82 In a general sense, the right to birth registration in article 7 supports integrated birth certificates:

The effective enjoyment of a child's right to birth registration requires that the law recognise and reflect the actual nature of a child's family environment and include information about the identity of those persons who have accepted parental responsibility for the child.¹⁵⁰

- 6.83 The birth certificates of donor-conceived people, which include an extra page stating further information is available, do not provide a suitable option. While the extra page is intended to encourage openness about children's origins, and people's privacy is respected, a person's identity is not reflected on the birth certificate any differently. This model does not satisfy the needs of adopted people who want the reality of their identity reflected on their birth certificates.

The purpose of a birth certificate

- 6.84 The purpose of a birth certificate was a fundamental question in the review. Views differ.¹⁵¹ Penny Mackieson recently noted:

Birth certificates are used for a number of purposes and there appears to be a lack of common agreement, also of satisfaction, in relation to this.¹⁵²

- 6.85 The 2015 review of adoption law in South Australia described birth certificates as 'foundational' documents establishing 'a person's biological and familial beginnings'.¹⁵³

- 6.86 A recent article in the *Victoria University Law and Justice Journal* observed that birth certificates 'benefit the individual, both practically and psychologically'.¹⁵⁴ As well as providing proof of identity, birth certificates may 'shape [a] person's sense of identity'.¹⁵⁵ By providing official recognition of a person's family, birth certificates may affect a person's perception of how they and their family 'are viewed by the government' and accepted by the community.¹⁵⁶

- 6.87 In this Commission's 2007 report on Assisted Reproductive Technology (ART) and adoption, the Commission acknowledged that birth certificates 'have symbolic value for many people' but considered that this 'is not their primary purpose'.¹⁵⁷ It stated birth certificates are primarily 'documents with legal consequences'.¹⁵⁸ As discussed above, a birth certificate is admissible in legal proceedings as evidence of the facts recorded in it.¹⁵⁹ Under the *Status of Children Act 1974* (Vic), birth certificates issued in Victoria provide 'prima facie' proof that the people named as a child's parents in the certificate are the child's parents.¹⁶⁰ Similar laws exist across Australia.¹⁶¹

150 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, 2004) 30.

151 Family Law Council, Commonwealth of Australia, *Report on Parentage and the Family Law Act* (2013) 127.

152 Penny Mackieson, 'Birth Certificates: The Elephant in the Room in Gender and Adoption Debates' *New Matilda* (online) (20 October 2016) <<https://newmatilda.com/2016/10/20/birth-certificates-the-elephant-in-the-room-in-gender-and-adoption-debates/>>. See also Olivia Rundle and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No One at All' (2012) 26(2) *Australian Journal of Family Law* 116; Submission 34 (VANISH).

153 Lorna Hallahan, *Adoption Act 1988 (SA) Review* (Flinders University, 2015).

154 Paula Gerber and Phoebe Lindner, 'Modern Families: Should Children be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victoria University Law and Justice Journal* 34, 35.

155 Ibid 35. See also Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *NYU Journal of Legislation and Public Policy* 225, 228–9, 235–6.

156 Paula Gerber and Phoebe Lindner, 'Modern Families: Should Children be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victoria University Law and Justice Journal* 34, 36.

157 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 145. See also 143.

158 Ibid.

159 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 46; *Family Law Act 1975* (Cth) s 102.

160 *Status of Children Act 1974* (Vic) s 8(1).

161 *Parentage Act 2004* (ACT) s 9; *Status of Children Act 1996* (NSW) s 11; *Status of Children Act* (NT) s 9; *Status of Children Act 1978* (Qld) s 25; *Status of Children Act 1974* (Tas) s 8A; *Family Law Act 1975* (Cth) s 69R.

- 6.88 The Commission concluded sperm donors should not be included on birth certificates due to birth certificates' legal functions:

Only those people who are recognised as the legal parents of the child should be named on the birth certificate.¹⁶²

The purpose of a birth certificate: responses

- 6.89 The question 'What is the purpose of a birth certificate' arose in consultations.¹⁶³ Various alternatives were posed:

Is it to accurately record the facts of one's parentage and birth; to legally recognise the parenting arrangements for the child; and/or to provide a legal identity document for the person born?¹⁶⁴

Is it a document that demonstrates our history and identity, or is it just a document we use for identification (legal, administrative) purposes? Or both?¹⁶⁵

- 6.90 A common theme in submissions and consultations was that a birth certificate should be a true record of a person's birth and, therefore, show a child's biological origins.¹⁶⁶ VANISH asked:

what is the purpose of a birth certificate if it does not accurately reflect the details of one's biological/genetic heritage and birth?¹⁶⁷

- 6.91 It submitted that a birth certificate's 'primary purpose' should be to provide an accurate and comprehensive record of the facts of a person's genetic and/or biological parentage and birth.¹⁶⁸

- 6.92 Adoption Origins Victoria stated:

Birth certificates are certificates of heritage and bloodlines. They are not 'parenting certificates'.¹⁶⁹

- 6.93 Some people told the Commission that a wider review of the question is needed, because similar issues arise in ART and surrogacy.¹⁷⁰ Participants in a consultation with Rainbow Families Council and the VGLRL told the Commission that birth certificates do not reflect the reality of many children in LGBTI families. Recent academic literature discusses these issues.¹⁷¹ The Commission's review was limited to how adopted people's identities should be reflected on their birth certificates.

The purpose of a birth certificate: Commission's conclusions

- 6.94 The Commission's research found that, across Australia, the primary purposes of birth certificates are legal.¹⁷² Birth certificates have two main purposes.

¹⁶² Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 145. See also 191.

¹⁶³ Consultations 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby), 25 (VANISH).

¹⁶⁴ Submission 34 (VANISH).

¹⁶⁵ Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

¹⁶⁶ Submissions 26 (Adoption Origins Victoria Inc.), 34 (VANISH).

¹⁶⁷ Submission 34 (VANISH).

¹⁶⁸ Ibid.

¹⁶⁹ Consultation 12 (Adoption Origins Victoria Inc.). See also Submission 26 (Adoption Origins Victoria Inc.).

¹⁷⁰ Submission 34 (VANISH); Consultation 25 (VANISH). See also Olivia Rundle and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No One at All' (2012) 26(2) *Australian Journal of Family Law* 116.

¹⁷¹ See, eg, Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *NYU Journal of Legislation and Public Policy* 225; Paula Gerber and Phoebe Lindner, 'Modern Families: Should Children be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victoria University Law and Justice Journal* 34; Olivia Rundle and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No One at All' (2012) 26(2) *Australian Journal of Family Law* 116.

¹⁷² Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 143.

- 6.95 First, birth certificates establish a person's legal identity.¹⁷³ They are official 'identity documents'. In its 1997 adoption review, the New South Wales Law Reform Commission stated:
- 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.¹⁷⁴
- 6.96 A birth certificate must show a person's 'true and correct legal identity'.¹⁷⁵ In adoption, a child's legal identity changes when an adoption order is made (whether or not the child's name changes). The order ends the legal relationship between a child and their parents and creates a new legal relationship between the child and their adoptive parents. The child's new legal identity must be reflected on their birth certificate. Maintaining the child's original birth certificate is not viable 'as this would not certify to the world at large his or her true and current legal identity'.¹⁷⁶
- 6.97 Secondly, birth certificates show who a child's *legal* parents are.¹⁷⁷ In Victoria and across Australia, people named on birth certificates are presumed to be a child's parents.¹⁷⁸ A person named as a parent in a register of births is presumed to be a child's parent under the federal *Child Support (Assessment) Act 1989* (Cth),¹⁷⁹ *Australian Passports Act 2005* (Cth)¹⁸⁰ and the *Family Law Act 1975* (Cth).¹⁸¹ A child's birth certificate must be compatible with these laws to avoid legal complications. Naming only natural parents, who are not legal parents, could create legal problems.¹⁸²
- 6.98 Very often, a child's natural parents and legal parents are the same people.¹⁸³ In adoption, they are not. Before an adoption order, the natural parents are the child's legal parents. The adoption order transfers parentage to the adoptive parents. The adoptive parents become the child's legal parents.
- 6.99 This distinction is reflected in the naming of parents on the child's birth certificate. The natural parents are named on the child's birth certificate until the adoption order is made. After legal parentage changes, the adoptive parents appear on the birth certificate. While the birth certificate is misleading about the facts of the birth, it does not mislead about who the child's legal parents are.

173 Ibid; Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report No 25 (2013) 50; New South Wales Registry of Births, Deaths and Marriages, *Birth Certificate Content Review* (2014) 3–4, 6, 12; Births, Deaths and Marriages Victoria, Department of Justice and Regulation, *Register a Birth* (20 September 2016) <<http://www.bdm.vic.gov.au/home/births/register+a+birth/>>; Paula Gerber and Phoebe Lindner, 'Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?' (2015) 18(2) *NYU Journal of Legislation and Public Policy* 225, 234–5.

174 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 281.

175 Ibid 282.

176 Ibid.

177 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 114, 143, 145–6; Olivia Rundle and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No One at All' (2012) 26(2) *Australian Journal of Family Law* 116; Paula Gerber and Phoebe Lindner, 'Modern Families: Should Children be Able to Have More than Two Parents Recorded on Their Birth Certificates?' (2015) 5(1) *Victoria University Law and Justice Journal* 34.

178 *Parentage Act 2004* (ACT) s 9; *Status of Children Act 1996* (NSW) s 11; *Status of Children Act* (NT) s 9; *Status of Children Act 1978* (Qld) s 25; *Status of Children Act 1974* (Tas) s 8A; *Status of Children Act 1974* (Vic) s 8(1); *Family Law Act 1975* (Cth) s 69R; Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 143.

179 *Child Support (Assessment) Act 1989* (Cth) s 29.

180 *Australian Passports Act 2005* (Cth) s 11.

181 *Family Law Act 1975* (Cth) s 69R. This presumption can be rebutted 'by proof on the balance of probabilities'—for example a 'parentage testing order': s 69U; *Re Michael* (Surrogacy Arrangements) (2009) 41 Fam LR 694, 701 [48]–[49].

182 Recognition as a parent gives rise to a range of legal powers and obligations: Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 112–114, 143; Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Consultation Paper (2004) 74; Family Law Council, Commonwealth of Australia, *Report on Parentage and the Family Law Act* (2013) xx, 105–6. Under the *Family Law Act 1975* (Cth), a parent has 'parental responsibility' until the child turns 18: s 61C(1). This includes 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': s 61B. Parents have 'the primary duty' to maintain their children financially: s 66C; *Child Support (Assessment) Act 1989* (Cth) s 3. A person named as a parent in a register of births may have a duty to pay child support: *Child Support (Assessment) Act 1989* (Cth) s 29. In its 2007 report on ART and adoption, this Commission concluded that donors should not be named on the birth certificates of donor-conceived people, because this could create a conflict with the *Status of Children Act 1974* (Vic): Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 146. See also New South Wales Registry of Births, Deaths and Marriages, *Birth Certificate Content Review* (2014) 16.

183 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 114.

- 6.100 This occurs in other situations. Where a child is born through surrogacy, the surrogate mother and her partner (if she has one) are presumed to be the child's legal parents and are responsible for registering the child's birth.¹⁸⁴ The intended parents (called the 'commissioning parents') may obtain a court order which has a similar effect to an adoption order: legal parentage transfers from the surrogate mother or couple to the intended parents.¹⁸⁵ The child's birth registration is amended in a similar way to when an adoption is registered and, as in adoption, an amended birth certificate is issued.¹⁸⁶
- 6.101 In ART, the Status of Children Act gives people who were not involved in the birth the status of a parent and provides that people involved in the birth are not the child's parents.¹⁸⁷ If a woman gives birth from a donor's sperm, her male partner is recognised as the child's father and the donor is not.¹⁸⁸ Similarly, if a woman in a same-sex relationship gives birth from a donor's sperm, her partner is recognised as the child's legal parent and the donor is presumed not to be the father.¹⁸⁹
- 6.102 This determines who is named as the child's parents in the BDM Register and, therefore, on the child's birth certificate.¹⁹⁰ The birth certificates of children born through ART and surrogacy include the names of people who were not involved in the child's birth but are recognised by the law as the child's parents.¹⁹¹
- 6.103 Birth certificates do not necessarily record a child's biological heritage.¹⁹²
- 6.104 Legal parents must be named on birth certificates. Adoptive parents must therefore be on their children's birth certificates. Original birth certificates cannot be maintained because they do not show who a child's legal parents are.
- 6.105 Integrated birth certificates would fulfil the purposes of a birth certificate, and would not cause legal problems, as long as a person's legal identity is clear on the document and it is clear who a person's legal parents are.

Practical issues raised with the Commission

- 6.106 Four practical issues were raised with the Commission regarding introduction of integrated birth certificates:
- possible security risks
 - possible issues relating to the 'Document Verification Service'
 - possible difficulties when dealing with agencies
 - cost.

184 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 15; Births, Deaths and Marriages Victoria, Department of Justice and Regulation, Victoria, *Surrogacy* (30 July 2014) <<http://www.bdm.vic.gov.au/home/births/surrogacy/>>.

185 *Status of Children Act 1974* (Vic) ss 20–22, 26.

186 *Births, Deaths and Marriages Registration Act 1996* (Vic), s 19A; Victoria, *Parliamentary Debates*, Legislative Assembly, 10 September 2008, 3457 (Rob Hulls, Attorney-General).

187 *Status of Children Act 1974* (Vic) pts II, III; *Arc-Dekker v Registrar of Births, Deaths and Marriages (Review and Regulation)* [2016] VCAT 1529 (13 September 2016).

188 *Status of Children Act 1974* (Vic) ss 10C, 10D.

189 *Ibid* s 13. See *Arc-Dekker v Registrar of Births, Deaths and Marriages (Review and Regulation)* [2016] VCAT 1529 (13 September 2016).

190 *Arc-Dekker v Registrar of Births, Deaths and Marriages (Review and Regulation)* [2016] VCAT 1529 (13 September 2016).

191 The *Births, Deaths and Marriages Registration Act 1996* (Vic) allows a mother's female partner to be named as a parent in the BDM Register and, therefore, on the child's birth certificate: s 17A(2). If the donor is named as the child's father, the court can order that his name be removed and replaced with the mother's partner's name: s 17A(3).

192 *Arc-Dekker v Registrar of Births, Deaths and Marriages (Review and Regulation)* [2016] VCAT 1529 (13 September 2016), 14 [100]; Olivia Rundle and Samantha Hardy, 'Australian Birth Certificates: The Best Interests of No One at All' (2012) 26(2) *Australian Journal of Family Law* 116.

6.107 In the Commission's view, the primary issues are security and costs.

Possible security risks

- 6.108 A person must not be able to present two legal identities.¹⁹³ The Senate Committee observed that 'risks of security, fraud and identity theft' could arise if a person had two 'legally valid identity documents'.¹⁹⁴ An adopted person could not use their original birth certificate, as well as their amended birth certificate, as valid proof of identity.¹⁹⁵ Maintaining the original birth certificate and using the adoption certificate or another document to establish legal parentage would be problematic, because the two legal documents would show different legal identities.
- 6.109 The Senate Committee was satisfied that integrated birth certificates did not create the risks about which it was concerned. The New South Wales Law Reform Commission saw no reason why a person could not have, and be able to use, both the amended and integrated birth certificates, 'as the adoptee's legal identity [would be] apparent from either'.¹⁹⁶
- 6.110 These conclusions seem correct. However, the Commission acknowledges that the Victorian Government is better placed to make assessments about possible security risks in the context of the National Identity Security Strategy.¹⁹⁷
- 6.111 The Commission received helpful information from the Commonwealth Attorney-General's Department about the Document Verification Service (DVS), which is a key part of that strategy.¹⁹⁸

Possible issues with the Document Verification Service

- 6.112 The DVS is an online Commonwealth-run service which Commonwealth, state and territory agencies and private organisations use to verify the integrity of people's identity documents, including birth certificates. Over 400 organisations use the DVS.¹⁹⁹
- 6.113 The Commission was told the DVS might not be able to accommodate integrated birth certificates.²⁰⁰ The Commission sought clarification from the Commonwealth Attorney-General's Department. It advised that while it may be technically possible to accommodate integrated certificates, it might require substantial and costly technical changes across the DVS and agencies using the system. It is not clear what technical changes, if any, would be necessary.²⁰¹ The Victorian Government will need to explore this matter further.

Possible difficulties with other agencies

- 6.114 The Commission was told problems might arise if a person presented an integrated birth certificate to a government agency, because the different form of certificate could create confusion and agencies might refuse to accept it as proof of identity.²⁰² No specific instances were reported to the Commission about these issues.²⁰³
- 6.115 The Commission discussed similar issues in 2007 when it considered whether donors

193 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 281–2.

194 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 256.

195 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 281–2.

196 Ibid 283.

197 Attorney-General's Department, Commonwealth of Australia, *National Identity Security Strategy 2012* (2013).

198 Ibid; Attorney-General's Department, Commonwealth of Australia, *Document Verification Service* <<https://www.ag.gov.au/RightsAndProtections/IdentitySecurity/Pages/DocumentVerificationService.aspx>>.

199 Email correspondence from DVS Implementation, National Security Policy Branch, Attorney-General's Department, to the Commission, 12 October 2016.

200 Telephone correspondence with the Registrar of Births, Deaths and Marriages (WA), 1 September 2016; Meeting between the Commission, Department of Health and Human Services (DHHS) and Births, Deaths and Marriages Victoria (BDMV), 22 September 2016.

201 Email correspondence from DVS Implementation, National Security Policy Branch, Attorney-General's Department, to the Commission, 12 October 2016; Identity Matching Services, Attorney-General's Department, to the Commission, 24 January 2017.

202 Telephone correspondence with the Registrar of Births, Deaths and Marriages (WA), 1 September 2016; Meeting between the Commission, DHHS and BDMV, 22 September 2016.

203 A representative of the DHHS reported that adopted people applying for passports have had difficulties with the Department of Foreign Affairs and Trade when using their *amended* birth certificate: Meeting between the Commission, DHHS and BDMV, 22 September 2016.

should be named on the birth certificates of donor-conceived people:

To include information on the birth certificates that does not give rise to legal obligations and which does not assist in identifying a person for legal and administrative purposes would create confusion about a person's legal status in respect of the child. This could lead to problems with organisations such as government agencies, schools and health providers. It is also likely that a birth certificate listing such information would not be accepted for official purposes both within Australia and internationally. It is likely that a birth certificate listing [information about a donor] would not be accepted for official purposes both within Australia and internationally.²⁰⁴

- 6.116 Victoria's BDM told the Commission that the introduction of 'commemorative' (non-legal) integrated birth certificates would be possible under Victoria's current legislative framework and that the introduction of integrated birth certificates with legal status would require legislative amendment.²⁰⁵ Commemorative certificates are not legal documents and cannot be used for identity purposes.²⁰⁶ BDM noted that the experiences of the jurisdictions which have introduced legal integrated birth certificates indicated that additional consultation and engagement with agencies which would need to rely on the certificates would be necessary to avoid confusion about the legal status of the document being used.²⁰⁷
- 6.117 The South Australian BDM provided information to the Commission about practice in South Australia (before changes were enacted in December 2016). It told the Commission adopted people may have a 'post-adoption birth certificate', integrated birth certificate or both. While both can be used as identity documents, people are advised to use the post-adoption birth certificate when applying to agencies (for example, for licences and passports), to avoid possible confusion. The Commission was told integrated birth certificates are not common and agencies sometimes reject them as identity documents.²⁰⁸
- 6.118 Recent amendments to South Australia's adoption legislation:
- enable the Registrar of Births, Deaths and Marriages to register an adopted child's birth to reflect the 'truest possible' account of their biological parentage and at the same time ensure any certificates produced make clear who is the child's legal parent.²⁰⁹
- 6.119 Information published by the South Australian Government indicates that integrated birth certificates are intended to be valid identity documents.²¹⁰
- 6.120 The integrated birth certificates issued in Western Australia do not have equal legal status to regular birth certificates.²¹¹ The amended birth certificate is the legally valid birth certificate. It shows the adopted person's 'new identity' and the 'new parentage'. The Registrar of BDM (WA) told the Commission the integrated certificate is intended to be an 'information source', which provides a record of the adoption and can assist with tracing family members. The Registrar explained that BDM (WA) does not support using integrated birth certificates as official identity documents. It considers that they could cause confusion in the community, because the certificates show two identities.²¹² The Registrar told the Commission:

204 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 145–6.
 205 Meeting between the Commission, DHHS and BDMV, 22 September 2016.
 206 Births, Deaths and Marriages Victoria, Department of Justice and Regulation, Victoria, *Register a Birth* (20 September 2016) <<http://www.bdm.vic.gov.au/home/births/register-a-birth/>>; Victorian Law Reform Commission, *Birth Registration and Birth Certificates*, Report No 25 (2013) 67.
 207 Meeting between the Commission, the DHHS and BDMV, 22 September 2016.
 208 Telephone correspondence with Births, Deaths and Marriages (SA), 15 August 2016.
 209 South Australia, *Parliamentary Debates*, House of Assembly, 21 September 2016, 6882 (John Rau, Minister for Child Protection Reform).
 210 Department for Education and Child Development, Government of South Australia, *Changes to the Adoption Act – Frequently Asked Questions* (15 September 2016).
 211 Telephone correspondence with the Registrar of Births, Deaths and Marriages (WA), 1 September 2016.
 212 Ibid.

it is unlikely the integrated birth certificate would be accepted by the multitude of organisations which now require birth certificates for identity purposes given the two identities on the document, leading to additional frustration and anguish for adoptees.²¹³

- 6.121 The situation in New South Wales is unclear. A 2014 review stated that New South Wales legislation is consistent with the Senate Committee's recommendation on integrated birth certificates.²¹⁴ However, it is not clear that an integrated certificate is 'legal proof of identity of equal status to other birth certificates'. The New South Wales Registry of BDM stamps the integrated birth certificates 'not for official use',²¹⁵ and states that the documents 'cannot be used for identification purposes'.²¹⁶
- 6.122 The Commission sought clarification from BDM (NSW) regarding the status of the integrated certificate. It was told the certificate has the same legal status as other birth certificates and can be accepted as proof of identity. The documents are stamped 'not for official use' because they contain information about the 'pre-adoptive birth registration', which is superseded by the 'post-adoptive birth registration' and 'no longer active'. However, this does not prevent other agencies from accepting the document as 'valid identification' as it contains information from the 'active' post-adoptive birth registration. It is up to the agency whether to accept the document as proof of identity.²¹⁷
- 6.123 The approaches in South Australia, Western Australia and New South Wales are not consistent. Integrated birth certificates cannot be used as identity documents in Western Australia. It is unclear whether they are accepted as identity documents in South Australia and New South Wales.
- 6.124 A nationally co-ordinated response to the question of the legal status of integrated birth certificates would be helpful. The Commission was told that the Senate Committee's recommendation was discussed nationally during 2013 and 2014.²¹⁸ However, it was unable to obtain clear information about the outcome of that work.

Cost

- 6.125 In addition to the costs of technical changes related to the DVS, referred to in [6.113], there may be substantial costs associated with implementing changes to ensure agencies across Australia and internationally are able to accept integrated birth certificates. This is a question for the Victorian Government to consider.

Practical issues: Commission's conclusions

- 6.126 If an integrated birth certificate clearly shows a person's legal identity, it should be able to have the same legal status as other birth certificates. It should be possible to design an integrated certificate which clearly distinguishes between a person's legal post-adoption identity and birth identity. However, this is a matter for the Registrar of BDM to determine, in consultation with other agencies.
- 6.127 Potential administrative difficulties within Victorian agencies could be addressed by giving staff proper information and training. However, the Commission acknowledges it may not be practicable to prevent possible difficulties when people present integrated certificates to agencies outside Victoria, including overseas.
- 6.128 A complete assessment of the practical issues was not possible due to the lack of clear, reliable information. These issues will need to be considered by Government, and will require national consultation and co-ordination. The information the Commission received

213 Email correspondence with the Registrar of Births, Deaths and Marriages (WA), 24 January 2017.

214 New South Wales Registry of Births, Deaths and Marriages, *Birth Certificate Content Review* (2014) 7.

215 Email correspondence with the Assistant Registrar of Births, Deaths and Marriages (NSW), September 2016.

216 New South Wales Registry of Births, Deaths and Marriages, *Adoptions* (18 April 2016) <www.bdm.nsw.gov.au/Pages/births/adoptions.aspx>. The New South Wales Law Reform Commission saw no reason why an integrated certificate should not be used for official purposes, because the person's current legal name would be clear: New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 283.

217 Email correspondence with the Assistant Registrar of Births, Deaths and Marriages (NSW), September 2016.

218 Telephone correspondence with the Registrar of Births, Deaths and Marriages (WA), 1 September 2016.

reinforces that people should have the option of using the amended certificate for situations where practical difficulties may arise.

Commission's conclusions

- 6.129 While amended birth certificates naming only adoptive parents were introduced to conceal the truth about a child's adoption, adoptive parents must continue to be named on adopted children's birth certificates due to the legal purposes of modern birth certificates. The documents must reflect a person's legal identity and who their legal parents are.
- 6.130 This means it is not viable to maintain and restore use of the original birth certificate. Legal and practical problems would arise if only a person's natural parents were named on their birth certificate. The current system of issuing amended birth certificates should continue, for the reasons discussed in this chapter.
- 6.131 An adopted person should be able to obtain, if they wish, an integrated birth certificate which includes their natural parents' names, reflecting the reality of their family relationships, history and identity. The Commission sees no legal reason why integrated birth certificates should not have equal legal status to other birth certificates, provided that they clearly show a person's legal identity and legal parentage. The Government should examine the concerns raised by agencies about practical and security matters and determine whether it is feasible to use integrated certificates as valid identity documents.
- 6.132 In the meantime, commemorative integrated birth certificates should be available on application to BDM, to all people adopted in future and all people who have been adopted. In Chapter 16, the Commission recommends that:
- a) A child should be able to obtain a copy of their original birth certificate:
 - with their adoptive parents' consent or
 - after a counsellor assesses the child as mature enough to receive information about the identity of their natural parents.
 - b) Adoptive parents should be able to obtain a copy of their child's original birth certificate on their behalf.
- 6.133 Integrated birth certificates should be available to adopted children on the same terms. Children who are mature enough to make an informed decision should be able to choose how their identity is reflected on their birth certificate.
- 6.134 The Commission proposes that adoptive parents' access to the integrated birth certificate from BDM would be in accordance with the BDM Access Policy, which enables parents to have access to their child's birth certificate, on the child's behalf, where they are under 18.²¹⁹
- 6.135 BDM should consult publicly and with relevant state and national agencies on the design of the integrated birth certificate.

219

Births, Deaths and Marriages Victoria, Department of Justice and Regulation, Victoria, *Access Policy* (23 March 2015) 7.4.0 <<http://bdm.vic.gov.au/utility/about+bdm/legislation+and+policies/>>. Otherwise, a person may have access to another person's birth certificate with their written authority: 7.3.0.

Recommendations

- 24** Subject to security and cost implications, integrated birth certificates should be introduced in Victoria. These should:
- a. be available:
 - i. for future adoptions and all previous adoptions
 - ii. in addition to the amended birth certificate that is currently provided
 - iii. on application to the Registrar of Births, Deaths and Marriages
 - b. clearly show the person's legal identity
 - c. have the same legal status as the amended birth certificate.
- 25** Where an adopted child is under 18 years of age, their integrated birth certificate should be available, on application, to:
- a. their adoptive parents, on the child's behalf
 - b. to the child:
 - i. with their adoptive parents' consent or
 - ii. after receiving counselling from a counsellor who assesses the child as mature enough to understand the consequences of receiving information about the identity of their natural parents.

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7. Aboriginal and Torres Strait Islander children and adoption

Introduction

- 7.1 This chapter reviews, and makes recommendations about, improvements to adoption law for Aboriginal and Torres Strait Islander children.
- 7.2 In developing the recommendations in this chapter, the Commission focused on three key ideas strongly emphasised by Aboriginal and Torres Strait Islander groups and individuals:
- Statutory adoption is generally not a culturally appropriate option for Aboriginal and Torres Strait Islander children.
 - Any adoption must ensure that cultural connections for Aboriginal and Torres Strait Islander children are not merely preserved but also promoted and developed.
 - Aboriginal and Torres Strait Islander communities are the experts in what is best for their children. The law needs to ensure that Aboriginal and Torres Strait Islander communities are involved early and consistently in decisions about their children.
- 7.3 These ideas are not new. They have been highlighted in numerous reports and recommendations going back to at least the 1980s. However, as two recent reports of the Commission for Children and Young People demonstrate, they are often poorly implemented.¹
- 7.4 The *Adoption Act 1984* (Vic) provides additional requirements for the adoption of Aboriginal and Torres Strait Islander children. It includes a version of the Aboriginal and Torres Strait Islander Child Placement Principle.
- 7.5 The inclusion of separate requirements for the adoption of Aboriginal and Torres Strait Islander children in 1984 represented a significant policy shift.² The 1964 Adoption Act had not made any separate provision for the adoption of Aboriginal or Torres Strait Islander children. However, in comparison with the *Children, Youth and Families Act 2005* (Vic) (the CYF Act) and more recent adoption legislation in other states and territories, the requirements provide relatively weak protection for a child's cultural connections.
- 7.6 The Commission concludes that effective implementation of the apologies given to the Stolen Generations, for the ongoing devastating effects of assimilation policy and forced removal of children based on race, requires separate rules and guidelines for Aboriginal and Torres Strait Islander children in relation to adoption. This will also provide adequate recognition of Aboriginal self-determination and of Indigenous cultural continuity and integrity.

¹ Commission for Children and Young People, Victoria, *In the Child's Best Interests: Inquiry into Compliance with the Intent of the Aboriginal Child Placement Principle in Victoria* (2016); Commission for Children and Young People, Victoria, *Always Was, Always Will Be Koori Children: Systemic Inquiry into Services Provided to Aboriginal Children and Young People in Out-Of-Home Care in Victoria* (2016).

² See Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4248–9 (Pauline Toner, Minister for Community Welfare Services). The content of the Second Reading Speech relates to the Adoption Bill as originally introduced to the Legislative Assembly on 18 April 1984. This was subsequently withdrawn and the Adoption Bill (No 2) was introduced on 11 September 1984. However, clause 50 of the Bill was not amended. See generally Victorian Law Reform Commission, *Review of the Adoption Act 1984*, Consultation Paper (2016) 76–8.

Context

- 7.7 The rates of adoption for Aboriginal and Torres Strait Islander children are very low. In 2015–16, only three children identified as Aboriginal or Torres Strait Islanders had an adoption order finalised in Australia.³
- 7.8 DHHS data shows that since 2005–2006 there have been no recorded adoptions of an Aboriginal or Torres Strait Islander child in Victoria. It is possible that some Aboriginal or Torres Strait Islander children were adopted in this period, but were not identified.
- 7.9 From 1998 to 2015, 15 Aboriginal or Torres Strait Islander children were adopted. None of the adoptive parents were Aboriginal or Torres Strait Islanders. Twelve adoptions, all of which occurred in 1999–2000, were ‘known-child’ adoptions. The remaining three were ‘local’ adoptions.
- 7.10 The Commission requested additional information about these adoptions but DHHS was unable to provide it. The available data is not specific enough for the Commission to assess the extent to which agencies complied with requirements in the Adoption Act relating to Aboriginal and Torres Strait Islander children.

The Stolen Generations and the apologies

- 7.11 In 1997, the Human Rights and Equal Opportunity Commission published *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Bringing Them Home)*.⁴ It considered the past laws, practices and policies that separated Aboriginal and Torres Strait Islander children from their families by compulsion, duress, or undue influence and the effects.
- 7.12 ‘Stolen Generations’ is the name given to the generations of Aboriginal and Torres Strait Islander children removed from their families. *Bringing Them Home* stated that ‘between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970’.⁵
- 7.13 The report made recommendations about adoption, which are discussed in this chapter.
- 7.14 On 17 September 1997, the Legislative Assembly of the Parliament of Victoria issued an apology to the Aboriginal people for the removal of Aboriginal children.⁶ The debates included acknowledgment of the ongoing effects, and commitments ‘to make sure that such events do not take place again’.⁷
- 7.15 An apology was also issued in the Australian Parliament on 13 February 2008.⁸

Aboriginal and Torres Strait Islander Child Placement Principle

- 7.16 The Aboriginal and Torres Strait Islander Child Placement Principle exists in varying forms in laws across Australia. It:

recognises the destructive and ongoing impact of policies and practices of assimilation and the separation and removal of Aboriginal and Torres Strait Islander children from their parents and communities. It recognises that Aboriginal and Torres Strait Islander people have the knowledge and experience to make the best decisions concerning their children and recognises the importance of each child staying connected to their family, community, culture and country. It promotes a partnership between government

3 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 46. The Commission acknowledges that Aboriginal and Torres Strait Islander children who were not identified may have been adopted so this number may be higher than reported.

4 Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

5 Ibid 37.

6 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 1997, 120.

7 See, eg, ibid 108 (Jeff Kennett, Premier).

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 177.

and Aboriginal and Torres Strait Islander communities in decision making ... in order to ensure that the connections are understood and maintained.⁹

- 7.17 The way it is described, and the elements it includes, are not entirely consistent across the various laws.
- 7.18 Frequently, a single principle that applies to both Aboriginal children and Torres Strait Islander children is used. At different times this is called the Indigenous Child Placement Principle¹⁰ or the Aboriginal Child Placement Principle.¹¹
- 7.19 In New South Wales, two separate set of principles accommodate the differences between Aboriginal and Torres Strait Islander concepts in relation to adoption. They are the Aboriginal Child Placement Principles and the Torres Strait Islander Child Placement Principles.¹²
- 7.20 The Aboriginal and Torres Strait Islander Child Placement Principle is named differently in different legislation, and its content is not consistent. In Victoria, a version is included in both the Adoption Act and the CYF Act.¹³ They are not identical.
- 7.21 For clarity, the remaining discussion uses the term Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) unless referring to a specific document or law.
- 7.22 The Secretariat of National Aboriginal and Islander Child Care (SNAICC) commented that:
- Despite repeated recommendations over the past few decades ... for national standards legislation to embed a consistent approach to the ATSICPP, the ATSICPP continues to be incompletely and inconsistently applied across jurisdictions. This ... often leads to a common misunderstanding of the ATSICPP as a narrow guide to the placement of Aboriginal and Torres Strait Islander children. In reality the ATSICPP ... is best understood by examining and considering its five key elements covering prevention, partnership, placement, participation and connection.¹⁴

Commission for Children and Young People reports

- 7.23 Two reports from the Commission for Children and Young People were tabled in the Victorian Parliament in October 2016:
- *In the Child's Best Interests: Inquiry into Compliance with the Intent of the Aboriginal Child Placement Principle in Victoria*¹⁵
 - *Always Was Always Will Be Koori Children: Systemic Inquiry into Services Provided to Aboriginal Children and Young People in Out-Of-Home Care in Victoria*.¹⁶
- 7.24 *In the Child's Best Interests* considered compliance with the intent of the ATSICPP. The report found that written policy showed strong compliance with the legislative requirements of the ATSICPP, but this did not translate into practice. It assessed compliance in practice with the intent of the ATSICPP across five domains, and provided a rating from zero compliance to excellent compliance. Compliance in all five domains was either minimal or partial:

9 Claire Tilbury, Secretariat of National Aboriginal and Islander Child Care, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (2013) 3.

10 See, eg, Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 587–8.

11 See, eg, *Children, Youth and Families Act 2005* (Vic) s 13.

12 See, eg, *Adoption Act 2000* (NSW) ss 35, 39.

13 *Adoption Act 1984* (Vic) s 50; *Children, Youth and Families Act 2005* (Vic) s 13.

14 Claire Tilbury, Secretariat of National Aboriginal and Islander Child Care, *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (2013) 3.

15 Commission for Children and Young People, Victoria, *In the Child's Best Interests: Inquiry into Compliance with the Intent of the Aboriginal Child Placement Principle in Victoria* (2016).

16 Commission for Children and Young People, Victoria, *Always Was, Always Will Be Koori Children: Systemic Inquiry Into Services Provided to Aboriginal Children and Young People in Out-Of-Home Care in Victoria* (2016).

- Identification of Aboriginality: Was the Aboriginality of the child correctly determined by the completion of the investigation stage? (partial compliance)¹⁷
 - Was regard had to the advice of the Aboriginal Child Specialist Advice and Support Service at every significant decision point? (partial compliance)¹⁸
 - Was an Aboriginal family-led decision-making meeting convened at substantiation and issuing of a protection order or declined by the family? (minimal compliance)¹⁹
 - Is there evidence that children were placed at the highest possible level of the ATSICPP placement hierarchy? (partial compliance)²⁰
 - Is there a completed cultural support plan or a case plan that considers opportunities for continuing contact with Aboriginal family, community and culture? (minimal compliance)²¹
- 7.25 *In the Child's Best Interests* noted that there is a lack of guidance about why the ATSICPP exists or what it is for. It recommended that DHHS in partnership with Aboriginal Community Controlled Organisations should define the intent of the ATSICPP. In developing the definition, the underlying intent (unstated in current legislation) is that Aboriginal children should remain in the care of their families of origin wherever possible and safe. It also recommended that future amendments to the CYF Act make this clear.²²
- 7.26 The report made 54 recommendations to improve compliance with the intent of the ATSICPP.
- 7.27 *In the Child's Best Interests* and *Always Was Always Will Be Koori Children* highlight ways in which the child protection system is failing Aboriginal and Torres Strait Islander children, and recommend improvements.
- 7.28 The Commission's recommendations relate to adoption under the Adoption Act rather than child protection. However, many of the deficiencies identified in practice—such as failure to identify and record Aboriginal and Torres Strait Islander status—are equally relevant to adoption.
- 7.29 The Commission considers that improvements to practice and monitoring in response to these two reports should be extended to adoption wherever relevant. A lesser level of cultural safety in adoption would be highly undesirable.

Current law

- 7.30 In some circumstances, the Adoption Act places specific duties on the Secretary, principal officer and the court in relation to Aboriginal and Torres Strait Islander children.
- 7.31 It provides special rights to the parents of Aboriginal and Torres Strait Islander children who are considering the adoption of their child:
- specific counselling requirements and a version of the ATSICPP²³
 - the ability for a parent to give consent to an adoption of an Aboriginal or Torres Strait Islander child subject to conditions about contact with the child²⁴
 - requirements, in some cases, that an adopted Aboriginal or Torres Strait Islander child and their adoptive parents are notified when the child reaches the age of 12 years that the child may be entitled to certain rights and privileges.²⁵

17 Commission for Children and Young People, Victoria, *In the Child's Best Interests: Inquiry into Compliance with the Intent of the Aboriginal Child Placement Principle in Victoria* (2016) 93.

18 Ibid 100.

19 Ibid 120.

20 Ibid 132.

21 Ibid 152.

22 Ibid 27.

23 *Adoption Act 1984* (Vic) s 50.

24 Ibid s 37.

25 Ibid ss 70(2), 114.

Aboriginal and Torres Strait Islander Child Placement Principle in the Adoption Act

- 7.32 The Adoption Act includes a version of the ATSICPP.²⁶
- 7.33 It is difficult to find this provision because it is not expressly identified as an ATSICPP. It is located well into the Adoption Act (section 50) and is difficult to interpret. The limitations on the situations in which it applies mean that its use depends on the wishes of the natural parents. This means that its scope is limited.
- 7.34 The special requirements in section 50 for the adoption of Aboriginal and Torres Strait Islander children 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'.²⁷
- 7.35 The requirements apply if:
- consent is given to the adoption of a child by an Aboriginal or Torres Strait Islander parent who states in the consent document that they wish the child to be adopted within the Aboriginal or Torres Strait Islander community²⁸
 - consent is given to the adoption of a child by a non-Aboriginal or non-Torres Strait Islander parent, if that parent states in the consent document that he or she believes that the other parent is an Aboriginal or Torres Strait Islander person and that they wish the child to be adopted within the Aboriginal or Torres Strait Islander community.²⁹
- 7.36 If consent is given in either of these two circumstances, the court must be satisfied that the parent received counselling from an Aboriginal agency, or that the parent expressed a wish in writing not to do so.³⁰
- 7.37 The Adoption Act also provides a placement hierarchy, detailing who the child should be placed with.³¹ The placement hierarchy is:
- 1) The proposed adoptive parents are members, or at least one of them is a member, of the Aboriginal or Torres Strait Islander community to which a parent who gave consent belongs.
 - 2) If a member of the Aboriginal or Torres Strait Islander community to which a parent who gave consent belongs is not reasonably available as an adoptive parent, then at least one of the proposed adoptive parents is a member of an Aboriginal or Torres Strait Islander community.
 - 3) If a person from either of these two categories is not reasonably available as an adoptive parent, the proposed parents must be approved by an Aboriginal agency as suitable to adopt an Aboriginal or Torres Strait Islander child.³²
- 7.38 Generally, the requirements for counselling by an Aboriginal agency and requirement to follow the placement hierarchy only apply if a parent has expressed a wish that the child be adopted within the Aboriginal or Torres Strait Islander community.³³

26 Ibid s 50. For a discussion of the development of the ATSICPP and a history of the version included in the *Adoption Act 1984* (Vic) see Victorian Law Reform Commission, *Review of the Adoption Act 1984*, Consultation Paper (2016) 74–8.

27 *Adoption Act 1984* (Vic) s 50(1).

28 Ibid s 50(2)(a)(i).

29 Ibid s 50(2)(a)(ii).

30 Ibid s 50(2).

31 Ibid ss 50(2)(c)–(e).

32 This requirement is in addition to approval by or on behalf of the Secretary or the principal officer of an approved agency. Sections 50(3)–(4) of the *Adoption Act 1984* (Vic) provide for an organisation to be declared as an Aboriginal agency for the purposes of s 50 by Order of the Governor-in-Council published in the *Government Gazette*.

33 *Adoption Act 1984* (Vic) s 50(2). The exception to this is where the court has dispensed with parental consent. In this case, the placement hierarchy applies if the Secretary or principal officer of an approved agency believes on reasonable grounds that the child has been accepted by an Aboriginal or Torres Strait Islander community as an Aboriginal or Torres Strait Islander person and tells the court this.

Aboriginal Child Placement Principle in the CYF Act

- 7.39 The CYF Act includes a section headed 'Aboriginal Child Placement Principle'.³⁴ Its formulation differs from that in the Adoption Act.
- 7.40 It requires that if it is in the best interests of an Aboriginal or Torres Strait Islander child to be placed in out-of-home care, regard must be had to:³⁵
- the advice of the relevant Aboriginal agency
 - the criteria provided in the section about placement preferences, which sets out the preferred order of placement³⁶
 - the additional principles in the CYF Act for placement of an Aboriginal or Torres Strait Islander child.³⁷
- 7.41 The CYF Act provides that the preferred placement is 'within the Aboriginal or Torres Strait Islander extended family or relatives and where this is not possible other extended family or relatives'.³⁸
- 7.42 There is a placement hierarchy if 'placement with extended family or relatives is not feasible or possible'.³⁹ This decision may only be made after consultation with the relevant Aboriginal agency. It provides the following placement preference:
- an Aboriginal family from the local community and within close geographical proximity to the child's natural family;
 - an Aboriginal family from another Aboriginal community;
 - as a last resort, a non-Aboriginal family living in close proximity to the child's natural family.
- 7.43 The ATSICPP in the CYF Act requires that 'any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community'.⁴⁰ This requirement is not included in the Adoption Act.
- 7.44 The CYF Act includes the following additional principles for placement of an Aboriginal child:
- In deciding where a child is to be placed, account is to be taken of whether the child identifies as Aboriginal and the expressed wishes of the child.⁴¹
 - If a child has parents from different Aboriginal communities, the order of placement is for first preference to be an Aboriginal family from the local community and within close geographical proximity to the child's natural family; and second to an Aboriginal family from another Aboriginal community. Consideration should also be given to the child's own sense of belonging.⁴²
 - If a child with parents from different Aboriginal communities is placed with one parent's family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her other parent's family, community and culture.⁴³
 - If a child has one Aboriginal parent and one non-Aboriginal parent, the child must be placed with the parent with whom it is in the best interests of the child to be placed.⁴⁴

34 *Children, Youth and Families Act 2005* (Vic) s 13. Section 3(1) of the Act defines 'Aboriginal person' to include both Aboriginal and Torres Strait Islander people.

35 *Ibid* s 13(1).

36 *Ibid*. The criteria are provided by s 13(2).

37 *Ibid* s 13(1)(c). The additional principles are provided by s 14.

38 *Ibid* s 13(2)(a).

39 *Ibid* s 13(2)(b).

40 *Ibid* s 13(2)(c). Section 14(5) also provides similarly.

41 *Ibid* s 14(1).

42 *Ibid* s 14(2).

43 *Ibid* s 14(3).

44 *Ibid* s 14(4).

- If an Aboriginal child is placed with a person who is not within an Aboriginal family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her Aboriginal family, community and culture.⁴⁵
- 7.45 A decision to place an Aboriginal child in out-of-home care may not be made without consulting an Aboriginal agency and applying the ATSICPP.⁴⁶
- 7.46 The CYF Act also includes decision-making principles 'in recognition of the principle of Aboriginal self-management and self-determination':⁴⁷
- in making a decision or taking an action in relation to an Aboriginal child, an opportunity should be given, where relevant, to members of the Aboriginal community to which the child belongs and other respected Aboriginal persons to contribute their views;⁴⁸
 - a decision in relation to the placement of an Aboriginal child or other significant decision in relation to an Aboriginal child, should involve a meeting convened by an Aboriginal convener who has been approved by an Aboriginal agency or by an Aboriginal organisation approved by the Secretary and, wherever possible, attended by the child, the child's parent, members of the child's extended family and other appropriate members of the Aboriginal community as determined by the child's parent.⁴⁹

Conditional consent to adoption

- 7.47 The Adoption Act enables the parent of an Aboriginal or Torres Strait Islander child to give a conditional consent to adoption subject to conditions about contact with the child. These 'conditional consent' provisions are only available in the adoption of an Aboriginal or Torres Strait Islander child.⁵⁰ The adoption order may be made subject to these contact conditions.⁵¹
- 7.48 Consent may be given subject to a condition that the relevant parent, specified relatives of the child, and members of the Aboriginal community or Torres Strait Islander community to which the child belongs have rights to have contact with the child.⁵²
- 7.49 The range of people who can be given contact rights through conditional consent is broad. In contrast, only parents or relatives can be given contact rights under the general provisions.⁵³
- 7.50 The rights to give a conditional consent are limited. The parent must have expressed a wish in the consent document that the child be adopted within the Aboriginal or Torres Strait Islander community.⁵⁴ Conditional consent may be given by:
- an Aboriginal or Torres Strait Islander parent
 - a parent who is not an Aboriginal or Torres Strait Islander person, but believes that the other parent is.
- 7.51 The contact rights are not unlimited and the legislation provides for an Aboriginal agency to support contact arrangements to help ensure that they are successful.⁵⁵

45 Ibid s 14(5).

46 Ibid s 12(1)(c).

47 Ibid s 12(1).

48 Ibid s 12(1)(a).

49 Ibid s 12(1)(b).

50 *Adoption Act 1984* (Vic) s 37(1).

51 Ibid s 59. Section 59A of the Act provides for any adoption order to be made subject to conditions relating to contact in specified circumstances. It allows conditions about contact to be made by the court if there is agreement between the parent(s) and the adoptive parent(s) after consent has been given. These conditions may be available for all adoptions.

52 Ibid s 37(1). Rights of access are in accordance with prescribed terms set out in the *Adoption Regulations 2008* (Vic) reg 30.

53 *Adoption Act 1984* (Vic) s 59A. See also s 4(1) which provides that 'relative, in relation to a child means a grandparent, brother, sister, 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'.

54 Ibid ss 37(1), 50(2).

55 Ibid s 37(1); *Adoption Regulations 2008* (Vic) reg 30.

- 7.52 If no one suitable to adopt the child can be found, the parent must be informed in writing of this fact. The parent must also be advised of the right to vary the conditions or revoke the consent within 28 days after the notice.⁵⁶
- 7.53 If no revocation of consent or variation of the conditions is made within 28 days, the Secretary or principal officer of the agency may apply to the court for the revocation or alteration of the conditions relating to the consent.⁵⁷ The court may order this. The court must be satisfied that the Secretary or principal officer took reasonable steps to satisfy the conditions, and that they considered a report from an Aboriginal agency.⁵⁸

Responses

Identification of Aboriginal and Torres Strait Islander children

- 7.54 There was strong support for placing a positive duty on the Secretary of DHHS to make reasonable inquiries about whether a child who may be placed for adoption is an Aboriginal or Torres Strait Islander child.⁵⁹ There were no responses suggesting that there should not be a duty.
- 7.55 A number of people emphasised the importance of information about the child's cultural identity and connections being recorded. The Wathaurong Aboriginal Co-operative told the Commission that identifying a child as Aboriginal, and recording this information, is a crucial step in any adoption process. The person can then seek out their history and connections in the future.⁶⁰
- 7.56 The Commission was told that people often seek out connections at some point in their life and that connection to country is 'about who you are'.⁶¹ Someone who does not know they have Aboriginal or Torres Strait Islander heritage is unable to seek out these connections.⁶²
- 7.57 Identifying and recording whether an adopted person has Aboriginal or Torres Strait Islander heritage is important at an intergenerational level.⁶³ Even if an adopted person does not want to identify as Aboriginal, their children may wish to seek out their culture.⁶⁴ Elaine Taylor told the Commission that an inquiry is important so that future generations are not denied their Aboriginality.⁶⁵
- 7.58 The Law Institute of Victoria submitted that: 'If no reasonable inquiry is made as to the child's Aboriginality, then that child is unable to exercise their right to identity, culture and community'.⁶⁶
- 7.59 Staff at the Bendigo and District Aboriginal Co-operative stated that it was critical to identify and document that a child is Aboriginal. They suggested that a genogram or family tree should be prepared as soon as possible to look for kin. Identification of kin assists in convening an Aboriginal family-led decision making meeting.⁶⁷

56 *Adoption Act 1984 (Vic)* s 37(2).

57 *Ibid* s 37(3).

58 *Ibid* s 37(4).

59 Submissions 3 (Leilani Hannah), 9 (Australian Adoptee Rights Action Group), 35 (OzChild), 45 (Dr Briony Horsfall), 50 (Barnardos Australia), 51 (Law Institute of Victoria), 60 (Berry Street); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 34 (Elaine Taylor).

60 Consultation 23 (Wathaurong Aboriginal Co-operative).

61 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

62 Submission 51 (Law Institute of Victoria); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 29 (Staff at the Bendigo and District Aboriginal Co-operative), 34 (Elaine Taylor).

63 Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 34 (Elaine Taylor).

64 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

65 Consultation 34 (Elaine Taylor).

66 Submission 51 (Law Institute of Victoria).

67 Consultation 29 (Staff at the Bendigo and District Aboriginal Co-operative).

- 7.60 The Commission was told that it was a lengthy and resource-intensive process to establish proof of Aboriginal and/or Torres Strait Islander heritage later in life if the person has no paperwork. It places a burden on Aboriginal Community Controlled Organisations. Establishing proof of Aboriginal and/or Torres Strait Islander heritage should be done before a child is placed for an adoption because of the difficulties in establishing this later.⁶⁸
- 7.61 This proof of heritage is required to access a range of services and benefits such as ABSTUDY and may also affect land rights.⁶⁹
- 7.62 Responses emphasised the need to learn from the experiences of the Stolen Generations. The lack of documentation has compounded the Stolen Generations' loss of connection to culture because it is very hard for them to find their family and country.⁷⁰
- 7.63 Some responses considered who should be involved in this inquiry. The Law Institute of Victoria submitted that the inquiry should be 'informed and approved by Aboriginal child welfare organisations, such as VACCA'.⁷¹
- 7.64 Berry Street submitted that inquiries 'could include documented evidence of consultation with a range of Aboriginal agencies and with Victoria's Aboriginal Commissioner for Children and Young People'.⁷²
- 7.65 The Centre for Excellence in Child and Family Welfare submitted that each child's situation 'should be considered fully, including thorough research into the child's cultural background, extended family and their community connections'.⁷³
- 7.66 Others stated that Aboriginal Community Controlled Organisations should be involved in identifying if a child is Aboriginal or a Torres Strait Islander.⁷⁴ A participant at a roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies proposed that reasonable inquiries should include contacting Link-up,⁷⁵ VACCA and other Aboriginal Community Controlled Organisations.⁷⁶
- 7.67 Some people stated that timeframes need to allow for inquiries about the child's heritage.⁷⁷ The Law Institute of Victoria submitted that the CYF Act does not allow sufficient time:

for the Secretary to make such enquiries and then, if the child is identified as having Aboriginal or Torres Strait Islander heritage, for the Aboriginal child care agency to comply with the Aboriginal Child Placement Principle by making enquiries to locate possible family or kinship carers with whom the child could be placed or spend time with to maintain the connection to their identity, culture and community.⁷⁸

68 Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative).

69 Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative).

70 Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative).

71 Submission 51 (Law Institute of Victoria).

72 Submission 60 (Berry Street).

73 Submission 56 (Centre for Excellence in Child and Family Welfare Inc.).

74 Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative).

75 Link-up provides a support service to the Stolen Generations to find their families and for families to find members who are part of the Stolen Generations.

76 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

77 Submission 51 (Law Institute of Victoria); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

78 Submission 51 (Law Institute of Victoria).

Separate rules and guidelines for Aboriginal and Torres Strait Islander children

- 7.68 Some people stated that the same rules and guidelines for adoption should apply to all children.⁷⁹ Some considered that having separate rules and guidelines for Aboriginal and Torres Strait Islander children created inequality.⁸⁰ Sharyn White said that ‘ALL children ... have a deep need to remain connected to their kin, not just certain groups of people’.⁸¹
- 7.69 Jeremy Orchard submitted that the same guidelines should apply to all adoptions:
 some guidelines will be more applicable than others depending on cultural and linguistic background of the child(ren) and adults. Victoria is a very diverse community, so guidelines should cover the wide ranging aspects for all.⁸²
- 7.70 Most responses supported separate rules and guidelines for the adoption of Aboriginal and Torres Strait Islander children.⁸³ A number of responses referred to the Stolen Generations and the recommendations in the *Bringing Them Home* report.⁸⁴ The Law Institute of Victoria stated:
 Separate rules and guidelines are required to take into account the unique needs of these children arising from the intergenerational trauma caused by the treatment by the government of Aboriginal people in the past, including the forced systematic removal by the State of Aboriginal children from their families and communities and attempts to remove their Aboriginality from their identity and lives. This is consistent with the recommendations of the ‘Bringing Them Home: Stolen Children report’.⁸⁵
- 7.71 Aboriginal groups and individuals emphasised that there is a need to recognise the ongoing impact of the Stolen Generations. This is not an historical issue, but a continuing one. One participant at a consultation talked about a song by Archie Roach, ‘Took the Children Away’, which describes the forcible removal of Archie and his siblings from their parents in Victoria. The participant emphasised that the events described in the song are real and part of the continuing life story for the Stolen Generations.⁸⁶
- 7.72 The Commission was told that many Aboriginal people who experienced the Stolen Generations are afraid of government authority and will seek to avoid it, including running away if they see a police car.⁸⁷
- 7.73 One person talked about the removal of her mother from her family and her mother’s eventual adoption as a member of the Stolen Generations. She explained that her mother was removed when she was two years old and it took her 48 years to find her family. She described the emotional impact on their mother of realising that she had brothers and sisters with the same parents.⁸⁸
- 7.74 SNAICC submitted that:
 The view that differentiated approaches to adoption are not required for Aboriginal and Torres Strait Islander children is highly objectionable ... the mainstreaming of ... policy and practice would reflect an abject failure to acknowledge the realities of injustice experienced by Aboriginal and Torres Strait Islander peoples throughout Australian history.⁸⁹

79 Submissions 4 (Confidential), 6 (Name withheld), 9 (Australian Adoptee Rights Action Group), 15 (Jeremy Orchard), 19 (Sharyn White); Consultation 20 (Brenda Coughlan, Spokesperson for Independent Regional Mothers).

80 Submission 9 (Australian Adoptee Rights Action Group); Consultation 20 (Brenda Coughlan, Spokesperson for Independent Regional Mothers).

81 Submission 19 (Sharyn White).

82 Submission 15 (Jeremy Orchard).

83 Submissions 35 (OzChild), 45 (Dr Briony Horsfall), 46 (Australian Psychological Society), 48 (Victorian Council of Social Service), 51 (Law Institute of Victoria), 52 (Commission for Children and Young People), 53 (SNAICC—National Voice for our Children), 55 (CREATE Foundation), 60 (Berry Street); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative), 34 (Elaine Taylor).

84 Submissions 35 (OzChild), 51 (Law Institute of Victoria), 53 (SNAICC—National Voice for our Children), 55 (CREATE Foundation); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative).

85 Submission 51 (Law Institute of Victoria).

86 Consultation 23 (Wathaurong Aboriginal Co-operative).

87 Ibid.

88 Ibid.

89 Submission 53 (SNAICC—National Voice for our Children).

- 7.75 SNAICC also disagreed that a mainstream approach would achieve better outcomes for Aboriginal and Torres Strait Islander children, stating:
- [this view] overwhelmingly fails to recognise the unique circumstances facing our children ... our children have unique rights to remain connected to their culture, which must be understood as a key contributor to their stability and wellbeing—not the antithesis of it.⁹⁰
- 7.76 SNAICC considered that views that there should not be separate rules and guidelines for Aboriginal children are in direct contravention of the provisions of international human rights law, along with inquiries such as *Bringing Them Home*.⁹¹
- 7.77 Elaine Taylor told the Commission that adoptions of Aboriginal children need to be open because children need to know their family history. There should always be contact between the child's birth parents, the child's adoptive parents and the child. She said that this could be facilitated through the agency, the provision of cards and letters, and should include not just the child's birth parents, but grandparents as well.⁹²
- 7.78 A range of matters were proposed as important in forming guidelines about adoption of Aboriginal and Torres Strait Islander children including:
- an ATSICPP that is properly implemented and adhered to⁹³
 - involvement of Aboriginal Community Controlled Organisations in all aspects of decision making⁹⁴
 - involvement of family in decision making⁹⁵
 - cultural support plans⁹⁶
 - inquiry into whether a child has Aboriginal or Torres Strait Islander heritage and documentation of this.⁹⁷

Requirement to consider other options ahead of adoption

- 7.79 A number of those who consulted with the Commission said that statutory adoption should be a last resort for Aboriginal and Torres Strait Islander children.⁹⁸ Adoption is alien to Aboriginal culture⁹⁹ and for people affected by the Stolen Generations, adoption is not an option.¹⁰⁰
- 7.80 OzChild submitted that:
- adoption should be ... a last resort for Aboriginal and Torres Strait Islander children to avoid repeating mistakes of the past. As highlighted in the *Bringing Them Home* Report, Aboriginal and Torres Strait Islander people lost their sense of culture, connection, identity and suffered significant trauma and abuse from being separated from their family of origin.¹⁰¹

90 Ibid.

91 Ibid.

92 Consultation 34 (Elaine Taylor).

93 Submissions 48 (Victorian Council of Social Service), 51 (Law Institute of Victoria), 52 (Commission for Children and Young People), 53 (SNAICC—National Voice for our Children), 55 (CREATE Foundation), 60 (Berry Street); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 29 (Staff at the Bendigo and District Aboriginal Co-operative).

94 Submissions 53 (SNAICC—National Voice for our Children), 55 (CREATE Foundation); Consultations 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative), 34 (Elaine Taylor).

95 Consultation 29 (Staff at the Bendigo and District Aboriginal Co-operative).

96 Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 53 (SNAICC—National Voice for our Children).

97 35 (OzChild), 45 (Dr Briony Horsfall), 50 (Barnardos Australia), 51 (Law Institute of Victoria), 60 (Berry Street); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 34 (Elaine Taylor).

98 Submissions 35 (OzChild), 51 (Law Institute of Victoria); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 34 (Elaine Taylor).

99 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

100 Consultation 23 (Wathaurong Aboriginal Co-operative).

101 Submission 35 (OzChild).

- 7.81 SNAICC submitted that Aboriginal and Torres Strait Islander children ‘have rights of identity that can only be enjoyed in connection with their kin, communities and cultures’. It stated:
- Closed adoption that severs the connection of children to their families and communities of origin is never an appropriate care option for Aboriginal and Torres Strait Islander children, except as it relates to traditional Torres Strait Islander adoption practices.¹⁰²
- 7.82 SNAICC submitted that, in the short term, adoption legislation should place a complete ban on the adoption of Aboriginal and Torres Strait Islander children. This ban should be maintained until agreement is reached between Victoria’s Aboriginal and Torres Strait Islander communities and the Victorian Government on the elements of an open adoption legislative regime. This would need to include adequate provision for the protection of cultural rights.¹⁰³
- 7.83 Some people stated that adoption should be a last resort for all children including, but not limited to, Aboriginal and Torres Strait Islander children.¹⁰⁴ This view that adoption should be a last resort for all children is discussed at [2.55].

Conditional consent to adoption and connection to culture

- 7.84 The consultation paper asked whether the parents of Aboriginal and Torres Strait Islander children should retain the ability to make their consent to the adoption of their children conditional upon contact arrangements. It also asked what options there should be to protect the connection of Aboriginal and Torres Strait Islander children to country, kin and community.
- 7.85 Some responses objected to the idea that the parents of an Aboriginal or Torres Strait Islander have a right to make their consent to adoption conditional on them having contact with their child.¹⁰⁵ The Australian Adoptee Rights Action Group stated that ‘ALL PARENTS should have this ability to put conditions on the adoption. Why this persistence in assuming that non-indigenous children are somehow more easily accepting of adoption?’¹⁰⁶
- 7.86 Others considered that the ability to provide conditional consent is appropriate and provides for implementation of the ATSICPP.¹⁰⁷
- 7.87 SNAICC submitted that:
- In relation to the ‘connection’ element of the ATSICPP, SNAICC supports continuation of current provisions that enable Aboriginal and Torres Strait Islander parents to place special conditions on adoptions relating to the maintenance of relationships and cultural connections.¹⁰⁸
- 7.88 The Law Institute of Victoria submitted that:
- Parents or other family or community members significant to an Aboriginal and Torres Strait Islander children should be provided with the opportunity to present to the Court any conditions they consider should be placed on the adoption of their children as, in most cases, those persons will be best placed to consider how that child is able to enhance and preserve their connection to country, kin, language, family and community even if those family members are unable to care for the children themselves.¹⁰⁹

102 Submission 53 (SNAICC—National Voice for our Children).

103 Ibid.

104 Submissions 6 (Name withheld), 9 (Australian Adoptee Rights Action Group).

105 Submissions 6 (Name withheld), 9 (Australian Adoptee Rights Action Group).

106 Submission 9 (Australian Adoptee Rights Action Group).

107 Submissions 53 (SNAICC—National Voice for our Children), 60 (Berry Street); Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

108 Submission 53 (SNAICC—National Voice for our Children).

109 Submission 51 (Law Institute of Victoria).

- 7.89 Other suggestions for maintaining connection to culture if an Aboriginal or Torres Strait Islander child is adopted included cultural plans,¹¹⁰ Aboriginal family-led decision making and family finding,¹¹¹ and a buddy system for adoptive parents.¹¹²
- 7.90 SNAICC submitted that:
- additional provisions are required to make the maintenance of connection by adoptive parents mandatory and accountable. Where Aboriginal and Torres Strait Islander children are in any long-term care arrangement away from their birth family, be it adoption or otherwise, genuine cultural support plans must be developed and maintained (including with regular review) on an ongoing basis. Ongoing support is required for children in care to access cultural supports and connect with Aboriginal and Torres Strait Islander community organisations.¹¹³
- 7.91 Participants at a roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies said that cultural plans are a way to provide for connection to culture. One participant said that a cultural plan is like a family tree except that it tells the stories of where the person comes from.¹¹⁴
- 7.92 A participant said that Aboriginal Community Controlled Organisations should be able to support contact arrangements, but they cannot perform this role without resourcing. If the Adoption Act was changed in this way, resources would need to be allocated.¹¹⁵
- 7.93 Wathaurong Aboriginal Co-operative told the Commission that a cultural plan should be made in consultation with the local Aboriginal Community Controlled Organisation, which should be involved in the whole process to ensure that it is effective.¹¹⁶
- 7.94 Staff at the Bendigo and District Aboriginal Co-operative stated that Aboriginal family-led decision making should always be used to bring the local community into the decision-making process. Other family options for the care of the child are often identified through this process.¹¹⁷
- 7.95 The Centre for Excellence in Child and Family Welfare submitted that:
- the Act should encourage the use of family group meetings to make decisions ... Family group meetings introduce a consultative approach, which may allay some concerns of the Indigenous community that they are being excluded from adoption decision-making processes. Although family groups meetings may play an important part in finding the right solution for the child, the Centre would caution against making them mandatory.¹¹⁸
- 7.96 Elaine Taylor told the Commission that she 'lives her culture every day but some children grow up without this'. She suggested that prospective adoptive parents need to have cultural training and suggested a buddy system where the adoptive parents are paired with an Aboriginal family who can act as an adoptive grandparent or aunty.¹¹⁹

Participatory elements of ATSICPP

- 7.97 Consultations with Aboriginal and Torres Strait Islander groups and individuals stressed the importance of involving Aboriginal Community Controlled Organisations as well as Aboriginal and Torres Strait Islander families and communities.¹²⁰

110 Submission 53 (SNAICC—National Voice for our Children); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative).

111 Submission 56 (Centre for Excellence in Child and Family Welfare Inc.); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 29 (Staff at the Bendigo and District Aboriginal Co-operative).

112 Consultation 34 (Elaine Taylor).

113 Submission 53 (SNAICC—National Voice for our Children).

114 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

115 Ibid.

116 Consultation 23 (Wathaurong Aboriginal Co-operative).

117 Consultation 29 (Staff at the Bendigo and District Aboriginal Co-operative).

118 Submission 56 (Centre for Excellence in Child and Family Welfare Inc.).

119 Consultation 34 (Elaine Taylor).

120 Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative), 34 (Elaine Taylor).

- 7.98 SNAICC emphasised the need for the Adoption Act to provide for participatory elements of the ATSICPP, not just the placement hierarchy element of it.¹²¹
- 7.99 SNAICC highlighted that representative Aboriginal and Torres Strait Islander organisations, families and children have rights to participate in decisions on the care and protection of children. It submitted that adoption reform must include requirements for representative participation. It also submitted that a similar provision to section 323 of the CYF Act, which requires that a permanent care order may not be made without the recommendation of an Aboriginal agency, should be included in adoption legislation.¹²²
- 7.100 SNAICC also submitted that the Adoption Act should include safeguards to ensure that Aboriginal and Torres Strait Islander community and family have been involved in identifying appropriate care arrangements. It noted: 'Effective and broad consultations with families and communities can lead to the identification of broader family networks for kinship carers that agencies may not be aware of.'¹²³

Placement hierarchy in ATSICPP

- 7.101 A number of responses supported a requirement that the first placement preference in any adoption of an Aboriginal or Torres Strait Islander child be extended family or relatives. Some stated this directly and others through support for consistency with the ATSICPP in the CYF Act.¹²⁴
- 7.102 SNAICC submitted 'that a stronger formulation of the placement hierarchy is required in Victorian legislation'.¹²⁵ It supported the formulation of the hierarchy in the CYF Act and consistent wording in legislation around placement hierarchies for Aboriginal and Torres Strait Islander children.¹²⁶
- 7.103 Some people submitted that extended family should be the first placement choice and that this should apply to all children, not just Aboriginal and Torres Strait Islander children.¹²⁷
- 7.104 Responses from Aboriginal and Torres Strait Islander individuals and agencies emphasised the importance of connection to culture.¹²⁸
- 7.105 Staff at the Bendigo and District Aboriginal Co-operative stated that placement should ideally be in the community the child is from. However, sometimes connection to place and connection to family may be in conflict. If no family members are able to care for a child in the place the child is from, the child may be relocated. This raises the risk that their connection to country may be broken. They considered that if a child is moved, there should be processes to ensure that they will maintain connection to their local culture.¹²⁹
- 7.106 Similar concerns were raised by Elaine Taylor who said that consideration should be given to the area in which the child lives, where the child is going to be placed, and where the child's adoptive parents are from. She told the Commission that Aboriginal children should be kept in the place where they have grown up.¹³⁰
- 7.107 A participant at a consultation with the Wathaurong Aboriginal Co-operative discussed whether it is in the best interests of the child to stay in the local community or be sent to an Aboriginal family in another place. They stated that in some cases the placement hierarchy in the ATSICPP in the CYF Act does not work. If a child is connected to the

121 Submission 53 (SNAICC—National Voice for our Children).

122 Ibid.

123 Ibid.

124 Submissions 35 (OzChild), 51 (Law Institute of Victoria), 53 (SNAICC—National Voice for our Children); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 29 (Staff at the Bendigo and District Aboriginal Co-operative).

125 Submission 53 (SNAICC—National Voice for our Children).

126 Ibid.

127 Submissions 6 (Name withheld), 33a (Name withheld).

128 Submission 53 (SNAICC—National Voice for our Children); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 23 (Wathaurong Aboriginal Co-operative), 29 (Staff at the Bendigo and District Aboriginal Co-operative), 34 (Elaine Taylor).

129 Consultation 29 (Staff at the Bendigo and District Aboriginal Co-operative).

130 Consultation 34 (Elaine Taylor).

community, their removal is traumatic. The participant described twins who were sent to New South Wales to family they had not met. The children had grown up in Geelong but because of the 'kin' element of the ATSICPP, their connection to the 'community' was not considered.¹³¹

Torres Strait Islander children

- 7.108 The consultation paper asked if there should be different principles for the adoption of Aboriginal children as compared to Torres Strait Islander children.
- 7.109 Some people stated that the rules should be the same for all children.¹³²
- 7.110 The Law Institute of Victoria submitted that it would be difficult to have distinct rules for Torres Strait Islander children as compared to Aboriginal children because:

many Aboriginal children in Victoria have family members, and identify as being part of Aboriginal and Torres Strait Islander communities, from around Australia including the Torres Strait. This is an inevitable consequence of the forced removal of Aboriginal children from their parents and communities coupled with the natural increase of movement of modern day Australians between States and Territories.¹³³

- 7.111 Participants at a roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies had a variety of views:
- Some participants said that people who identify as Torres Strait Islander or Aboriginal in Victoria are 'one community' and not identified as separate. Torres Strait Islanders in Victoria belong to Aboriginal Community Controlled Organisations that include people with both Aboriginal and Torres Strait Islander heritage.
 - One participant stated that decisions should be subject to the customary laws which should be applied in that case, otherwise that the ATSICPP should apply.¹³⁴
- 7.112 The Commission spoke with members of the working party for the recognition of Torres Strait Islander child-rearing practices. The working party has been trying to gain legal recognition of Torres Strait Islander child-rearing practices, and specifically traditional adoption (*Kupai Omasker*), for more than 30 years.¹³⁵
- 7.113 *Kupai Omasker* is the permanent transfer of a child of one family to another as a gift. A participant discussed how legal recognition of *Kupai Omasker* might work in practice. They told the Commission that state adoption legislation does not match with the appropriate customary processes for gifting a child in Torres Strait Islander culture.
- 7.114 One of the key matters the working party is seeking is that birth certificates use the name of the 'receiving parents'.
- 7.115 Participants considered that elders or a Commissioner should endorse a traditional adoption rather than DHHS, an approved agency or the court. A participant said that the process should not be taken outside the integrity of the culture.

Commission's conclusion

- 7.116 Australia's history of assimilationist policy and law based on race is documented in *Bringing Them Home*. It resulted in the removal of Aboriginal and Torres Strait Islander children from their families based on their race. The majority of Victoria's Aboriginal and Torres Strait Islander people have experienced the consequences of these practices, either personally or through their extended families.¹³⁶ The ongoing impact of family disruption

¹³¹ Consultation 23 (Wathaurong Aboriginal Co-operative).

¹³² Submissions 6 (Name withheld), 9 (Australian Adoptee Rights Action Group), 33a (Name withheld); Consultation 8 (Harold Hall).

¹³³ Submission 51 (Law Institute of Victoria).

¹³⁴ Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

¹³⁵ Consultation 37 (Working Party for the Recognition of Torres Strait Islander Child Rearing Practices).

¹³⁶ See, eg, Victorian Aboriginal Child Care Agency, *Aboriginal Cultural Competence Framework* (Department of Human Services, Victoria, 2008) 14.

and child removal on contemporary Victorian Aboriginal and Torres Strait Islander families has been widely acknowledged.¹³⁷

- 7.117 Effective implementation of the apologies given to the Stolen Generations and adequate recognition of Aboriginal self-determination require separate rules and guidelines for Aboriginal and Torres Strait Islander children.
- 7.118 The Adoption Act should implement the recommendation in *Bringing Them Home* that statutory adoption be a last resort for Aboriginal and Torres Strait Islander children and that culturally appropriate alternatives should be preferred. This recommendation has been implemented in other jurisdictions.¹³⁸ If a child is unable to live with their parents, other arrangements should be used in preference to statutory adoption. If these arrangements require formalisation, parenting orders under the *Family Law Act 1975* (Cth) may be used. In child protection situations a range of possible orders exist under the CYF Act.
- 7.119 There should be a duty on the Secretary or principal officer to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal or Torres Strait Islander child. If a child's Aboriginal or Torres Strait Islander status is not identified, none of the specific rules and guidelines for the adoption of Aboriginal children can be applied. Information about the child's Aboriginal or Torres Strait Islander status needs to be recorded.
- 7.120 *In the Child's Best Interests* and *Always Was Always Will Be Koori Children* found that there are practice deficits in establishing children's Aboriginal identity.¹³⁹ *Always Was Always Will be Koori Children* recommended a whole-of-government strategy to improve mechanisms to ensure all departments and government-funded services are culturally competent, have rigorous methods and related training for identification of a child's Aboriginality.¹⁴⁰ The Commission endorses these recommendations and considers improvements in practice that result from these recommendations should also be extended to adoption services.
- 7.121 The Adoption Act should require that if a child is identified as an Aboriginal or Torres Strait Islander child, an Aboriginal agency is involved in all aspects of the adoption process. This provides improved self-determination of Aboriginal and Torres Strait Islander people and a partnership between government and Aboriginal and Torres Strait Islander people. It would align the Adoption Act with recommendations in *Bringing Them Home* that placements of an Aboriginal or Torres Strait Islander child should not be made except on the recommendation of the appropriate accredited Indigenous organisation.
- 7.122 The Commission considers that statutory adoption is generally an inappropriate option for Aboriginal and Torres Strait Islander children. However, in the event that it is being considered, an Aboriginal agency should be involved in decision making. In some cases this may be VACCA, in other cases a local Aboriginal Community Controlled Organisation.
- 7.123 The requirements for status as an Aboriginal agency under the Adoption Act should be defined consistently with section 6 of the CYF Act. This provides for a consistent approach to what is recognised as an Aboriginal agency that provides services to children and their families. It is worth considering whether a one-step process could be used to approve an Aboriginal agency under both the Adoption Act and the CYF Act.
- 7.124 Aboriginal and Torres Strait Islander agencies are strongly supportive of the ATSICPP. As those with the most to gain from effective policy and legislation for Aboriginal and Torres Strait Islander children, they are uniquely qualified to speak about what is in the best interests of their children.

137 Philip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (Department of Premier and Cabinet, 2012) 281; Victoria, Royal Commission into Family Violence, Final Report (2016) vol 5, 10, 48.

138 *Adoption Act 1994* (WA) s 3(2). See also *Adoption Act 1988* (SA) s 11(1); *Adoption Act 2009* (Qld) s 7; *Adoption Act 2000* (NSW) s 36; *Adoption of Children Act* (NT) s 11.

139 Commission for Children and Young People, Victoria, *Always Was, Always Will Be Koori Children: Systemic Inquiry into Services Provided to Aboriginal Children and Young People in Out-Of-Home Care in Victoria* (2016) 58.

140 Ibid 59.

- 7.125 *Bringing Them Home* recommended National Standards Legislation which would include a consistent version of the ATSICPP. At a minimum, Victoria should aim for consistency in the articulation of the principle in Victorian legislation.
- 7.126 An ATSICPP that is worded consistently with sections 13 and 14 of the CYF Act should replace the current version in section 50 of the Adoption Act. The principle in the CYF Act provides better for key aspects of the ATSICPP. Specifically:
- it provides that first preference in the placement hierarchy is for the child to be placed within the Aboriginal extended family or relatives
 - it includes a proximity requirement if the child is placed with a non-Aboriginal family
 - it provides for consideration of the expressed wishes of the child and the child's own sense of belonging
 - it requires that any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community.
- 7.127 The Commission considers that decision-making principles in sections 12 of the CYF Act should also be replicated in the Adoption Act to ensure that the child's family, community and an Aboriginal agency participate in decision making. Consistency with the CYF Act meets the Commission's terms of reference, which include harmonising the Adoption Act with other relevant legislation.
- 7.128 *In the Child's Best Interests* recommended that DHHS, in partnership with Aboriginal Community Controlled Organisations, should define the intent of the ATSICPP and that any future amendments to the CYF Act should state the underlying intent. Any changes that are made to section 13 of the CYF Act to implement this recommendation should be reflected in the Adoption Act.
- 7.129 Consistency in the way Victorian legislation articulates the ATSICPP will assist with clarity. Measures taken to improve and monitor compliance with the ATSICPP developed in response to the recommendations from *In the Child's Best Interests* should also be applied to adoption as appropriate.
- 7.130 In general, statutory adoption provided for in the Adoption Act is inappropriate for both Aboriginal and Torres Strait Islander children. It is inappropriate for Aboriginal children because it is alien to Aboriginal culture. Although Torres Strait Islanders have *Kupai Omasker* or 'traditional adoption', which involves the permanent transfer of a child, its rules and features are dictated by custom. These rules and features are not consistent with the process and rules of statutory adoption.
- 7.131 The right for parents of Aboriginal or Torres Strait Islander children to give conditional consent to an adoption should be retained. Because the Commission recommends replacing section 50 of the Adoption Act, the conditional consent requirements should cease to be linked to this section.
- 7.132 To provide adequately for cultural and community connections, the Adoption Act should require a cultural support plan to be prepared for any Aboriginal or Torres Strait Islander child placed for adoption. This is consistent with the CYF Act, which requires that a cultural plan is provided to each Aboriginal child in out of home care.¹⁴¹ Any improvements made to practice in cultural support planning under section 176 of the CYF Act should also be applied to adoption. The situation should not arise where an Aboriginal or Torres Strait Islander child does not know their culture, community and country.

- 7.133 For this reason, the requirements (currently in section 114) to notify an Aboriginal or Torres Strait Islander child and their adoptive parents when the child is 12 years old that they may be entitled to certain rights and benefits are unnecessary and should be removed. The associated duty on the court to send a memorandum to the Registrar of BDM (section 70(2)) should also be removed.

Recommendations

- 26 The Adoption Act should require the Secretary or principal officer to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal or Torres Strait Islander child.
- 27 The Adoption Act should require that if a child is identified as an Aboriginal or Torres Strait Islander child, an Aboriginal agency be involved in all aspects of the adoption process. The requirements for status as an Aboriginal agency under the Adoption Act should be defined consistently with section 6 of the *Children, Youth and Families Act 2005* (Vic).
- 28 The Adoption Act should include a section stating that statutory adoption is not part of Aboriginal or Torres Strait Islander culture. It should provide that the court will not make an order for the adoption of an Aboriginal or Torres Strait Islander child unless satisfied that statutory adoption is clearly preferable to any alternative order that may be made under the laws of the State or the Commonwealth.
- 29 The Adoption Act should include an Aboriginal and Torres Strait Islander Child Placement Principle and decision-making principles. The wording should be consistent with sections 12, 13 and 14 of the *Children, Youth and Families Act 2005* (Vic). The Aboriginal and Torres Strait Islander Child Placement Principle should include a requirement that a cultural support plan is prepared for any Aboriginal or Torres Strait Islander child placed for adoption.
- 30 The Adoption Act should specify that an Aboriginal or Torres Strait Islander child cannot be placed for adoption and the court cannot make an adoption order unless:
 - a. the Secretary or principal officer has received a report from the Aboriginal agency recommending that the child be placed for adoption
 - b. a cultural support plan has been prepared for the child.

Consent

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8. Consent

Introduction

- 8.1 This chapter reviews and makes recommendations to improve the consent process in adoption.
- 8.2 The starting point of the Adoption Act is that consent for an adoption is required from the child's mother and father, or in the case of a non-citizen child, the person who is the guardian of that child under the *Immigration (Guardianship of Children) Act 1946* (Cth).¹ In some circumstances it is possible for the court to dispense with consent.²
- 8.3 The general requirement for consent protects the rights of the natural parents. It also protects a child's right to know and be cared for by their parents,³ not to be arbitrarily separated from their parents and to be raised by them.⁴
- 8.4 The Commission considers that ensuring processes and procedures surrounding consent are robust is crucial to ensuring that consent is free and informed.
- 8.5 The Victorian history of forced adoptions and the Stolen Generations demands that every possible effort be made to provide safeguards in the consent process. To ensure that consent is both free and informed, it is essential to explore all care options with parents considering adoption. It is also important to provide them with relevant information about all aspects of adoption, including the possible psychological effects.
- 8.6 This chapter provides recommendations for improving the consent process. These include recommendations to:
- strengthen the counselling process and avoid conflicts of interest
 - extend the total timeframe for revoking consent
 - increase the information that must be provided to a person considering consenting to the adoption of their child
 - ensure court official witnesses have appropriate training on their role
 - ensure that parents under 18 years of age have capacity to provide consent, and
 - increase opportunities for a father to be involved in adoption decision making.
- 8.7 The chapter also includes recommendations to ensure that consent is only dispensed with in exceptional circumstances.

1 *Adoption Act 1984* (Vic) s 33. See s 36 for the circumstances in which consent may be given by a guardian or delegate of a guardian for a non-citizen child.

2 *Ibid* s 43.

3 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1).

4 *Ibid* art 9.

- 8.8 The chapter uses the term ‘options counselling’ to describe the counselling that must be provided to a parent considering adoption for their child. This term is not used in the Adoption Act. The term ‘options counselling’ highlights that counselling should explore a range of issues, including all options for care of the child.⁵

Forced adoption and the apologies

- 8.9 In the past, some adoptions occurred without effective consent, against the will of parents. These are known as ‘forced adoptions’.
- 8.10 In 2012, the Senate Community Affairs References Committee completed a report, *Commonwealth Contribution to Former Forced Adoption Policies and Practices*. It defined ‘forced adoption’ as an ‘adoption where a child’s natural parent, or parents, were compelled to relinquish a child for adoption’.⁶ This included situations where no consent was given, where alternatives to adoption were not explained, where consent was given under duress, and where consent was revoked.⁷
- 8.11 On 25 October 2012, the Parliament of Victoria issued a formal apology to those affected by past forced adoption practices in Victoria.⁸ The apology acknowledged that ‘many thousands of Victorian babies were taken from their mothers, without informed consent, and that this loss caused immense grief’.⁹ It also acknowledged ‘the devastating and ongoing impacts of these practices of the past’ and offered an unreserved apology to all those harmed.¹⁰ The apology included a commitment to ‘never forget what happened and to never repeat these practices’.¹¹
- 8.12 On 21 March 2013, the Prime Minister, Julia Gillard, apologised on behalf of the Australian Government to people affected by forced adoption.¹² The apology included commitments ‘to make sure these practices are never repeated’ and to ‘remember the lessons of family separation’. It also stated that the nation’s focus will be ‘on protecting the fundamental rights of children and on the importance of the child’s right to know and be cared for by his or her parents’.¹³
- 8.13 There are ongoing concerns from some community members that consent to adoptions may be forced or coerced. Forced adoptions occurred in Victoria under previous adoption legislation, despite those laws containing consent provisions.¹⁴ For Victorians affected by forced adoption, the commitments made in the apologies to avoid repeating the mistakes of the past are critical.

Fathers and consent

Current law

- 8.14 If the child’s parents are or were married at any time between conception and the birth of the child, the people whose consent is required for an adoption are the mother and her husband, or former husband.¹⁵

5 For a description of the counselling process including timing and issues covered, see Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 18.

6 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 6.

7 Ibid 54.

8 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 October 2012, 4779.

9 Ibid 4771 (Ted Baillieu, Premier).

10 Ibid.

11 Ibid.

12 Motions of apology were moved in the House of Representatives and the Senate and passed on 3 December 2013 and 14 May 2013: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2013, 1415; Commonwealth, *Parliamentary Debates*, Senate, 14 May 2013, 2406.

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2013, 1415 (Christopher Pyne, Minister for Education).

14 *Adoption of Children Act 1958* (Vic) s 5(3); *Adoption of Children Act 1964* (Vic) s 13, div 3. The consent provisions in the *Adoption Act 1984* (Vic) are substantially more robust than those of the preceding Acts.

15 *Adoption Act 1984* (Vic) s 33(2). See also s 5 of the *Status of Children Act 1974* (Vic), which creates a presumption as to parenthood that ‘a child born to a woman during her marriage or within ten months after the marriage has been dissolved by death or otherwise shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be’.

- 8.15 If the child's parents were not married to each other at any time between conception and the birth of the child, the Adoption Act sets out a range of situations in which a man is presumed to be the father.¹⁶ Consent is required from a man who is presumed to be the child's father.¹⁷
- 8.16 The court may dispense with a parent's consent if satisfied that the person cannot be found after reasonable inquiry.¹⁸ The Adoption Act details the steps that must be taken to establish that reasonable inquiry has been made.¹⁹
- 8.17 The Adoption Act does not oblige anyone to identify the father. There are some obligations to contact a man reasonably believed to be the father of the child.²⁰
- 8.18 The Secretary or principal officer of the approved agency arranging the adoption must contact a man they believe on reasonable grounds may be the father. This must happen within two business days of the mother giving her consent to the adoption.²¹ The obligation to contact the man believed to be the father only applies if his name or address is known.²²
- 8.19 The man must be advised of the belief that he may be the child's father. He must also be advised that his consent will not be required unless he commences proceedings to obtain a declaration of paternity. He must commence these proceedings before the end of the period in which the mother can revoke consent.²³
- 8.20 The court may dispense with the requirement to contact the man believed to be the father. The Secretary or principal officer must apply for this dispensation within two business days of the mother giving consent.²⁴
- 8.21 The Adoption Act does not specify the grounds on which the court may dispense with the requirement to contact the man believed to be the father. It seems likely that this provision is intended to cover situations where the court considers it appropriate that the mother should have sole decision-making responsibility. This might include situations of rape or incest, or situations where there would be an unacceptable risk of harm to the mother or child if the father were informed.

Responses

- 8.22 A significant number of people considered that greater efforts need to be made to identify and contact the father of the child to obtain his consent to an adoption.²⁵
- 8.23 The main reasons for requiring increased effort to identify and contact the father were:
- better care options than adoption may be available through the father or his family²⁶
 - the importance to the development of a child's identity of knowledge of their father and his family²⁷

¹⁶ *Adoption Act 1984* (Vic) ss 33(3)(a)–(e).

¹⁷ *Ibid* s 33(3).

¹⁸ *Ibid* s 43(1)(a).

¹⁹ *Ibid* s 43(2). It requires that the court is satisfied that a letter seeking that consent has been sent by certified mail addressed to that person, a letter seeking that consent has been sent by certified mail addressed to that person at the address of such other person (if any) as the Secretary or principal officer of an approved agency believes may know where the first-mentioned person may be found; the Secretary or principal officer of an approved agency is satisfied that the address of that person cannot be found on a roll of electors under the *Commonwealth Electoral Act 1918* (Cth) of the Commonwealth as amended and in force for the time being; notice to the person that consent of the person is sought has been published in a newspaper circulating generally in the area where the last known place of residence of the person is situated; and enquiries have been made of such persons, bodies, agencies and government departments as might reasonably be expected to have known where that person may be found.

²⁰ *Ibid* s 49.

²¹ *Ibid* s 49(2).

²² *Ibid* ss 49(1)(a)–(b),(2). In practical terms it would appear to require that the name and address of the man presumed to be the father is known. However, the section uses 'or' rather than 'and'.

²³ *Ibid* ss 49(1)–(2).

²⁴ *Ibid* s 49(1)(b)(ii).

²⁵ Submissions 3 (Leilani Hannah), 7 (Name withheld), 9 (Australian Adoptee Rights Action Group), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 16 (Name withheld), 18 (Dan Barron), 21 (Name withheld), 30 (Name withheld), 33a (Name withheld), 34 (VANISH), 35 (OzChild), 39 (ARMS (Vic)), 50 (Barnardos Australia), 51 (Law Institute of Victoria), 54 (Australian Christian Lobby); Consultations 15 (Roundtable with culturally and linguistically diverse representative agencies), 31 (SS).

²⁶ Submissions 7 (Name withheld), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 18 (Dan Barron), 20 (Name withheld), 39 (ARMS (Vic)).

²⁷ Submissions 30 (Name withheld), 34 (VANISH).

- grief issues for an adopted person who is unable to trace their father²⁸
- loss to the father if he is excluded from the decision-making process²⁹
- lost opportunity for an adopted person to establish a relationship with their father or members of his family.³⁰

8.24 Information about the paternal side of the family, including information about the genetic and cultural history, is unavailable if the father is not identified. Dan Barron, a permanent care father, submitted:

At worst the current provisions in the Victorian Act may work to let men off the hook in terms of their responsibilities, meaning they may not be required to be recognised as fathers, and this is very unfair on the children so affected. Even if a father has no intention of being involved in the care of an infant, he has at the least an obligation to allow that child knowledge about their biological heritage.³¹

8.25 Dan Barron also noted that parenting roles have shifted significantly since 1984 when the Adoption Act became law in Victoria:

it is acknowledged that fathers are equally able to bring up babies and children, and it is very important that fathers are made aware that they have a right to look after the child if they are able to do so.³²

8.26 ARMS (Vic) submitted that there is inequality between the way mothers and fathers are treated:

We allocate a status to the mother which is clearly different from the status of the father. The father should be involved from the moment the mother decides she wants to give up her baby ... there are plenty of fathers (in past adoptions) who would have had a different response or weren't allowed to be involved.³³

8.27 Another submission stated:

Once the father is identified, he should be given significant time to ascertain his parental rights, support to consider parenting his child—and all the options that the natural mother has been given ... It is assumed he doesn't want his child. If he does, he now has time limits and limited information about how to go about this. Totally unfair. This needs to be addressed in the legislation, with considerable time given to the natural father to assert his parental rights.³⁴

8.28 Others said if the father is contacted, he or his family may be able to provide appropriate care for the child.³⁵ Grandparents Victoria submitted that:

it is not in the best interests of the child to be placed with an adoptive family before all biological avenues are explored, nor is it in their best interests to discover years after the adoption that a biological relative would have been prepared to raise them if they had been given the opportunity.³⁶

8.29 VANISH submitted that: 'From the adopted person's perspective, it is a violation of their birthright to not be provided with the identity of their biological/genetic father and for his details to not be included on their birth certificate.'³⁷ It also submitted:

28 Submissions 20 (Name withheld), 57 (Patricia Harper).

29 Submission 34 (VANISH).

30 Submission 35 (OzChild).

31 Submission 18 (Dan Barron).

32 Ibid.

33 Submission 39 (ARMS (Vic)).

34 Submission 33b (Name withheld).

35 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 18 (Dan Barron), 20 (Name withheld), 33a (Name withheld), 39 (ARMS (Vic)).

36 Submission 11a (Grandparents Victoria Inc./Kinship Carers Victoria).

37 Submission 34 (VANISH).

Many fathers have ... experienced profound loss following exclusion from the birth and adoption of their child ... These disappointments and losses are compounded if such a scenario eventuated because those authorised to arrange the adoption did not take reasonable steps to accurately identify the adopted person's father, irrespective of the nature of the relationship between the father and mother at the time.³⁸

- 8.30 The Commission heard from some adopted people who have had difficulties or been unable to trace their father because he is not named on the birth certificate.³⁹
- 8.31 One submission explained the deep sense of grief the person has about not being able to trace their natural father: 'This search has consumed much of my life; both physically and mentally. I may never know who he is and this is very distressing.'⁴⁰
- 8.32 The submission underlined the dearth of information that may be available to an adopted person about the identity of their father, and the impact of this:

And, if you know who this man is, please let me know;

Height: Tall

Age: 25 (in 1960)

Complexion: Fair

Occupation: Public Servant

Residence: Queensland (most likely Brisbane)

This is my biological father. I have no other information and I am still researching his identity, as I will until the moment I draw my last breath.

- 8.33 Patricia Harper submitted that before the 1984 Adoption Act:
- steps to identify and obtain the adoption consent of fathers were frequently actively discouraged ... when an adopted person later obtained a copy of their original birth certificate, the place where their father's name should have been was simply a blank space ... the adopted person was unable to identify their father unless they were also able to ... make contact with, their birth mother—and ask if she would agree to telling them the name of their father—which some birth mothers were not willing to do.⁴¹
- 8.34 Some submissions suggested steps that should be taken to contact the father. These included advertisements in newspapers, searching police records, searching drivers licence records, requests to Centrelink, sending requests in writing to the father's last known address, using a registry similar to one the Supreme Court uses to publish probate notices, and using social media.⁴²
- 8.35 Participants at two roundtables said that seeking to identify the father through indirect means, such as contacting the mother's family, may place the mother or child at risk.⁴³
- 8.36 Child & Family Services Ballarat submitted that it would not support breaching a mother's privacy to seek information about the father. The counsellor would discuss with the mother why it is important to disclose information about the father.⁴⁴
- 8.37 Connections UnitingCare submitted that a mother 'should be provided with information about the likely consequences of this decision, including future legal challenges by the father'.⁴⁵

38 Ibid.

39 Submission 20 (Name withheld); Consultations 11 (Trevor Smith), 22 (Fae Cuff).

40 Submission 20 (Name withheld).

41 Submission 57 (Patricia Harper).

42 Submissions 9 (Australian Adoptee Rights Action Group), 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 21 (Name withheld).

43 Consultations 13 (Roundtable with approved adoption agencies), 15 (Roundtable with culturally and linguistically diverse representative agencies).

44 Submission 36 (Child & Family Services Ballarat Inc.).

45 Submission 29 (Connections UnitingCare).

- 8.38 Approved agencies told the Commission that it would be helpful if the Adoption Act provided clear guidance about when a father need not be contacted.⁴⁶
- 8.39 A significant number of people said it should not be necessary to contact the father for consent where there has been rape, incest, family violence, or where there is a significant or unacceptable risk of harm to the mother or child if the father is contacted.⁴⁷
- 8.40 A small number of people said that there were no circumstances where no attempt should be made to contact the father to seek his consent to an adoption.⁴⁸

Commission's conclusions

- 8.41 There are important benefits to the adopted person of identifying and contacting their father. These include the possibility that better care options than adoption may be available through the father or his family, assistance with an adopted person's identity development, and increased access to genetic and cultural history for the adopted person.
- 8.42 An adopted person may experience significant grief and loss and a sense of a 'missing piece' if they have no knowledge of their father and his family.
- 8.43 There may also be significant grief and loss issues for a father and his family if the father is excluded from the adoption decision making process and later discovers the existence of the child.
- 8.44 The Commission's recommendations aim to balance the importance of identifying the father with the need to ensure that the mother and child are safe and that the requirements are workable.
- 8.45 The Commission considered a legislative requirement that the mother identify the father of the child. It also considered a requirement to contact third parties such as the mother's family, friends, or community to try to ascertain the identity or location of the father.
- 8.46 The Commission concluded that coercive approaches are neither workable nor desirable. A mother considering adoption is voluntarily exploring adoption as an option to provide for her child. Introducing coercion has the following problems:
- The mother may not approach an adoption service if she fears that she will be compelled to reveal the identity of the father. A failure for the mother to explore options for care of her child may compromise the safety of both mother and child.
 - Breaching a mother's confidentiality to approach third parties may place the safety of both mother and child at risk.
 - The counselling process would be compromised. It would place the counsellor in an ethically questionable position if they were required to push the mother to reveal who the father is above other aspects of the counselling process.
 - The mother may not know the father's identity, so it may not be possible for her to disclose his identity.
 - It is hard to verify a mother's assertion that she does not know the father's identity.
- 8.47 The significance of the father should be recognised legislatively by placing a positive duty on the Secretary to take reasonable steps to identify the father. In practice, this should require that the legislation specifies that counselling with the mother must thoroughly explore the importance to the child of identifying the father.⁴⁹

⁴⁶ Consultation 13 (Roundtable with approved adoption agencies).

⁴⁷ Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 20 (Name withheld), 21 (Name withheld), 27 (Institute of Open Adoption Studies, University of Sydney), 35 (OzChild), 36 (Child & Family Services Ballarat Inc.), 39 (ARMS (Vic)), 54 (Australian Christian Lobby), 58 (Name withheld); Consultations 13 (Roundtable with approved adoption agencies), 15 (Roundtable with culturally and linguistically diverse representative agencies).

⁴⁸ Submissions 9 (Australian Adoptee Rights Action Group), 16 (Name withheld), 33a (Name withheld).

⁴⁹ As a matter of current practice, counsellors would thoroughly explore and document information regarding discussions with the mother about the identity of the father. A legislative requirement will strengthen existing practice. See Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 21.

- 8.48 The Adoption Act requires the completion of a certificate of compliance, which certifies that the required counselling and written information has been given to a person proposing to give consent.⁵⁰ This must be seen and read by the court witness to consent.⁵¹ The certificate of compliance should include a statement that the counsellor gave the mother information about the importance of identifying the father and the dates on which this was discussed.
- 8.49 Additionally, if the father is not identified, the written report provided to the court concerning the proposed adoption (currently under section 15 of the Adoption Act) should include details about the efforts made to identify him.
- 8.50 Currently, the court can decide to dispense with the need to notify a man believed to be the father. The Secretary or principal officer must apply within two business days of the mother giving consent. The grounds for the application and decision are not specified.⁵²
- 8.51 Court scrutiny provides an additional safeguard to ensure that a decision not to contact a possible father is only made in exceptional circumstances.
- 8.52 On balance, the Commission considers that the Secretary is the better choice as decision maker. Providing for the Secretary to make the decision reduces the risk of a child remaining in temporary and potentially multiple placements for a protracted period of time while consent is finalised.
- 8.53 The Commission recommends extending the period for revocation of consent (Recommendation 38). This is important to ensure that a parent giving consent has adequate time to come to terms with the decision and consider alternatives. Because the Commission proposes extending the timeframes for revoking consent, it is particularly important that any unnecessary delays are avoided.
- 8.54 The Adoption Act can require the Secretary to apply to the court for a decision within a set timeframe. It cannot control when the court makes its decision. If there are delays and the court ultimately decides that the father should be notified, he would need to be given an appropriate period to commence paternity proceedings. This has the potential to significantly delay a decision about the child's future.
- 8.55 In contrast, the Adoption Act can require the Secretary to make the decision within a set time period, which reduces delay.
- 8.56 The current power in section 49(1)(b)(ii) for the court to dispense with the requirement to notify the man believed to be the father should be removed. It should be replaced with a power for the Secretary to dispense with the requirement to notify a man believed to be the father. The Adoption Act should specify an appropriate timeframe for this to occur. The other elements of section 49 should be retained, modified as necessary in accordance with other recommendations made by the Commission.
- 8.57 The significance of the decision means that responsibility should sit with the Secretary. The Act should specify that it is a duty which cannot be delegated.
- 8.58 To reduce subjectivity of decision making, the Commission proposes the grounds for making a decision.
- 8.59 The Secretary should be able to dispense with the requirement to contact the man believed to be the father in the following limited circumstances:
- the child's conception was a result of an offence
 - the man is a lineal relative of the mother (a lineal relative is a blood relative in the direct line of descent)

50 *Adoption Act 1984* (Vic) s 35(3); *Adoption Regulations 2008* (Vic) reg 26, sch 12.
51 *Adoption Regulations 2008* (Vic) reg 20, sch 10.
52 *Adoption Act 1984* (Vic) s 49(1)(b)(ii).

- there would be an unacceptable risk of harm to the child or mother if the person were made aware of the child's birth or proposed adoption.
- 8.60 The Commission acknowledges that dispensing with the need to notify the possible father means that the family of the possible father is also excluded. This is a loss to both the family and the child.
- 8.61 The Commission considers that it would be not in the child's best interests to contact the possible father in the circumstances described above. It would increase the chances of the mother disappearing. If arrangements were made for the child to be cared for by the father's family, it seems likely that the child would not have contact with their mother. It also risks traumatising the mother.
- 8.62 The court should have the power to dispense with the consent of the father, where the father is known, on the same grounds as those which enable the Secretary to dispense with the need to notify a man believed to be the father.
- 8.63 The Commission acknowledges concerns raised by approved agencies about difficulties in complying with privacy legislation when trying to locate a father. The use of independent counsellors would be likely to exacerbate any existing problems. For this reason, duties relating to locating the father should sit with the Secretary rather than counsellors or the principal officer.

Recommendations

- 31** The Adoption Act should require that, where the father has not been identified, the Secretary must take reasonable steps, as specified in the Regulations, to establish the identity of the father. The Regulations should specify that:
- a. the mother should receive counselling that encourages her to disclose as much information as possible to give to the child
 - b. if the mother is unwilling or unable to disclose details identifying the father, the certificate of compliance (currently provided for in regulation 26) should include a statement specifying that the counsellor gave the mother information relating to the following matters and the dates on which they were discussed:
 - i. the importance to the child of knowing that both parents have had the opportunity to participate in planning the adoptive placement
 - ii. the long-term rights and interests of the child in having knowledge of their origins, including the relevance of genetic and medical information and importance of this knowledge for the development of the child's identity
 - iii. the importance of the child's future rights as separate from the mother's own immediate needs and rights.
- 32** The Adoption Act should require that if the father is not identified the written report provided to the court concerning the proposed adoption (currently under section 15 of the Adoption Act) includes details about the efforts made to identify the father.

- 33** The Secretary should have a non-delegable power to dispense with the requirement to notify a man believed on reasonable grounds to be the father if:
- a. the child's conception was the result of an offence committed by the person
 - b. the person is a lineal relative of the mother
 - c. there would be an unacceptable risk of harm to the child or mother if the person were made aware of the child's birth or proposed adoption.

Counselling

Current law

- 8.64 For consent to be effective it must be in a prescribed form signed by the person giving consent.⁵³ A consent form includes specific information to ensure that information provided about the effect of an adoption order is consistent and that the person providing consent understands the effect of an adoption order.
- 8.65 In most cases, the form includes a statement that when the court makes an adoption order, the person giving consent will lose their rights as a parent of the child, those rights will be transferred to the person or persons who adopt the child, and the child will be treated in law as the child of the person or persons who adopt the child.⁵⁴
- 8.66 If consent is given in Victoria, the person giving consent must have received counselling from an 'approved counsellor'.⁵⁵
- 8.67 The Secretary can approve a person as a counsellor by publishing a notice in the *Government Gazette*.⁵⁶
- 8.68 A counsellor must be an officer or employee of DHHS, or employed by an approved agency, or a person who, in the opinion of the Secretary, has the qualifications and experience appropriate for a counsellor for the purposes of the Adoption Act.⁵⁷
- 8.69 The Adoption Act and Regulations do not provide guidance as to the qualifications or experience required for a person to be an approved counsellor.
- 8.70 The Secretary or principal officer is required to sign a certificate of compliance. This certifies that before the person gives consent, the required counselling has occurred, including that the required information has been given.⁵⁸ The court official witness must have seen and read the certificate of compliance.

⁵³ *Adoption Act 1984* (Vic) ss 34(1), 36. See also *Adoption Regulations 2008* (Vic) reg 20, sch 9.

⁵⁴ *Adoption Regulations 2008* (Vic) reg 20(a)(i),(iii), sch 9 form 1, form 3. This does not apply where consent is given by the child's parent to the adoption of their child by the parent's spouse or de facto spouse. In that case the form includes statements that the person consents on the understanding that their rights as a parent will not be altered in any way by an adoption order in favour of their spouse and that the person understands that an adoption order gives the person and their spouse the same rights as parents of the child that both would have if they were married when the child was born: *Adoption Regulations 2008* (Vic) reg 20(a)(ii), sch 9 form 2. Note that the forms will need to be updated to reflect the changes under the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7(7), which replaces the term 'de facto spouse' in the *Adoption Act 1984* (Vic) s 11(6) with the term 'domestic partner'.

⁵⁵ *Adoption Act 1984* (Vic) s 35(1)(a). Counselling must be provided by a person approved for the purpose by the Secretary or the principal officer of an approved agency.

⁵⁶ *Ibid* s 5(1).

⁵⁷ *Ibid* s 5(2).

⁵⁸ *Ibid* s 35(3); *Adoption Regulations 2008* (Vic) reg 26.

- 8.71 If consent is given outside Victoria, the counselling requirements do not apply.⁵⁹ However, in all cases, the person giving consent must have received information about the effect of the adoption order, and the procedures for revoking consent and for extending the period for revoking consent.⁶⁰

Responses

- 8.72 Two key concerns were expressed about approved counsellors in adoption. These were:
- an actual or perceived conflict of interest because DHHS or approved agencies perform multiple roles in the adoption process—assessing applicants for adoption, providing options counselling for parents who are considering placing their child for adoption and acting as one of the witnesses for consent, linking children and applicants, and providing placement support to the child and adoptive parents⁶¹
 - a lack of clarity and regulation about who can provide counselling and the risk that counsellors may not be suitably qualified or specialised.⁶²
- 8.73 A number of people told the Commission that there is a conflict of interest if DHHS or approved agencies provide counselling as well as placing children for adoption.⁶³
- 8.74 Participants at a consultation with the Australian Association of Social Workers told the Commission that there are independence and transparency issues. If the counselling and linking roles are not kept separate, the worker is placed in a very difficult position professionally.⁶⁴
- 8.75 Others also proposed the need for more oversight or independence through the consent process. Adoption Origins Victoria said that an independent body (for example, an ‘ethics committee’) should oversee the consent process, including the counselling. It said that DHHS and approved agencies should not have the counselling role because representing both the natural parents and the adoptive parents is a conflict of interest.⁶⁵
- 8.76 Dr Briony Horsfall submitted that an independent statutory body similar to the Victorian Assisted Reproductive Treatment Authority should provide the majority of adoption services, including counselling.⁶⁶
- 8.77 Some people told the Commission counselling should be provided by an independent counsellor to ensure there is no conflict of interest.⁶⁷
- 8.78 Professor the Hon. Nahim Mushin told the Commission that there is a conflict of interest in the role DHHS plays. He proposed that the court should have a greater role and that the only role that DHHS should have in consent is to assist the court.⁶⁸
- 8.79 Participants at a roundtable with approved agencies told the Commission that, generally, a counsellor would have a bachelor’s degree in social work, psychology or behavioural science and would have completed options counselling training.⁶⁹

59 *Adoption Act 1984* (Vic) s 35(4).

60 *Adoption Regulations 2008* (Vic) regs 17(1)(b)–(c), 23, sch 10–11.

61 Submission 34 (VANISH); Consultations 12 (Adoption Origins Victoria Inc.), 24 (Australian Association of Social Workers), 26 (Roundtable with groups and individuals representing children’s interests), 32 (Ann Jukes and Gabrielle Hitch), 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

62 Submissions 26 (Adoption Origins Victoria Inc.), 42 (Australian Association of Social Workers).

63 Consultations 12 (Adoption Origins Victoria Inc.), 24 (Australian Association of Social Workers), 25 (VANISH), 26 (Roundtable with groups and individuals representing children’s interests).

64 Consultation 24 (Australian Association of Social Workers).

65 Consultation 12 (Adoption Origins Victoria Inc.).

66 Submission 45 (Dr Briony Horsfall).

67 Submissions 34 (VANISH), 39 (ARMS (Vic)); Consultation 32 (Ann Jukes and Gabrielle Hitch).

68 Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

69 Consultation 13 (Roundtable with approved adoption agencies).

- 8.80 The Australian Association of Social Workers submitted that:
- The absence of a definition within the Act about educational requirements and experience raises significant concerns about the quality of support that is being provided and the ability to regulate it. ‘Counselling’ is a poorly regulated field and a commonly used term to describe a whole range of approaches. Given the complexity involved in supporting individuals and families through the adoption process, the Act has to ensure that those providing counselling have the necessary qualifications and experience.⁷⁰
- 8.81 Adoption Origins Victoria submitted that:
- counsellors need to be appointed who have a clear knowledge of the likely trauma of adoption for children and for the parents. Currently, Adoption Origins Victoria is concerned at the qualifications of the Counsellors and the lack of requirement for substantive and robust advice about the impact of adoption.⁷¹
- 8.82 CREATE Foundation submitted that where young people who have been in out-of-home care consider the adoption of their child, ‘matters of consent are complex and require specialised support’. It submitted that ‘Trauma-informed practice is necessary to enable informed consent’.⁷²
- 8.83 Participants at a roundtable with culturally and linguistically diverse representative agencies emphasised the need for the use of interpreters. They identified a risk that if a person giving consent comes from a culture where adoption does not exist, the person may not fully understand the permanent nature of adoption.⁷³
- 8.84 The Youth Disability Advocacy Service raised concerns about the complex and legalistic nature of the consent process. It submitted:
- there is no guarantee that ... counsellors will have any expertise in disability. This is particularly concerning in light of the fact that the Act currently includes provisions for dispensation of consent, including in circumstances where: the person’s mental or physical condition makes them incapable of properly considering the consent, and the person has a mental or physical disability preventing the needs of the child from being met.⁷⁴

Commission’s conclusions

- 8.85 In light of the history of forced adoption in Victoria, it is crucial that the consent process is as robust as possible, with stringent legal and procedural requirements.
- 8.86 It is important to maximise safeguards to ensure that there is no potential for a conflict of interest.
- 8.87 There is a risk of a perceived or actual conflict of interest for approved counsellors under the Adoption Act because of the multiple roles played by DHHS and approved agencies. The same agency provides counselling to a person considering adoption, assesses prospective adoptive parents, places children for adoption and supervises the placement. This creates a perception that pressure may be placed on a parent to consent to the adoption of their child.
- 8.88 Options counselling should be provided by counsellors who are independent of DHHS and approved agencies. This establishes a clear separation between the options counselling process, one possible outcome of which may be for a parent to provide consent to the adoption of their child, and the processes for assessing prospective adoptive parents and linking them with a child. It will ensure that there is no actual or perceived conflict of interest.

⁷⁰ Submission 42 (Australian Association of Social Workers).

⁷¹ Submission 26 (Adoption Origins Victoria Inc).

⁷² Submission 55 (CREATE Foundation).

⁷³ Consultation 15 (Roundtable with culturally and linguistically diverse representative agencies).

⁷⁴ Submission 47 (Youth Disability Advocacy Service).

- 8.89 If a parent approaches an approved agency or DHHS about adoption of their child, the relevant Secretary or principal officer should refer them to an approved counsellor. Under the Commission's recommendation all approved counsellors would be independent of DHHS and approved agencies.
- 8.90 There is also a need to provide greater clarity and regulation as to who can provide counselling.
- 8.91 There are two key components to this. The first is that the counsellor has appropriate qualifications. The second is that the counsellor has sufficient knowledge, skill and specialisation in options counselling.
- 8.92 The approach taken in New South Wales provides a useful model. New South Wales requires that the counsellor must have specified qualifications,⁷⁵ including a university qualification in the social sciences, which took the equivalent of at least three years full-time study.⁷⁶
- 8.93 There should be a legislative requirement that an approved counsellor hold a relevant university degree and is a member of a relevant professional body.
- 8.94 Approved counsellors should undertake appropriate and specialised training in providing counselling in adoption. They should also carry out additional training as required by the Secretary from time to time.
- 8.95 The process to approve a counsellor should include approving them to act as a witness to consent.⁷⁷ Their training will need to ensure they thoroughly understand the consent process.
- 8.96 If a person proposes to give consent, the approved counsellor should complete a certificate of compliance, certifying that counselling has occurred and the required information has been given. This can be an adapted version of the certificate of compliance currently completed by the Secretary or principal officer.⁷⁸ As occurs now, it should be presented to the court official witness, so that they can be satisfied that the required counselling and information has been given. The certificate of compliance should then be provided to the principal officer or Secretary who is making the arrangements for adoption.
- 8.97 The Commission's recommendation aims to ensure that there is sufficient transparency and rigour to the requirements to be an approved counsellor. The Secretary is best placed to decide the detail of what degrees and professional memberships are appropriate. The Secretary should also decide what adoption specific training is required.
- 8.98 A number of additional requirements would need to be considered in providing for a person to be approved as a counsellor and for approval to be rescinded. In the case of rescinding of approval, these might include a relevant criminal record, disciplinary action for breach of professional standards, or improper or unethical conduct. In the case of rescinding approval, it might also include matters such as a loss of mental capacity.
- 8.99 The Commission has made recommendations aimed at maximising the chances of identifying and locating the father. These are important both to enabling a father to be involved in adoption decision making, including having an opportunity to parent his child, and to ensuring that an adopted person can access information about their father. The success of these recommendations depends on any information about the actual or possible identity of the father being passed on to the Secretary by the approved counsellor.

⁷⁵ *Adoption Act 2000* (NSW) s 57.

⁷⁶ *Adoption Regulation 2015* (NSW) reg 77(2)(c).

⁷⁷ Section 34(1)(a)(ii) of the *Adoption Act 1984* (Vic) requires that one of the witnesses to consent be a person approved for the purpose by the Secretary or principal officer. Regulation 22(1) of the *Adoption Regulations 2008* (Vic) requires that this must generally be the approved counsellor. The Commission considers that an approved counsellor should always be approved as a witness to consent as part of the approval process. The Secretary should only need to approve a person to witness consent if the approved counsellor who gave counselling is 'unavailable or it is impracticable for the person to be present because of the particular circumstances'. In this situation the Secretary should approve a witness on the basis set out in regulation 22(1)(b) of the *Adoption Regulations 2008* (Vic).

⁷⁸ *Adoption Act 1984* (Vic) s 35(3); *Adoption Regulations 2008* (Vic) reg 26, sch 12.

- 8.100 To protect the integrity of the counselling process, the counsellor would need to tell a mother receiving counselling that any information about an actual or possible father will be passed on to the Secretary. This would need to occur at the outset of counselling.

Recommendation

- 34** The Adoption Act should replace the current requirements in section 5(2) of the Adoption Act for approved counsellors as follows:
- Counsellors must be independent of the Department of Health and Human Services and approved agencies.
 - Counsellors must hold a relevant university degree that is prescribed in the Adoption Regulations.
 - Counsellors must be a member of a relevant professional body that is prescribed in the Adoption Regulations.

Written information provided by counsellor

Current law

- 8.101 A person giving consent must have received written information from the person who gave them counselling. Information must be provided about the effect of an adoption order, the alternatives to adoption, the names and addresses of organisations that provide family support services, the rules relating to consent and the rules once consent cannot be revoked but before an adoption order has been made, and information about different arrangements that may be made to care for the child.⁷⁹
- 8.102 The person giving consent must also be given notice in writing that the person may, at any time, make application subject to and in accordance with the *Births, Deaths and Marriages Registration Act 1996* (Vic) for a certified copy of, or extract from, the entry relating to the child in the Register of Births.⁸⁰

Responses

- 8.103 Some people raised concerns that the level of information provided as part of the counselling and consent process is inadequate.
- 8.104 Adoption Origins Victoria submitted that 'surrendering one's own child has far more devastating consequences than is first realized ... the parent/s ... should be fully informed of the ramifications ... not only for them but also for the adopted person'.⁸¹ It suggested a range of additional information including:
- the likely negative lifelong psychological effects of the adoption
 - a warning that adopted persons are overrepresented in suicide, addiction, substance abuse and mental health statistics.
 - advice to parents that their child will probably want to reconnect at a later stage and that they should be prepared for that outcome
 - that private arrangements for contact are not enforceable and that court-sanctioned contact is the only formal way to protect the child's right to have contact with his or her parent(s) and extended family.⁸²

⁷⁹ *Adoption Act 1984* (Vic) s 35(1); *Adoption Regulations 2008* (Vic) reg 17(1).
⁸⁰ *Adoption Act 1984* (Vic) s 35(1)(c).
⁸¹ Submission 26 (Adoption Origins Victoria Inc.).
⁸² *Ibid.*

- 8.105 The Australian Adoptee Action Rights Group told the Commission that it should be mandatory to provide a detailed and comprehensive paragraph about the impacts on children removed at birth.⁸³ It submitted:
- Mothers are not informed that after birth their brains actually change, their views on everything change. They are not informed on the short and long term impacts of removal on their child: that babies suffer when not placed on the breast of the mother after birth, that babies suffer when removed ... The psychological and emotional impacts long-term are not told: that premature maternal separation causes pre-verbal trauma that marks people with a sense of loss of self and disconnection from others, feelings of abandonment, worthlessness and grief, can manifest in adulthood as anxiety, depression, rage, mental illness and suicidal ideation.⁸⁴
- 8.106 VANISH submitted that both parents should be informed about the rights of other parties to access the information about the adoption in future.⁸⁵
- 8.107 The Youth Disability Advocacy Service expressed concern that the consent process is complex and legalistic. It submitted that this risks placing young parents with cognitive impairment, as well as young parents with disability from non-English speaking backgrounds, at severe disadvantage. It recommended that information about the consent process should be explained verbally in plain language, provided in Easy English, and made available on request in alternative formats such as large print, braille and audio.⁸⁶
- 8.108 The Youth Disability Advocacy Service also proposed that the Adoption Act should ensure that parents are informed about their right to an independent advocate.⁸⁷

Commission's conclusions

- 8.109 The aim of providing information is to safeguard free and informed consent. Two prominent themes that arose during the Commission's consultation process were the lifelong effects and trauma associated with adoption. The written information which must be given to a person considering consenting to adoption does not currently adequately address these matters.
- 8.110 Adoption legislation in Queensland requires additional written information to that provided in Victoria. The additional information includes financial supports available, whether or not adoption proceeds, and the psychological effects of adoption.⁸⁸
- 8.111 To ensure that a person considering consent to adoption is adequately informed about all aspects of adoption, additional written information should be provided.
- 8.112 The additional information should relate to: financial and other support that may be available to the parent whether or not an adoption of the child proceeds; possible short- and long-term psychological effects for the parent of consenting to the adoption; possible short- and long-term psychological effects for the child of being adopted; and the rights and responsibilities of the parties to an adoption, including those relating to adoption plans.

83 Consultation 27 (Australian Adoptee Rights Action Group).
 84 Submission 9 (Australian Adoptee Rights Action Group).
 85 Submission 34 (VANISH).
 86 Submission 47 (Youth Disability Advocacy Service).
 87 Ibid.
 88 *Adoption Act 2009* (Qld) s 23.

Recommendation

- 35** The Adoption Regulations should require that in addition to the current mandatory written information that is provided by the counsellor (under regulation 17), written information should also be provided about:
- support (financial and otherwise) that may be available to the parent whether or not an adoption of the child proceeds
 - possible psychological effects for the parent, both short and long-term, of consenting to the adoption
 - possible psychological effects for the child, both short and long-term, of being adopted
 - the rights and responsibilities of the parties to an adoption, including those relating to adoption plans.

Legal advice

Current law

- 8.113 There are no requirements in the Adoption Act that someone considering consent to adoption receive legal advice.

Responses

- 8.114 Some people considered that there is a need for advice from an independent legal practitioner for a person providing consent to adoption.⁸⁹
- 8.115 ARMS (Vic) submitted that all parties need to have independent legal representation and that the mother should have legal representation before giving consent right through to the legalisation of the adoption.⁹⁰
- 8.116 VANISH submitted that the Adoption Act should provide for independent legal representation for the natural parents.⁹¹
- 8.117 Professor the Honourable Nahum Mushin said that there should be legal representation for minors (litigation guardianship if required), legal advice must be available, and the court must be satisfied it is proper consent. The issue of consent then becomes a matter of fact.⁹²

Commission's conclusion

- 8.118 No jurisdiction in Australia has a general requirement that a person providing consent must have legal advice from a legal practitioner.⁹³
- 8.119 The Commission does not consider that there should be a general requirement that a person providing consent to an adoption must have legal advice.

89 Submissions 21 (Name withheld), 34 (VANISH), 39 (ARMS (Vic)); Consultations 32 (Ann Jukes and Gabrielle Hitch), 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

90 Submission 39 (ARMS (Vic)).

91 Submission 34 (VANISH).

92 Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

93 The Australian Capital Territory and New South Wales have requirements about independent legal advice if the parent is under 18 years: *Adoption Act 1993* (ACT) s 27(3); *Adoption Act 2000* (NSW) s 58(4).

- 8.120 The key concerns people raised about the consent process included: conflicts of interest; timeframes for giving and revoking consent; that alternative options to adoption are not explored sufficiently; that insufficient information about the long-term psychological effects of adoption, including grief and trauma, is provided; and that a person's language, cultural background or capacity may mean that they do not fully understand the legal effect of adoption.
- 8.121 None of these concerns would be addressed through a requirement that a person providing consent must have legal advice.
- 8.122 Lawyers do not have skill or knowledge in exploring alternatives to adoption, nor in the long-term psychological effects of adoption. Concerns that a person does not comprehend the legal effect of an adoption because of language, cultural background or capacity are also not resolved through a requirement for legal advice. Although some lawyers may be skilled and experienced at working with clients from culturally and linguistically diverse backgrounds, many are not. Nor do lawyers have any specialised skills in assessing capacity.
- 8.123 The consequences of consenting to a child's adoption are extremely significant, but the legal effects are not so complex that legal advice is needed in each case.
- 8.124 There are already a variety of checks and balances in the Adoption Act to ensure that the person understands the legal effects of the adoption. These include:
- counselling requirements⁹⁴
 - requirements that written information is given about the effect of an adoption order, the alternatives to adoption and the names and addresses of family support services (generally not less than seven days before consent is given)⁹⁵
 - requirements that the witnesses are satisfied that the person giving consent understands: the effect of an adoption order; the procedures for revoking consent to the adoption; and the procedure for extending the period for revoking consent to the adoption⁹⁶
 - offence provisions for a person who makes a false statement for the purposes of or in connection with a proposed adoption or any other matter under the Act,⁹⁷ and for a person who does not follow the rules for witnessing a consent document.⁹⁸
- 8.125 In Queensland the chief executive of the department 'must ensure each of the child's parents is told that the parent may wish to seek legal advice and is given the details of at least 1 entity that generally provides free legal services'.⁹⁹ This strikes a suitable balance. It ensures that a person considering consent to adoption is aware of the option of legal advice without unduly affecting their autonomy by requiring that they receive legal advice as well as counselling.
- 8.126 The duty should be set at a slightly higher level to ensure that people do not fail to seek legal advice because they lack confidence to contact a legal service. The person should be asked if they would like assistance contacting a legal service. If the person does want assistance, the Secretary or principal officer should facilitate legal assistance by ensuring that a relevant legal service is contacted and the person is introduced to the service.

94 *Adoption Act 1984* (Vic) s 35.

95 *Ibid* s 35(1)(b).

96 *Ibid* s 34; *Adoption Regulations 2008* (Vic) regs 17(1)(b)–(c), 23, schs 10–11.

97 *Adoption Act 1984* (Vic) s 124.

98 *Ibid* s 127.

99 *Adoption Act 2009* (Qld) s 26.

Recommendation

- 36** The Adoption Act should require the Secretary or principal officer to ensure that:
- each person considering giving consent to an adoption is told that it may be advisable to seek legal advice; is given the details of at least one entity that generally provides free legal services; and is offered assistance in contacting a legal service
 - if the person does want assistance, a relevant legal service is contacted and the person is introduced to the service with an explanation of why they are seeking legal advice.

Training for witnessing consent

Current law

- 8.127 The consent form must be signed in the presence of two eligible witnesses.¹⁰⁰
- 8.128 If consent is given in Australia, there are two classes of eligible witness. One witness must be drawn from each class.¹⁰¹
- 8.129 The first category of witness is a person approved by the Secretary or principal officer of an approved agency. Generally this witness would be the approved counsellor who provided counselling before the consent was given.¹⁰²
- 8.130 The second category of witness is court officials.¹⁰³
- 8.131 The witnesses must sign a prescribed statement. A witness must not sign the statement unless they believe that the person giving the consent understands:
- the effect of an adoption order
 - the procedures for revoking consent
 - the procedure for extending the period for revoking consent.¹⁰⁴

Responses

- 8.132 Approved agencies highlighted the importance of the role of the court official in witnessing consent. They said that the court registrar has an important role in providing oversight of the consent process but that their approach and level of knowledge is not always consistent.¹⁰⁵
- 8.133 Child & Family Services Ballarat submitted that it would be useful for court staff to get specific training so that they understand their obligations in witnessing consent to adoption and to ensure that consents are fully informed. It noted that court staff should be the oversight for this process, not a rubber stamp.¹⁰⁶

¹⁰⁰ *Adoption Act 1984* (Vic) s 34.

¹⁰¹ *Ibid* s 34(1)(a).

¹⁰² *Ibid* s 34(1)(a)(ii); *Adoption Regulations 2008* (Vic) reg 22(1).

¹⁰³ *Adoption Act 1984* (Vic) ss 34(1)–(2). Section 34(2)(c) of the Act provides that if the consent is signed in another state or territory, the relevant witness is a person who is the principal administrative officer of a court in that state or territory or a deputy of such an officer. If the consent is signed in Victoria, the prescribed court officials are set out in the *Adoption Regulations 2008* (Vic) reg 22(2). There is also provision for gazettal of an authorised person.

¹⁰⁴ *Adoption Act 1984* (Vic) s 34; *Adoption Regulations 2008* (Vic) regs 17(1)(b)–(c), 23, schs 10–11.

¹⁰⁵ Consultation 13 (Roundtable with approved adoption agencies).

¹⁰⁶ Submission 36 (Child & Family Services Ballarat Inc.).

Commission's conclusion

- 8.134 The witnessing requirements in the Adoption Act are a crucial element in ensuring oversight of the consent process. It is important that witnesses have a thorough understanding of what is required and what adoption involves.
- 8.135 The approved counsellor should undertake training to ensure they thoroughly understand the consent process and their role in it.
- 8.136 The Commission considers that training should also be provided to court staff who will be witnessing adoption consents.
- 8.137 The court official performing the witnessing of consent provides independent oversight of the consent process. In particular, training should focus on ensuring that court staff understand that they must not sign the witness statement unless they believe that the person understands the effect of an adoption order and the procedures for revoking consent to the adoption.
- 8.138 To test this understanding of the person signing consent, the court staff member should ask appropriate questions. Training should assist them to do this.

Recommendation

- 37** Court officials who witness adoption consents should receive training that:
- emphasises the importance of the independent oversight that they provide
 - emphasises that they must not sign the witness statement unless they believe that the person understands the effect of an adoption order and the procedures for revoking consent to the adoption
 - provides guidance about the types of question that should be asked to assess that the person providing consent understands these matters.

Timeframes to give and revoke consent

Current law

- 8.139 Generally, consent may not be given within 14 days after the birth of the child. Where it is in the best interests of the child, the court can order that consent may be given earlier.¹⁰⁷
- 8.140 Consent to the adoption of a child may be revoked within 28 days from the date on which consent was signed.¹⁰⁸
- 8.141 The timeframe for revoking consent may be extended by a maximum of 14 days.¹⁰⁹

Responses

- 8.142 Some people raised concerns about the minimum timeframe for consent to be given.¹¹⁰ Concerns were also raised about the period to revoke consent. Key concerns were:

¹⁰⁷ *Adoption Act 1984* (Vic) ss 42(2)–(3). Section 42(1) sets out a range of other circumstances where consent is ineffective and the court may not make an adoption order in reliance on it.

¹⁰⁸ *Ibid* s 41(1)(a).

¹⁰⁹ *Ibid*. Section 38(1) provides that if the Secretary or principal officer considers that it is no longer possible to place the child with a proposed adoptive parent or parents, each person who gave consent must be informed in writing of the right to revoke consent. The timeframe for revoking consent is 56 days after the notice is given.

¹¹⁰ Submission 34 (VANISH); Consultations 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies), 22 (Fae Cuff), 26 (Roundtable with groups and individuals representing children's interests).

- A mother who has just given birth may not be physically or emotionally ready to make a decision of this magnitude within 14 days for consent or 30 days for revoking consent.¹¹¹
- The timeframes do not allow adequate time to provide counselling about options, pros and cons, and enable contact with the child during that time.¹¹²
- Consent is a process of consideration—there must be adequate time for the mother to consider the decision and understand the impact of separation from her child.¹¹³
- A timeframe this short may limit efforts to explore options for other family to care for the child.¹¹⁴

8.143 VANISH submitted that:

while the Act mandates a minimum time frame of 14 days after birth before consent can be given, in practice there is usually a much longer period required to ensure parents receive information ... The Act should reflect this, and it should also extend the minimum time after birth before consent can be given to at least 30 days, with the capacity to extend this for a further 30 days.¹¹⁵

8.144 Child & Family Services Ballarat submitted:

For some parents, for instance those who have had pre-birth counselling, they are able to make this decision in a shorter timeframe, and prefer matters to be resolved quickly. The current consent provisions allow for both situations—delaying consent to provide maximum opportunity to weigh up issues or consent being provided within a short period when required.¹¹⁶

8.145 Another submission stated that the consent provisions ‘strike an appropriate balance between empowering birth parents to consider their options and make a considered, informed decision with time to “cool off” and also reaching finality so that permanent arrangements can be made for the child’.¹¹⁷

8.146 Approved agencies told the Commission that the timeframe for counselling and taking consent can be very variable. They said that if the minimum period for giving consent is extended to longer than 14 days after the birth of the child, some parents would disappear.¹¹⁸

8.147 Women’s Forum Australia submitted that the timeframes for giving consent are too long. It proposed that it should be possible for ‘adoption orders to be commenced (and if reasonable in the given case, finalised) while the baby is still in utero, provided that the birth parent has the ability to withdraw consent for a reasonable period (say, 30 days) after the birth’.¹¹⁹

8.148 Approved agencies told the Commission that extending the period to revoke consent could affect placement stability. They said it is often four to five months after consent before the child is placed for adoption. During this time the child is in temporary pre-adoption placements. Extending the period in which consent can be revoked could push the timeframe of temporary placement out further.¹²⁰

8.149 A number of people expressed concern about the timeframe for revocation of consent. They considered there is insufficient time to work through the range of issues.¹²¹

111 Submission 23 (Fae Cuff).

112 Consultation 25 (VANISH).

113 Ibid.

114 Consultation 26 (Roundtable with groups and individuals representing children’s interests).

115 Submission 34 (VANISH).

116 Submission 36 (Child & Family Services Ballarat Inc.).

117 Submission 58 (Name withheld).

118 Consultation 13 (Roundtable with approved adoption agencies).

119 Submission 38 (Women’s Forum Australia).

120 Consultation 13 (Roundtable with approved adoption agencies).

121 Submissions 23 (Fae Cuff), 26 (Adoption Origins Victoria Inc.), 33b (Name withheld), 34 (VANISH), 39 (ARMS (Vic)), 47 (Youth Disability Advocacy Service); Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

- 8.150 Fae Cuff submitted that:
- 30 days isn't long enough for a decision of such importance to be made. Your body and mind are going through changes that any mother will tell you will last for some time. Add to this the pressure of handing a child over for adoption! Perhaps add the loss of a relationship with baby's father, accommodation worries, financial problems, being disconnected from family and friends. Having to make a final decision with all of those pressures is not very different now than it was in my time. Why can't the baby be placed in short term care for a few months until mother is deemed well enough mentally and physically (perhaps by a GP/psychologist) to make a final decision.¹²²
- 8.151 A range of timeframes for revocation of consent were proposed including at least two months,¹²³ six months,¹²⁴ 12 months,¹²⁵ and up to the time of making the adoption order.¹²⁶
- 8.152 The Youth Disability Advocacy Service raised particular concerns about the revocation timeframes in relation to young parents with disability. It proposed greater flexibility around these timeframes in order to safeguard against unwilling or coerced adoption.¹²⁷
- 8.153 Adoption Origins Victoria submitted that the period for revocation needs to be significantly longer, suggesting a minimum of six months, but preferably until the day an adoption order is made. It submitted that the family of origin, including the child, 'needs the complete protection of their community to ensure that their family, wherever possible, is kept intact'.¹²⁸
- 8.154 A participant at a roundtable with groups and individuals representing children's interests said research about attachment should not be interpreted too narrowly because it is always evolving. The participant said that it is best for infants and young children if they have a primary carer, but if they have consistency of care and are attached to a network of carers, this can also be effective for their development.¹²⁹
- 8.155 Another submission made similar points suggesting a 12-month period to revoke consent 'so that the natural parent and family can genuinely explore their parenting options'. The submission stated:
- A child under 12 months of age can still successfully transfer back to their natural family without ongoing trauma ... we know this through research ... Up to 12 months is also a more realistic amount of time for someone to fully explore the options around keeping the child. An extension of consent for 14 days would not be required if the revocation period was changed to 12 months. Relinquishment should be a considered decision that is not made under significant time pressure. Give these processes the time they deserve, for the best interests of the child involved—and their parents.¹³⁰

Commission's conclusions

- 8.156 The Commission considers that the current total timeframe for consent and revocation of consent from when a child is born is too short. This timeframe for consent and revocation should be viewed as a whole, rather than as two separate events. Consent is not final until any revocation period finishes. A child will not be placed for adoption until after the period for revocation of consent expires.
- 8.157 The minimum timeframes for providing consent after a child's birth differ between Australian states and territories. The general requirement in Victoria that consent not be

122 Submission 23 (Fae Cuff).

123 Consultation 22 (Fae Cuff).

124 Submission 39 (ARMS (Vic)).

125 Submission 33b (Name withheld).

126 Submission 26 (Adoption Origins Victoria Inc.).

127 Submission 47 (Youth Disability Advocacy Service).

128 Submission 26 (Adoption Origins Victoria Inc.).

129 Consultation 26 (Roundtable with groups and individuals representing children's interests).

130 Submission 33b (Name withheld).

given within 14 days after the child's birth, which may be shortened by the court, falls at the short end of the range.

- 8.158 The shortest default timeframe for providing consent is in Tasmania. It provides for consent seven days after the birth.¹³¹ South Australia provides that generally consent may not be given by a mother less than 14 days after birth, but in some cases may be given five days after birth.¹³²
- 8.159 The other states and territories provide that, generally, the minimum timeframe for giving consent is a month.¹³³ Some allow this timeframe to be shortened.
- 8.160 All Australian states and territories allow a revocation period of approximately one month, with some allowing extensions of the revocation period.¹³⁴ The longest total period for a parent to revoke consent is 42 days (where a 14-day extension on the initial 28-day revocation period applies), which is the approach taken in Victoria and the Australian Capital Territory.¹³⁵
- 8.161 The Commission considers that the minimum total timeframe for consent to become effective and irrevocable should be 90 days from the birth of a child. A shorter total timeframe from birth carries too great a risk that the person giving consent did not have adequate time to come to terms with the decision and consider alternatives.
- 8.162 The legislation needs to ensure that there is no risk that finalisation of consent is rushed.
- 8.163 It is not in the child's best interests for the consent process to be open to question. Equally, it is not in a child's best interests to experience multiple placements or for permanency to be delayed, as this may pose risks to attachment. The proposed minimum of 90 days from the child's birth for finalisation of consent balances these matters.
- 8.164 The Commission considered whether the minimum consent period should be extended so that consent may not be given within 28 days after the child's birth. However, it accepts that some parents may wish to give consent within a short timeframe and this should be permitted. This provides for situations where there has been options counselling before the birth and the parent or parents wish to give consent in a shorter timeframe.
- 8.165 The Commission considers that the preferable approach is for the timeframe for revoking consent to be extended so that the total consent and revocation period is never less than 90 days from the birth of the child.
- 8.166 The revocation period should always be a minimum of 60 days. If consent is given to the adoption of the child within 30 days after birth, the total time for revocation of consent should be extended to provide that consent is not finalised earlier than 90 days after birth.
- 8.167 A mother is going through physical and emotional changes after birth. She may be disconnected from family and friends, may lack support, and may be experiencing financial and accommodation issues. In situations where she consents within the 14-day period, the current revocation period of 28 days is a very short time for her to consider other options and revoke consent if she wishes. Seeking an extension of 14 days to the revocation period places a burden on the mother to sign another witnessed form.

131 *Adoption Act 1988* (Tas) s 36(2). This timeframe can be shorter if it is proved that, at the time consent was signed, the mother was in a fit condition to give the consent, which can be established by a certificate of a medical practitioner stating that, at the time when an instrument of consent was signed by the mother of the child to whom it relates, the mother was in a fit condition to give the consent: ss 36(2)–(3).

132 *Adoption Act 1988* (SA) ss 15(2)–(3).

133 *Adoption Act 1993* (ACT) s 34(3); *Adoption Act 2000* (NSW) s 60(a); *Adoption of Children Act* (NT) s 34(2)(b); *Adoption Act 1994* (WA) s 18(1); *Adoption Act 2009* (Qld) s 19.

134 Section 15(6) of the *Adoption Act 1988* (SA) provides a 25-day period which can be extended to a maximum of 39 days; s 22 of the *Adoption Act 1994* (WA) provides that consent may be revoked up to 28 days from the day on which all required consents have been delivered or dispensed with; s 33 of the *Adoption of Children Act* (NT) provides that consent may be revoked before the expiration of one month after the date on which consent was signed; s 73(2) of the *Adoption Act 2000* (NSW) provides that consent may be revoked before the end of the 30-day period beginning on the day which the person signed consent; s 35(1) of the *Adoption Act 1988* (Tas) provides that consent may be revoked before the expiration of 30 days after the date on which consent was signed; s 20 of the *Adoption Act 2009* (Qld) provides that a parent may revoke consent within 30 days after the consent is given.

135 *Adoption Act 1984* (Vic) s 41(1)(a); *Adoption Act 1993* (ACT) s 31.

- 8.168 In some situations, a mother may not have known she was pregnant or may have been in denial about it. In this situation, 90 days is a relatively short time to come to terms with having given birth and think through the options. Equally, a father may not have known that the mother was pregnant and if he gives consent quickly, he may subsequently reconsider this.
- 8.169 The current revocation period gives a very limited amount of time for a man believed to be the father of the child to commence proceedings to obtain a declaration of paternity. The Adoption Act requires a man who is notified that he may be the child's father to commence proceedings before the end of the revocation period for the mother's consent (which is the 28-day period).¹³⁶ The man's consent will not be required unless he commences declaration of paternity proceedings.

Recommendation

- 38** The Adoption Act should extend the timeframe in section 41(1) for revoking consent to provide that the period during which consent may be revoked is 90 days after the birth of the child, or 60 days from the day consent was given, whichever is the later.

Minors consenting to adoption

Current law

- 8.170 The Adoption Act does not provide a minimum age for consent or any guidance about when, if at all, it is appropriate for a person under 18 years of age to provide consent.
- 8.171 The *Age of Majority Act 1977* (Vic) provides that once a person is 18 years of age they attain 'full age and full capacity'.¹³⁷

Responses

- 8.172 Approved agencies identified the following issues with a parent under 18 providing consent:
- The Act does not impose any requirements to assess whether young parents are competent to consent.
 - The parents of young mothers feel that they should be involved in decision making but the Act does not provide for this and the young parent considering adoption may not want it.
 - There is no guidance about the process that should be used to assess whether a young parent is competent to give consent to the adoption of their child.
 - There is no guidance about what should happen if a young parent is not competent to give consent.¹³⁸
- 8.173 If there is doubt about a young person's capacity to consent to the adoption of their child, some approved agencies would get a psychiatrist to undertake a Gillick competency test.¹³⁹ (The Gillick test is discussed in Chapter 3 at [3.30].)

¹³⁶ *Adoption Act 1984* (Vic) s 49.

¹³⁷ *Age of Majority Act 1977* (Vic) s 3(1). Section 3(3) of the Age of Majority Act specifies that this does not 'affect any deficiency of juristic competence or capacity that is attributable to insanity, or mental infirmity, or any other factor as distinct from age'.

¹³⁸ Consultation 13 (Roundtable with approved adoption agencies).

¹³⁹ *Ibid.*

8.174 Connections UnitingCare provided the following case study to illustrate the complexities involved if young parents are proposing to give consent to adoption:

PR is a child born to parents under the age of 13 years. Connections were contacted to provide relinquishment counselling as the parents wanted to explore adoption for the child. A psychological assessment of the parents was sought and it was identified that the older parent was capable of giving informed consent, but that the younger parent would prefer his guardian to make the decision on his behalf. The psychologist engaged for the purpose said he could not make a firm ruling on the younger parent's capacity, which resulted in uncertainty about whether both parents were required to consent to the adoption.¹⁴⁰

8.175 Connections UnitingCare submitted that this raised the following questions:

- At what age can a young person make a decision for adoption in relation to their child?
- What assessment of competency is required and what degree of proof is required?
- Should an options counsellor be able to assess competency?
- If the child is not competent, are there any circumstances in which the child's guardian should provide consent on their behalf, or should their consent be dispensed with?¹⁴¹

8.176 The submission suggested that guidelines about the process for determining competency should be included in the Act for consistency, including an acceptable age (considering the child's stage of development) where consent can be provided.¹⁴²

8.177 A suggestion made to the Commission was that if a person providing consent to an adoption is under 18 years of age, they should have their own legal representative.¹⁴³ Adoption Origins Victoria submitted:

A sixteen year old has not reached the cognitive or emotional maturity necessary to make decisions in the best interests of her child or herself. At the very least ... an independent legal representative ought to be appointed for any mother or father under eighteen years who are considering putting their child up for adoption.¹⁴⁴

Commission's conclusions

8.178 The Commission considers that the Adoption Act should provide additional protection and guidance for consent by a person under 18. The central issue is whether the young parent has capacity to provide consent.

8.179 Legislation in other Australian jurisdictions takes a variety of approaches to consent to an adoption where the person providing consent is under 18.

8.180 Queensland requires that if a parent of the child is not an adult, the chief executive of the department must have a 'qualified person' assess whether the parent has capacity to give the consent.¹⁴⁵ The person who conducts the capacity assessment must not be the same person who provides counselling to the parent.¹⁴⁶ A 'qualified person' is defined as 'a person who, if called as a witness in a proceeding, would be qualified to give expert evidence on the issue of whether a parent has capacity to give consent to an adoption of the child'.¹⁴⁷

¹⁴⁰ Submission 29 (Connections UnitingCare).

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Submission 26 (Adoption Origins Victoria Inc.); Consultation 32 (Ann Jukes and Gabrielle Hitch).

¹⁴⁴ Submission 26 (Adoption Origins Victoria Inc.).

¹⁴⁵ *Adoption Act 2009* (Qld) ss 28(1)–(2).

¹⁴⁶ Ibid s 28(3).

¹⁴⁷ Ibid s 27.

- 8.181 New South Wales requires that if the person consenting is under 18, the counsellor must give a written report on their capacity to understand the effect of signing consent to the adoption.¹⁴⁸
- 8.182 The South Australian *Adoption (Review) Amendment Act 2016* introduces a new requirement for a parent under 16 years of age consenting to the adoption of their child. Their consent must be endorsed by at least two psychologists. Each psychologist must believe that the person consenting has a sufficient understanding of the consequences of adoption to be able to make a responsible decision in relation to the consent.¹⁴⁹
- 8.183 The Commission considers that the Adoption Act should provide additional safeguards where a person under 18 years of age is considering giving consent to the adoption of their child.
- 8.184 If a person under 18 is considering giving consent to the adoption of their child, an independent capacity assessment should be undertaken.
- 8.185 As discussed in Chapter 5 in relation to Gillick competence, a young person's capacity to make decisions is not determined by their age alone. The requirement that a capacity assessment be made if a parent considering giving consent is under 18 provides certainty about when capacity must be assessed. Capacity must be determined on a case-by-case basis rather than based on age.
- 8.186 The Commission considers that the Queensland approach to capacity assessment for provision of consent by a person under 18 is appropriate. The Adoption Act should include requirements for capacity assessment based on this model.

Recommendation

- 39** The Adoption Act should require that, if a parent under 18 years of age is considering giving consent to the adoption of their child, the Secretary must have a 'qualified person' assess, and provide a report on, the parent's capacity to provide consent.
- A 'qualified person' should be defined as 'a person who, if called as a witness in a proceeding, would be qualified to give expert evidence on the issue of whether a parent has capacity to give consent to an adoption of the child'.
 - The 'qualified person' must not be the same person who is providing or will provide counselling to the parent.

148 *Adoption Regulation 2015* (NSW) reg 77(3).
149 *Adoption (Review) Amendment Act 2016* (SA) s 14.

Dispensing with consent

Current law

8.187 The Adoption Act enables the court to dispense with a person's consent to an adoption in certain circumstances.¹⁵⁰

8.188 These are:

- The person cannot be found, after reasonable inquiry.¹⁵¹
- The person's physical or mental condition means they are not capable of properly considering the question of whether they should give consent, and this situation is unlikely to change (this requires a certificate signed by a minimum of two registered medical practitioners).¹⁵²
- The person has abandoned, deserted, persistently neglected or ill-treated the child.¹⁵³
- The person has seriously ill-treated the child to the extent that it is unlikely that the child would accept, or be accepted by the person within, the family of that person.¹⁵⁴
- The person has, for a period of not less than one year, failed, without reasonable cause, to discharge the obligations of a parent of the child.¹⁵⁵
- The person has such a physical or mental disability, or is otherwise so impaired, that the person would be unable to meet the needs of the child.¹⁵⁶
- The child is unlikely to be accepted into, or to accept, a family relationship with the person.¹⁵⁷
- There are any other special circumstances by reason of which, in the interests of the welfare of the child, the consent may properly be dispensed with.¹⁵⁸

Children, Youth and Families Act 2005 (Vic)

8.189 The CYF Act sets out a range of circumstances in which a child is in need of protection.

8.190 Many of the grounds for finding a child is in need of protection under the CYF Act overlap with the grounds for dispensing with a person's consent under the Adoption Act. The CYF Act provides that a child is in need of protection if:

- the child has been abandoned by their parents, the parents cannot be found after reasonable inquiries, and no other suitable person can be found who is willing and able to care for the child
- the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child
- the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type
- the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type

150 *Adoption Act 1984* (Vic) s 43. The court may not dispense with the consent of a guardian of the child under the *Immigration (Guardianship of Children) Act 1946* (Cth).

151 *Adoption Act 1984* (Vic) s 43(1)(a). Section 43(2) details the steps that must be taken to demonstrate that a reasonable inquiry has been made for a person and that they cannot be found.

152 *Ibid* ss 43(1)(b), (3).

153 *Ibid* s 43(1)(c).

154 *Ibid* s 43(1)(d).

155 *Ibid* s 43(1)(e).

156 *Ibid* s 43(1)(f).

157 *Ibid* s 43(1)(g).

158 *Ibid* s 43(1)(h). Section 43(5) enables the court to revoke an order dispensing with a person's consent at any time before an adoption order is made. An application for the order dispensing with consent to be revoked may be made by or on behalf of the Secretary, the principal officer of an approved agency or the person whose consent was dispensed with.

- the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type
- the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.¹⁵⁹

Responses

- 8.191 One response considered that the existing grounds for dispensing with consent to adoption appear appropriate.¹⁶⁰
- 8.192 Barnardos Australia submitted that the Adoption Act should include additional grounds for dispensing with consent, equivalent to those available in relation to authorised carer adoptions in New South Wales.¹⁶¹ The New South Wales Act allows the court to dispense with the consent of a person to a child's adoption (other than the child) if an authorised carer applies to adopt the child.¹⁶²
- 8.193 Women's Forum Australia submitted that 'parental consent to adoption in cases where it has been substantiated that children are at risk of harm can significantly delay the adoption process, often for years, to the detriment of the children involved'. It submitted that dispensation with consent should be used 'if it is established that a child cannot be safely returned to his or her birth family within a reasonable and child-centred time frame (say, six months)'.¹⁶³
- 8.194 Professor the Hon. Nahum Mushin told the Commission that, in his view, the test for dispensing with consent should be: 'Is it in the best interests of the child?' He stated that the court's discretion should not be fettered.¹⁶⁴
- 8.195 There was a very strong response by the majority of people who considered this question that the grounds for dispensing with consent are not appropriate. Many people supported limitation or narrowing of the grounds for dispensing with consent¹⁶⁵ or total removal of the court's ability to dispense with consent.¹⁶⁶
- 8.196 The following concerns were expressed about the grounds for dispensation:
- they are framed too broadly or are too vague or unclear¹⁶⁷
 - the list is too extensive and does not reflect contemporary thresholds for statutory intervention in the life of a family and child¹⁶⁸
 - they are not in line with contemporary thinking, reflecting, for example, a dated understanding of disability¹⁶⁹
 - the interaction with the CYF Act is problematic, and dispensation with consent should not be used to increase adoption of children in the child protection system.¹⁷⁰

159 *Children, Youth and Families Act 2005* (Vic) s 162.

160 Submission 35 (OzChild).

161 Submission 50 (Barnardos Australia).

162 *Adoption Act 2000* (NSW) s 67(1)(d). The child must have established a stable relationship with the carer(s) and the adoption must promote the child's welfare.

163 Submission 38 (Women's Forum Australia).

164 Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

165 Submissions 26 (Adoption Origins Victoria Inc.), 29 (Connections UnitingCare), 34 (VANISH), 36 (Child & Family Services Ballarat Inc.), 49 (Office of the Public Advocate), 60 (Berry Street); Consultations 9 (Roundtable with legal sector), 15 (Roundtable with culturally and linguistically diverse representative agencies), 26 (Roundtable with groups and individuals representing children's interests).

166 Submissions 3 (Leilani Hannah), 33a (Name withheld), 33b (Name withheld).

167 Submissions 16 (Name withheld), 23 (Fae Cuff), 60 (Berry Street); Consultation 9 (Roundtable with legal sector).

168 Submission 45 (Dr Briony Horsfall); Consultation 26 (Roundtable with groups and individuals representing children's interests).

169 Submission 49 (Office of the Public Advocate); Consultations 5 (Roundtable with disability and mental health sector), 15 (Roundtable with culturally and linguistically diverse representative agencies).

170 Submissions 26 (Adoption Origins Victoria Inc.), 29 (Connections UnitingCare), 34 (VANISH), 36 (Child & Family Services Ballarat Inc.), 49 (Office of the Public Advocate), 51 (Law Institute of Victoria).

- 8.197 Participants at a roundtable with groups and individuals representing children's interests said that there are too many dispensation grounds and that they are too open ended.¹⁷¹
- 8.198 The Law Institute of Victoria supported the removal of the ground that 'the person has, for a period of not less than one year, failed, without reasonable cause, to discharge the obligations of a parent of the child'.¹⁷²
- 8.199 A legal practitioner with experience in making applications for dispensation of consent said that the grounds are dated, too open to interpretation and too broad. They said the interpretation of the different grounds of dispensation can vary greatly in practice.¹⁷³
- 8.200 Dr Briony Horsfall submitted that 'the current list of circumstances under which consent may be dispensed with are too broad and do not reflect contemporary thresholds for statutory intervention in the life of a family and child'.¹⁷⁴
- 8.201 Dr Horsfall submitted that consideration should be given to requiring 'family finding' as part of a dispensation with consent process. She submitted that family finding should ensure that adult extended family members (and siblings under 18) have been identified and provided with timely information and meaningful opportunity for involvement when a child is being placed for adoption.¹⁷⁵
- 8.202 VANISH submitted that dispensation with the consent of a child's parent should only be possible if they cannot be located and no extended members of the child's natural family are known. This should require reasonable efforts over a reasonable period of time. It submitted that:
- There are other legally permanent placement options available in the event that a natural parent does not consent to their child being adopted, and thus planning for a child's permanency need not be adversely impacted. We note that applications for dispensation of consent are very rare in Victoria, and only occur in unusual and special circumstances.¹⁷⁶
- 8.203 The Office of the Public Advocate also submitted that dispensation with consent should only be available if the person cannot be found. It submitted that all other current grounds should be removed because these situations are dealt with under the CYF Act.¹⁷⁷ It raised particular concerns with the ground that 'the person has such a physical or mental disability, or is otherwise so impaired that the person would be unable to meet the needs of the child':
- In contemporary Victoria, such children are already protected through the provisions of the CYFA. Under the CYFA, Child Protection is required to provide supports to enable the parents to raise their own children before protective orders are made that remove their children permanently. OPA does not support an avenue for the removal of children from parents with disabilities without these supports being provided. Credible research has demonstrated that most parents with disabilities are able to successfully raise their children if provided with appropriate support to do so.¹⁷⁸
- 8.204 A participant at a roundtable with the disability and mental health sector stated that this ground reflects 'the most out of date understanding of disability there is'. The participant said that research clearly shows that if people with disabilities are provided with the proper support then most are able to parent their child.¹⁷⁹

171 Consultation 26 (Roundtable with groups and individuals representing children's interests).
 172 Submission 51 (Law Institute of Victoria).
 173 Consultation 9 (Roundtable with legal sector).
 174 Submission 45 (Dr Briony Horsfall).
 175 Ibid.
 176 Submission 34 (VANISH).
 177 Submission 49 (Office of the Public Advocate).
 178 Ibid.
 179 Consultation 5 (Roundtable with disability and mental health sector).

- 8.205 A number of responses expressed concern about the interaction between the CYF Act and the provisions to dispense with consent under the Adoption Act.¹⁸⁰
- 8.206 Concerns relate to the amendments to the CYF Act that came into effect on 1 March 2016 which introduced a 'permanency objective' that places adoption above permanent care, and also introduced reduced timeframes to achieve family reunification.¹⁸¹
- 8.207 In contrast to the other permanency objectives in the CYF Act, if adoption is the permanency objective in a child's case plan, the legal requirements and processes to be followed are provided by the Adoption Act and Adoption Regulations. An adoption cannot occur unless the relevant consents have been given, or the court has dispensed with consent.
- 8.208 The Law Institute of Victoria submitted that some members are concerned that unless the provisions for dispensation with consent in the Adoption Act are strengthened, so that it is only used in the most extreme of circumstances, it will:
- be used to increase the number of children adopted from within the Victorian child protection system whose parents are unable to address the issues affecting their parenting within the restrictive cumulative time period created by *Children Youth & Families (Permanent Care & Other matters) Amendment Act 2014* (Vic) which came into effect on 1 March, 2016.¹⁸²
- 8.209 Some of the Law Institute of Victoria's members argued for significant amendment to the dispensation with consent provisions in the Adoption Act 'as it otherwise creates an unnecessarily low evidential threshold to justify dispensation of the requirement of consent of a parent'. These members of the Law Institute of Victoria thought it would be concerning if the following grounds for dispensation under the Adoption Act were used in the context of child protection:¹⁸³
- The person has abandoned, deserted, persistently neglected or ill-treated the child.¹⁸⁴
 - The person has seriously ill-treated the child to the extent that it is unlikely that the child would accept, or be accepted by the person within, the family of that person.¹⁸⁵
 - The person has, for a period of not less than one year, failed, without reasonable cause, to discharge the obligations of a parent of the child.¹⁸⁶
 - The person has such a physical or mental disability, or is otherwise so impaired, that the person would be unable to meet the needs of the child.¹⁸⁷
 - For any reason the child is unlikely to be accepted into, or to accept, a family relationship with the person.¹⁸⁸
 - There are any other special circumstances by reason of which, in the interests of the welfare of the child, the consent may properly be dispensed with.¹⁸⁹
- 8.210 ARMS (Vic) suggested that 'the question is really: if consent needs to be dispensed with, why adoption rather than any other care option?' It considered that dispensation with consent:

180 Submissions 26 (Adoption Origins Victoria Inc.), 29 (Connections UnitingCare), 34 (VANISH), 36 (Child & Family Services Ballarat Inc.), 49 (Office of the Public Advocate), 51 (Law Institute of Victoria).

181 *Children, Youth and Families Act 2005* (Vic) s 167.

182 Submission 51 (Law Institute of Victoria).

183 Ibid.

184 *Adoption Act 1984* (Vic) s 43(1)(c).

185 Ibid s 43(1)(d).

186 Ibid s 43(1)(e).

187 Ibid s 43(1)(f).

188 Ibid s 43(1)(g).

189 Ibid s 43(1)(h).

opens the door to a new wave of forced adoptions. Troubled families must resolve their problems within 12 months or their in care children will be placed for adoption. There are often insufficient services (rehab, housing, anger management, etc.) available within the short time frame mandated.¹⁹⁰

8.211 Adoption Origins Victoria submitted that the grounds for dispensation with consent :

provide extremely low evidential thresholds to permit dispensation and that too easily, many more children, particularly from the child protection system, could be put up for adoption and the requirement for consent of their parents dispensed by the Court.¹⁹¹

8.212 Child & Family Services Ballarat told the Commission that it has been contacted by permanent care parents who wish to know if they can adopt the child, including whether they can dispense with a parent's consent. It told the Commission that DHHS has advised Child & Family Services Ballarat that, in practice, the general principle would be that if parents do not want to consent, then a permanent care order should be pursued, as the intention is not to seek to dispense with natural parents' consent.¹⁹²

8.213 Child & Family Services Ballarat recommended that the Adoption Act should provide greater clarity. It proposed that the court not make an order for the adoption of a child unless:

- it is satisfied that the permanent care order or Family Court order does not make adequate provision for the welfare and interests of the child
- that there are special or exceptional circumstances that would warrant the making of an adoption order
- it would make better provision for the welfare and interests of the child.¹⁹³

8.214 Connections UnitingCare submitted:

There is ... increasingly a need to ensure that dispensation of consent is exercised only within its intended purpose under the Adoption Act. Permanency reforms to the Children, Youth and Families Act (2005) has resulted in adoption being considered prior to permanent care. There is therefore a need for greater clarification about circumstances in which dispensation of consent can be applied for, as the dispensation clauses currently contained within the Adoption Act could realistically be applied to all situations where children have been placed in out of home care due to substantiated concerns of abuse and/or neglect.

8.215 Connections UnitingCare suggested that the following grounds for dispensing with consent under the Adoption Act might all be made out in situations where children have been placed in out-of-home care due to substantiated concerns of abuse and/or neglect.¹⁹⁴

- The person has abandoned, deserted, persistently neglected or ill-treated the child.¹⁹⁵
- The person has seriously ill-treated the child to the extent that it is unlikely that the child would accept, or be accepted by the person within, the family of that person.¹⁹⁶
- The person has, for a period of not less than one year, failed, without reasonable cause, to discharge the obligations of a parent of the child.¹⁹⁷
- The person has such a physical or mental disability, or is otherwise so impaired, that the person would be unable to meet the needs of the child.¹⁹⁸

190 Submission 39 (ARMS (Vic)).

191 Submission 26 (Adoption Origins Victoria Inc.).

192 Submission 36 (Child & Family Services Ballarat Inc.).

193 Ibid.

194 Submission 29 (Connections UnitingCare).

195 *Adoption Act 1984* (Vic) s 43(1)(c).

196 Ibid s 43(1)(d).

197 Ibid s 43(1)(e).

198 Ibid s 43(1)(f).

- 8.216 Connections UnitingCare submitted that adoption should not be the first option for children removed from their parents' care. It noted that legally, adoption terminates all birth family relationships, and that many children in permanent care have relationships with grandparents and extended family members that endure while in their permanent placement. It submitted that adoption of children who have been removed from their parents' care should generally only occur with the consent of the parent/s.¹⁹⁹

Commission's conclusion

- 8.217 Consent is the cornerstone of the adoption process and a crucial element in ensuring that the rights of parents are protected and that an adoption is in the best interests of the child.
- 8.218 The Commission considers that the current grounds for dispensation with consent are too broad. Many allow for dispensation with consent in situations more appropriately covered by the use of orders under the CYF Act.
- 8.219 Significant concerns were raised with the Commission about the interaction between the CYF Act and the provisions to dispense with consent under the Adoption Act. Specifically, there were concerns about the amendments to the CYF Act that came into effect on 1 March 2016. They introduced a 'permanency objective', which placed adoption above permanent care, and also introduced reduced time frames to achieve family reunification. These amendments appear to increase the likelihood that applications may be made seeking for consent to be dispensed with to allow an adoption order to be made.
- 8.220 The Adoption Act (s 43(1)(c)–(g)) provides for consent to be dispensed with on the basis of 'child protection' grounds. The Commission considers that the child protection system is established to make decisions in relation to children at risk of harm. These considerations are not appropriate in the adoption framework, because adoption is premised on consent.
- 8.221 The CYF Act provides an alternative to adoption where a child cannot live with their parent but the parent does not consent to their adoption. Permanent care orders give 'parental responsibility' to the carer until the young person is 18, but provide for preservation of the child's relationship with their natural family.²⁰⁰
- 8.222 The Commission considers that the grounds for dispensation with consent in the Adoption Act should be narrowed to exclude its use for child protection matters for these reasons:
- Adoption is an extreme and highly interventionist order—it permanently severs the legal ties between a child and their natural family, results in the cancellation of the child's birth certificate and the issuing of a new birth certificate, creating a 'new identity' for the child.
 - Adoption negatively affects the likelihood of social relationships between the child and their family of origin being preserved, even when contact arrangements are in place at the time of the adoption.
 - Many of the 'child protection' dispensation grounds align with the grounds for finding a child in need of protection under section 162; this means that if a child is found in need of protection under the CYF Act, it seems likely that it would be possible to make out a ground for dispensation with consent under the Adoption Act.
 - Victoria has provided a specific alternative to adoption for children in the child protection system—permanent care orders—to achieve stability and permanency.

199 Submission 29 (Connections UnitingCare).
200 *Children, Youth and Families Act 2005* (Vic) s 321.

- Consent of the natural parents is not required for adoption once a person turns 18, so the person can seek adoption by their permanent care parents at this stage if they wish.
- 8.223 The current grounds for dispensation with consent provided for in section 43(1)(c)–(g) of the Adoption Act should be removed. Additionally, the general ground providing for dispensation with consent in exceptional circumstances where it is in the best interests of the child should clarify that this is not intended to include the grounds currently covered by section 43(1)(c)–(g).
- 8.224 There are some limited circumstances in which dispensation with consent should be allowed where it is in the best interests of the child. These grounds should cover situations where a parent cannot consent because they cannot be found or because they lack capacity and are unlikely to regain it.
- 8.225 The grounds for dispensing with consent should also cover three situations not currently expressly provided for. These are situations where the child was conceived as the result of an offence committed by the person, where the person is the father and he is a lineal relative of the mother, and where seeking consent would present an unacceptable risk of harm to the child or mother if the person were made aware of the child's birth or proposed adoption.
- 8.226 There should also be provision for any other exceptional circumstances where consent should be dispensed with in the best interests of the child. A general 'catchall' dispensation ground already exists in the Adoption Act. Consent should only be dispensed with in exceptional circumstances. For this reason, the threshold for dispensation in this provision should be lifted from 'special circumstances' to 'exceptional circumstances'. This 'catch all' ground should expressly exclude situations that are more appropriately covered by the CYF Act.

Recommendation

- 40** In place of sections 43(1)–(3) the Adoption Act should provide that the court should have the power to dispense with the consent of a person to adoption (other than a guardian under current section 33(6)) if satisfied:
- a. The person cannot, after reasonable inquiry, be found. The Act should specify the steps required to demonstrate reasonable inquiry.
 - b. The person committed an offence which resulted in the child's conception.
 - c. There would be an unacceptable risk of harm to the child or mother if the person were made aware of the child's birth or proposed adoption.
 - d. The person is the father and he is a lineal relative of the mother.
 - e. There is evidence that the person is, and is unlikely to cease to be, in such a physical or mental condition as not to be capable of giving consent. The evidence required for this should be a certificate signed by no fewer than two medical practitioners registered under the Health Practitioner Regulation National Law.
 - f. There are any other exceptional circumstances by reason of which, in the best interests of the child, the consent may properly be dispensed with. This ground for dispensation with consent should be drafted to clarify that exceptional circumstances do not include any of the grounds currently contained in section 43(1)(c)–(g) of the *Adoption Act 1984* (Vic).

Discrimination and equal opportunity in adoption

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9. Discrimination and equal opportunity in adoption

Introduction

- 9.1 The terms of reference asked the Commission to examine matters affecting applicants for adoption, including:
- eligibility requirements relating to applicants' 'relationship status' and 'living arrangements'
 - whether legislative practice and procedural requirements for assessment are clearly articulated in the *Adoption Act 1984* (Vic) and *Adoption Regulations 2008* (Vic).
- 9.2 Applicants must satisfy various requirements to be able to adopt a child. Some are set out in the Adoption Act, some are contained in the Adoption Regulations, others exist in policy.
- 9.3 When the court is deciding whether to make an adoption order, it must be satisfied that:
- the applicants are eligible to adopt a child under the Adoption Act¹
 - the applicants are suitable, according to criteria in the Adoption Regulations²
 - the Secretary or principal officer of an approved agency has considered the natural parents' wishes about the adoptive parents' religion, race and ethnic background and having contact with, and receiving information about, the child after the adoption.³
- 9.4 Couples in specified relationships are eligible to adopt if they have been in their particular relationship (or a combination of the specified relationships) for at least two years.⁴ Couples in 'domestic relationships' must live together.⁵ A sole person is permitted to adopt a child in special circumstances.⁶ A step-parent or relative of a child must meet stringent requirements.⁷ Eligibility is examined in Chapter 10.
- 9.5 The Department of Health and Human Services (DHHS) and approved agencies assess applicants' suitability and provide reports to the court.⁸ The suitability criteria include factors such as a person's health, age, character, life experience and financial circumstances.⁹ The criteria and other aspects of assessment are examined in Chapter 11.
- 9.6 Applicants assessed as suitable are placed on a register of approved people.¹⁰ The Secretary or principal officer selects people from the register to adopt a child, taking into account wishes expressed by the child's parents.¹¹ The selection process is examined in Chapter 12.

1 *Adoption Act 1984* (Vic) ss 10A, 11, 12.
2 *Ibid* ss 13, 15(1)(a); *Adoption Regulations 2008* (Vic) regs 35, 37.
3 *Adoption Act 1984* (Vic) ss 15(1)(b)–(c).
4 *Ibid* s 11(1).
5 *Ibid* ss 4 (definition of 'domestic relationship'), 11(1)(c).
6 *Ibid* s 11(3).
7 *Ibid* ss 11(5)–(7), 12.
8 *Ibid* ss 13, 15.
9 *Adoption Regulations 2008* (Vic) reg 35.
10 *Adoption Act 1984* (Vic) s 13A.
11 *Ibid* ss 15(1)(b)–(c).

9.7 This chapter discusses:

- the nature and limits of applicants' entitlements under the Adoption Act
- applicants' entitlements under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) and *Equal Opportunity Act 2010* (Vic)
- discrimination in the adoption process to protect children's best interests.

Applicants' entitlements under the Adoption Act

9.8 Two fundamental principles of adoption law and policy are:

- Adoption is a service for children in need of a family, not for adults wanting a child.¹²
- No person has a right to adopt a child.¹³

9.9 The Adoption Act gives certain people entitlement to:

- apply to DHHS or an approved agency for approval to adopt¹⁴
- be assessed for approval according to the suitability criteria¹⁵
- obtain approval if they are assessed as suitable (or to have an adverse decision reviewed)
- be placed on the register of approved people if they obtain approval,¹⁶ enabling them to be considered for selection to adopt a child
- remain on the register while they continue to be eligible and suitable applicants.

9.10 There is no guarantee that an applicant on the register will be selected to adopt a child. Whether an applicant is considered and chosen depends on the child's needs, the parent or parents' wishes and the applicants' characteristics. The decision is often made with the involvement of the child's parent or parents, who have the opportunity to select their preferred family.

Applicants' entitlements under the Charter and Equal Opportunity Act

9.11 The Charter protects and promotes human rights in Victoria.¹⁷ It sets out 20 human rights, including the right of every person to 'equality before the law'.¹⁸ This includes 'the right to equal and effective protection against discrimination'.¹⁹

9.12 The Equal Opportunity Act supports the Charter right to equality. Its objectives include eliminating discrimination in Victoria 'to the greatest possible extent' and promoting and protecting the Charter right to equality.²⁰ The Act prohibits discrimination based on particular attributes, including age, gender identity, disability, marital status, physical features, race, religious belief or activity and sexual orientation.²¹ Discrimination is prohibited in certain fields of activity,²² such as employment, education, accommodation and the provision of goods and services. 'Services' appears to include adoption services.²³

12 Ibid s 32; *Adoption Act 2000* (NSW) s 8(1)(b); *Adoption Act 1994* (WA) s 3(1); New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Report No 81 (1997) 207–8; Adoption Legislative Review Committee, Parliament of Western Australia, *Review of the Adoption Act 1994* (2007) 39; Adoption Legislative Review Committee, Family and Children's Services, Western Australia, *Final Report: A New Approach to Adoption* (1991) 17, 149. See also Chapter 2 and Recommendation 2.

13 *Adoption Act 2000* (NSW) s 8(1)(c). See also Chapter 2 and Recommendation 4.

14 *Adoption Act 1984* (Vic) ss 13, 20A.

15 The Secretary or principal officer must not refuse, or defer the making of a decision on, an application unless the applicant is given written notification of the reasons and reasonable opportunity to be heard: *Adoption Act 1984* (Vic) s 13(5).

16 *Adoption Act 1984* (Vic) s 13A.

17 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(2).

18 Ibid s 8(3).

19 Ibid. 'Discrimination' has the same meaning as in the *Equal Opportunity Act 2010* (Vic) s 6.

20 *Equal Opportunity Act 2010* (Vic) ss 3(a)–(b).

21 Ibid s 6.

22 Ibid pt 4.

23 Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples: Legislative Review* (2015). See also the definition of 'services': *Equal Opportunity Act 2010* (Vic) s 4. Whether the definition of services includes adoption services has not been judicially considered.

- 9.13 The Commission was asked to make recommendations to:
- ‘uphold principles set out in the [Charter]’
 - ensure that the Adoption Act and Adoption Regulations operate harmoniously with other Victorian laws including the Charter and Equal Opportunity Act.
- 9.14 Adoption laws, policies and practices are inherently discriminatory, in the ordinary sense of the word.²⁴ Only certain people are able to adopt a child, based on their relationship status. Their suitability to adopt is judged on their age, physical and mental health, financial circumstances and other personal characteristics. Selection decisions are based on these factors, as well the applicant’s religion, race and ethnic background.²⁵ A child is often adopted by the family that the child’s parent or parents choose based on their own personal preferences. On its face, adoption laws, policies and practices conflict with the principle of non-discrimination contained in the Charter and Equal Opportunity Act.
- 9.15 However, not all discrimination is unlawful. It is unlawful to treat a person unfavourably based on their personal characteristics if this breaches the Equal Opportunity Act (or other anti-discrimination laws). Not all discriminatory conduct breaches these laws. Exceptions and exemptions permit discrimination in certain circumstances.²⁶ A person is allowed to discriminate where this is authorised by another law or necessary to comply with another law.²⁷ The provisions in the Adoption Act relating to the eligibility, assessment and selection of applicants appear to authorise or require discrimination.
- 9.16 Likewise, the law may impose reasonable limits on Charter rights.²⁸ Sometimes discrimination is justified and necessary, for example to protect the best interests of children.²⁹ All children have rights under the Charter ‘without discrimination, to such protection as is in [the child’s] best interests and is needed by [the child] by reason of being a child’.³⁰

Discrimination in the adoption process

- 9.17 The overriding principle in adoption law is that children’s best interests are the paramount consideration.³¹ In the terms of reference the Commission was required to give effect to this principle in its recommendations. The rights of each child to a safe, stable, family environment in which they maintain their connection with their original family may in some circumstances outweigh the right of people who want to adopt to equal consideration.
- 9.18 Victoria’s adoption laws, policies and practices are intended to protect the best interests of children by ensuring that they are adopted by the people who are best able to meet their needs. In Chapters 10 to 13, the Commission examines whether discriminatory requirements and practices remain appropriate and necessary to ensure that children’s best interests are protected.
- 9.19 Chapter 10 examines whether discrimination in the eligibility criteria should be removed, in light of contemporary understanding and law relating to family and the best interests of the child.

24 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Report No 81 (1997) 206. The ordinary meaning of the word ‘discriminate’ is to ‘make a distinction’, or to ‘note or observe a difference’, or to ‘differentiate’, whether between options, persons or things: Macquarie Dictionary, 6th Edition 2013, Macquarie Dictionary Publishers, Sydney. All choice involves discrimination.

25 *Adoption Act 1984* (Vic) s 15(1)(b).

26 *Equal Opportunity Act 2010* (Vic) s 13, pt 5.

27 *Ibid* s 75.

28 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

29 Explanatory Memorandum, Adoption Bill 2009 (Qld) 15; Adoption Legislative Review Committee, Parliament of Western Australia, *Review of the Adoption Act 1994* (2007) 26, 48; Adoption Legislative Review Committee, Family and Children’s Services, Western Australia, *Adoption Legislative Review: Adoption Act (1994)*, Final Report (1997) 45; Adoption Legislative Review Committee, Family and Children’s Services, Western Australia, *Final Report: A New Approach to Adoption* (1991) 15, 149.

30 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2).

31 *Adoption Act 1984* (Vic) s 9.

- 9.20 Chapter 11 discusses people's concerns about discriminatory effects of suitability criteria, particularly criteria relating to health and age.
- 9.21 Chapter 12 considers whether children's best interests justify discrimination in the process of selecting adoptive parents for a child.
- 9.22 Chapter 13 examines an exception in the Equal Opportunity Act which permits a religious body to discriminate against a person based on their marital status, sexual orientation or gender identity (and other attributes), where the action conforms with the body's religious 'doctrines, beliefs or principles'.³² This exception may allow faith-based approved agencies to refuse to provide adoption services to LGBTI applicants. Chapter 13 considers whether this is harmonious with the recent amendments to the Adoption Act which enable LGBTI people to adopt.

Eligibility to adopt

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10. Eligibility to adopt

Introduction

- 10.1 The *Adoption Act 1984* (Vic) sets out eligibility criteria which applicants must meet in order to be able to adopt a child.¹
- 10.2 Couples, step-parents and relatives of a child must satisfy the eligibility criteria in order to be able to make an application to the Secretary or principal officer to be assessed and approved to adopt.² All applicants, including sole applicants, must also satisfy the eligibility criteria before the court can make an adoption order.³
- 10.3 This chapter is divided into three parts.
- 10.4 The first part of this chapter explains the eligibility framework in the Adoption Act and the adoption of adults.
- 10.5 The second part considers the eligibility requirements that must be satisfied before an applicant can adopt from the local adoption program. The Adoption Act prescribes that couples who meet eligibility criteria based on their relationship status and living arrangements can apply to be assessed for approval to adopt.⁴ Sole applicants, including single people, are only eligible to adopt if special circumstances exist in relation to the child which make the adoption desirable.⁵ This part also reviews the consequences of widening the eligibility criteria under the Adoption Act.
- 10.6 The third part of this chapter considers 'known-child' adoption. Currently, only step-parents and relatives are able to adopt children known to them.⁶ Known-child adoptions are generally discouraged. The Adoption Act demonstrates a preference for orders under the *Family Law Act 1975* (Cth).⁷
- 10.7 This part also examines whether the Adoption Act should provide a pathway to adoption from permanent care, and in what circumstances. The Adoption Act does not specifically allow a person caring for a child subject to a permanent care order under the *Children, Youth and Families Act 2005* (Vic) (the CYF Act) to adopt that child.

1 *Adoption Act 1984* (Vic) ss 10–12.

2 *Ibid* ss 13(1), 20A.

3 *Ibid* ss 10, 11–13, 15(1)(a).

4 *Ibid* ss 10A(a), 11(1)–(1A), 13(1), 20A.

5 *Ibid* s 11(3).

6 *Ibid* ss 11(6)–(7), 12–13, 20A.

7 *Ibid* ss 11(6)(a), 12(a).

Eligibility framework

- 10.8 The Adoption Act recognises two types of adoption, based on the nature of the consent given to the child's adoption by its natural parents:
- *General consent*.⁸ Natural parents may give general consent to their child's adoption. Once consent is given, the child comes under the guardianship of the Secretary or principal officer⁹ and the child is able to be adopted by a couple, or by one person in special circumstances, with whom they have had no previous relationship. General consent is given in local adoption.
 - *Specific consent*.¹⁰ Natural parents may give consent to their child's adoption by a specific step-parent or relative. Once consent is given, the child does not come under the guardianship of the Secretary or principal officer¹¹ and their legal relationship with their non-resident parent is only severed at the time the adoption order is made. Specific consent is given in known-child adoption.

Adoption of adults

- 10.9 The Adoption Act recognises that anyone who has 'brought up, maintained and educated' a person as if they were their parent¹² (such as a foster parent), is eligible to adopt a person who has attained the age of 18.
- 10.10 An adult can be adopted provided special circumstances exist that make the adoption desirable.¹³ Consent of the person's natural parents is not required,¹⁴ but the consent of the person being adopted is required.¹⁵
- 10.11 From 2010 to 2016, 74 out of 244 adoptions (30 per cent) were adult adoptions.¹⁶
- 10.12 The Commission has not made recommendations regarding the eligibility requirements to adopt a person who has attained the age of 18. The Adoption Act appropriately reflects a person's autonomy to choose to be adopted by a parental figure in their life, once they have reached adulthood.

Local adoption

- 10.13 In Australia, local adoptions are defined as adoptions of children who were born or permanently reside in Australia, and who are able to be placed for adoption with prospective adoptive parents with whom generally they have had no previous contact or relationship.¹⁷
- 10.14 In Victoria, to adopt through the local adoption program, applicant(s) must be:¹⁸
- a couple in a qualifying relationship
 - a sole applicant in special circumstances.
- 10.15 Adoption by couples and single people are discussed in turn below.

8 Ibid s 39(1).

9 Ibid s 46(1).

10 Ibid s 39(2).

11 Ibid s 46(3)(a).

12 Ibid s 10(1)(b).

13 Ibid s 15(2).

14 Ibid s 33(7).

15 See, eg, County Court of Victoria, *County Court Guide to Making an Application for Adoption* (as at 1 July 2016) 2 [8].

16 County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission.

17 See, eg, Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 4, 99.

18 *Adoption Act 1984* (Vic) s 11.

Adoption by a couple

Current law and practice

- 10.16 Couples must satisfy the eligibility criteria under the Adoption Act before the Secretary or principal officer may assess their suitability to adopt a child.¹⁹ Later in the process, the court may make an adoption order in their favour if the eligibility criteria are satisfied.²⁰
- 10.17 The eligibility criteria stipulate that couples must have been:
- married for no less than two years²¹
 - in a traditional Aboriginal marriage for no less than two years²²
 - in a registered domestic relationship for no less than two years²³
 - living in a domestic relationship for no less than two years²⁴
 - living with each other in any combination of the relationships referred to above, for no less than two years.²⁵
- 10.18 Couples are not eligible where one person within a domestic relationship is married to another person or in a registered domestic relationship with another person.²⁶ For example, if they have not divorced their previous partner.
- 10.19 Same-sex couples are eligible to adopt if they have been in a registered domestic relationship or living in a domestic relationship for no less than two years.²⁷
- 10.20 In 2015–16, of the adoptive parents who adopted through a local adoption program in Australia, 43 (95.6 per cent) were married and one couple (2.2 per cent) was in a de facto relationship.²⁸

Relationship of two years duration

- 10.21 All couples are required to have been in a relationship for at least two years.²⁹
- 10.22 The two-year eligibility threshold developed from adoption agency practice under the previous *Adoption of Children Act 1964* (Vic). That Act was silent on a ‘two-year’ requirement but agency practice at the time required couples to have been married and living together for at least two, preferably three, years³⁰ to allow a couple time to make the adjustments ‘necessary to bring stability to the marital relationship’.³¹
- 10.23 The 1983 *Report of Adoption Legislation Review Committee* recommended that qualifying relationships under the Act should have continued for a period of no less than two years.³² This was later reflected in the Adoption Act, with the reasoning that it established that a couple were in a ‘stable relationship’.³³
- 10.24 A need for stability is recognised four times within the *Adoption Regulations 2008* (Vic) in relation to the assessment criteria, which includes an assessment of ‘the stability and quality of the applicants’ relationship with each other’.³⁴ DHHS policy also highlights the

19 Ibid ss 13(1), 20A(a).

20 Ibid ss 11(1)–(1A).

21 Ibid s 11(1)(a).

22 Ibid s 11(1)(b).

23 Ibid s 11(1)(ba). See s 4(1) (definition of ‘registered domestic relationship’); *Relationships Act 2008* (Vic) s 3.

24 *Adoption Act 1984* (Vic) s 11(1)(c).

25 Ibid s 11(1)(d).

26 Ibid s 11(1A).

27 Ibid ss 11(1)(ba)–(c), 4(1) (definition of ‘domestic relationship’).

28 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 24. In 2015–16, there were 45 local adoptions in Australia.

29 *Adoption Act 1984* (Vic) s 11(1).

30 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 189 [11.0.11].

31 Ibid 190.

32 Ibid 204 Recommendation 176.

33 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4248 (Pauline Toner, Minister for Community Welfare Services). See also, Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 198 (Dr Denis Napthine, Minister for Youth and Community Services).

34 *Adoption Regulations 2008* (Vic) reg 35(i).

importance of stability in a relationship, due to the likelihood that an introduction of a child into a relationship will create further pressure.³⁵

- 10.25 Other jurisdictions also impose a duration requirement on couples. A two-year relationship period is required of couples wanting to adopt in New South Wales³⁶ and the Northern Territory.³⁷
- 10.26 To be eligible to adopt in the Australian Capital Territory and Tasmania, couples are required to have lived together for at least three years.³⁸ In South Australia, couples are required to have been living together for at least five years.³⁹
- 10.27 In Queensland, the recent Adoption and Other Legislation Amendment Bill 2016 removed the requirement that a couple must have lived together for a period of two years.⁴⁰

Application of the two-year period

- 10.28 There is an inconsistency in the drafting of the Adoption Act regarding the application of the two-year period.
- 10.29 The eligibility requirements under section 11 require that all couples have been in a qualifying relationship for no less than two years 'before the date on which the order is made'.⁴¹ This suggests that couples who have been in a relationship for less than two years could apply to the Secretary or principal officer to be assessed for approval to adopt and have a child placed with them, provided that they meet the two-year threshold by the time the adoption order is made.
- 10.30 However, this suggestion is inconsistent with other provisions in the Adoption Act, including:
- section 10A, which requires the relationship to have existed for two years before an application for an adoption order is made
 - section 20A, which requires the Secretary or approved agency to be satisfied that a couple has been in a qualifying relationship for at least two years before they make arrangements or enter into negotiations to assess the suitability of a person to adopt a child.
- 10.31 Sections 10A and 20A were implemented in 1997 to reflect the practice at the time that applications for approval to adopt were deferred until the two-year period had elapsed.⁴² However, section 11 was not amended.

Cohabitation requirement

- 10.32 Couples who have been living in a domestic relationship for no less than two years are eligible to apply for approval to adopt.⁴³ The Adoption Act defines a 'domestic relationship' as:
- a relationship between 2 persons who are living together as a couple on a genuine domestic basis (irrespective of sex or gender) and who are neither married to each other nor in a registered domestic relationship with each other.⁴⁴

³⁵ Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 52.

³⁶ *Adoption Act 2000* (NSW) s 28(4).

³⁷ *Adoption of Children Act* (NT) s 13(1).

³⁸ *Adoption Act 1993* (ACT) s 14(b)(i); *Adoption Act 1988* (Tas) ss 20(1)–(2).

³⁹ *Adoption Act 1988* (SA) s 12(1).

⁴⁰ Adoption and Other Legislation Amendment Bill 2016 (Qld) cl 13(4). See *Adoption Act 2009* (Qld) s 76(1)(h)(iii).

⁴¹ *Adoption Act 1984* (Vic) s 11(1).

⁴² *Disability Services and Other Acts (Amendment) Act 1997* (Vic) ss 5, 9. See also, Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1997, 198–9 (Dr Denis Napthine, Minister for Youth and Community Services).

⁴³ *Adoption Act 1984* (Vic) s 11(1)(c).

⁴⁴ *Ibid* s 4(1) (definition of 'domestic relationship').

- 10.33 By this definition, the Adoption Act distinguishes between types of couples by imposing an additional requirement that couples in a domestic relationship be ‘living together’ which does not apply to couples who are either married, in a traditional Aboriginal marriage, or who are in a registered domestic relationship.⁴⁵
- 10.34 The cohabitation requirement also applies to couples who have lived in any combination of the qualifying relationships under the Adoption Act, for example, a couple who were living in a domestic relationship and then married—they must have been ‘living with each other’ for a period of two years.⁴⁶
- 10.35 Section 20A of the Adoption Act also imposes a cohabitation requirement. A couple cannot be assessed for their suitability to adopt a child unless they have been ‘married to each other or living in that relationship with each other for not less than 2 years’.⁴⁷ The same requirement applies to step-parent adoptions and adoption of a child who is related to a person’s partner.⁴⁸ The cohabitation requirement effectively bars all couples who are not married from being assessed to adopt if they have lived apart at any point in the preceding two years.⁴⁹

Introduction of cohabitation requirement

- 10.36 The cohabitation requirement was introduced to the Adoption Act in 1997 when adoption by de facto couples was first permitted.⁵⁰
- 10.37 The 2015 *Adoption by Same-Sex Couples: Legislative Review* recognised the potential for discrimination against same-sex couples, who are unable to marry in Australia, caused by the cohabitation period. The review recommended that a new category of a ‘registered relationship’ be recognised under the Adoption Act, thereby allowing same-sex couples who register their relationship to achieve equality with married couples under the Act.⁵¹ Inconsistency of the cohabitation requirements in the Adoption Act was identified, but was considered beyond the scope of that review.⁵²
- 10.38 The inconsistency was considered by the Parliamentary Scrutiny of Acts and Regulations Committee, which found that the provisions ‘may engage the Charter’s rights against discrimination on the basis of marital status’. They sought further information as to the compatibility of the Bill⁵³ with Charter rights.⁵⁴
- 10.39 Ultimately, the cohabitation requirement was not amended by the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic).⁵⁵

Other definitions of ‘domestic relationship’

- 10.40 A cohabitation requirement lies within the definition of ‘domestic relationship’ in the Adoption Act.⁵⁶ The definition is similar to other definitions in Victorian and Commonwealth legislation, though not all definitions require a couple to live together.
- 10.41 In 2001, the *Statute Law Amendment (Relationships) Act 2001* (Vic) amended some Victorian Acts to give legal recognition to the rights and obligations of people in domestic relationships. Some of these definitions included a cohabitation requirement.⁵⁷

45 *Adoption Act 1984* (Vic) s 4(1) (definition of ‘registered domestic relationship’); *Relationships Act 2008* (Vic) s 3 (definition of ‘registered domestic relationship’). Couples in a domestic relationship can register their relationship without living together. See *Relationships Act 2008* (Vic) ss 10(3)(a), 6.

46 *Adoption Act 1984* (Vic) s 11(1)(d).

47 *Ibid* s 20A(a).

48 *Ibid* s 20A(b).

49 See, eg, Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *58th Parliament Alert Digest*, No 13 of 2015, 20 October 2015 3.

50 *Disability Services and Other Acts (Amendment) Act 1997* (Vic) ss 3(1), 6(1). The term ‘de facto relationship’ was later replaced with ‘domestic relationship’. See *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) ss 4(1)–(2).

51 Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples: Legislative Review* (2015) 24.

52 *Ibid* 9.

53 *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015* (Vic).

54 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *58th Parliament Alert Digest*, No 13 of 2015, 20 October 2015 3.

55 See also Victoria, *Parliamentary Debates*, Legislative Council, 12 November 2015, 4329–30, 4360–62.

56 *Adoption Act 1984* (Vic) s 4(1) (definition of ‘domestic relationship’).

57 *Statute Law Amendment (Relationships) Act 2001* (Vic).

- 10.42 The *Relationships Act 2008* (Vic) defines 'domestic relationship' in a similar way to the definition under the Adoption Act and includes the requirement of 'living together'.⁵⁸ However, a 2016 amendment recognised the registration of domestic relationships in which only one person lives in Victoria, thereby legally recognising couples who live apart.⁵⁹
- 10.43 The CYF Act defines a 'domestic partner' as someone who is not married to, but is 'living as a couple' with, another person on a genuine domestic basis. This does not include a specific requirement of 'living together'.⁶⁰ In determining whether people are domestic partners, the CYF Act requires a range of circumstances to be taken into account, including a couple's financial or personal commitment and support for each other, whether or not they are living under the same roof.⁶¹
- 10.44 The Family Law Act considers a range of circumstances when determining whether a couple are in a de facto relationship and are living together on a genuine basis.⁶² Those circumstances include the nature and extent of a couple's common residence.⁶³ However, if a couple does not live together, this does not mean that they are not in a de facto relationship.
- 10.45 In the Victorian Court of Appeal decision of *Giller v Procopets*, Justice Neave considered that a de facto relationship need not come to an end when cohabitation ceases, thereby recognising that couples living apart may still be recognised as a couple by law.⁶⁴

Responses

- 10.46 In its consultation paper, the Commission asked whether the requirement of 'cohabitation' was consistent with contemporary family life and in the best interests of the child, and if so, whether such a requirement should apply to all couples applying to adopt.
- 10.47 The Commission heard support for retaining the cohabitation requirement under the Adoption Act.⁶⁵ Some people submitted that cohabitation demonstrates a commitment to a relationship⁶⁶ and it was in the best interests of children that their parents live together.⁶⁷
- 10.48 The Commission also heard some support for the cohabitation requirement in the Adoption Act to apply equally to all couples eligible to adopt,⁶⁸ thereby requiring an extension of the provision to cover couples who are married, in a traditional Aboriginal marriage or a registered relationship.
- 10.49 VANISH told the Commission that cohabitation is consistent with contemporary family life and in the best interests of children. It submitted that being married does not indicate greater stability than other relationships, and so the Adoption Act should apply the cohabitation requirement for a minimum of two years for all couples who wish to adopt.⁶⁹

58 *Relationships Act 2008* (Vic) s 39(1) (definition of 'domestic relationship').

59 *Ibid* s 6; *Relationships Amendment Act 2016* (Vic) s 5. See Submission 44 (Victorian Gay & Lesbian Rights Lobby).

60 *Children, Youth and Families Act 2005* (Vic) s 3(1) (definition of 'domestic partner').

61 *Ibid* s 3(2)(b). See also *Relationships Act 2008* (Vic) s 35(2).

62 *Family Law Act 1975* (Cth) s 4AA(1)(c). See also s 4AA.

63 *Ibid* s 4AA(2)(b).

64 *Giller v Procopets* (2008) VR 1 [262].

65 Submissions 9 (Australian Adoptee Rights Action Group), 17 (Name withheld), 20 (Name withheld), 33a (Name withheld), 51 (Law Institute of Victoria).

66 Submission 17 (Name withheld).

67 Submission 20 (Name withheld).

68 Submissions 9 (Australian Adoptee Rights Action Group), 17 (Name withheld), 33b (Name withheld), 36 (Child & Family Service Ballarat Inc.). The Commission also heard from people who did not consider that the requirement of cohabitation should apply to all couples equally. However, those people did not support the principle of cohabitation applying to any couple, see, eg, Submission 21 (Name withheld).

69 Submission 34 (VANISH).

- 10.50 The Law Institute of Victoria submitted that there should be a minimum cohabitation requirement of at least two years, to demonstrate a stable relationship. It was submitted that if the purpose of the cohabitation requirement is to ensure that couples have time to make adjustments to bring stability into a relationship, then such a requirement should apply to all couples equally.⁷⁰
- 10.51 The Commission also heard of concerns about mandating the cohabitation requirement, as the requirement would be inconsistent with societal norms⁷¹ and inconsistent with contemporary family life.⁷²
- 10.52 The Commission for Children and Young People supported an update of the current eligibility criteria to ensure the criteria reflect diverse familial arrangements. It suggested that:
- The best interests of a child are served when the determination of suitability to adopt is based on holistic, thorough assessment of ability to meet the needs of a child or children, rather than arbitrary relationship status and cohabitation requirements.⁷³
- 10.53 OzChild considered that decisions made as to the placement of a child with any person should be made in their best interests and not be connected to a cohabitation requirement.⁷⁴
- 10.54 At a consultation with the Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby (VGLRL), participants spoke of the need to remove the cohabitation requirement. A participant considered the requirement to be: ⁷⁵
- inconsistent with contemporary family life, as families can live apart for various reasons, including for work or to care for elderly parents
 - inconsistent with other legislation, such as the Relationships Act, which allows couples who do not live together to register their relationships⁷⁶
 - discriminatory, as the cohabitation requirement poses the idea that couples in a domestic relationship have more to prove than couples who are married, and such provisions disproportionately apply to the LGBTI community.
- 10.55 A participant at the same consultation suggested that either the cohabitation requirement needs to be removed from the definition of 'domestic relationship', or the Adoption Act should define that 'living together' does not mean cohabitation, but rather a mutual commitment to a shared life.⁷⁷
- 10.56 The Commission also received feedback on whether the two-year period provided a reliable demonstration of the stability of a couple's relationship.
- 10.57 Barnardos Australia, which provides adoption services in New South Wales, submitted that a relationship should be of at least two years duration, preferably longer, for all couples, regardless of the type of relationship.⁷⁸
- 10.58 At a roundtable with the legal sector, the Commission was told by some participants that the two-year timeframe was arbitrary and a very short period in which to demonstrate relationship stability. However, some considered that any reasonable timeframe was better than none.⁷⁹

70 Submission 51 (Law Institute of Victoria). The Law Institute of Victoria also suggested the use of the unequivocal wording in the *Adoption Act 2000* (NSW).

71 Submission 7 (Name withheld).

72 Submission 21 (Name withheld).

73 Submission 52 (Commission for Children and Young People).

74 Submission 35 (OzChild).

75 Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

76 See also, Submission 44 (Victorian Gay & Lesbian Rights Lobby); *Relationships Act 2008* (Vic) s 6.

77 Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

78 Submission 50 (Barnardos Australia).

79 Consultation 9 (Roundtable with legal sector).

- 10.59 Another participant at the same roundtable questioned whether cohabitation for two years is meaningful to demonstrate stability. If a marriage is accepted as stable, then they suggested it should be sufficient for couples in a domestic relationship to make a declaration of a commitment to remain in a stable relationship, or that they intend to maintain that stability for the child.⁸⁰

Co-parenting

- 10.60 Another issue raised during the consultation and submission process was the lack of legal recognition that the Adoption Act gives to co-parenting arrangements. Co-parenting arrangements involve parenting by more than two people or across families and households by people who identify as parents, co-parents or donors.⁸¹
- 10.61 Participants in a roundtable with the Rainbow Families Council and the VGLRL explained that in some cases, children are being raised by more than two people. For example, a lesbian couple and a donor father may all be playing an active role in a child's upbringing. However, the Adoption Act does not recognise any such family arrangement.
- 10.62 Participants explained that generally the law has been reluctant to recognise more than two parents. Where there are more than two parents, they can seek legal recognition of their roles in a parenting order in the federal family law system. However, these orders provide for contact rather than parental responsibility for more than two people.⁸²

Commission's conclusions

Cohabitation requirement

- 10.63 Central to the review of the eligibility criteria is the need for modernisation of the Adoption Act to reflect contemporary views of family and to ensure that the Act does not contain any unnecessary or unreasonable discrimination.
- 10.64 The Charter and the *Equal Opportunity Act 2010* (Vic) prohibit discrimination based on marital status in certain fields of activity.⁸³ However, legal protection is not absolute. The law can impose reasonable limits on Charter rights⁸⁴ and permit discrimination in certain situations,⁸⁵ such as the need to ensure children are protected. Eligibility criteria are necessary in adoption law for this reason. The welfare and interests of the child remain the paramount consideration, above equal rights for people who want to adopt.⁸⁶
- 10.65 There have been two notable amendments to the Adoption Act's eligibility criteria regarding family structure. The recognition of couples in a domestic relationship and same-sex couples reflects and goes some way to removing unnecessary discrimination.
- 10.66 The cohabitation requirement that applies only to couples in a domestic relationship discriminates based on marital status and is inconsistent with Charter rights. To achieve consistency, the Commission considered whether the requirement should apply to all qualifying couples under the Adoption Act or be removed entirely.
- 10.67 If the cohabitation requirement applied to all couples, this would be inconsistent with other legislation about couples. A couple would need to live together to adopt, but not to marry or register their relationship.
- 10.68 Couples may live apart due to work or family commitments but be able to provide a stable, secure and beneficial environment in which to raise a child. Some couples may have been together for many years, but in the two years before an application to adopt

80 Ibid.

81 Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

82 Ibid.

83 See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8; *Equal Opportunity Act 2010* (Vic) s 6(h).

84 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

85 See, eg, *Equal Opportunity Act 2010* (Vic) pt 5.

86 *Adoption Act 1984* (Vic) s 9.

have spent some time living in different locations due to work or family commitments, thereby excluding them.

- 10.69 The cohabitation requirement is intended to demonstrate the stability of a relationship. It is not certain it does so. Further, it applies to certain types of relationships and not others on the basis of marital status.
- 10.70 The assessment criteria under the Adoption Act and Adoption Regulations and the assessment process are a more robust and comprehensive way to ensure that only suitable people in a stable relationship are approved to adopt. The Commission examines the adoption assessment criteria in Chapter 11.
- 10.71 The Commission considers that the cohabitation requirement should be removed from the Adoption Act and the definition of 'domestic relationship' be amended to remove the term 'living together'.⁸⁷ The Act should remove any implication that couples in any qualifying relationship are required to live together.

Recommendation

- 41** The eligibility criteria under the Adoption Act should not require or imply that couples in a domestic relationship live together.

Two years duration

- 10.72 The requirement that all eligible relationships under the Adoption Act be of at least two years duration is based on historical practice rather than evidence.
- 10.73 It is important to provide stability to a child. Use of any particular time period appears arbitrary and does not ensure the stability of a couple's relationship. The Commission considers that stability within a couple's relationship is best determined by an assessment as part of the approval process.⁸⁸
- 10.74 However, the Commission acknowledges that use of a duration requirement provides a helpful and transparent benchmark for couples who wish to apply to adopt. For example, couples who have only been together for three months know that they will not be able to apply. Imposing a time period is also consistent with other Australian jurisdictions.
- 10.75 There is no evidence to indicate whether the two-year period should be increased or decreased in the best interests of children. The Commission considers there is no need to amend the two-year requirement as it is currently applied in the Adoption Act.
- 10.76 Section 11 of the Adoption Act should be amended to ensure consistency with sections 10A and 20A, to require that couples have been together for at least two years prior to being assessed to adopt a child, and not two years before the date on which an adoption order is made.

Co-parenting

- 10.77 The Adoption Act does not contemplate more than two people adopting a child or adoption by two people who are not in a marital or domestic relationship, such as two friends.
- 10.78 Adoption is only one of the legal frameworks that provide legal recognition to a family. The project timeframe has not allowed the Commission to consider permitting more than two people to adopt a child.

Adoption by a single person

Current law and practice

- 10.79 The Adoption Act allows the court to make an adoption order in favour of one person. A person can adopt if they are single.⁸⁹
- 10.80 A person in a relationship can also adopt as a sole applicant, but their partner's consent is required if:
- the couple is married or in a registered domestic relationship and living together⁹⁰
 - the couple is in a domestic relationship and has been for at least two years.⁹¹
- 10.81 In each case, the court must not make an adoption order in favour of one person unless it is satisfied that 'special circumstances' exist in relation to the child which make the adoption desirable.⁹²
- 10.82 Step-parents who wish to adopt their partner's child apply to the court to adopt as a sole applicant.⁹³ Relatives of a child may also apply to adopt as a sole applicant.⁹⁴
- 10.83 The law relating to the eligibility of one person to adopt has remained fixed since 1984.
- 10.84 From 2010 to 2016, there were four adoptions by a single person in Victoria. All were adoptions of a child with special needs.⁹⁵ In 2015–16, there was only one adoption by a single person in Australia.⁹⁶

Special circumstances

- 10.85 The Adoption Act does not define 'special circumstances'.
- 10.86 When the Adoption Act was introduced, it was envisaged that 'special circumstances' would reflect situations where a child had an existing strong relationship with a single person, or the child would cope better with one parent to relate to.⁹⁷ In practice 'special circumstances' is interpreted to mean that single people can only adopt children with 'special needs'.⁹⁸
- 10.87 The special needs adoption program includes children older than 12 months and children with complex needs, such as children with a disability or children who come from difficult backgrounds and may have experienced abuse or neglect.⁹⁹
- 10.88 The limitation in the Adoption Act is not unique to Victoria. In the Northern Territory,¹⁰⁰ Tasmania¹⁰¹ and South Australia,¹⁰² an adoption order can be made in favour of one person on similar terms to Victoria.

89 *Adoption Act 1984* (Vic) s 11(3).

90 *Ibid* s 11(4)(b).

91 *Ibid* s 11(4)(c).

92 *Ibid* s 11(3).

93 *Ibid* s 11(5).

94 *Ibid* s 12.

95 County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission.

96 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 24.

97 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4247 (Pauline Toner, Minister for Community Welfare Services).

98 This information was provided to the Commission by the Department of Health and Human Services and some approved agencies. Special needs adoption is not referred to in the Adoption Act.

99 The Commission obtained this information through preliminary consultations with the Department of Health and Human Services and some approved agencies. See also Department of Human Services, Victoria, *Other Forms of Adoption* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/other-forms-of-adoption>>. Children with special needs are not placed through the infant adoption program but through a 'permanent care' program. Couples and single people can adopt children with special needs. See *Pathway for Children into Adoption and Permanent Care*, Brochure (2013) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/>>.

100 *Adoption of Children Act* (NT) s 14(1)(b).

101 *Adoption Act 1988* (Tas) s 20(4).

102 *Adoption Act 1988* (SA) s 12(3)(b); *Adoption Regulations 2004* (SA) reg 19(3).

- 10.89 However, in New South Wales,¹⁰³ Queensland,¹⁰⁴ Western Australia¹⁰⁵ and the Australian Capital Territory,¹⁰⁶ eligibility requirements for one person to adopt are similar to those that apply to couples.
- 10.90 A review of research undertaken in the United States examined the process outcomes of adoption by single parents.¹⁰⁷ It considered practice where children available for adoption by single parents were special needs children.¹⁰⁸ The review found that:
- it is time for a change in thinking about single persons as adoptive parents. They are not applicants of less capacity than two parent families. Rather, these are families which have unique strengths and can provide stable homes for children.¹⁰⁹
- 10.91 In its submission to the Commission, the Australian Christian Lobby (ACL) referred to research studies into family structures.¹¹⁰ A number of studies relied upon by the ACL concluded that children from single-parent families overall fare less well than children in intact two-parent families.¹¹¹ The Commission considers this research has limited, if any, application to adoption as the parents studied are generally not single parents by choice, unlike single applicants for adoption.¹¹²
- 10.92 In the United States and the United Kingdom, there has been a significant increase in the number of households headed by single parents. Thirty per cent of households are single-parent households, the majority of which were headed by single mothers. A 2016 study observed:
- There is a large body of research on the psychological wellbeing of children in single-mother families formed by divorce. These studies have consistently shown that children whose parents divorce are more likely to show emotional and behavioural problems than are children in intact families. ... However, the children's difficulties appear to be largely associated with aspects of the divorce, rather than single-parenthood, in itself. One factor that has been found to be related to children's adjustment problems is conflict between parents.¹¹³
- Children of single mothers by choice have not been exposed to parental conflict and are less likely to have experienced the economic hardship or maternal psychological problems that commonly result from marital breakdown and unplanned single parenthood.¹¹⁴
- 10.93 A 2016 United Kingdom study, *Single Mothers by Choice: Mother-child Relationships and Children's Psychological Adjustment*, conducted in relation to women who choose to become mothers through donor insemination, found that children of single mothers by choice experienced similar levels of parenting quality to children in two-parent relationships.
- The solo mothers did not differ from the partnered mothers in terms of anxiety, depression, or stress associated with parenting.¹¹⁵

103 *Adoption Act 2000* (NSW) s 27.

104 *Adoption Act 2009* (Qld) s 68(1). See also, Explanatory Note, Adoption and Other Legislation Amendment Bill (Qld) 2016 2; Adoption and Other Legislation Amendment Bill 2016 (Qld) cl 7.

105 *Adoption Act 1994* (WA) ss 38(2), 39.

106 *Adoption Act 1993* (ACT) ss 13–14.

107 Joan Shireman, 'Adoptions by Single Parents' (1995) 20(3–4) *Marriage & Family Review* 367–8.

108 Ibid 370. As adoption by a single person was seen as less advantageous than two-parent adoption.

109 Ibid 386.

110 Submission 54 (Australian Christian Lobby).

111 Ibid. See, eg, Sarah Wise, 'Family Structure, Child Outcomes and Environmental Mediators: An Overview of the Development in Diverse Families Study' (Research Paper No 30, Australian Institute of Family Studies, 2003) 5. However, this paper cited by the ACL also noted that most of the data is based on outcomes for children in 'divorced single-parent families, or families involving teenage mothers, rather than women who make a decision to raise a child without a parenting partner.' See: ibid 6.

112 Regardless, the Commission considered these studies in this review.

113 Susan Golombok et al, 'Single Mothers by Choice: Mother–Child Relationships and Children's Psychological Adjustment' (2016) 30(4) *Journal of Family Psychology* 409. The Commission notes that this study was undertaken in relation to single mothers by choice who have undertaken IVF treatment. That 'choice' is comparable in principle to adoption. However, the Commission notes that children who have been adopted and parents who have adopted may have dissimilar outcomes and experiences associated with the adoption.

114 Ibid 410.

115 Ibid 415.

Although the children of solo mothers were no more likely to experience psychological problems than were those with a mother and father, higher levels of financial difficulties, and higher levels of parenting stress were each associated with higher levels of children's emotional and behavioural problems within the solo mother families ... It is important to emphasize, however, that the solo mother families did not differ from the two-parent families in the association between financial hardship, parenting stress, and child adjustment problems, indicating that these risk factors were operating in a similar fashion in both family types.¹¹⁶

Children, Youth and Families Act 2005 (Vic)

- 10.94 The limitation on adoption by single people is inconsistent with the approach under the CYF Act.
- 10.95 Under the CYF Act, the Children's Court of Victoria can make permanent care orders for children who cannot live with their parents, in favour of one person as well as couples.¹¹⁷ The same suitability criteria apply to both groups.¹¹⁸

Assisted reproductive technology and adoption

- 10.96 In Victoria, women who are not in a relationship are permitted to undertake assisted reproductive treatment.¹¹⁹ In 2014–15, single women made up the largest proportion of women undertaking IVF treatment (50 per cent).¹²⁰
- 10.97 In 2007, the Victorian Law Reform Commission found that 'single people are able to provide secure and loving environments for children'¹²¹ and recommended that the Adoption Act allow single applicants to adopt in accordance with the same criteria as couples.¹²² This recommendation was not implemented.

Responses

- 10.98 In its consultation paper, the Commission asked whether the requirement that single people can adopt only in 'special circumstances' is consistent with the best interests of the child. If the provision required amendment, the Commission asked what criteria should apply.
- 10.99 The Commission received considerable support for the removal of the special circumstances provision,¹²³ and heard that single applicants should be assessed and be able to adopt in the same way as couples.¹²⁴ Many submissions considered the barriers discriminatory.¹²⁵
- 10.100 In a consultation with Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby (VGLRL), it was suggested that the requirement of 'special circumstances' discriminates against a group of people who are eligible to undertake assisted reproductive technology, foster children, and parent children under a permanent care order.¹²⁶
- 10.101 The VGLRL submitted that the different treatment of single people and couples under the Adoption Act is at odds with the Equal Opportunity Act and the Charter, which recognise the right to not be treated differently due to relationship status.¹²⁷

116 Ibid.

117 *Children, Youth and Families Act 2005* (Vic) s 320(1).

118 Ibid s 319(1).

119 *Assisted Reproductive Treatment Act 2008* (Vic) s 10(1)(a).

120 Victorian Assisted Reproductive Treatment Authority, *Annual Report 2016* (2016) 19.

121 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 109.

122 Ibid 108 (Recommendation 71).

123 Submission 6 (Name withheld); Consultations 3 (Confidential), 5 (Roundtable with disability and mental health sector), 18 (Fiona De Vries), 19 (Chrissie Davies).

124 Submissions 5 (Confidential), 7 (Name withheld), 17 (Name withheld), 21 (Name withheld), 49 (Office of the Public Advocate), 35 (OzChild), 36 (Child & Family Services Ballarat Inc.); Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

125 Submission 17 (Name withheld); Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

126 Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

127 Submission 44 (Victorian Gay & Lesbian Rights Lobby).

- 10.102 Connections UnitingCare submitted that the provision is both discriminatory and contradictory, as:
- ‘healthy’ infants cannot be placed with single applicants as the legislation excludes them, however some of our most vulnerable children with special circumstances can be placed with a single person. In practice, this involves children with complex special needs being placed with single applicants provided all other placement options are exhausted first.¹²⁸
- 10.103 At a roundtable with the disability and mental health sector, some participants agreed that the special circumstances requirement should be removed from the Adoption Act. Participants said the requirement sends a message that single people are not adequate to be parents but they can have a child with a disability. Such a provision is nonsensical and reinforces negative attitudes towards disability.¹²⁹
- 10.104 Some people said there was no basis for the inconsistency between the Adoption Act and the CYF Act criteria for prospective carers.¹³⁰ Additionally, removal of such discriminatory barriers would be in line with the recent amendments to same-sex adoption and with other Australian legislation.¹³¹
- 10.105 The Law Institute of Victoria (LIV) expressed the view that the barrier posed by the special circumstances requirement is out of step with modern values and inconsistent with the best interests of a child. The LIV submitted that the court should have full discretion to determine a person’s suitability, unfettered by questions of relationship status.¹³²
- 10.106 Some commented that it is more important to assess the person’s qualities, merits or ability to care for the child.¹³³
- 10.107 Some concern was expressed about the potential lack of a support network in which to raise a child.¹³⁴ It was recognised that such support systems could come from relative or close friends,¹³⁵ not just from a relationship partner.
- 10.108 The Commission also heard from people opposed to amendment or removal of the ‘special circumstances’ provision in the Adoption Act. Some submissions suggested that it is in the best interests of a child to have a mother and a father¹³⁶ and adoption by a single person should only occur in the minority of cases.¹³⁷
- 10.109 The Australian Christian Lobby submitted that the current provision is appropriate to ensure the best interests of a child are the paramount consideration. It submitted that there is ‘evidence that the well-being of children is best served when they experience the love of both a mother and father in a safe, secure and stable relationship’.¹³⁸
- 10.110 The Women’s Forum submitted that the current eligibility provisions in the Adoption Act should be maintained and strengthened. It explained that an amendment to the single person provisions would effectively preference the desires of adoptive parents over the needs of vulnerable children.¹³⁹

128 Submission 29 (Connections UnitingCare).

129 Consultation 5 (Roundtable with disability and mental health sector).

130 Submissions 41 (Adopt Change), 35 (OzChild).

131 Submission 41 (Adopt Change).

132 Submission 51 (Law Institute of Victoria).

133 Submissions 6 (Name withheld), 27 (Institute of Open Adoption Studies, University of Sydney), 29 (Connections UnitingCare), 52 (Commission for Children and Young People).

134 Consultation 9 (Roundtable with legal sector).

135 Consultation 16 (Professor Meredith Temple-Smith).

136 Submissions 20 (Name withheld), 33a (Name withheld).

137 Submission 15 (Jeremy Orchard).

138 Submission 54 (Australian Christian Lobby).

139 Submission 38 (Women’s Forum Australia).

Commission's conclusions

- 10.111 The limitation in the Adoption Act that only permits adoption by single people in special circumstances appears to assume that adoption by one person is less beneficial to a child than adoption by a couple, and that it is generally not in the best interests of a child. Restricting adoption to children with special needs is illogical and discriminates against all parties.
- 10.112 The Adoption Act and adoption practice make a significant differentiation between couples and single people on the basis of marital status. This is inconsistent with the Charter and the right to recognition and equality before the law.¹⁴⁰ Discrimination on the basis of marital status is not necessary or relevant to ensure the safety, wellbeing and interests of a child who is eligible to be adopted.
- 10.113 The law in Victoria already recognises that single people are suitable parents, able to provide children with a safe, stable and secure environment. Single people are eligible to care for a child under CYF Act orders, undertake IVF on their own, and adopt children with special needs (generally seen as a more challenging undertaking than an adoption through the infant adoption program).
- 10.114 The requirement of 'special circumstances' should be removed from the Adoption Act.¹⁴¹ The Commission considers that eligibility criteria should not differentiate between applicants on the basis of their relationship status. Concerns about safety, security and stability of a single person can be appropriately addressed as part of the adoption assessment process.

Recommendation

- 42** The eligibility criteria under the Adoption Act should permit single people to adopt on the same basis as couples.

Consequences of widening eligibility criteria

- 10.115 Widening the eligibility criteria under the Adoption Act may lead to an increase in the number of applications for approval to the Secretary or principal officer to adopt a child from the local adoption program. It is important to note that widening the eligibility criteria has no causal link with the number of adoptions.
- 10.116 Eligibility criteria should not be used as a means of limiting the number of people who apply to the Secretary or principal officer to be approved as suitable to adopt. This principle was recognised when the Adoption Act was last reviewed in Victoria, and is still relevant today.¹⁴²
- 10.117 The *Adoption Legislation Review Committee* recognised that a process was needed to reduce the number of applications to adopt young children. The Committee considered that an educational program for applicants would be helpful, together with the random selection of persons eligible to apply.¹⁴³ It proposed that a ballot should be held and publicised each year to determine which applications proceeded to the assessment process. Unsuccessful applicants would be able to review their application every 12 months.¹⁴⁴

¹⁴⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

¹⁴¹ Pursuant to *Adoption Act 1984* (Vic) s 11(3).

¹⁴² See Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 187 [11.0.6], 188 [11.0.9].

¹⁴³ Adoption Legislation Review Committee, Parliament of Victoria, *Working Paper Chapters 6–14* (1980–81) 60 [7.1.14].

¹⁴⁴ Ibid 64 Recommendation 125.

- 10.118 Currently, the information and training programs which are a prerequisite to an application to adopt¹⁴⁵ play an important part in limiting the number of applications by educating prospective applicants about the realities of the adoption process.
- 10.119 The DHHS *Adoption and Permanent Care Procedures Manual* also envisages the opening and closing of an applicant list. Prospective applicants are advised whether the infant adoption program is accepting applications or, if the program is closed, when it will reopen.¹⁴⁶
- 10.120 The Adoption Act does not provide a 'right' to be assessed to adopt. However, the Adoption Act requires the Secretary or principal officer to notify the person and give reasons for deferring or refusing to make a decision on an application for approval.¹⁴⁷
- 10.121 The Commission has observed that applicants have an expectation that if they apply to the Secretary or principal officer, they will be assessed. The Adoption Act does not provide a mechanism to manage the number of applicants and their expectations.
- 10.122 The *Adoption Act 2009* (Qld) contains specific provisions for managing applications for approval.¹⁴⁸ It requires the chief executive of the department to decide each year whether the number of prospective adoptive parents with 'different profiles' approved to adopt are enough to meet the needs of children.¹⁴⁹
- 10.123 The chief executive determines the number of prospective parents to be assessed with regard to the number and profiles of people already on the register and must consider whether:¹⁵⁰
- if too few people are assessed, the need for adoptive parents may not be met within a reasonable time
 - if too many people are assessed, this may be an inefficient use of resources, unnecessarily raise expectations of prospective adoptive parents and unnecessarily intrude on their privacy and personal affairs.
- 10.124 If the chief executive is satisfied that the number of people registered is significantly higher than the number of adoptions, the expression of interest register may be closed (equivalent to an application to adopt in Victoria).¹⁵¹ The Queensland Act also provides guidance on deciding the priority of who may be selected.¹⁵²

Commission's conclusions

- 10.125 The Commission considers that every eligible person under the Adoption Act should be entitled to apply to the Secretary or principal officer to be assessed for approval to adopt. However, an application for approval should not create an entitlement to be assessed.
- 10.126 The Adoption Act should require the Secretary to manage and determine the number of prospective adoptive parents needed to meet the future needs of children and decide the number of parents who should be assessed. This is consistent with the principle that adoption is a service for children, not prospective adoptive parents.
- 10.127 In managing applications for approval to adopt, consideration should be given to anticipating the number of children able to be adopted and their needs. Any mechanism to manage application numbers should be equitable and, as far as possible, within the best interests of a child. The mechanism should be publicly available and transparent.

¹⁴⁵ Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 42–5; Department of Human Services, Victoria, *Adoption Information and Training* (2016) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/adoption-information-and-training>>.

¹⁴⁶ Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 48. It is unclear whether this practice persists.

¹⁴⁷ *Adoption Act 1984* (Vic) s 13(5).

¹⁴⁸ *Adoption Act 2009* (Qld) ss 66–7.

¹⁴⁹ *Ibid* s 67(1).

¹⁵⁰ *Ibid* s 67(2).

¹⁵¹ *Ibid* s 84.

¹⁵² *Ibid* s 88(5).

Recommendation

- 43** The Adoption Act should require the Secretary to manage the assessment of applications to adopt a child in a way that:
- anticipates the number of children likely to be adopted and their particular needs
 - ensures that there is a wide range of prospective adoptive parents to select from, reflective of the wide range of people eligible to adopt (couples, same-sex couples and single people)
 - provides for ongoing monitoring and review of how the applications are processed to ensure that there are enough suitable prospective adoptive parents to meet the needs of children
 - ensures that the assessment process is both published and transparent to all persons wanting to adopt a child.

Known-child adoption

- 10.128 A known-child adoption is the adoption of a child by a specific person who has a pre-existing relationship with the child.¹⁵³ For a child to be adopted, specific consent to that adoption needs to be given by the child's natural parents.¹⁵⁴
- 10.129 The Adoption Act recognises two types of known-child adoption:
- adoption by a step-parent
 - adoption by a relative of a child.
- 10.130 At the time the Adoption Act was introduced, approximately half the adoptions in Victoria were by step-parents.¹⁵⁵ Today, known-child adoptions are not common and the Adoption Act limits when they can occur.
- 10.131 In 2015–16, there were 10 known-child adoptions in Victoria.¹⁵⁶

Current law and practice

Step-parent adoption

- 10.132 Adoption by the spouse or domestic partner of a parent of a child (a step-parent) severs a child's legal relationship with one of their natural parents while preserving their legal relationship with their other parent.¹⁵⁷
- 10.133 If a child's natural parents have given their specific consent to the adoption,¹⁵⁸ a step-parent must also apply to the Secretary or principal officer to be assessed as suitable to adopt.¹⁵⁹
- 10.134 A step-parent can apply to the court for an adoption order as a sole applicant,¹⁶⁰ provided they have been married to the child's parent, or living in that relationship, for at least two years.¹⁶¹

¹⁵³ Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 4, 99.

¹⁵⁴ *Adoption Act 1984* (Vic) s 39(2). Discussed at [10.8].

¹⁵⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4244, 4248 (Pauline Toner, Minister for Community Welfare Services).

¹⁵⁶ Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 27.

¹⁵⁷ *Adoption Act 1984* (Vic) s 11(7)(c).

¹⁵⁸ *Ibid* s 39(2).

¹⁵⁹ *Ibid* ss 13, 15(1)(a).

¹⁶⁰ *Ibid* s 11(5).

¹⁶¹ *Ibid* s 10A(b); see also s 20A(b).

- 10.135 To make an adoption order, the court must be satisfied that:¹⁶²
- the making of an order in relation to the guardianship or custody of the child under the Family Law Act (such as a parenting order) would not make adequate provision for the welfare and interests of the child¹⁶³
 - exceptional circumstances exist which warrant making an adoption order¹⁶⁴
 - an adoption order would make better provision for the welfare and interests of the child than an order under the Family Law Act.¹⁶⁵
- 10.136 If an adoption order is made, the step-parent is deemed to be the parent of the child jointly with the child's parent as if they had been married to each other at the time the child was born.¹⁶⁶ The Adoption Act uses the word 'married' regardless of whether the step-parent and other parent are in a marital relationship or a domestic relationship.
- 10.137 In 2015–16, there were 76 step-parent adoptions in Australia.¹⁶⁷

Leave of the Family Court

- 10.138 Under the Family Law Act, leave of the Family Court of Australia¹⁶⁸ is required before an application for an adoption order can be filed by a step-parent in the County Court.¹⁶⁹ This requirement is not reflected in the Adoption Act.
- 10.139 Natural parents of a child are recognised under the Family Law Act as having parental responsibility for a child.¹⁷⁰ That parental responsibility ceases to exist when the Family Court grants leave to a step-parent to make an application for an adoption order and an adoption order is then made in a state court.¹⁷¹ Upon the adoption of a child, any parenting order that was in place is no longer in force.¹⁷²
- 10.140 The Adoption Act does not prevent a person from making an application for an adoption order in Victoria if leave of the Family Court has not been granted. However, without leave, a natural parent's parental responsibility under the Family Law Act does not cease. A child will continue to be recognised by the family law jurisdiction as a child of both their natural parents¹⁷³ and any parenting order would continue to be in force.¹⁷⁴ This means that the Family Court could entertain further applications by either of the child's natural parents, despite any adoption.¹⁷⁵
- 10.141 In deciding whether to grant leave, the Family Court must consider whether it would be in the best interests of the child.¹⁷⁶ The Family Court explores a wide range of additional considerations,¹⁷⁷ but the primary considerations are:¹⁷⁸
- the benefit to the child in having a meaningful relationship with both parents

¹⁶² See *ibid* ss 11(5)–(7).

¹⁶³ *Ibid* s 11(6)(a).

¹⁶⁴ The *Adoption Act 1984* (Vic) does not define 'exceptional circumstances' pursuant to s 11(6)(b).

¹⁶⁵ *Ibid* s 11(6)(c).

¹⁶⁶ *Ibid* s 11(7).

¹⁶⁷ Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 27. This figure may include adoption of a child aged 18 and over.

¹⁶⁸ The Family Court of Australia has exclusive jurisdiction in relation to adoption. See Family Court of Australia, *Protocol for the Division of Work between the Family Court of Australia and the Federal Circuit Court* (12 April 2013) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/protocol-for-division-of-work-fcoa-fcc>>.

¹⁶⁹ *Family Law Act 1975* (Cth) s 60G.

¹⁷⁰ Parental responsibility is defined as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'. See *Family Law Act 1975* (Cth) s 61B.

¹⁷¹ *Ibid* ss 60F(4), 60HA(3), 61E.

¹⁷² *Ibid* s 65J(2).

¹⁷³ *Ibid* s 61E(2).

¹⁷⁴ *Ibid* s 65J(2).

¹⁷⁵ If leave of the Family Court was granted and a child adopted, a natural parent who no longer has parental responsibility for a child can still apply to the Family Court for a parenting order as a person 'concerned with the care, welfare or development of the child'. However, they would not have recognition as a parent of a child. See *Family Law Act 1975* (Cth) s 65C(c). See also Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 131.

¹⁷⁶ *Family Law Act 1975* (Cth) ss 60CB, 60CG, 60G(2).

¹⁷⁷ *Ibid* s 60CC(3).

¹⁷⁸ *Ibid* s 60CC(2)(a).

- the need to protect the child from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence.¹⁷⁹

10.142 The adoption legislation in the Australian Capital Territory, Queensland and South Australia specifies that an order for adoption by a step-parent may not be made without leave of the Family Court.¹⁸⁰

Adoption by a relative

10.143 The Adoption Act contains a separate provision for adoption orders made in favour of a relative of a child. A relative is defined as a 'grandparent, brother, sister, uncle or aunt of the child, whether the relationship is of the whole blood or half-blood or by affinity'.¹⁸¹

10.144 The court can make an adoption order in favour of a relative of a child as a sole applicant, or together with their partner,¹⁸² if they are married or have been living in a domestic relationship for no less than two years.¹⁸³

10.145 A relative of a child cannot adopt unless the court is satisfied that:¹⁸⁴

- the making of an order in relation to the guardianship or custody of the child under the Family Law Act (such as a parenting order) 'would not make adequate provision for the welfare and interests of the child'
- exceptional circumstances exist which warrant making an adoption order¹⁸⁵
- an adoption order would make better provision for the welfare and interests of the child than an order under the Family Law Act.

10.146 In 2015–16, there were three adoptions by a relative in Australia.¹⁸⁶

Orders under the Family Law Act

10.147 There is a presumption in the Adoption Act against adoptions by step-parents and relatives in favour of Family Law Act orders.¹⁸⁷

10.148 Parenting orders under the Family Law Act deal with a range of parenting arrangements,¹⁸⁸ and may confer or allocate parental responsibility for a child.¹⁸⁹ Parenting orders remain in force until a child turns 18, marries or enters into a de facto relationship.¹⁹⁰

10.149 Parenting orders are different from adoption orders in that they do not sever a child's legal relationship with their natural family or alter their birth certificate.

10.150 The *Adoption and Permanent Care Procedures Manual* provides some explanation as to when a parenting order would be considered inadequate and an adoption order preferred.¹⁹¹ Circumstances include when greater 'legal security' is needed or it would give a child 'a greater sense of belonging within the family',¹⁹² or where a parent has died or been 'totally absent from the child's life', or where the parents have a 'history of violence' or a child was 'conceived by rape'.¹⁹³ Generally, a combination of circumstances is required.¹⁹⁴

179 Ibid s 60CC(2)(b).

180 Adoption Act 1993 (ACT) s 14(d); Adoption Act 2009 (Qld) s 92(1)(d); Adoption Act 1988 (SA) s 10(2).

181 Adoption Act 1984 (Vic) s 4(1) (definition of 'relative').

182 Ibid s 12.

183 Ibid 10A. See ss 12(d)–(e).

184 Ibid ss 12(a)–(c).

185 The Adoption Act 1984 (Vic) does not define 'exceptional circumstances' pursuant to s 12(b).

186 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 27. This figure may include the adoption of children aged 18 and over.

187 Adoption Act 1984 (Vic) ss 11(6)(a), (c), 12(a), (c).

188 Family Law Act 1975 (Cth) s 64B.

189 Ibid s 61D.

190 Ibid s 65H(2).

191 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 134–5.

192 Ibid 135.

193 Ibid 134.

194 Ibid. See also Department of Human Services, Victoria, *Stepchildren and Adoption: Information for Parents and Step-parents* (2009) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

- 10.151 The preference for alternative orders is present in other Australian adoption laws. In New South Wales,¹⁹⁵ South Australia,¹⁹⁶ Western Australia¹⁹⁷ and the Australian Capital Territory,¹⁹⁸ the making of an adoption order must be 'preferable' or 'clearly preferable' to orders under alternative legislation.

Concerns with known-child adoption

- 10.152 The Adoption Act favours Family Law Act orders for several reasons. An adoption order has the effect of severing a child's legal relationship not only with their natural parent, but with the natural parent's wider family and relatives.¹⁹⁹ Additionally, the child's birth certificate would no longer reflect their natural parentage and their birth name could be changed.²⁰⁰
- 10.153 DHHS practice recognises that altering a child's legal identity could heighten the risk of 'genealogical confusion' for the child.²⁰¹ For example, in the case of adoption by a step-father, the adoption severs the natural father's legal relationship with the child and the child's legal relationship with their natural father's family. This may decrease the chances of the child having ongoing contact with that side of their family.²⁰² When a relative adopts a child, it can distort family relationships. For example, when a grandmother adopts a child, in law she becomes the child's mother and the mother becomes the child's sister.²⁰³
- 10.154 At the time the Adoption Act was introduced, adoption was increasingly being used by step-parents. In 1981–82, 57 per cent of adoptions in Victoria were by step-parents.²⁰⁴ The 1983 *Adoption Legislation Review Committee* was opposed to step-parent adoption as a 'widespread practice'²⁰⁵ and considered relative adoption should only be permitted in special circumstances.²⁰⁶
- 10.155 In her 1984 paper, *Children in Stepfamilies: their Legal and Family Status*, Patricia Harper questioned the necessity of step-parent adoptions:
- It is questioned whether such a complete and final severance of ties is in the best interests of the child. In most cases, if not all cases the step-parent is already caring for the child and will continue to do so whether or not the child is adopted. Thus, a complete severance of the ties between the child and the natural parent and family by means of adoption seems neither necessary nor appropriate in order to ensure that the step-parent continues to care for the child and would not appear to be in the best interests of the child.²⁰⁷
- 10.156 The *National Principles in Adoption* discourage step-parent and relative adoptions.²⁰⁸ These principles state that such adoptions should not be considered 'unless it can be demonstrated that a lesser order would not serve the needs of the child'.²⁰⁹ The principles express a preference for orders through the Family Court that do not interfere with the biological relationship between the child and their birth family and siblings.²¹⁰

195 *Adoption Act 2000* (NSW) ss 29(c), 30(1)(d).

196 *Adoption Act 1988* (SA) s 10(1).

197 *Adoption Act 1994* (WA) s 68(1)(fa).

198 *Adoption Act 1993* (ACT) s 14(e)(ii).

199 *Adoption Act 1984* (Vic) s 53.

200 This reflects the legal effect of adoption: *Ibid* s 53.

201 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 135.

202 *Ibid* 130. See also Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 54 [4.4.2].

203 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 56 [4.6.2]; Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 104.

204 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 53 [4.4.1].

205 *Ibid* 54 [4.4.3].

206 *Ibid* 56 Recommendation 33.

207 Patricia Harper, *Children in Stepfamilies: Their Legal and Family Status*, Background Paper No. 4 (Australian Institute of Family Studies, 1984) 13.

208 In 1993, the Community and Disability Services Ministers Conference (CDSMC) ratified the *National Principles in Adoption*. These were reviewed in 1997 to incorporate Australia's obligations under the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*. The CDSMC has since been disbanded as part of streamlining the Council of Australian Governments system. It is unclear whether there has been further work on this issue. The 1997 National Principles in Adoption are available on the DHS website at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/national-principles-in-adoption-1997>>.

209 Community and Disability Services Ministers Conference, *National Principles in Adoption 1997* Principle 2(2).

210 *Ibid* Principle 11.

Fees for known-child adoption

- 10.157 In Victoria, the Adoption Act does not permit the charging of fees by the Secretary or principal officer for adoption application and assessment processes.
- 10.158 The Adoption Act includes a specific offence prohibiting payment or reward in consideration of the adoption of a child, including prohibiting payment for the making of arrangements with a view to the adoption of a child.²¹¹
- 10.159 In some jurisdictions, payment is permitted for the arrangement of a known-child adoption. For example, in Queensland, step-parents are required to pay both an application fee and an assessment fee.²¹²
- 10.160 In Western Australia, fees can be charged in relation to an adoption, such as fees for counselling,²¹³ although known-child adoption is exempt from such fees.²¹⁴ Step-parents, certain relatives or carers are required to pay for the preparation of the written report by the CEO to the court for use in the adoption proceedings.²¹⁵

Responses

- 10.161 In its consultation paper, the Commission asked whether the limited circumstances in which step-parents and relatives can adopt under the Adoption Act are appropriate and if not, what changes are required.
- 10.162 There was support for the current provisions under the Adoption Act that give preference to orders under the Family Law Act.²¹⁶ This support was largely because alternative legal frameworks, such as permanent care and parenting orders, provide for a child's care without severing the child's relationship with their natural family.²¹⁷
- 10.163 Patricia Harper submitted that the arguments against step-parent and relative adoptions she made in 1986²¹⁸ still hold, and parenting orders under the Family Law Act should remain the preferred option.²¹⁹
- 10.164 Connections UnitingCare submitted that the current provisions in the Adoption Act are adequate as the Family Court provides a legal avenue for step-parents and extended family to formalise care arrangements. However, it submitted that greater clarity is needed about the circumstances in which step-parent adoption would be appropriate and the Adoption Act should provide guidance as to when a step-parent adoption will meet the 'exceptional circumstances' criterion.²²⁰
- 10.165 The LIV submitted that the Adoption Act should be simplified for known-child adoptions.²²¹ The VGLRL also supported simplification of the adoption process in some step-parent situations, such as:
- where a child has no other legal parent. For example, they were born to a single parent, their other parent has died, they were born through international surrogacy and one commissioning parent is already recognised.
 - where the other legal parent (the non-custodial parent) consents to the adoption.²²²

211 *Adoption Act 1984* (Vic) s 119(1)(d).

212 *Adoption Regulation 2009* (Qld) sch 2. See *Adoption Act 2009* (Qld) ss 92–3.

213 See *Adoption Act 1994* (WA) s 37; *Adoption Regulations 1995* (WA) reg 86B.

214 *Adoption Act 1994* (WA) s 37(2).

215 Ibid s 61(1); *Adoption Regulations 1995* (WA) reg 87A.

216 Submission 36 (Child & Family Services Ballarat Inc.); Consultation 2 (Grandparents Victoria).

217 See Submissions 7 (Name withheld), 9 (Australian Adoptee Rights Action Group). See also Submissions 33a (Name withheld), 35 (OzChild); Consultation 2 (Grandparents Victoria).

218 Family Law Council, Step-Families Sub Committee, *Cinderella Re-visited: Rights and Responsibilities in Step-families* (Australian Government Publishing Service, 1986).

219 Submission 57 (Patricia Harper).

220 Submission 29 (Connections UnitingCare).

221 Submission 51 (Law Institute of Victoria).

222 Submission 44 (Victorian Gay & Lesbian Rights Lobby).

- 10.166 The VGLRL submitted that in such situations it is a burden for step-parents to have to first get leave from the Family Court to demonstrate that an application for adoption is in a child's best interests, and then apply to the County Court and demonstrate the same thing.²²³
- 10.167 Some submissions said that step-parents should never be able to adopt.²²⁴ VANISH submitted that the Adoption Act should not permit adoption by a relative or step-parent under any circumstances, as such arrangements are not in the best interests of children and are inconsistent with contemporary relationships and arrangements.²²⁵

Charging of a fee

- 10.168 The Commission was told that adoption agencies are not funded to process known-child adoptions.²²⁶ Connections UnitingCare submitted that such assessments are largely undertaken in good faith on a *pro bono* basis, which would be unlikely to continue without additional funding.²²⁷
- 10.169 At a roundtable with approved adoption agencies, it was explained that, given the high workload of the agencies and funding issues, step-parent adoptions are not a priority. This was because they are generally not urgent situations, as the child and adoptive parent are simply legalising an existing relationship. One participant said that their waiting list for step-parent adoptions was between six and 12 months, whereas in the infant adoption program it was three months.²²⁸
- 10.170 Another participant at the roundtable described step-parent adoption as a 'donation' to a family that is not necessarily in need, but is wanting to formalise an existing relationship.²²⁹
- 10.171 The Commission was told that some step-parents are adamant that they want to adopt, even when they are told about other options such as parenting orders. As they do not pay for assessment, adoption is a cheaper option for step-parents than applying for a parenting order.²³⁰
- 10.172 An added barrier is that the Adoption Act makes it unlawful for payments to be made in relation to an adoption.²³¹ The Commission was told that with sufficient safeguards in the Act, agencies could charge a service fee for step-parent adoption.²³²

Commission's conclusions

- 10.173 The Adoption Act clearly favours parenting orders over adoption for all known-child applications. The Commission finds merit in the arguments against known-child adoption and supports the continuation of the current intention of the Adoption Act.
- 10.174 Permanently ending legal recognition of a parent-child relationship, even when a child's natural parent is deceased, is a serious step that should be approached with caution. The importance of such a decision in the context of a stable step-family arrangement suggests that it should be made by the person to be adopted upon reaching the age of 18.
- 10.175 The Commission makes no recommendations in relation to how a step-parent or relative may apply to adopt. The Commission considers that orders under the Family Law Act should continue to be the preferred alternative to adoption. The legal test set out in sections 11(6) and 12 in the Adoption Act should continue.

223 Ibid.
224 Submission 3 (Leilani Hannah).
225 Submission 34 (VANISH).
226 Consultation 13 (Roundtable with approved adoption agencies).
227 Submission 29 (Connections UnitingCare).
228 Consultation 13 (Roundtable with approved adoption agencies).
229 Ibid.
230 Ibid.
231 Submission 29 (Connections UnitingCare). See also *Adoption Act 1984* (Vic) s 119.
232 Submission 29 (Connections UnitingCare).

- 10.176 However, to modernise the Adoption Act, minor amendments to terminology are required. The Commission recommends in Chapter 2 that the terms ‘guardianship’ and ‘custody’ used in sections 11(6)(a) 12(a) be replaced with the term ‘parental responsibility’.²³³
- 10.177 The Adoption Act does not provide a definition of ‘exceptional circumstances’. The Commission considers that this is an appropriately high test, which must only be satisfied if the circumstances warrant redefining a child’s family and identity in the way that adoption would do. There are reasons why the court may make a known-child adoption and a specific definition may narrow the application of the Adoption Act and the court’s discretion.
- 10.178 However, the Commission notes that the test of ‘exceptional circumstances’ should not be satisfied by factors such as:
- an adoption order would provide the right of inheritance from a step-parent or relative
 - an adoption order would provide the means of changing a child’s name or birth certificate.

Leave of the Family Court

- 10.179 The Family Law Act requires that step-parents who wish to adopt must first be granted leave to apply from the Family Court.²³⁴ This is not reflected in the Adoption Act.
- 10.180 Concerns were raised with the Commission that the requirement that step-parents have to apply to two separate courts is onerous.²³⁵ The Family Law Act requires that leave of the Family Court be granted and it is outside the Commission’s terms of reference to make any recommendations which limit the application of the Family Law Act.
- 10.181 The requirement under the Family Law Act is established law. To ensure harmonious operation of the legislation, the requirement for leave should be reflected in the Adoption Act.

Administrative fee for step-parent adoptions

- 10.182 Unlike infant adoptions, applications to adopt by step-parents, when considered on the basis of risk, generally do not require urgent priority of the Secretary or principal officer. Children are already in the care of their natural parent and their step-parent and that arrangement is likely to continue whether an adoption order is made or not.
- 10.183 The Commission considers that it is reasonable to expect that if a step-parent wishes to adopt a child before that child turns 18, they should contribute to the Secretary or principal officer’s administrative costs of considering and assessing their application to adopt.
- 10.184 Children who reach the age of 18 may apply to be adopted by a step-parent or relative on their own initiative. The Secretary or principal officer need not be involved in an adult adoption, and thus no fee would apply.

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Recommendation 7(a).
Family Law Act 1975 (Cth) s 60G.
Submission 44 (Victorian Gay & Lesbian Rights Lobby).

Recommendation

- 44** Where a step-parent wishes to adopt a child, the Adoption Act should:
- reflect that leave from the Family Court of Australia must be granted before an application to adopt may be filed
 - permit the Secretary to charge a fee for the administrative cost of arranging a step-parent adoption.

Adoption from care

- 10.185 The Adoption Act does not provide a way for a person with parental responsibility for a child under a permanent care order to adopt that child.
- 10.186 Adoption is only one of the ways that parental responsibility is transferred from a child's natural parents to other people. In Victoria, permanent care orders are used when a child is in Victoria's child protection system to provide a permanent family for a child who is not able to live with their natural family.²³⁶
- 10.187 A permanent care order does not sever the legal relationship with the child's natural parents like an adoption order does.²³⁷ Permanent care orders do not alter a child's birth record, do not affect the child's right to inherit from their natural parents, and expire when the child turns 18.²³⁸
- 10.188 The CYF Act provides a hierarchy of permanency objectives and requires that in a case plan prepared for the child,²³⁹ the permanency objectives be considered in that order of preference.²⁴⁰ Adoption is placed third out of five possible objectives, ahead of permanent care and long-term out-of-home care.²⁴¹
- 10.189 The preference in the CYF Act is for placement with family members, including adoption.²⁴² This does not appear to be consistent with the Adoption Act which imposes restrictions on adoption by relatives, preferring orders under the Family Law Act over adoption orders.²⁴³
- 10.190 Adoption from care by a person known to the child would be a form of known-child adoption. In this section, the Commission considers whether there should be a pathway between permanent care orders under the CYF Act and adoption.
- 10.191 The Commission for Children and Young People is undertaking the *Permanency Amendments Inquiry* to review legislative amendments to permanent care orders under the CYF Act which took effect on 1 March 2016. That inquiry is being undertaken independently of this review of adoption laws and its findings are expected by March 2017. The Commission will not have the benefit of considering the outcome of that inquiry as part of this review.

²³⁶ *Children, Youth and Families Act 2005* (Vic) s 319.

²³⁷ Permanent care orders transfer parental responsibility: *Children, Youth and Families Act 2005* (Vic) s 321(1)(a).

²³⁸ Ibid s 321(1)(c). A permanent care order may continue after the child turns 17 but ceases to be in force when the child attains the age of 18 or marries, whichever happens first.

²³⁹ Ibid ss 166(3), 167.

²⁴⁰ Ibid s 167(1).

²⁴¹ Ibid.

²⁴² Ibid ss 167(2)(a)–(b).

²⁴³ *Adoption Act 1984* (Vic) s 12.

Current law and practice

- 10.192 The eligibility requirements under the Adoption Act only enable two types of known-child adoption; adoption by a step-parent or relative.²⁴⁴ They do not enable adoption by a particular person who cares for the child under CYF Act orders, including under a permanent care order.
- 10.193 As a form of known-child adoption, specific consent by a natural parent would be required for adoption by a child's carer under CYF Act orders. Specific consent can only be given to an adoption by a relative of the child or a step-parent of the child.²⁴⁵
- 10.194 If a child is in the child protection system and general consent to adopt is given by the natural parents, the child becomes available for adoption from the local adoption program by a person with whom they have no previous relationship. However, the Adoption Act does provide that a child who has been brought up, maintained and educated by the applicant can be adopted upon turning 18.²⁴⁶ This would allow a permanent carer, a foster carer or similar to adopt when the child becomes an adult.
- 10.195 The Adoption Act recognises the operation of the CYF Act. After consent is given by the natural parents, 'a child who is the subject of a care by Secretary order or long-term care order' under the CYF Act does not come under the guardianship of the Secretary or principal officer while awaiting adoption.²⁴⁷ This is because, under these orders, parental responsibility for the child is already conferred on the Secretary to the exclusion of all other persons.²⁴⁸
- 10.196 Currently, there is no established pathway between orders made under the CYF Act and the Adoption Act.
- 10.197 In comparison, there is an established recognition between orders under the CYF Act and orders under the Family Law Act. If a permanent care order is in place, it is suspended upon the making of an application under the Family Law Act in its place²⁴⁹ and if a permanent care order is made in the Children's Court, if registered in the Family Court, it will have the same effect as if it were an order made in the Family Court.²⁵⁰

Policy of adoption from care

- 10.198 Approaches to 'permanency' are inconsistent between Australian jurisdictions.
- 10.199 The New South Wales Government has a policy of increasing the use of adoption.²⁵¹ In 2015–16, adoptions by a carer in New South Wales accounted for 68 of the 70 carer adoptions in Australia.²⁵² However, the number of adoptions from care in New South Wales fell 22 per cent from the previous year. This reduction reflects, in part, the use of guardianship orders for children in out-of-home care as an alternative to adoption.²⁵³
- 10.200 The New South Wales policy was introduced in 2014 under a suite of legislative amendments under the *Child Protection Legislation Amendment Act 2014* (NSW). The legislative changes facilitated the use of adoption for children in out-of-home care, and established a framework that simplified adoption from care.²⁵⁴

244 Ibid ss 11(6)–(7), 12.

245 Ibid s 39(2).

246 Ibid s 10(1)(b); see also s 15(2).

247 Ibid s 46(3)(b).

248 *Children, Youth and Families Act 2005* (Vic) ss 289(1)(a), 290(1)(a).

249 Ibid s 324(1); see also s 322(4). A permanent care order ceases to be in force upon the making of an order under the Family Law Act.

250 *Family Law Act 1975* (Cth) s 70C; *Family Law Rules 2004* (Cth) r 23.01A.

251 See, eg, New South Wales Government, 'New Institute Puts Focus on Adoption' (Media Release, 16 March 2016) <<https://www.nsw.gov.au/media-releases-premier>>; *Adoption Act 2000* (NSW) pt 3A.

252 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 27.

253 Ibid.

254 *Child Protection Legislation Amendment Act 2014* (NSW) sch 1.

- 10.201 In Western Australia, amendments to the *Adoption Act 1994* (WA), which came into effect in 2012²⁵⁵ reintroduced adoption from care.²⁵⁶
- 10.202 Adoption from care was considered recently by two South Australian inquiries.
- 10.203 The 2015 *Adoption Act 1988 (SA) Review* considered research into outcomes for children adopted from care.²⁵⁷ The review concluded that adoption from care should be a last resort. All other options, such as orders under child protection legislation, were considered adequate to provide security and stability for a child without undermining long-term identity formation.²⁵⁸
- 10.204 The South Australian *Child Protection Systems Royal Commission* delivered its final report on 5 August 2016. Its views relating to adoption from care accorded with the findings of the *Adoption Act 1988 (SA) Review*.²⁵⁹ The Royal Commission concluded that:
- Adoption is no panacea for the current shortage of suitable care placements for children who cannot remain with their families of origin. The fact that there is a cohort of families who are interested in starting or growing their families through local adoption, and who may relieve placement pressure in the care system, is irrelevant to the question of a child's best interests.²⁶⁰
- 10.205 The Royal Commission supported greater use of a form of guardianship (Other Person Guardianship) under the South Australian child protection legislation,²⁶¹ which delegates guardianship and decision-making power to the family caring for the child.²⁶² The use of such orders, as an alternative to adoption, was also supported by the *Adoption Act 1988 (SA) Review*.²⁶³

Responses

- 10.206 The intersection between adoption and permanent care was an issue raised in submissions and during the Commission's consultation process.
- 10.207 In a roundtable with permanent care and adoptive families, the Commission was told of frustrations permanent care parents face in the limited legal recognition of their parental responsibilities compared to adoptive parents:
- Lack of recognition they feel as a permanent care parent. A participant said that as a permanent care parent, they felt '90 per cent the parent' compared to an adoptive parent.
 - Lack of recognition by federal laws. For example, the difficulty in establishing parentage in order to obtain a passport for the child.
 - The role the label of 'permanent care' plays in disclosing a child's history. For example, the use of the word 'care' reveals that they have needed out-of-home care.
 - The ongoing risk of court proceedings. For example, natural parents might come back to the court years after a permanent care order is made and the lack of security permanent care parents feel with the nature of their court order.²⁶⁴

255 *Adoption Amendment Act 2012* (WA).
 256 See Western Australia, *Parliamentary Debates*, Legislative Council, Second Reading, 30 November 2011, 10087b–10090a, Hon. Robyn McSweeney (Minister for Child Protection).
 257 Lorna Hallahan, *Adoption Act 1988 (SA) Review* (Flinders University, 2015) 59–63, 89–100.
 258 Ibid 62.
 259 South Australia, Child Protection Systems Royal Commission, *Child Protection Systems Royal Commission Report* (2016) Vol IV 369.
 260 Ibid.
 261 *Children's Protection Act 1993* (SA).
 262 South Australia, Child Protection Systems Royal Commission, *Child Protection Systems Royal Commission Report* (2016) Vol IV, 369.
 263 See, Lorna Hallahan, *Adoption Act 1988 (SA) Review* (Flinders University, 2015) 12, 37, 62.
 264 Consultation 6 (Roundtable with Permanent Care and Adoptive Families).

- 10.208 Some people spoke of the sense of belonging that adoption gives a child, which cannot be provided by a care order.²⁶⁵ Professor Meredith Temple-Smith submitted that permanent care orders can be seen as different. They do not amount to a statement by the carer family that 'I will never let you go'.²⁶⁶
- 10.209 Dan Barron detailed his experience as a parent of two children under permanent care orders and the difference between adoption and child protection. He submitted that while a permanent care order may be the best option for children who are living within a kinship placement, in stranger placements a modified form of adoption could be recognised. He submitted that the strength of adoption is that it makes parents for life. That legal status provides benefits for the child. A permanent care order does not make the new parents 'legal parents' of the child in the fullest sense and expires at the age of 18.²⁶⁷
- 10.210 Mr Barron explained the difficulties permanent care parents have in proving their parental responsibility for a child. Under permanent care, a child's birth certificate is not altered. Government departments use this document for many purposes to establish parental responsibility. He said that there is a lack of legal recognition of Victorian permanent care parents under federal law, including:
- Applying for an Australian passport for the child requires the birth certificate, which does not establish the permanent carer's parental responsibility for the child despite a permanent care order.
 - Centrelink does not recognise a permanent care parent as being responsible for paying child support if a couple separates.
 - Permanent care parents are excluded from paid parental leave, as the federal scheme considers them more like foster carers than adoptive parents.²⁶⁸
- 10.211 A parent of a permanent care child spoke of her frustration at being prevented from adopting, despite it being a long time since her child had had contact with their natural parents.²⁶⁹
- 10.212 The Commission received submissions from Barnardos and the Institute of Open Adoption Studies which operate in New South Wales.²⁷⁰ Barnardos submitted that the approach in New South Wales is 'excellent for enabling the adoption of non-Aboriginal children from care'. It told the Commission:
- Barnardos experience is that 'third party orders' (such as Permanent Care Orders) are inferior to adoption in relation to ongoing security for children. This is because Permanent Care Orders stop at age eighteen and young people's best interests are served by having lifelong connections beyond age eighteen and into adulthood. Furthermore, adoption is superior to 'third party orders' as these orders can be much more easily challenged than Adoption Orders. Barnardos experience is that threats to challenge third party orders in NSW can destabilise placements and lead to a breakdown of important relationships, even though these challenges are rarely successful.²⁷¹
- 10.213 However, the experience and perception of people who have been adopted can be quite different.
- 10.214 Thomas Graham submitted that permanent care and parenting orders provide both care and protection for children, and support relationships without legally severing the child from their family as adoption does.²⁷² He explained:

²⁶⁵ Submission 59 (Karleen Gribble BRurSc PhD); Consultation 28 (Hannah Penney).

²⁶⁶ Consultation 16 (Professor Meredith Temple-Smith).

²⁶⁷ Submission 18 (Dan Barron).

²⁶⁸ Ibid.

²⁶⁹ Consultation 19 (Chrissie Davies).

²⁷⁰ Submissions 27 (Institute of Open Adoption Studies, University of Sydney), 50 (Barnardos Australia).

²⁷¹ Submission 50 (Barnardos Australia).

²⁷² Submission 43 (Thomas Graham).

One of the great myths about adoption is that has a happy endings for all, all the time. That there are no long term costs or harmful effects. Our indigenous people are the most compelling example of the devastating effects the sustained removal of children from their parents, over many decades, has on families. The social consequences have been devastating on a personal, family and social level, costing the nation billions of dollars each year. Modernising adoption to increase its frequency and numbers will not stem the flow of children into out-of-home-care; it simply highlights that many families are broken, parents are floundering and their children are screaming for help. Adoption doesn't address the issue of struggling families and parents it just preys on their children.²⁷³

10.215 Fae Cuff told the Commission that she would have preferred guardianship or permanent care to adoption. She considered that permanent care parents still form the same relationship with a child as they would if the child were adopted, but in permanent care, the child keeps their identity.²⁷⁴

10.216 Permanent care or alternative care orders were the preferred option for many.²⁷⁵ It was acknowledged that in some cases there is a need to sever legal parenting responsibility from natural parents, but not to sever a child's legal identity, heritage and contact with their natural family.²⁷⁶

10.217 Grandparents Victoria told the Commission that permanent care is preferable to adoption for several reasons, including that it keeps open a possible reunification with natural families, and provides greater opportunity for natural parents to have contact with their children. Grandparents Victoria does not support the New South Wales model of adoption from care.²⁷⁷

10.218 The Office of the Public Advocate (OPA) was also concerned about the priority of adoption over permanent care, or other long-term care options, in the CYF Act. It submitted that adoption should not be more readily available as an option from care, without the 'full, free and informed consent of the parents'. Parents with disabilities and mental illness would be especially vulnerable if adoption from care could occur without consent.²⁷⁸

10.219 The OPA also submitted that there would be concerns with obtaining informed consent from natural parents who have had their children removed by the state:

Almost always, the parents want their child returned to them. In these circumstances, it is difficult to see how the parents can give a free and unpressured consent to adoption. At most, it will be a highly constrained consent, rather than free consent.²⁷⁹

10.220 A concern that emerged from the Commission's consultation processes was that government would move children from permanent care to adoption.²⁸⁰ Much of this concern arose from the policy in New South Wales and the placing of adoption ahead of permanent care in the permanency objectives hierarchy under the CYF Act.²⁸¹

10.221 Adoption Origins Victoria submitted that it was concerned about a potential push towards adoption from care so as to 'transfer to the adoptive parents the problem of the government's failure to provide effective remedial input and parenting services to vulnerable children and their parents'.²⁸²

273 Ibid.

274 Consultation 22 (Fae Cuff).

275 Submission 34 (VANISH); Consultations 7 (Bobby Richards), 12 (Adoption Origins Victoria Inc.), 35 (Confidential), 36 (Kylie Martens).

276 Consultation 12 (Adoption Origins Victoria Inc.).

277 Consultation 2 (Grandparents Victoria).

278 Submission 49 (Office of the Public Advocate).

279 Ibid.

280 See Submissions 43 (Thomas Graham), 48 (Victorian Council of Social Service); Consultations 12 (Adoption Origins Victoria Inc.), 31 (SS).

281 Submission 51 (Law Institute of Victoria); Consultations 2 (Grandparents Victoria), 12 (Adoption Origins Victoria Inc.).

282 Submission 26 (Adoption Origins Victoria Inc.).

- 10.222 The Commission was told in a roundtable with approved adoption agencies that to use adoption would be a 'big call' when a child is in care and already has stability. A participant queried whether an agency should be stepping in and deciding that a child should be adopted from care, or let the child decide when they have the right to do so.²⁸³

Commission's conclusions

- 10.223 Adoption is a distinct and separate legal framework from the child protection system.
- 10.224 The consent of a child's natural parents is the fundamental requirement in adoption. It should only be dispensed with in the circumstances recommended in Chapter 8. In that chapter, the Commission recommends that dispensation grounds relating to child protection situations²⁸⁴ should be removed.
- 10.225 However, the Commission accepts that there may be limited circumstances where adoption of a child by their permanent care parents would be appropriate, for example, where the child's natural parents have given their consent to an adoption or have died.
- 10.226 The Adoption Act should specify the circumstances in which adoption of a child by their permanent care parents can occur. The requirements that should be met are discussed below.
- 10.227 The Commission recognises the importance of permanency and stability for children. However, as discussed in Chapter 1, there is little empirical evidence to support an assertion that adoption is the most beneficial form of permanent placement for a child who is not able to live with their parents. Permanent care orders provide carers with the parental responsibility and stability required for children in out-of-home care. Parenting orders can also provide this stability.
- 10.228 The Commission observes that the New South Wales approach of setting targets to increase the numbers of adoptions from care, along with relaxing the grounds on which to dispense with consent and reducing decision timeframes, creates a risk that some adoptions will resemble forced adoptions.
- 10.229 The Commission acknowledges the challenges and frustrations permanent care parents face in obtaining legal recognition of their legal parental status at a federal level. However, adoption should not be used as a means of correcting these deficiencies.

Requirements for adopting from care

- 10.230 As a form of known-child adoption, adoption from permanent care should be subject to principles similar to those that apply to adoption by a step-parent or relative.
- 10.231 Eligibility to adopt from care should be limited to people who have had a permanent care order under the CYF Act in their favour for at least two years. Imposing this requirement is consistent with the other two-year requirements in the Adoption Act which imply stability of relationships.²⁸⁵ This would also ensure that children are not quickly moved from permanent care to adoption.
- 10.232 Specific consent to the adoption must be given by the natural parents. Where consent is not given, the grounds for dispensing with consent in relation to an adoption from permanent care should not include the 'child protection' grounds.²⁸⁶ This is consistent with the new grounds for dispensing with consent in Recommendation 40.²⁸⁷

²⁸³ Consultation 13 (Roundtable with approved adoption agencies).

²⁸⁴ *Adoption Act 1984* (Vic) ss 43(c)–(g).

²⁸⁵ See, eg, *Adoption Act 1984* (Vic) ss 10A, 11.

²⁸⁶ *Ibid* ss 43(1)(c)–(g).

²⁸⁷ This is discussed in Chapter 8.

- 10.233 As permanent care parents have already been assessed as suitable parents under the CYF Act, they should not be required to be assessed as suitable under the Adoption Act. The Adoption Act should provide that a permanent care parent is suitable to adopt, provided that the court is satisfied that while caring for the child under a permanent care order, they have demonstrated a willingness and capacity to:
- meet the child's needs
 - preserve the child's identity and connection to their culture of origin and their relationship with their natural family, including wider family members.²⁸⁸
- 10.234 The Secretary or principal officer should report on these matters to the court.
- 10.235 The court should only make an adoption order if it is satisfied that an adoption would be in the best interests of the child, and:
- the continuation of the permanent care order under the CYF Act or the making of an order under the Family Law Act would not make adequate provision for the best interests of the child
 - exceptional circumstances exist which warrant redefining a child's family in the way that an adoption would do
 - the adoption would make better provision for the best interests of the child than the continuation of the permanent care order under the CYF Act or the making of an order under the Family Law Act.²⁸⁹
- 10.236 Lack of contact between a child and their natural parents should not in itself be a reason to support a move to adoption.²⁹⁰

Leave of the Children's Court

- 10.237 The President of the Children's Court is a County Court judge.²⁹¹ In effect, she is able to hear adoption matters in the County Court and CYF matters in the Children's Court.
- 10.238 It would be necessary, upon the making of an adoption order, for the permanent care order to be discharged. CYF Act jurisdiction is with the Children's Court and the revocation of a permanent care order is a decision of that Court.²⁹²
- 10.239 The Children's Court would have extensive knowledge of the circumstances of that child and their particular needs. The Commission proposes that leave of the Children's Court should be granted before proceedings may be commenced for adoption of a child in the County Court. This would be consistent with the requirement under the Family Law Act that leave should be granted by the Family Court in relation to a step-parent adoption.²⁹³
- 10.240 The requirement for leave should be reflected in the Adoption Act. Best practice would also be to reflect this provision in the CYF Act. The Children's Court should not grant leave to apply unless it is satisfied that:
- making an adoption order would be in the best interests of the child in accordance with the best interests principles under the Adoption Act
 - an adoption order would be clearly preferable to the continuation of the permanent care order.
- 10.241 Leave to apply to adopt should only be granted by the President, or delegate of, the Children's Court. That Court should also provide reasons for its decision.

²⁸⁸ A permanent care order must include a condition that the person caring for the child must preserve the child's identity and connection to their culture of origin and the child's relationship with their birth family. See *Children, Youth and Families Act 2005* (Vic) s 321(1)(ca).

²⁸⁹ See *Adoption Act 1984* (Vic) ss 11(6), 12(a)–(c).

²⁹⁰ Issues relating to ongoing contact can be complex. See, eg, Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 66–7.

²⁹¹ *Children, Youth and Families Act 2005* (Vic) s 508(2).

²⁹² *Ibid* ss 326, 515.

²⁹³ *Family Law Act 1975* (Cth) s 60G.

Recommendations

- 45** The Adoption Act should permit the adoption of a child from permanent care only where the child has been living in the applicant's care under a *Children, Youth and Families Act 2005* (Vic) permanent care order for at least two years.
- 46** The Adoption Act should enable a permanent carer to be eligible to adopt if the court is satisfied that:
- a. Leave to apply has been granted by the President of the Children's Court of Victoria or her nominee.
 - b. The natural parents, or appropriate persons, have provided specific consent to the adoption or the court has dispensed with consent in the circumstances recommended in Recommendation 40.
 - c. The terms of an adoption plan have been agreed on the same basis as any other application for adoption.
 - d. While caring for the child under a permanent care order, the person has demonstrated a willingness and capacity to meet the child's needs and preserve the child's identity and connection to their culture of origin and the child's relationship with their natural family, including wider family members.
 - e. The continuation of the permanent care order under the *Children, Youth and Families Act 2005* (Vic) or the making of an order under the *Family Law Act 1975* (Cth), would not make adequate provision for the best interests of the child and an adoption order would make better provision for the best interests of the child.
 - f. Exceptional circumstances exist which warrant the making of an adoption order.
- 47** The Adoption Act should not permit a permanent carer to adopt unless leave to apply has been granted by the President of the Children's Court of Victoria or her nominee. In determining an application for leave, the President of the Children's Court must be satisfied that:
- a. the making of an adoption order would be in the best interests of the child; and
 - b. an adoption order would be clearly preferable to the continuation of the permanent care order under the *Children, Youth and Families Act 2005* (Vic).

If leave of the court is granted, a permanent care order should cease to have effect upon the making of an adoption order.

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11. Assessment of applicants for adoption

Introduction

- 11.1 The *Adoption Act 1984* (Vic) requires that all applicants are assessed as suitable to adopt.¹ In practice, this means that no one can adopt a child unless they are approved by the Department of Health and Human Services (DHHS) or an approved agency. To obtain approval, applicants go through a comprehensive assessment process.
- 11.2 Applicants are assessed against suitability criteria set out in the *Adoption Regulations 2008* (Vic) and must meet additional requirements. They must submit application paperwork, give extensive personal and financial details, undergo medical and criminal record checks and be interviewed a number of times. Information about the assessment requirements and procedures is spread across various sources, including policy documents that are not up-to-date.
- 11.3 The Commission was asked to make recommendations to ensure that 'legislative practice and procedural requirements' are 'clearly articulated'.
- 11.4 It is not easy for community members to grasp the assessment process and requirements. Responses from parents, applicants, approved agencies and adoption workers highlighted that greater clarity and transparency is required.
- 11.5 Parents and applicants told the Commission they did not always understand what they were being assessed against or how the assessment process worked. Some people submitted that the suitability criteria—particularly age and health criteria—are unclear, subjective and discriminatory. A number complained about delays and inconsistency within and across agencies. Some people felt unable to give feedback to agencies during the process in case it affected their chances of adopting.
- 11.6 The specific issues raised in submissions and consultations are discussed in this chapter:
- fit and proper person approval
 - the appropriateness of the criteria
 - the clarity and transparency of the criteria and other requirements
 - the transparency of the process
 - inconsistency in practices across agencies.
- 11.7 The Commission found the suitability criteria are appropriate, but not easy to understand in detail. Applicants need access to better information. The overall purpose of the assessment is sometimes lost and needs to be made clearer. Improvements relating to assessment should be made to the *Adoption Act* and *Adoption Regulations*, and a single set of guidelines should be drawn up to facilitate consistent decision making. This would also help to address the problem of inconsistency between agencies.

Current law and practice

- 11.8 There is little detail about assessment of applicants in the Adoption Act and the Adoption Regulations. Most of the detail is found in DHHS policy documents such as the *Adoption and Permanent Care Procedures Manual* (the Adoption Manual) and *Adoption and Permanent Care Learning Guide* (the Learning Guide), which is a training resource for staff.² The legal status and force of those documents is uncertain.
- 11.9 To make an adoption order, the court must be satisfied that the applicants meet suitability criteria called ‘prescribed requirements’ in the Adoption Regulations.³ DHHS and approved agencies assess applicants against these requirements and provide reports to the court.⁴ In practice, assessment focuses on ‘understanding how a family functions and what it offers a child’.⁵
- 11.10 In addition, all applicants, other than applicants related to a child, must be approved by the Secretary or a principal officer as ‘fit and proper persons’ to adopt a child.⁶ This assessment is made against the suitability criteria.⁷ DHHS and approved agencies also require applicants to meet other policy requirements that are not contained in the Adoption Act or Adoption Regulations.
- 11.11 The assessment process is complex. It includes:
- information and training sessions
 - submitting application documentation
 - full medical examinations
 - criminal history checks
 - interviews
 - home inspections
 - decision by an assessment panel.
- 11.12 Parents told the Commission that the assessment process was demanding, testing and intrusive. They believed this was appropriate because it prepared them for parenting.⁸

‘Fit and proper person’ approval

- 11.13 Couples, sole applicants and step-parents applying to adopt a child must have ‘fit and proper person’ approval from the Secretary or a principal officer.⁹ Approval is given if the applicants meet the suitability criteria.¹⁰
- 11.14 Although all of these applicants require fit and proper person approval, the Adoption Act states that only eligible couples ‘may apply’ to the Secretary or a principal officer for approval.¹¹
- 11.15 A relative of a child does not need fit and proper person approval to adopt a child.¹² However, all applicants including relatives are required to satisfy the suitability criteria.¹³
- 11.16 The Commission identified three areas of confusion.

2 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 1 Introduction* (2005); *Part 2 Infant Adoption* (2005).

3 *Adoption Regulations 2008* (Vic) reg 35.

4 *Adoption Act 1984* (Vic) s 15; *Supreme Court (Adoption) Rules 2015* (Vic) r 23.

5 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 9.

6 *Adoption Act 1984* (Vic) ss 13, 15(1)(a).

7 *Adoption Regulations 2008* (Vic) reg 37.

8 Consultation 6 (Roundtable with Permanent Care and Adoptive Families).

9 *Adoption Act 1984* (Vic) s 15(1)(a).

10 *Ibid* s 13; *Adoption Regulations 2008* (Vic) reg 37.

11 *Adoption Act 1984* (Vic) s 13.

12 *Ibid* s 15(1)(a).

13 *Ibid*.

- 11.17 First, all applicants except relatives must satisfy the suitability criteria *and* be approved as fit and proper persons. Approval is based on the suitability criteria. This means that fit and proper person approval adds nothing to the suitability requirements.
- 11.18 Secondly, fit and proper person approval does not apply to relatives, but they must still meet the suitability criteria on which the approval is based.¹⁴
- 11.19 Thirdly, the Adoption Act states that only certain people ‘may apply’ to the Secretary or a principal officer for approval.¹⁵ The group of applicants who may apply consists of couples who are eligible to adopt.¹⁶ Sole applicants and step-parents are not expressly excluded from applying, but they are not included in the group of people who ‘may apply’.¹⁷ This creates uncertainty about their ability to apply for the approval needed to adopt.

Commission’s conclusions

- 11.20 The requirement in the Adoption Act for approval as a fit and proper person is confusing, unnecessary and should be removed. A simple ‘suitability test’ should apply. The content of the test is discussed in the following sections.
- 11.21 The suitability test should apply to all applicants, except permanent care parents who apply to adopt a child in their permanent care. Chapter 10 discusses the circumstances in which these adoptions should be permitted.

Recommendation

- 48** A single ‘suitability’ assessment should replace the ‘fit and proper person’ approval requirement in sections 13 and 15 of the current Adoption Act. It should apply to all applicants other than permanent care parents who apply to adopt a child in their permanent care.

Suitability criteria: the Adoption Regulations

- 11.22 All applicants’ suitability to adopt is assessed against the suitability criteria in the Adoption Regulations. The criteria cover many aspects of an applicant’s background, personality, capacities and circumstances. The criteria, in full, are:
- The health of the applicants, including emotional, physical and mental health, is suitable.
 - The age and maturity of the applicants are suitable.
 - The applicants have suitable skills and life experience.
 - The applicants’ financial circumstances are suitable.
 - The applicants have the capacity to provide a stable, secure and beneficial emotional and physical environment during a child’s upbringing until the child reaches social and emotional independence.
 - The applicants have the capacity to provide appropriate support to the maintenance of a child’s cultural identity and religious faith (if any).

¹⁴ Ibid s 15(1)(a); see also s 20A(b).

¹⁵ Ibid s 13(1).

¹⁶ Section 13(1) of the *Adoption Act 1984* (Vic) states that the people who ‘may apply’ for approval are ‘persons capable of making an application under section 10A(a) for an adoption order under section 11’. These people are ‘2 persons who are married or living in a relationship referred to in section 11(1)’; s 10A(a). The relationships referred to in 11 are marriages, traditional Aboriginal marriages, registered relationships and domestic relationships. See also s 20A(a).

¹⁷ This is because they are not ‘persons capable of making an application under s 10A(a) for an adoption order under section 11’ of the *Adoption Act 1984* (Vic).

- The applicants have a suitable appreciation of the importance of:
 - contact with a child's natural parents and family of origin
 - exchange of information about the child with the child's natural parents and family of origin.
 - The general stability of character of the applicants is suitable and the criminal history (if any) of the applicants does not make the applicants unsuitable.
 - The stability and quality of the applicants' relationship with each other, and between them and any other household and family members, is suitable.
 - The criminal history (if any) of any household members does not make the applicants unsuitable.
 - If the applicants have had the care of a child before applying for approval as fit and proper persons to adopt a child, the applicants have shown an ability to provide a stable, secure and beneficial emotional and physical environment for the child.¹⁸
- 11.23 The *Supreme Court (Adoption) Rules 2015* (Vic) require the Secretary or principal officer arranging the adoption to give the court a report which addresses whether the applicant satisfies the suitability criteria.¹⁹
- 11.24 Of the 11 criteria listed above, the Commission heard that two are of particular concern to people: age and health.

Adoption Manual and other documents

- 11.25 The suitability criteria in the Adoption Regulations are expressed in general terms. They do not specify, for example, what 'suitable health' means or what age range is suitable. The Adoption Manual provides guidance to decision makers about how to apply the criteria.
- 11.26 It discusses the criteria that applied under the previous *Adoption Regulations 1998* (Vic).²⁰ These are similar to the current suitability criteria. The Adoption Manual discusses factors which should be taken into account in the assessment, including applicants' personality,²¹ family background,²² motivation for wanting to adopt,²³ expectations,²⁴ lifestyle,²⁵ ability to cope with stress²⁶ and acceptance of infertility issues.²⁷ These factors are not mentioned expressly in the Adoption Regulations but appear to come within the scope of the suitability criteria set out in the regulations.
- 11.27 The Adoption Manual refers to principles set out in the 1986 *Standards in Adoption* (the Adoption Standards).²⁸ These are practice standards developed in the 1980s to guide implementation of the Adoption Act.²⁹ DHHS informed the Commission that it is in the process of updating the Adoption Manual.
- 11.28 Detail about the suitability criteria is found in other policy documents, including the Learning Guide and application documentation. DHHS and approved agencies use 'uniform practice guidelines about the management of obesity' to evaluate the suitability of an applicant's health.³⁰

18 *Adoption Regulations 2008* (Vic) reg 35.

19 *Adoption Act 1984* (Vic) s 15; *Supreme Court (Adoption) Rules 2015* (Vic) r 23.

20 *Adoption Regulations 1998* (Vic) s 35; Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 46.

21 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 51.

22 Ibid. See also Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 15.

23 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 55.

24 Ibid 56–7.

25 Ibid 56.

26 Ibid.

27 Ibid 55; Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 23, 26.

28 Department of Human Services, Victoria, *Standards in Adoption* (1986).

29 Ibid 2.

30 Submission 29 (Connections UnitingCare); Consultation 13 (Roundtable with approved adoption agencies).

Appropriateness of criteria: responses

- 11.29 Submissions from two approved agencies and VANISH expressed support for the current suitability criteria.³¹ One person's submission stated the criteria:
- must include age, health and financial status to make sure that the child does not have adopted parents that are not within the normal age range for having children, not going to die and leave the child an orphan and have the financial capability to support a child.³²
- 11.30 Another submission said a person's BMI (healthy weight) 'should not be a factor' in assessing their suitability to be a parent.³³ The Victorian Gay and Lesbian Rights Lobby (VGLRL) submitted that specifying age, weight and physical and mental health requirements 'may be too prescriptive' and 'may amount to discrimination'.³⁴ The 'primary criterion should be the applicants' capacity to provide a stable, secure and beneficial emotional and physical environment during a child's upbringing'.
- 11.31 The VGLRL submitted that some requirements could discriminate against LGBTI people. The criminal history requirement could exclude men with old convictions for historical homosexual offences, if a decision maker decided this criminal history made them 'unsuitable' applicants. VGLRL pointed out that the Adoption Manual should be updated to reflect that the requirements relating to infertility adjustment are not relevant to gay applicants.³⁵
- 11.32 One mother's submission spoke about the focus on infertility issues:
- I don't feel this is well defined and feel that certain conditions (i.e. certain time since applicants last IVF treatment, the focus on time frame for grief and loss for couples who can't conceive) need to be reviewed as not all couples 'grieve' at the same time/for the same length of time, not all couples want to go through IVF, but I felt the training was very targeted towards grief and loss on a couple's ability to have a biological child ...³⁶
- 11.33 A submission from a person adopted in the 1950s said:
- Mental health [is important]. I believe many adoptive ... mothers, similar to mine, never came to terms with not being able to have biological children. I know how that plays out, as I paid for that loss.³⁷
- 11.34 Rainbow Families Council raised concerns about possible exclusion of applicants with a disability.³⁸ The Youth Disability Advocacy Service submitted:
- an assessment of someone's ability to care for a child should never be made on the basis of disability alone. In the case of a person with disability, options should be provided for a medical check to be undertaken by a medical professional of their choosing with whom they have built up a relationship over time, and who has an understanding of the individual's disability and its real, rather than assumed impact.³⁹
- 11.35 The Commission did not hear from any people who had applied for approval unsuccessfully or receive any information indicating that criteria are applied inappropriately.

31 Submissions 29 (Connections UnitingCare), 34 (VANISH), 36 (Child & Family Services Ballarat Inc.).
32 Submission 7 (Name withheld).
33 Submission 5 (Confidential).
34 Submission 44 (Victorian Gay & Lesbian Rights Lobby).
35 Ibid.
36 Submission 32 (Name withheld).
37 Submission 23 (Fae Cuff).
38 Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).
39 Submission 47 (Youth Disability Advocacy Service).

- 11.36 The VGLRL submitted that the criteria should differ 'based on the child's age' and where the child and applicant have a pre-existing relationship.⁴⁰ Barnados Australia, which arranges a high proportion of adoptions by carers in New South Wales, submitted 'The pre-existing relationship and attachments between the adoptee and adoptive family should be given the highest priority.'⁴¹

Appropriateness of the criteria: Commission's conclusions

- 11.37 On the whole, the suitability criteria are appropriate. They are consistent with the purpose of assessment, which is to determine an applicant's ability to bring up an adopted child, through to adulthood, in a positive, stable family environment.⁴² All factors are relevant to a person's ability to fulfil this responsibility. The criteria establish a reasonable framework for assessing a person's capacity to provide for the needs of an adopted child. They are generally consistent with the criteria used in other states and territories⁴³ and Victoria's *Children, Youth and Families Act 2005* (Vic).⁴⁴
- 11.38 Submissions and consultations did not raise major concerns about the relevance of the criteria. The Commission was told that there is a possibility that some criteria could be applied in a discriminatory way. However, the Commission did not receive any complaint that discrimination has occurred in the assessment of any applicant.
- 11.39 As discussed in Chapter 9, discrimination in the assessment of applicants is legitimate and necessary for the protection of children. In the Commission's view, the criteria are not unreasonably discriminatory. Fair-minded application of the criteria would not cause improper discrimination. Applicants can have decisions reviewed if they consider a decision maker has applied the criteria unfairly or arbitrarily.⁴⁵
- 11.40 It is important that the suitability criteria are both clear and transparent so that applicants and potential applicants know what they are assessed against and decision makers apply the criteria correctly and consistently.

Clarity and transparency of the criteria: responses

- 11.41 Members of the public and approved agencies told the Commission that some criteria are not clear. Two criteria were of particular concern: age and health.⁴⁶ The Adoption Regulations require that an applicant's age and 'emotional, physical and mental health' are suitable, without specifying what this means.
- 11.42 An adoption worker said the Adoption Act should clarify the age requirement:
- as this is a very sensitive and contentious issue and [presents] individual agencies with numerous challenges, due to lack of clarification both within the Adoption Act and the DHHS policy and procedure manuals.⁴⁷
- 11.43 A current applicant told the Commission the criteria relating to suitable age and health were 'blurry' and 'subjective'. She was told she and her husband had 'little chance' of being able to adopt, because they are 'in their 40s'.⁴⁸ However, she knew that other people in their 40s had adopted.⁴⁹ This couple also underwent an extensive medical assessment but it was not clear to them what health issues might disqualify them.⁵⁰

40 Submission 44 (Victorian Gay & Lesbian Rights Lobby).

41 Submission 50 (Barnados Australia).

42 See, eg, Department of Human Services, Victoria, *Adoption and Permanent Care Standards* (1986) 33–5; Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 9.

43 See, eg, *Adoption Act 1993* (ACT) ss 18, 39F(1)(c); *Adoption Act 2000* (NSW) s 45; *Adoption Regulation 2015* (NSW) reg 45; *Adoption Act 2009* (Qld) ss 120–133; *Adoption Regulation 2009* (Qld) reg 7; *Adoption Regulations 2004* (SA) reg 9(3); *Adoption Act 1988* (Tas) s 24; *Adoption Regulations 2006* (Tas) reg 18; *Adoption Act 1994* (WA) s 68(2).

44 *Children, Youth and Families Regulations 2007* (Vic) reg 18.

45 *Adoption Act 1984* (Vic) s 129A.

46 Submissions 17 (Name withheld), 29 (Connections UnitingCare), 40 (Confidential).

47 Submission 17 (Name withheld).

48 Consultation 3 (Confidential).

49 The Commission has not identified documentation supporting the idea that people may not adopt in their 40s.

50 Consultation 3 (Confidential).

- 11.44 A number of people said the criteria should be more transparent.⁵¹ One submission said 'There is barely any information anywhere, [including at] information sessions and training sessions ... very little [is revealed] at any stage through the process'.⁵² A current applicant said no guidelines on the criteria and eligibility are provided to applicants.⁵³ Another submission stated that all requirements should be 'clearly set out' in the Adoption Act and Adoption Regulations and on the 'government website'.⁵⁴
- 11.45 An approved agency said transparency is needed to assist applicants to understand 'why they have or have not been approved'. It submitted that the Adoption Regulations 'need to be more concrete regarding [the] suitability criteria':
- The most frequent reason for an application for adoption not proceeding to assessment is on health grounds ... Medical reports are sought and reviewed by the DHHS medical examiner which provides guidance to the Adoption agency about the applicant's suitability. It is often difficult for applicants to accept that they are not recommended in the program due to health concerns such as obesity. The Victorian Adoption program has uniform practice guidelines about the management of obesity, but these are not referenced in the Regulations.⁵⁵
- 11.46 Another approved agency submitted that detail relating to the criteria should be kept in policy documents, rather than the Adoption Regulations, because flexibility is needed.⁵⁶ A worker from an adoption agency submitted that a DHHS 'policy guide [on healthy weight and age] would be very helpful to provide applicants when they first express interest'.⁵⁷

Clarity and transparency of the criteria: Commission's conclusions

- 11.47 Based on what the Commission was told in consultations and submissions, many people are unclear about the exact nature of the assessment criteria, especially those to do with age and health. Most of the details and scope of the age and health criteria are available, but are located in several different policy and practice documents, such as the DHHS website, the Adoption Manual, application documentation and a medical report applicants must submit.
- 11.48 These documents indicate that applicants must be 'fit and healthy enough to care for a child safely through to adulthood'.⁵⁸ Age is relevant to this question.⁵⁹ The health assessment is based on a detailed report from a doctor, who is asked whether 'the applicant will be medically fit, to care for and support a child, until the child attains 18 years?'.⁶⁰ The Adoption Manual states that 'situations involving medical issues are considered on an individual basis' and highlights conditions that 'may require further consideration'. These include conditions affecting 'day to day coping' and 'life span'.⁶¹ The Adoption Standards state applicants will be excluded if they have a terminal illness and may die before a child turns 18, or 'a substantial risk of a genetic disorder which may reduce their capacity to care for a child'.⁶²

51 Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

52 Submission 22 (Confidential).

53 Consultation 3 (Confidential).

54 Submission 10 (Confidential).

55 Submission 29 (Connections UnitingCare).

56 Submission 36 (Child & Family Services Ballarat Inc.). This view was also expressed in Submission 7 (Name withheld).

57 Submission 40 (Confidential).

58 Department of Human Services, Victoria, *Applying to adopt an infant in Victoria* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/applying-to-adopt-an-infant-in-victoria>>. See also Department of Human Services, Victoria, *Standards in Adoption* (1986) 35; Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 47; Department of Human Services, Victoria, Central Resource Exchange: Infant Adoption Program of Victoria, 'Training Registration Form' <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

59 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 47.

60 Department of Human Services, Victoria, *Confidential medical report for prospective applicant to be considered to adopt or permanently care for a child*.

61 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 50.

62 Department of Human Services, Victoria, *Standards Adoption* (1986) 35.

- 11.49 Currently, the public and decision makers can only find the details of the age and health criteria by reviewing these different sources. It is not appropriate for such detailed information to be included in the Adoption Act or Adoption Regulations. However, it should all be located in one place so that people can easily refer to it.
- 11.50 The suitability criteria in the Adoption Regulations are framed broadly, which may reduce their clarity. The word 'suitable' is used in reference to various criteria, including 'skills and life experience', 'general stability of character' and 'financial circumstances'. A person must not have an 'unsuitable' criminal history. What is considered 'suitable' or 'unsuitable' is not defined. This makes it difficult to know what is required to satisfy the criteria or what might disqualify an applicant. It also creates the risk of subjective assessment.
- 11.51 However, the Commission does not recommend entering into detailed definitions of terms like 'suitable'. The point is not to encourage a 'tick the box' approach to assessment. Rather, decision makers should be using their judgment to assess applicants in a holistic way. This means keeping a clear focus on what the purpose of assessment is in the first place.

Purpose of assessment

- 11.52 The purpose of assessment should be clear to applicants and potential applicants. Previously, the 1998 Adoption Regulations expressed that the overall test was the applicants':
- capacity to provide a secure and beneficial emotional and physical environment during a child's upbringing until the child reaches social and emotional independence.⁶³
- 11.53 This statement survives almost unchanged in the current list of criteria in the Adoption Regulations, but rather than being an overall test it is simply one item in the list:
- capacity to provide a stable, secure and beneficial emotional and physical environment ...⁶⁴
- 11.54 The Commission considers that this statement encapsulates the overall purpose of the assessment. Its current position in the list means that its importance could be overlooked.
- 11.55 The Adoption Act should contain an overarching suitability test using these or similar words. This would emphasise that the focus of assessment is protecting children's best interests. This, in turn, would provide clearer guidance to decision makers and assist applicants to understand the relevance of criteria like age, health and the others. The current suitability criteria should remain in the Adoption Regulations.

Flexibility in assessment

- 11.56 These changes would provide a clear and flexible framework for decision making. Agencies need to apply a range of criteria to evaluate applicants' suitability.⁶⁵ Decision makers must use their professional expertise in making assessments based on each applicant's individual circumstances.⁶⁶
- 11.57 Decision makers should not take a 'tick the box' approach where, for example, an applicant is excluded if they have one specific health problem. While sometimes one factor alone will be enough to disqualify a person—such as a conviction for an offence against a child—usually all the circumstances should be taken into account. In most cases decision makers should look at the whole picture before making a decision. The overall question is whether an applicant can provide love, security and stability for a child who is adopted and meet their particular needs.

63 *Adoption Regulations 1998* (Vic) reg 35.

64 *Adoption Regulations 2008* (Vic) reg 35(e).

65 See, eg, Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 3; New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Report No 81 (1997) 232–3.

66 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 47.

- 11.58 For instance, it would be wrong to conclude that a person with a disability is unable to be a suitable parent for an adopted child without fully evaluating all of their circumstances. Similarly, in many cases whether a person's age is suitable will depend on their health. The Adoption Act does not intend that there be a fixed 'cut-off' age. Parliament removed strict age requirements in 1997.⁶⁷ The Adoption Manual acknowledges this and states:

Age may be associated with health issues, and with a couple's flexibility and ability to incorporate a child into their particular family situation and lifestyle. These matters require professional judgment within the context of the overall strengths and weaknesses of an application.⁶⁸

- 11.59 The suitability criteria should not be overly prescriptive and do not need to be defined in further detail in the Adoption Regulations. However, to increase clarity about the factors that decision makers may take into account, a standard and complete set of assessment guidelines should be drawn up.

Assessment guidelines

- 11.60 Currently, the details of the assessment criteria can be found in various sources, including the Adoption Manual, Adoption Standards, Learning Guide, DHHS website, the medical report and application documentation. Rather than these multiple sources, one set of clear assessment guidelines should be drawn up which:
- sets out the relevant matters decision makers may consider when deciding whether an applicant is suitable
 - is easy to understand
 - is used by all approved agencies
 - is published on the DHHS website and provided to any applicant who does not have access to the website
 - is reviewed every three years.
- 11.61 This would provide greater clarity about the assessment criteria for applicants and decision makers, increase their transparency and promote a consistent approach to decision making.

Recommendations

- 49** The Adoption Act should provide an overall 'suitability test' against which applicants are assessed. The prescribed requirements currently set out in regulation 35 of the Adoption Regulations should be the relevant considerations decision makers must take into account in assessing an applicant's or applicants' suitability to adopt a child.
- 50** Assessments of an applicant's or applicants' suitability to adopt a child should be carried out in accordance with guidelines issued by the Secretary. The guidelines should:
- a. set out relevant matters decision makers should consider
 - b. be published on the Department of Health and Human Services website
 - c. be reviewed by the Secretary every three years.

Additional requirements

- 11.62 DHHS and approved agencies apply additional requirements which may determine, in practice, whether a person is able to adopt. These requirements are found in the Adoption Manual and application documentation and include:
- At least one applicant in a couple must be an Australian citizen. If only one applicant is a citizen, the other applicant must be a permanent resident.⁶⁹
 - Applicants must have completed fertility treatment at least six months before starting the assessment process.⁷⁰ They must 'have fully explored their fertility prior to entering the program—any possibility of having biological children must be fully explored'.⁷¹
 - If a child is placed with the applicants, at least one parent is expected to provide full-time care at home for the first 12 months.⁷² This is 'so parents can solely focus on the physical and emotional needs of their child, and enable the child to settle and to develop attachment with their new parents'.⁷³
- 11.63 Similar requirements are set out in legislation in other states.⁷⁴
- 11.64 VANISH submitted that it may be appropriate to include additional policy requirements, such as these, in the Adoption Regulations, for transparency and 'to underline [their] significance'.⁷⁵ One approved agency said there is a 'lack of clarity' about the citizenship requirements.⁷⁶ The VGLRL told the Commission that some employees might have difficulty being able to obtain adoption leave.⁷⁷

Commission's conclusions

- 11.65 In effect, these requirements decide whether a person is able to adopt. Because they determine people's entitlements, they should be included in the Adoption Act or Adoption Regulations. This would make the requirements transparent and ensure they have a clear legal basis.

Recommendation

- 51** All policies, procedural requirements and processes that determine or affect whether a person is able to adopt should be included in the Adoption Act or Adoption Regulations. These include requirements relating to citizenship, fertility treatment and full-time care of a child.

69 Submission 29 (Connections UnitingCare). This information is set out in documentation given to applicants interested in attending infant adoption training. Schedule 4 of the *Adoption Regulations 2008* (Vic), which relates to the information that must be included in an application for approval as a fit and proper person, indicates that applicants may be asked to provide 'citizenship certificates'.

70 Department of Human Services, Victoria, *Applying to Adopt an Infant in Victoria* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/applying-to-adopt-an-infant-in-victoria>>.

71 Department of Human Services, Victoria, Central Resource Exchange: Infant Adoption Program of Victoria, 'Training Registration Form' <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. The Adoption Manual refers to the Adoption Standards, which state 'active fertility investigation and treatment and adoption assessment are not compatible': Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 55; Department of Human Services, Victoria, *Standards in Adoption* (1986) 33. The Adoption Manual states that the Permanent Care Program requires all applicants to give an undertaking before beginning education and assessment that they are not receiving fertility treatment and to confirm their understanding of the need to use contraception for two years after placement: Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 55.

72 The Adoption Standards state it is expected children placed will be 'in the full time care of a parent for ... the first eighteen months of life': Department of Human Services, Victoria, *Standards in Adoption* (1986) 36. The Commission was informed the period of full-time care currently required is generally 12 months.

73 Department of Human Services, Victoria, Central Resource Exchange: Infant Adoption Program of Victoria, 'Training Registration Form' <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

74 *Adoption Act 2009* (Qld) ss 71, 76(1)(b), 189(1); *Adoption Regulation 2009* (Qld) reg 5; *Adoption Regulations 2004* (SA) regs 8(1); *Adoption Act 1994* (WA) s 39. The *Adoption and Other Legislation Amendment Act 2016* (Qld) removed a requirement from the *Adoption Act 2009* (Qld) that a person must not be 'undergoing fertility treatment and [had] not undergone fertility treatment with the previous 6 months': *Adoption and Other Legislation Amendment Act 2016* (Qld) s 13.

75 Submission 34 (VANISH).

76 Submission 29 (Connections UnitingCare).

77 Submission 44 (Victorian Gay & Lesbian Rights Lobby).

Assessment process

- 11.66 The Adoption Act does not set out the procedural steps involved in the assessment process. It states only that:
- An application may be made to the Secretary or a principal officer for approval as a 'fit and proper person to adopt a child'.⁷⁸
 - The application must comply with the Adoption Regulations.⁷⁹
 - The Secretary or principal officer may approve applicants as fit and proper persons if they satisfy the suitability criteria.⁸⁰
 - The Secretary or principal officer must not refuse to approve, or defer the making of a decision, without giving the applicant notice and the opportunity to be heard.⁸¹
- 11.67 The Adoption Regulations state that the application must be in writing and contain certain information (for example, the applicant's personal details, education and qualifications and financial circumstances).⁸²
- 11.68 In practice, before making their application, applicants must attend a two-hour group information session and a subsequent two-day group education program.⁸³ These 'provide information about issues in adoption' and begin 'the process and preparation for adoptive parenthood'.⁸⁴ Agencies run a limited number of sessions each year. People interested in adopting are invited to attend when places become available.
- 11.69 After attending the information session and training, couples may apply for approval. The assessment is generally carried out by the agency (DHHS or approved agency) in the region where the applicants are situated. One approved agency operates a statewide adoption service. Practices may vary across agencies. Generally, the assessment process involves the following steps:⁸⁵
- The couple submits the application, including medical reports.
 - A social worker from the agency is allocated to conduct the assessment.
 - The social worker considers the information provided in the application, interviews the applicant several times, inspects their home and writes a report about the applicants' suitability. The report is provided to an 'applicant assessment committee' (AAC).
 - The AAC considers the report and any other relevant information and makes a recommendation to the Secretary or principal officer to approve, decline approval or defer the decision. The Secretary or principal officer makes the final decision.
- 11.70 The Learning Guide states that:
- Guidelines suggest that an adoption assessment should be completed within four months from completed application to decision at the Application Assessment Committee (AAC).⁸⁶
- 11.71 The Commission was informed that the process from the information session through to approval can take from 12 to 18 months or longer.⁸⁷

⁷⁸ *Adoption Act 1984* (Vic) s 13(1).

⁷⁹ *Ibid* s 13(2).

⁸⁰ *Ibid* s 13(3).

⁸¹ *Ibid* s 13(5).

⁸² *Adoption Regulations 2008* (Vic) reg 36, schs 4, 5.

⁸³ Department of Human Services, Victoria, *Applying to Adopt an Infant in Victoria* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/applying-to-adopt-an-infant-in-victoria>>.

⁸⁴ Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 9.

⁸⁵ Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 49, 67–8; Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 8, 10, 14, 27.

⁸⁶ Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 14.

⁸⁷ The Commission obtained this information at an information session for couples considering applying for infant adoption.

- 11.72 Applicants who obtain approval are placed on registers of approved people.⁸⁸ Unsuccessful applicants can request the agency to review the Secretary's or principal officer's decision. This is not mentioned in the Adoption Act but stated in the Adoption Manual and Learning Guide.⁸⁹ The Adoption Act provides that applicants can apply to the Victorian Civil and Administrative Tribunal for review of the Secretary's or principal officer's decision.⁹⁰
- 11.73 The Adoption Act does not say how long approval lasts or how approval is renewed. The Adoption Manual states:
- Approval is 'normally' valid for two years.⁹¹
 - An 'informal review' is conducted at the end of the first year. Applicants are 'contacted to confirm that they wish to remain on the [register] and are asked whether there has been any change in their circumstances'.⁹²
 - A 'formal review' is undertaken at the end of the second year. Applicants are required to provide up-to-date information, including medical reports. A police check is conducted. A decision maker interviews the applicants and prepares a 'short report' on the applicants' suitability. Decisions may or may not be made by the AAC, depending on the circumstances.⁹³
- 11.74 The Secretary or principal officer may revoke an approval. The person must be given notice and an opportunity to be heard.⁹⁴

Assessment process: responses

- 11.75 A few people said the assessment process should be set out clearly.⁹⁵ VANISH submitted:
- ... the process is long, burdensome and intrusive. Setting out the steps and requirements in regulation makes it clear, minimises the need to explain why certain processes are necessary, and assists applicants to prepare necessary paperwork, etc.⁹⁶
- 11.76 One submission stated the assessment process should be set out in the Adoption Act. It said: 'I've been through the process several times now and I'm still not 100% clear on the [whole] process.'⁹⁷ Other submissions stated the process should be set out in the Adoption Regulations or DHHS policy, because these would be easier to update as processes change.⁹⁸ One approved agency stressed 'the need to have flexibility'.⁹⁹
- 11.77 Some people were happy with the amount of information they received about the assessment process.¹⁰⁰ A mother who had recent experience of the assessment process told the Commission:
- While I thought the training and assessment process was expertly and sensitively run and the training sessions were very useful, there is room to improve the provision of information to applicants about the practicalities of the process.¹⁰¹

88 *Adoption Act 1984* (Vic) s 13A.

89 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 71–2; Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 27.

90 *Adoption Act 1984* (Vic) s 129A.

91 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 69.

92 *Ibid.*

93 *Ibid.* 70.

94 *Adoption Act 1984* (Vic) ss 13(4)–(5).

95 Consultation 18 (Fiona De Vries).

96 Submission 34 (VANISH).

97 Submission 22 (Confidential).

98 Submissions 7 (Name withheld), 58 (Name withheld).

99 Submission 36 (Child & Family Services Ballarat Inc.).

100 Consultations 6 (Roundtable with Permanent Care and Adoptive Families), 36 (Kylie Martens).

101 Submission 58 (Name withheld).

- 11.78 She submitted that better information could be provided to applicants, in a 'plain English summary', at the beginning of the process:

It would be very helpful and far less daunting if applicants were handed a booklet explaining each stage of the process and what happened next. Eg 'Who reads my life story?'; 'What information about me is placed on the adoption register?' 'How are applicants selected and how does the adoption register work?'¹⁰²

Commission's conclusions

- 11.79 Assessment procedures should be more transparent. The Commission found it difficult to determine the full extent of the processes and procedural requirements. Some are in the Adoption Act, some are in the Adoption Regulations and some are in different policy documents. The requirement to attend information and education sessions, the internal review process, the duration of approval and the renewal process are contained in policy documents. These processes affect a person's eligibility to adopt. Any process which has this effect should be included in the Adoption Act or Adoption Regulations.
- 11.80 Information about the administrative steps in the assessment process should be provided to applicants and available to anyone who expresses an interest in adoption. At a minimum, applicants should receive, in addition to the assessment guidelines, clear written information which outlines:
- who is eligible to apply for assessment
 - the requirements applicants must meet to obtain approval
 - the steps in the assessment process.
- 11.81 This information should be readily available on the DHHS website and provided to any applicant who does not have access to the website. Approved agencies may need to provide applicants with additional written information about their own processes. However, all applicants should receive generally consistent information.

Recommendation

- 52** Clear written information about assessment requirements and procedures should be published on the Department of Health and Human Services website and otherwise be readily available to applicants and any person who expresses interest in adopting a child. This should include information about eligibility for assessment, the suitability test and criteria and the assessment process.

Inconsistency in the assessment process

- 11.82 In Victoria, adoption services are provided by regional DHHS teams and approved agencies and one statewide approved agency. Approved agencies run their own information and training sessions on a rotational basis. Agencies have differing workloads and resources. This affects how quickly they can conduct and complete assessments. The Commission heard complaints from parents and applicants about inconsistent practices across agencies relating to information, the amount of time taken, and assessment practices.¹⁰³

- 11.83 Parents and applicants' experiences of assessment varied, depending on the agency and the individual social workers. One person described a very positive experience. Others said their social workers seemed to focus more on 'whether the house was childproof' than on how the couple interacted with each other and with children and the couple's approach to parenting. One parent stated: 'There needs to be more focus on the things that actually matter.' Others said the workers need better training, acknowledging that they have difficult jobs.¹⁰⁴
- 11.84 One mother told the Commission:
- We found the application process was not only an extremely long one but varied and inconsistent depending on which agency you went through ... we found the wait times between initial information session, 2 day training days, being assigned a case worker, being assessed and then going to panel to be excessively long ... While our case worker was supportive and helpful, we felt the 'process' was inconsistent and the level of support/degree of questioning during the assessment process from different case workers varied.¹⁰⁵
- 11.85 Another parent said 'inconsistency' between social workers can be 'unbearable'.¹⁰⁶ The Commission heard that applicants were allocated social workers after differing periods of time. It heard about delays of three months,¹⁰⁷ 12 months and two years.¹⁰⁸ One applicant had seen people in other regions allocated a social worker while she waited for months.¹⁰⁹ One mother told the Commission her experience with an approved agency was much faster and more positive than the experiences of the others she knew, who went through DHHS.¹¹⁰
- 11.86 Parents and an applicant told the Commission they felt unable to give feedback about the process, including concerns about delays and lack of information, because they were worried it would affect their chances of being selected to adopt a child.¹¹¹ The Commission was informed that DHHS does not have an evaluative mechanism in place to enable it to improve processes or even understand how they are working.
- 11.87 Approved agencies told the Commission greater consistency is desirable. Some said applicants should receive the same information and training, and standard assessment methods should be developed.¹¹² One approved agency said the assessment process should be set out clearly because there have been situations where people have been approved without attending information and training sessions.¹¹³ An adoption worker said more funding is needed to address 'long delays'.¹¹⁴
- 11.88 The Commission heard proposals which might improve consistency. Dr Briony Horsfall submitted that adoption services should be provided by a single, independent authority, similar to the Victorian Assisted Reproductive Treatment Authority.¹¹⁵ This is similar to a proposal for an integrated, centralised service model made by KPMG Management Consulting in 1998.¹¹⁶ However, this proposal may not be practical today given the low numbers of adoptions.

104 Ibid.

105 Submission 32 (Name withheld).

106 Consultation 6 (Roundtable with Permanent Care and Adoptive Families).

107 Ibid, Consultation 18 (Fiona De Vries).

108 Consultation 6 (Roundtable with Permanent Care and Adoptive Families).

109 Consultation 3 (Confidential).

110 Consultation 19 (Chrissie Davies).

111 Consultations 3 (Confidential), 6 (Roundtable with Permanent Care and Adoptive Families), 18 (Fiona De Vries).

112 Submission 36 (Child & Family Services Ballarat Inc.); Consultation 13 (Roundtable with approved adoption agencies).

113 Consultation 13 (Roundtable with approved adoption agencies).

114 Submission 40 (Confidential).

115 Submission 45 (Dr Briony Horsfall).

116 KPMG Management Consulting, *Redevelopment of Adoption and Permanent Care Services Options Paper* (Department of Human Services, Victoria, 1998) 17.

Commission’s conclusions

- 11.89 It is unsatisfactory that assessment practices and processes are unclear and inconsistent. Consistency in assessment practice and processes is important to ensure fairness to applicants.
- 11.90 Standard assessment tools should be developed for greater consistency and to ensure best practice is followed.
- 11.91 Applicants should receive the same information and training. Decision makers should take a consistent approach to assessments. The Commission has recommended above that applicants receive the same written information about assessment requirements and processes, and that decision makers conduct assessments in accordance with uniform guidelines.
- 11.92 Timeframes should be as consistent as possible. Long, uneven and unpredictable delays add to the stress of the process for applicants.
- 11.93 The Commission has not seen the service agreements between DHHS and the approved agencies and is not in a position to comment on the level of influence or control over agency practice available to DHHS. Agencies provide limited data to DHHS on the adoption services they provide. As the department responsible for adoption services in Victoria, DHHS should implement measures to improve consistency across agencies.
- 11.94 The Commission recommends that the Secretary establish an anonymous evaluative feedback mechanism, to enable applicants to give feedback about their experience of the assessment process. Parents and applicants told the Commission they were not willing to make complaints during the process because they were concerned this would affect their chances of adopting. This is understandable. DHHS and approved agencies decide whether or not applicants are approved and selected to adopt a child.
- 11.95 Feedback from applicants should inform standards and practice in adoption services in Victoria. This may improve consistency.

Recommendations

- 53** The Secretary should implement measures to develop consistency across agencies in the assessment process.
- 54** The Secretary should introduce a feedback mechanism to enable applicants to provide anonymous feedback about their experience of the assessment process.

Selection of adoptive parents

- 226** Introduction
- 227** Current law and practice
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12. Selection of adoptive parents

Introduction

- 12.1 After assessment, approved applicants are added to a register of possible adoptive parents.¹ To adopt a child, they must be chosen for a child who needs a family. How applicants are selected is not set out clearly in the *Adoption Act 1984* (Vic) or the *Adoption Regulations 2008* (Vic).
- 12.2 In practice, the process is called 'linking' and is carried out by the Department of Health and Human Services (DHHS) and approved agencies, often with the involvement of the child's parents. Under the Adoption Act, the Secretary or principal officer makes the decision and must consider the parents' wishes about:
- the 'religion, race or ethnic background' of the adoptive parents
 - having contact with and receiving information about the child after the adoption.²
- 12.3 Parents may express preferences about a broader range of characteristics regarding the adoptive parents in practice. They may also choose the family which they would like to adopt their child, from options selected by the agency which match, as closely as possible, the child's needs and parents' wishes.³
- 12.4 Four issues are examined in this chapter:
- parents' role in the process
 - the matters parents can express wishes about
 - the transparency of the process
 - agencies' practices.
- 12.5 The main issue discussed in submissions and consultations was parents' wishes. Some people proposed that the Adoption Act should formalise current practice. Other people objected to possible discrimination against applicants.
- 12.6 On its face, the linking process infringes the principle of non-discrimination contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) and *Equal Opportunity Act 2010* (Vic). However, the overriding principle in adoption is that all decisions must be in the child's best interests. Applying this test, the Commission recommends expanding the matters parents can express wishes about under the Adoption Act. This differs from a recommendation of the 2015 report on adoption by same-sex couples.

1 *Adoption Act 1984* (Vic) s 13A.

2 *Ibid* ss 15(1)(b)–(c).

3 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 49; Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 60; Department of Human Services, Victoria, *Standards in Adoption* (1986) 86.

Current law and practice

- 12.7 The Adoption Act does not provide a clear picture of the linking process. It does not specify who selects the adoptive parents or how and when the decision is made.
- 12.8 After parents' consents are given (or dispensed with), the Secretary or principal officer becomes the child's guardian 'for all purposes' until the adoption order is made.⁴ Although not stated, these purposes include placing the child with the adoptive family. The guardian's 'paramount consideration' is 'the welfare and interests of the child', as this principle applies to all decisions under the Adoption Act.⁵
- 12.9 In making the order, the court must be satisfied that the Secretary or principal officer 'has given consideration to any wishes expressed by a parent regarding:
- the applicants' religion, race or ethnic background
 - having contact with, or receiving information, about the child.⁶
- 12.10 The Adoption Regulations require the Secretary or principal officer to give parents the opportunity to express their wishes at the time of giving consent to adoption.⁷
- 12.11 The linking process is described in more detail in DHHS policy documents such as the *Adoption and Permanent Care Procedures Manual* (the Adoption Manual) and *Adoption and Permanent Care Learning Guide* (the Learning Guide). The Learning Guide states that the 'intent' of the Adoption Act is to 'involve' parents 'in the decision making regarding their child'.⁸ It states 'Practice has evolved which encourages':
- parents to participate and state 'a preference for the family for the child after reading non-identifying profiles of prospective adoptive parents'
 - 'exchange of information and contact' between the two families.⁹
- 12.12 As the child's legal guardian, the Secretary or principal officer must approve the parents' decision.¹⁰ The Adoption Manual states: 'Decisions made by birth parents must be seen within this context.'¹¹ However, the Adoption Manual states that it is 'unlikely' a proposed placement would proceed if the parents were strongly opposed to it, even if only one suitable family were available.¹² The Adoption Manual explains:
- This approach is based on the assumption that it is important for birth parents to participate in planning for their child's future wherever possible. It is envisaged that birth parents are likely to select a family with whom they feel some compatibility exists, and that this will assist the parties in feeling comfortable during future contacts.¹³
- 12.13 If parents do not wish to be involved in the decision making, the agency makes the linking decision.

4 Or other circumstances set out in s 46 of the *Adoption Act 1984* (Vic) occur.

5 *Adoption Act 1984* (Vic) s 9.

6 Ibid ss 15(1)(b)–(c).

7 *Adoption Regulations 2008* (Vic) reg 18.

8 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 30.

9 Ibid.

10 *Adoption Act 1984* (Vic) s 46; Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26; *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 47, 49.

11 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26. The Learning Guide states: 'The birth parent choice is therefore a recommendation for placement to the team leader or principal officer who holds guardianship of the child'; Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26; *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 49.

12 Ibid 60.

13 Ibid.

Parents' role in the process

- 12.14 Parents are encouraged to be 'actively' involved in selecting the family for their child.¹⁴ Similar practices are followed in other states and territories.¹⁵ Recognising a parent's involvement in these decisions is an object of adoption law in the Australian Capital Territory and a guiding principle of Queensland's *Adoption Act 2009* (Qld).¹⁶
- 12.15 Previous adoption reviews have observed that involving parents in the selection process may 'increase the chances of a successful open adoption'.¹⁷ The New South Wales Law Reform Commission reported in 1997 that participating 'in the selection of adoptive parents' gave natural parents 'a sense of control and helped them define their role in relation to their child' and helped some 'come to terms with their loss in the long term'.¹⁸ 'Being selected by the [natural] parent also gave [adoptive parents] increased confidence to parent the child.'¹⁹
- 12.16 The 1997 Draft National Principles in Adoption recognise that parents 'should be involved' in selecting adoptive parents (if they wish to) as a principle of open adoption.²⁰ They state, as a general principle, that parents 'have the right to express their wishes and be involved in the planning for the placement of their child',²¹ and that parents:
- should be given as much information as possible about the prospective adoptive parents and be allowed to participate to the greatest extent possible as is reasonably practical in the selection of approved adoptive parents for their child having regard to the paramount consideration of the needs of the child(ren).²²

Responses

- 12.17 Submissions and consultations reflected these views. There was strong support from a range of people and groups to maintain parents' ability to express wishes about the adoptive parents' qualities.
- 12.18 Approved agencies told the Commission that parents are encouraged to be involved in the selection process, because this can facilitate an open adoption relationship between the parents and adoptive family. In agencies' experience, if parents choose a family they are comfortable with, there is a better chance of the parents and adoptive family establishing and maintaining contact. One adoption worker said that 'if you go too far outside [a parent's wishes] you may be setting up open adoption to fail'.²³
- 12.19 Another adoption worker submitted that 'under the open adoption practices [parents'] wishes for their child need to be heard and respected':
- In order to provide the best possible opportunity for ongoing relationships between all parties a congruence between the natural parents' wishes and the adoptive parent is imperative ... To discount the natural parents' wishes is counter-productive to positive contact in the future.²⁴

14 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 47. See also Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26, 60.

15 See, eg, New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 286; New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Discussion Paper No 34 (1994) 173–4; Adoption Legislative Review Committee, Parliament of Western Australia, *Review of the Adoption Act 1994* (2007) 24.

16 *Adoption Act 1993* (ACT) s 4(f); *Adoption Act 2009* (Qld) s 6(2)(e).

17 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 284, see also 215. See also New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Discussion Paper No 34 (1994) 173–4. See also Adoption Legislative Review Committee, Family and Children's Services, Western Australia, *Adoption Legislative Review: Adoption Act (1994)*, Final Report (1997) 48; Department of Disability, Housing & Community Services, Australian Capital Territory, *A Better System for Children without Parents to Care for Them: Discussion Paper on the Adoption Act 1993* (2006); Department of Families, Queensland, *Adoption Legislation Review* (2002) 34–5.

18 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 285. See also Linda F Cushman et al, 'Openness in Adoption' (1997) 25 *Marriage & Family Review* 7.

19 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 286.

20 Community and Disability Services Ministers Conference, *National Principles in Adoption 1997*, 4.3 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/national-principles-in-adoption-1997>>.

21 *Ibid* 1.23.

22 *Ibid* 5.9.

23 Consultation 13 (Roundtable with approved adoption agencies).

24 Submission 17 (Name withheld).

- 12.20 VANISH and Women's Forum submitted parents' ability to express wishes about the adoptive parents' characteristics is central to facilitating open adoption relationships.²⁵ VANISH stated allowing parents 'an active and informed role' is 'in the best interests of children by ensuring some commonality and acceptance between the adults involved in their life'.²⁶
- 12.21 An adoption worker submitted:
for the adoptee (whether child or adult) to know they were placed with a family in accordance with their natural parents' wishes can be very powerful and important to all parties. So whether there has been ongoing contact or not the adoptee has a sense of who their natural parent is and what they wanted for them.²⁷
- 12.22 Three adoptive mothers and a current applicant supported natural parents' ability to state their preferences.²⁸ One mother said:
For me, it is very important to be able to say to our son, 'your birth mum chose us as parents'. The fact that she had input into that decision is in the best interests of the child.²⁹
- 12.23 Another mother said 'it is essential to empower the child's parents to decide what they hope for their child's future':
Thinking about their hopes for their child and choosing the adoptive parents that they feel are best in light of those hopes is not much to ask and one of the only choices that they will be able to make for their child. Second, in most cases the adoption is the beginning of a relationship between the birth parents, adoptive parents and—most importantly—the child. Allowing the parents to be open and honest about their wishes and empowering them to make the choice about who will adopt their child is one of the best ways to start that relationship.³⁰
- 12.24 She also told the Commission:
At its best, this is a tricky and fraught relationship that none of the parties have experience in navigating. Anything reasonable that can be done to give that relationship its best shot from the outset should be done.³¹
- 12.25 Some participants in a roundtable with lawyers stated parents should not be able to express wishes, because it is hard to know where this should 'start and finish' and it 'opens the door to discrimination' against applicants.³²
- 12.26 Some submissions warned against removing parents' ability to express wishes, because it could affect the openness of an adoption³³ and may 'tak[e] us back to past practices and forced adoptions where the natural parent, especially the natural mothers felt they had no voice'.³⁴ In a consultation with agencies representing culturally and linguistically diverse communities, a participant said a mother's wishes are 'essential' in making decisions about a child's placement.³⁵

25 Submissions 34 (VANISH), 38 (Women's Forum Australia).

26 Submission 34 (VANISH).

27 Submission 17 (Name withheld).

28 Submissions 32 (Name withheld), 58 (Name withheld); Consultation 3 (Confidential).

29 Consultation 36 (Kylie Martens).

30 Submission 58 (Name withheld).

31 Ibid.

32 Consultation 9 (Roundtable with legal sector).

33 Submissions 17 (Name withheld), 36 (Child & Family Services Ballarat Inc.).

34 Submission 17 (Name withheld). See also Submission 38 (Women's Forum Australia).

35 Consultation 15 (Roundtable with culturally and linguistically diverse representative agencies).

- 12.27 A number of submissions emphasised that parents' wishes should not be 'binding' or 'determinative'.³⁶ Placement decisions should be 'based on the best interests of the child and the parents' wishes [should] not override this'.³⁷ One submission stated:
- The best interests of the child are that the adoptive parents can provide a stable and safe environment and that the child is allowed to know its biological, racial and religious background when the child wants.³⁸
- 12.28 The Commission was told at the roundtable with approved agencies that selecting couples who could best provide for a child depends on a range of factors, including:
- the child's needs, including any special needs such as a disability or developmental issues
 - the parents' background
 - the child's cultural background and the parents' wishes about this.³⁹
- 12.29 Participants explained the tensions that can arise between respecting the parents' role and ability to express their wishes and their child's best interests in being placed with the most suitable family.⁴⁰

Commission's conclusions

- 12.30 Parents' participation in the linking process is in children's best interests, because it increases the possibility that they will have ongoing contact with their child and the adoptive family.⁴¹
- 12.31 The Adoption Act intends that the child may have ongoing contact with their natural parents, if the natural and adoptive parents agree. The Commission accepts this is more likely to occur if natural parents are comfortable with the family which adopts their child. This, in turn, is more likely if natural parents are involved in decision making and their preferences are respected. Natural parents' wishes therefore form part of the consideration of the child's best interests when choosing the family for the child.⁴²
- 12.32 The Commission has considered the possible tension between children's best interests in being placed with the most suitable family available and in maintaining contact with their natural parents. These interests may compete where a child's parent prefers a family which is less suitable than another family, or where selecting the most suitable family, over a parent's wishes, means the parent will be less willing to maintain contact. The Commission has balanced these interests and concluded that generally both interests must work together. In most cases, the most suitable family for a child will be one that enables a child to maintain contact with the natural parents.
- 12.33 However, parents' wishes should not be determinative. A wish that is contrary to a child's best interests should not be followed. Nor should parents be able to prevent (or 'veto') placement of a child with a suitable family if that would be in the child's best interests. The Commission appreciates that this principle can be difficult to apply in practice. Determining a child's best interests where the child's interests and parents' wishes conflict is a difficult balancing exercise for adoption workers. The best interests principles recommended in Chapter 5 are intended to assist workers in making these assessments.

³⁶ Submissions 20 (Name withheld), 22 (Confidential), 35 (OzChild), 50 (Barnardos Australia), 51 (Law Institute of Victoria).

³⁷ Submission 35 (OzChild); Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

³⁸ Submission 20 (Name withheld).

³⁹ Consultation 13 (Roundtable with approved adoption agencies).

⁴⁰ Submission 36 (Child & Family Services Ballarat Inc.); Consultations 13 (Roundtable with approved adoption agencies), 24 (Australian Association of Social Workers).

⁴¹ See also Chapter 4 on contact and adoption plans.

⁴² This is reflected in the best interests principles recommended in Chapter 5.

The matters parents may express wishes about

- 12.34 Under the Adoption Act, parents may express wishes about:
- the 'religion, race or ethnic background' of the adoptive parents
 - having contact with and receiving information about the child after the adoption.⁴³
- 12.35 The Adoption Act does not say what weight, if any, the Secretary or principal officer must give these wishes.⁴⁴ The court must simply be satisfied that the Secretary or principal officer has considered them.
- 12.36 In practice, parents are invited to express preferences about a broader range of factors than those set out in the Adoption Act, including 'location, education level, opportunities, and relationship'.⁴⁵ The Learning Guide states that these 'wishes must be considered when selecting a family for the child'.⁴⁶
- 12.37 There is a tension between parents' ability to express wishes about the adoptive family and protecting applicants from discrimination.

Other Victorian legislation

- 12.38 The *Children, Youth and Families Act 2005* (Vic) (the CYF Act) allows parents to express wishes about the full range of suitability criteria that permanent care parents must satisfy when permanent care orders are being made.⁴⁷ The criteria are broadly similar to the suitability criteria that applicants for adoption must meet, set out in Chapter 11.⁴⁸
- 12.39 The Equal Opportunity Act prohibits discrimination against a person based on attributes including age, employment activities, marital status and physical features. However, a general exception permits discrimination which is authorised by another law or necessary to comply with another law.⁴⁹ Currently, the Adoption Act authorises parents to state preferences about applicants' religion, race and ethnic background. It does not expressly authorise parents to indicate preferences about other attributes of applicants.
- 12.40 The right to equality in the Charter includes freedom from discrimination. All Charter rights are subject to reasonable limits, as discussed in Chapter 9.

2015 review

- 12.41 The 2015 *Adoption by Same-Sex Couples Legislative Review* advised the Government on how to change the Adoption Act to enable LGBTI couples to adopt.⁵⁰ The purpose of the review was to 'examine how to best legislate for adoption equality'.⁵¹ The review addressed questions including:

What amendments would be necessary to permit natural parents to express wishes in relation to the gender of the adoptive parents, including advice as to whether any such amendments would be consistent with the Adoption Act and consistent with the Charter of Human Rights and Responsibilities Act 2006, including whether such an amendment would satisfy a reasonableness test?⁵²

43 *Adoption Act 1984* (Vic) ss 15(1)(b)–(c).

44 Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples: Legislative Review* (2015) 26, 31.

45 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 49.

46 *Ibid.*

47 *Children, Youth and Families Act 2005* (Vic) s 319(1)(c).

48 *Children, Youth and Families Regulations 2007* (Vic) reg 18.

49 *Equal Opportunity Act 2010* (Vic) s 75.

50 Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples: Legislative Review* (2015) 3.

51 *Ibid.*

52 *Ibid.* 5.

- 12.42 The review recommended that parents should not be able to express wishes about adoptive parents' relationship status, sex or gender because it could 'open up discrimination against same sex couples' and 'undermine the commitment to allow same sex couples to adopt'.⁵³ It advised that 'an issue of inconsistency' with the Charter right to equality could arise.⁵⁴ However, it acknowledged that the limitation may not be 'unreasonable'.⁵⁵
- 12.43 The review advised that, if the Government wanted to allow parents to indicate preferences about these matters, following the approach in the CYF Act would be one way of achieving this.⁵⁶

Responses

- 12.44 Submissions from approved agencies,⁵⁷ an adoption worker,⁵⁸ people who were adopted,⁵⁹ an adoptive parent,⁶⁰ OzChild⁶¹ and VANISH⁶² supported the ability of parents to express wishes about the adoptive parents' religion, race and ethnicity.⁶³ Some expressed this in consultations.⁶⁴ A few people expressed contrary views.⁶⁵
- 12.45 The Law Institute of Victoria supported parents' ability to state wishes about religion, race and ethnic background but submitted that the Adoption Act should use different language to express this right.⁶⁶
- 12.46 One adopted person submitted:
- Birth parents should be able to express wishes about racial or ethnic preferences for the adoptive parents. It is hard enough being an adoptee without growing up outside of your ethnic group—where no one looks like you do. Looking like others is a very important aspect of identity. Adoptees generally do not have others who look like them. This is very alienating and can result in mental health issues.⁶⁷
- 12.47 Another said:
- The child needs to grow up with their own ethnicity, culture and family wishes. The contact and story of their original family needs to be kept intact.⁶⁸
- 12.48 One adopted person disagreed that parents should be able to express wishes about race, religion and ethnicity but said it would be 'inappropriate if adoptive parents of a different cultural background' denied their child access to the child's 'culture and heritage or racial/ethnic group of origin'.⁶⁹
- 12.49 There was strong support for extending the matters parents can formally express wishes about.
- 12.50 A mother whose child was adopted in 1987 said parents should be able to express wishes about any matter and should have ultimate say about who adopts their child.⁷⁰ She submitted that a parent's wishes should be treated as 'requirements':

53 Ibid 41; see also 8, 29, 32 and Recommendation 5.

54 Ibid 8, 32.

55 Ibid 42.

56 Ibid 29–30.

57 Submissions 29 (Connections UnitingCare), 36 (Child & Family Services Ballarat Inc.).

58 Submission 17 (Name withheld).

59 Submissions 7 (Name withheld), 16 (Name withheld).

60 Submission 58 (Name withheld).

61 Submission 35 (OzChild).

62 Submission 34 (VANISH).

63 Submissions 21 (Name withheld), 22 (Confidential).

64 Consultations 3 (Confidential), 15 (Roundtable with culturally and linguistically diverse representative agencies).

65 Submissions 5 (Confidential), 10 (Confidential), 44 (Victorian Gay & Lesbian Rights Lobby); Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

66 Submission 51 (Law Institute of Victoria).

67 Submission 7 (Name withheld).

68 Submission 16 (Name withheld).

69 Submission 5 (Confidential).

70 Consultation 35 (Confidential).

[Parents] are already disempowered and it is their right, and that of their child, that they identify what they wish to see in the adopters.⁷¹

12.51 An adoptive mother said:

I believe that it is highly appropriate that birth parents are able to express their wishes about the religion, race and ethnic background of adoptive parents and about any other characteristics that are important to them. I think that the current system works well where birth parents can openly and honestly nominate anything they wish in terms of adoptive parents and the agency will try to shortlist 3-4 couples that best meet these criteria.⁷²

12.52 Approved agencies submitted that the Adoption Act should specify a broader range of factors for parents to express wishes about. Their submissions spoke about the importance of parents' involvement in the selection process to an ongoing open adoption arrangement.⁷³ Connections UnitingCare (Connections) submitted:

it should continue to be at the discretion of the parents to choose the characteristics of the family their child will reside with. Questions about the religion, ethnicity, gender and sexual orientation may be important to birth parents and their preferences should be respected wherever possible. The ability of the birth family to form a relationship with the adoptive family will be important for the child's future sense of identity and kinship.⁷⁴

12.53 Connections submitted that parents should be permitted to express wishes about general matters such as the 'background, beliefs or attitudes' of the adoptive parents.⁷⁵ Child & Family Services Ballarat submitted parents should be able to 'express their wishes and any other views that are important to them'.⁷⁶

12.54 An adoption worker submitted that the factors about which parents can indicate wishes should include the adoptive parents' relationship status, following the changes enabling LGBTI couples to adopt.⁷⁷ Women's Forum submitted:

We consider that for many parents, the marital status of the prospective parents will be of equal, if not more, importance than these other characteristics and the right to specify marital status must be protected.

... the concerns of adoptive parents about issues such as discrimination must take second place to the needs of birth parents and vulnerable children. Birth parents must be allowed to have some control over the adoption process where possible in order to achieve the most favourable long-term outcomes. This includes having the right to specify the gender and marital status of the adoptive parents.⁷⁸

12.55 VANISH proposed that parents be able to express wishes about all of the suitability criteria in the Adoption Regulations.⁷⁹ The Victorian Gay and Lesbian Rights Lobby shared this view.⁸⁰

Commission's conclusions: parents' wishes

12.56 The questions of whether current law and practice is appropriate and the matters parents should be able to express wishes about must be considered in light of children's best interests. It is in children's best interests that their parents participate in the linking process. It follows that parents should be able to state preferences about a broad range

71 Submission 33a (Name withheld).

72 Submission 58 (Name withheld).

73 Submissions 29 (Connections UnitingCare), 36 (Child & Family Services Ballarat Inc.).

74 Submission 29 (Connections UnitingCare).

75 Ibid.

76 Submission 36 (Child & Family Services Ballarat Inc.).

77 Submission 17 (Name withheld).

78 Submission 38 (Women's Forum Australia).

79 Submission 34 (VANISH).

80 Submission 44 (Victorian Gay & Lesbian Rights Lobby).

of characteristics, including the religious (or non-religious) and cultural background of the family which adopts their children.

- 12.57 The Adoption Act should expressly allow parents to indicate wishes about a broad range of matters. This would formalise the current practice of inviting parents to indicate their preferred characteristics of the adoptive family and be consistent with adoption legislation in other states and territories, as well as Victoria's CYF Act.
- 12.58 The Commission has considered whether the approach taken in other adoption legislation or the CYF Act would be preferable. Some adoption Acts frame parents' ability to express wishes broadly. In Queensland, 'any preferences' of the parents must be taken into account.⁸¹ In the Australian Capital Territory, the court must consider 'any preferences' a parent expresses about the 'social, religious and financial characteristics of the adoptive family'.⁸² In Western Australia, parents may tell the chief executive their wishes about the 'child's upbringing and the preferred attributes of the adoptive family'.⁸³
- 12.59 The Commission recommends that the Adoption Act follow the approach taken in the CYF Act, whereby parents may express wishes about the matters contained in the suitability criteria. The criteria in the Adoption Regulations provide factors already established as relevant to applicants' abilities to care and provide for a child.⁸⁴ On this approach, a parent would be able to express preferences about matters including:
 - adoptive parents' ages, health, skills, life experiences, financial circumstances and characters
 - adoptive parents' capacity to provide appropriate support to maintaining the child's cultural identity and religious faith (if any). This description of factors is preferable to the language in the current Act
 - adoptive parents' attitudes towards ongoing contact with the child and information exchange⁸⁵
 - the 'stability and quality' of adoptive parents' 'relationship with each other' (if any). This would include whether the adoptive parents are married or in another kind of relationship.
- 12.60 The Commission acknowledges that this is inconsistent with the recommendation of the *Adoption by Same-Sex Couples Legislative Review*. The Commission has come to a different conclusion from that review, as a result of the wider review required by the Commission's terms of reference.
- 12.61 The Commission supports adoption by LGBTI people. In 2007, the Commission recommended that same-sex couples be eligible to adopt.⁸⁶ The Commission supports removing discrimination to the greatest extent possible.⁸⁷
- 12.62 However, as discussed in Chapter 9, discrimination in the process of selecting a family for a child is justified, reasonable and necessary to give effect to the overriding purpose of supporting and protecting a child's best interests. Linking is a service for the child who needs a family, not a service for the applicants wishing to adopt.

81 *Adoption Act 2009* (Qld) s 157.

82 *Adoption Act 1993* (ACT) ss 39D(3)(a), 39F(2)(b).

83 *Adoption Act 1994* (WA) s 45.

84 *Adoption Regulations 2008* (Vic) reg 35.

85 In Chapter 4, the Commission recommends the introduction of adoption plans which provide for parents' wishes about contact and information exchange.

86 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) Recommendation 67.

87 *Equal Opportunity Act 2010* (Vic) s 3(a).

- 12.63 The Commission acknowledges that the recommended approach will enable parents to express wishes about applicants' relationship status. To this extent it may discriminate against LGBTI applicants where a parent expresses a preference for a heterosexual couple to adopt their child. However, it is equally open to a parent to prefer a LGBTI couple over a heterosexual couple. Similarly, a parent may prefer applicants with particular religious beliefs over atheists, or applicants from one cultural background rather than another. The discrimination applies equally to everyone in the pool of possible adoptive parents.
- 12.64 As Chapter 9 discussed, no applicant has a right to adopt a child. Applicants' entitlements extend no further than being able to apply for assessment if eligible and obtain approval if assessed as suitable. Once approved, all applicants go into the pool of approved people. They may or may not be put forward as possible parents for a child. Selection depends on the best interests of the particular child, which includes the parents' wishes as well as the child's needs.
- 12.65 The recommended approach does not limit LGBTI couples' entitlements. Nor does it undo or undermine the equality achieved by the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic).
- 12.66 The Commission is mindful that the consultation paper observed:
- The Commission is not able to consider whether [natural] parents should be able to express wishes about the relationship status, sex or gender of adoptive parents. The *[Adoption by Same-Sex Couples Legislative Review]* recommended against allowing this, as it could be inconsistent with the amendments which enable same-sex couples and people who do not identify with a specific sex or gender to adopt. This recommendation was followed. The Commission considers this matter to be excluded from the present review.⁸⁸
- 12.67 The Commission revised this position with the benefit of the understanding it gained over the course of the review. The Commission now considers it would be artificial to exclude this question from its recommendation.
- 12.68 The Commission acknowledges the potential inconsistency with the Charter right to equality. However, it considers the proposed limitation to be reasonable.⁸⁹ Children have rights under the Charter 'without discrimination, to such protection as is in [the child's] best interests and is needed by [the child] by reason of being a child'.⁹⁰ The best interests of the child are the primary consideration, above equal rights of applicants.

Recommendation

- 55** The Adoption Act should provide that parents may express wishes about the factors in the prescribed requirements set out in regulation 35 of the Adoption Regulations. These should replace the factors currently specified in section 15(1)(b) of the Adoption Act.

88 Victorian Law Reform Commission, *Review of the Adoption Act 1984*, Consultation Paper (2016) 110.
 89 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
 90 *Ibid* s 17(2).

Commission's conclusions: Equal Opportunity Act

- 12.69 The Commission considers that, to ensure that the Adoption Act and Equal Opportunity Act operate harmoniously, the Equal Opportunity Act should not apply to agencies'
- giving effect to parents' wishes
 - choosing suitable adoptive parents for a child, based on the child's best interests (whether or not parents express wishes).
- 12.70 This would protect agencies from claims of discrimination when they carry out linking practices that are consistent with a child's best interests. Other jurisdictions have enacted specific exclusions.⁹¹
- 12.71 The *Adoption by Same-Sex Couples Legislative Review* recommended against specific exclusions for any adoption services in Victoria, because this would 'legitimise' discrimination.⁹² The Commission has come to a different conclusion. Discrimination in the linking process is justified in the best interests of children.
- 12.72 The review considered that the general exception in the Equal Opportunity Act which permits discrimination authorised by or necessary to comply with another law may provide 'sufficient' cover against possible breach of the Equal Opportunity Act.⁹³ A specific exclusion would provide certainty.
- 12.73 A specific exclusion should also apply to assessment of applicants which is reasonably based on the suitability criteria set out in the Adoption Regulations. Decisions about applicants' suitability are based on factors including their age, emotional, physical and mental health and employment activity. Discrimination based on these attributes is unlawful under the Equal Opportunity Act. The Commission does not suggest that assessment breaches the Equal Opportunity Act: the general exclusion in the Equal Opportunity Act may authorise any discriminatory conduct. However, a specific exclusion applying to assessment carried out in good faith would avoid any doubt and ensure there is no conflict between the Adoption Act and Equal Opportunity Act.
- 12.74 Recourse should be available under the Equal Opportunity Act if an assessment is not genuinely based on the suitability criteria. Currently under the Adoption Act, applicants may also apply to the Victorian Civil and Administrative Tribunal for reviews of assessment decisions.⁹⁴

Recommendation

- 56** The *Equal Opportunity Act 2010* (Vic) should not apply to:
- assessment of applicants reasonably based on the prescribed requirements contained in regulation 35 of the Adoption Regulations
 - identification of prospective adoptive parents in the best interests of a child, who reflect wishes expressed by the child's parents
 - where a child's parents do not express wishes about the preferred characteristics of the adoptive parents—identification of prospective adoptive parents in the best interests of a child.

⁹¹ *Discrimination Act 1991* (ACT) s 25A; *Adoption Act 2000* (NSW) s 45B; *Adoption Act 2009* (Qld) s 8; *Equal Opportunity Act 1984* (WA) s 4 (definition of 'services').

⁹² Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples: Legislative Review* (2015) 37–8.

⁹³ *Ibid* 8, 32.

⁹⁴ *Adoption Act 1984* (Vic) s 129A.

The transparency of the process

- 12.75 The Adoption Act and Adoption Regulations say little about the linking process. A few provisions indicate parts of the process:
- Only people approved as fit and proper persons can obtain an adoption order.⁹⁵
 - The Secretary and principal officers must maintain registers of the people with this approval.⁹⁶
 - The Secretary or principal officer arranging the adoption becomes the child's guardian 'for all purposes' until the adoption order is made.⁹⁷
 - When making an adoption order, the court must be satisfied that the Secretary or principal officer has considered 'any wishes expressed by a parent' regarding:
 - the applicants' religion, race or ethnic background
 - having contact with, or receiving information, about the child.⁹⁸
- 12.76 The Adoption Regulations require the Secretary or principal officer to give parents the opportunity to express these wishes at the time of giving consent to adoption.⁹⁹
- 12.77 In practice, parents may have a greater role in the process than the Adoption Act indicates. Based on their preferences and the child's needs, agencies prepare a short list of two or three couples who they consider are best able to meet a child's needs and, to the extent possible, the parents' wishes.¹⁰⁰ Parents are given de-identified information and photographs of each couple,¹⁰¹ and invited to select their preferred family.¹⁰²
- 12.78 These processes apply to local infant adoptions. The process for linking children with special needs may vary from the usual processes.
- 12.79 Linking practices vary across agencies.¹⁰³

Responses

- 12.80 A current applicant told the Commission she was not clear about how adoptive parents are selected. She said there needs to be more clarity and communication to applicants about this process.¹⁰⁴
- 12.81 A few submissions, including one from an approved agency, said the selection process should be set out more clearly.¹⁰⁵ Some said the Adoption Act should set this out.

Commission's conclusions

- 12.82 The selection of a family for a child decides the child's life course, dramatically changes the lives of the adoptive parents and affects the relationship the natural parents will have with the child. The process should be clear and transparent, for parents and applicants. Acts in other states and territories provide greater clarity and detail about the selection process.¹⁰⁶

95 Ibid s 15(1)(a). This does not apply to relatives of a child.

96 Ibid s 13A.

97 Or other circumstances set out in s 46 of the *Adoption Act 1984* (Vic) occur.

98 Ibid ss 15(1)(b)–(c).

99 *Adoption Regulations 2008* (Vic) reg 18.

100 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 47–50; Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 60; Department of Human Services, Victoria, *Standards in Adoption* (1986) 86.

101 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26, 60; Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 49–50; Department of Human Services, Victoria, *Information for Parents Considering Adoption of their Child* (2008) 11, 15.

102 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26, 60; Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 40, 50.

103 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 47.

104 Consultation 3 (Confidential).

105 Submissions 20 (Name withheld), 22 (Confidential), 29 (Connections UnitingCare).

106 See, eg, *Adoption Act 2000* (NSW) ss 45A, 45B; *Adoption Regulation 2015* (NSW) regs 69–73; *Adoption Act 2009* (Qld) ss 153–63; *Adoption Regulations 2004* (SA) reg 19; *Adoption Regulations 2006* (Tas) reg 29; *Adoption Act 1994* (WA) s 45.

- 12.83 The main elements of the process should be included in the Adoption Act. At a minimum, the Adoption Act should clearly set out:
- that the Secretary or principal officer makes placement decisions
 - that the Secretary or principal officer may select applicants from the register of approved people
 - that parents have the opportunity to consider information about prospective adoptive parents and indicate their preferred family
 - when selection occurs.
- 12.84 Different processes may need to be used to match a child with special needs with a family—for example, when placing the sibling of an adopted child.¹⁰⁷ Specific processes for selecting families with special needs should be reflected in the Adoption Act or Adoption Regulations.¹⁰⁸

Recommendation

- 57** The Adoption Act should set out the main elements of the linking process, including any different procedures for the placement of children with special needs.

Agencies' practices

- 12.85 The way in which adoption services are provided in Victoria gives rise to two possible issues in the linking process:
- Agencies may face conflicts between their duties to the parents and to the child.
 - Agencies may favour applicants they have assessed and fail to consider all approved applicants when selecting possible adoptive parents for a child.
- 12.86 Each adoption agency (whether within DHHS or an approved agency) carries out all aspects of adoption services. The Adoption Act empowers the Secretary to approve agencies to carry out 'the activity of conducting or making arrangements with a view to the adoption of children'.¹⁰⁹ It appears to assume that each approved agency will provide all adoption services. The Secretary's approvals currently cover the full range of adoption services.
- 12.87 This means that one agency may provide options counselling to parents considering adoption, assess and approve applicants who may be selected to adopt the child, carry out the linking process, act as the child's guardian, monitor the placement and manage legalisation.
- 12.88 The options counsellor has a 'primary role' in the linking process.¹¹⁰ They:
- have a discussion with the parents about their wishes
 - generally co-ordinate the process within the agency
 - '[check] that a choice of families that meet the needs of the child are available and, where [a] couple has been assessed by another agency, [discuss] the possible link with that agency'

¹⁰⁷ In Chapter 5, the Commission recommends that best interests principles should specify that it would ordinarily be in a child's best interests to be placed with the same family as any sibling of the child who is also to be adopted or has been adopted. Chapter 4 makes recommendations to ensure all reasonable steps are taken to place siblings together.

¹⁰⁸ See, eg, *Adoption Act 2009* (Qld) ss 89, 106.

¹⁰⁹ *Adoption Act 1984* (Vic) ss 21–2.

¹¹⁰ Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 48.

- present the child's needs and information about the parents to a 'Link Committee' which may be involved in decision making.¹¹¹
- 12.89 Where a Link Committee is not used to draw up the short list of prospective adoptive parents to be presented to the natural parents, the adoption worker does this in consultation with their supervisor. The short list must be approved by the principal officer or team leader who holds guardianship of the child, before presentation to the natural parents to indicate their preference.¹¹²
- 12.90 Some people submitted to the Commission that there is a risk of actual or perceived conflict of interest for the social workers and counsellors involved in the adoption.¹¹³ Conflicts of interest arise where:
- a person has conflicting duties to two or more clients
 - a personal interest conflicts with a duty to a client.
- 12.91 A 1998 report by KPMG Management Consulting commissioned by the then-Department of Human Services identified conflict of interest as a potential issue where one team attempts to represent the interests of the child, their parents and the alternative family.¹¹⁴
- 12.92 A possible risk is that when identifying prospective adoptive parents, agencies may consider only applicants in their own region, whom they have assessed and approved. Applicants can be selected from within the same service region as the parent and child or from other service regions.¹¹⁵
- 12.93 There is a statewide register of approved applicants, the Central Resource Exchange (CRE),¹¹⁶ but agencies are not required to consider all applicants on the register. The Adoption Act requires the Secretary and each principal officer to maintain separate registers of approved people.¹¹⁷ Policies set out in the Adoption Manual and Learning Guide recommend but do not require that agencies consider all approved applicants on the CRE.¹¹⁸
- 12.94 On the one hand, the Adoption Manual states:
- The primary role of the [CRE] is to facilitate placement of children across regions. Information about children available for placement and approved families is made available on a statewide basis, and is circulated to all teams. The process is intended to maximise placement opportunities for children, particularly these who are difficult to place. It is also intended to address inequities between regions with respect to availability of applicant families.¹¹⁹
- 12.95 On the other hand, the Adoption Manual states that an agency 'may initially wish to consider the family ... which has been identified within [the] region' (that is, assessed by that agency) but it may explore options in other regions.¹²⁰ Parents' preferences about the child's location are relevant.¹²¹

111 Ibid 48–9.

112 Ibid 48.

113 Submission 45 (Dr Briony Horsfall); Consultations 6 (Roundtable with Permanent Care and Adoptive Families), 24 (Australian Association of Social Workers), 32 (Ann Jukes and Gabrielle Hitch), 35 (Confidential), 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

114 KPMG Management Consulting, *Redevelopment of Adoption and Permanent Care Services Options Paper* (Department of Human Services, Victoria, 1998) 5, 8, 17.

115 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 60.

116 Ibid. Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005). The Commission is informed all approved applicants are on the CRE.

117 *Adoption Act 1984* (Vic) s 13A.

118 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 60–1; Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 49.

119 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 3.

120 Ibid 61.

121 Ibid.

Commission's conclusions

- 12.96 A risk that agencies may face conflicts of interest is a natural consequence of the way in which adoption services are provided.
- 12.97 It is not reasonable or realistic to expect even the most professional and committed social worker to engage in the linking process completely disinterestedly. Personal preferences may enter into decision making, even if unconsciously.
- 12.98 This creates a risk that the most suitable family may not be chosen for a child. A social worker or agency may favour applicants it has assessed and approved, without considering whether applicants in other regions may be better able to meet a child's needs and parents' wishes. Limiting the range of families considered for a child is contrary to the child's best interests. The purpose of linking is to match a child with the family best able to provide for the child's needs.
- 12.99 Changes to the Adoption Act and adoption practice would address these issues. First, it would be helpful to 'unbundle' the provision of adoption services. The Secretary should have the power to approve an agency to carry out specific functions. Ideally, options counselling, assessment of applicants and linking would be carried out by separate people or agencies. The Commission recommends in Chapter 8 that options counsellors should be independent of DHHS and approved agencies.
- 12.100 Secondly, a centralised approach to linking would better serve the best interests of children, by maximising the families that can be considered for a child. The Adoption Act should establish a central statewide register of approved applicants and require the Secretary and principal officers to consult the register when selecting prospective adoptive parents (except where this would be impracticable when placing a child with special needs: see [12.84] above).
- 12.101 It would be preferable if a central, independent panel with oversight over the entire pool of approved applicants selected the families presented to parents, rather than a panel formed by a regional agency. At the least, administrative linking processes and arrangements should ensure the full list of approved applicants is considered for children who need families, taking into account parents' preferences about the child's location.

Recommendations

- 58** The Adoption Act should enable the Secretary to approve agencies to carry out discrete, rather than all, adoption services.
- 59** The Adoption Act should establish a central statewide register of approved applicants which the Secretary and principal officers must consult when selecting prospective adoptive parents for a child who needs a family (except where this would be impracticable when placing a child with special needs).

Adoption services and the Equal Opportunity Act

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13. Adoption services and the Equal Opportunity Act

Introduction

- 13.1 The terms of reference require the Commission to provide recommendations to ensure that the *Adoption Act 1984* (Vic) operates harmoniously with other relevant legislation and upholds principles set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter).
- 13.2 The Charter protects and promotes human rights in Victoria¹ when people are dealing with state and local government, and private entities where they are performing public functions.² The Charter includes 20 basic human rights, including the right to recognition and equality before the law, which recognises the right to protection against discrimination,³ and the right to freedom of thought, conscience, religion and belief.⁴
- 13.3 Discrimination can be justified and necessary to ensure that children are protected.⁵ The Adoption Act and *Adoption Regulations 2008* (Vic) permit discrimination⁶ in several ways, including in the eligibility criteria,⁷ in the suitability and assessment criteria,⁸ and in giving consideration to a natural parent's wishes about prospective adoptive parents.⁹
- 13.4 Under the *Equal Opportunity Act 2010* (Vic), religious exceptions permit discrimination in specified circumstances.¹⁰
- 13.5 On 1 September 2016, the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) came into force and amended the eligibility criteria under the Adoption Act to permit same-sex couples to adopt.
- 13.6 Since those amendments, the majority of adoption agencies in Victoria, including faith-based organisations, have agreed to assist same-sex couples with their applications to adopt.¹¹ However, one faith-based agency, CatholicCare, has relied upon a religious exception under the Equal Opportunity Act to deny some adoption services to LGBTI couples.¹²
- 13.7 This chapter explores the relationship between the Charter, the Equal Opportunity Act and adoption service provision in Victoria, to the extent that it affects the operation of the Adoption Act.

1 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(2).

2 *Ibid* s 4.

3 *Ibid* s 8.

4 *Ibid* s 14.

5 For example, s 25 of the *Equal Opportunity Act 2010* (Vic) includes exceptions to anti-discrimination laws in relation to the employment of a person who cares, instructs or supervises children, necessary for the protection of children.

6 Discrimination is permitted when there is statutory authority to do so: *Equal Opportunity Act 2010* (Vic) s 75.

7 *Adoption Act 1984* (Vic) ss 11–2. This is discussed in Chapter 10.

8 *Ibid* ss 13(3), 15(1)(a); *Adoption Regulations 2008* (Vic) regs 35, 37. This is discussed in Chapter 11.

9 *Adoption Act 1984* (Vic) s 15(1)(b). This is discussed in Chapter 12.

10 *Equal Opportunity Act 2010* (Vic) ss 82–84.

11 Department of Humans Services, Victoria, *Fact Sheet: Adoption by Same-Sex and Gender Diverse Couples* (1 September 2016) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people>>.

12 *Ibid*.

Current law and practice

Adoption services in Victoria

- 13.8 Adoption services in Victoria are funded by the Secretary of the Department of Health and Human Services (DHHS). Welfare organisations can apply to the Secretary to be approved to provide adoption services.¹³
- 13.9 A welfare organisation is defined by the Adoption Act as:
- an organization, corporate or unincorporate, formed or carried on primarily or principally for religious, charitable, benevolent, philanthropic or welfare purposes, but does not include an organization formed or carried on for the purpose of trading or securing a pecuniary profit to its members.¹⁴
- 13.10 The inclusion of an organisation for ‘religious’ purposes in the definition was carried over from the *Adoption of Children Act 1964* (Vic).¹⁵
- 13.11 In Victoria, adoption and permanent care teams provide adoption services for particular geographical regions. Regional adoption services are provided by departmental teams and four community service organisations.¹⁶ CatholicCare is the only organisation that provides a statewide adoption service.¹⁷
- 13.12 Service delivery was regionalised in the 1980s.¹⁸ The Commission has heard that under regionalisation, people who wish to apply to adopt are assigned to the adoption service in their local region. Applicants are unable to ‘shop’ between regional adoption services. In practice, the only choice that applicants are able to exercise is to select a preferred adoption service from either their local adoption and permanent care team, or the statewide service provided by CatholicCare.¹⁹
- 13.13 Same-sex couples have been eligible to adopt since 1 September 2016. Following the enactment of the Adoption Amendment (Adoption by Same-Sex Couples) Act, CatholicCare has relied upon a religious exception under the Equal Opportunity Act to deny some services to same-sex couples. LGBTI couples who approach the organisation to adopt are referred to another approved adoption agency.²⁰
- 13.14 CatholicCare has developed an information sheet for prospective adoptive parents. That sheet states:
- Following the assessment and accreditation of couples, the matching process involves a family being selected as the best possible match to ensure the welfare and best interests of the child. Once a match is made, the adoption proceeds to legalisation through the court. CatholicCare, as a Catholic agency, is not able to complete these final two steps with LGBTI couples. We have a protocol in place with other adoption agencies to ensure that any LGBTI couples who are accredited through CatholicCare can be matched appropriately and supported by another agency for legalisation. This protocol also means that at any stage in the process, an LGBTI couple who chooses to transfer to another agency will be supported to do so.²¹

13 *Adoption Act 1984* (Vic) s 21.

14 *Ibid* s 21(4).

15 See *Adoption of Children Act 1964* (Vic) s 18(3).

16 Email correspondence from the Department of Health and Human Services to the Commission, 6 January 2017. These organisations operate as approved adoption agencies under ss 20–32 of the *Adoption Act 1984* (Vic).

17 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 1 Introduction* (2005) 14; Email correspondence from the Department of Health and Human Services to the Commission, 6 January 2017.

18 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 1 Introduction* (2005) 13.

19 Email correspondence from the Department of Health and Human Services to the Commission, 6 January 2017.

20 Department of Human Services, Victoria, *Fact Sheet: Adoption by Same-Sex and Gender Diverse Couples* (1 September 2016) < <http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-by-same-sex-and-gender-diverse-couples>>.

21 CatholicCare Melbourne, *Adoption Service Information for Prospective Parents*, Information Sheet (2016) provided to the Commission 11 November 2016, 2. CatholicCare advised the Commission that this information sheet is the only documentation of CatholicCare’s policy or protocol in relation to adoption by same-sex couples.

- 13.15 The effect of this policy and the regionalisation of adoption services in Victoria has meant that heterosexual couples can choose to adopt through their regional adoption service or the statewide service, CatholicCare. LGBTI couples cannot adopt through CatholicCare. However, they can approach CatholicCare for the application and assessment process.
- 13.16 From 2012 to 2015, 16 infant adoptions were facilitated by CatholicCare and a further three special needs adoptions.²²

Anti-discrimination and freedom of religion

- 13.17 The primary legislation for human rights in Victoria is the Charter.²³
- 13.18 The Charter requires the actions of public authorities in state and local government to be compatible with human rights.²⁴ Rights under the Charter include:
- the right to recognition and equality before the law. Everyone is entitled to equal and effective protection against discrimination and to enjoy their human rights without discrimination.²⁵
 - the right to freedom of thought, conscience, religion and belief.²⁶ This right includes the freedom to adopt a religion or belief of choice, and the freedom to demonstrate that 'religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private'.²⁷
- 13.19 Religious freedom is also reflected in the recognition of a person's cultural rights under the Charter. People with cultural or religious backgrounds must not be denied the right to enjoy their culture and declare and practise their religion.²⁸
- 13.20 An object of the Equal Opportunity Act is to 'eliminate discrimination, sexual harassment and victimisation'²⁹ in many areas of public life,³⁰ including in the provision of goods and services to the greatest extent possible.³¹ The Act prohibits discrimination on the basis of attributes including gender identity, marital status, sex and sexual orientation.³²
- 13.21 However, legal protection from discrimination is not absolute. The Equal Opportunity Act contains exceptions and exemptions that limit Charter rights and permit discrimination.³³ A person may also discriminate if they have statutory authority to do so.³⁴ For example, the Adoption Act provides statutory authority for the Secretary or principal officer to act on a natural parent's wishes regarding a prospective adoptive parent's religion, race or ethnic background.³⁵

Religious exceptions

- 13.22 Under the Equal Opportunity Act, religious exceptions permit discrimination in certain circumstances.³⁶
- 13.23 The religious exception under section 82(2) relates to the conduct of religious bodies and provides an exception to the anti-discrimination provisions in the Act. It states:

22 Department of Health and Human Services, Victoria, *Data Collections for the Victorian Law Reform Commission*, provided to the Commission 17 November 2016.

23 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 1(2).

24 See generally, Michael Brett Young, *From Commitment to Culture—The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (State of Victoria, 2015); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289–95 (Rob Hulls, Attorney-General).

25 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

26 *Ibid* s 14.

27 *Ibid* s 14(1).

28 *Ibid* s 19(1).

29 *Equal Opportunity Act 2010* (Vic) s 3(a).

30 *Ibid* pt 4.

31 *Ibid* s 44.

32 *Ibid* s 6.

33 *Ibid* pt 4. Discrimination is permitted if that discrimination is necessary to comply with, or is authorised by, a provision of an Act, or where VCAT has granted a temporary exemption to allow discrimination in a certain circumstance, or where a specific action is already covered by an exemption or a special measure under the Act. See, eg, *Equal Opportunity Act 2010* (Vic) ss 12, 75–91.

34 *Ibid* s 75.

35 *Adoption Act 1984* (Vic) s 15(1)(b). This is further discussed in Chapter 12.

36 *Equal Opportunity Act 2010* (Vic) ss 82–4.

Nothing in Part 4 applies to anything done on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity by a religious body that—

- (a) conforms with the doctrines, beliefs or principles of the religion; or
- (b) is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.³⁷

13.24 The definition of a 'religious body' may cover a wide range of organisations. It is defined as:

- (a) a body established for a religious purpose; or
- (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.³⁸

13.25 Similarly, section 84 permits a person to discriminate against another person. It states:

Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.³⁹

13.26 The religious exceptions under the Equal Opportunity Act demonstrate an inherent tension between the right to religious freedom and the right to equality and protection from discrimination.

... the problem for social policy is seeking to ensure that different values and beliefs around personal morality and religious faith are respected, while maintaining the most important aspect of the principle of non-discrimination—that in our shared communal life as a society, differences in race, gender, sexual orientation, and other personal attributes are not grounds for exclusion. How best to achieve this balance goes to the heart of debates about the proper role of the state in relation to other forms of social organisation within a society, and the support that the state should provide to mediating institutions between the individual and the state.⁴⁰

13.27 A faith-based organisation wishing to avail itself of the protection provided by the religious bodies exception, would first need to establish that it is an entity established for a religious purpose and demonstrate that its reason for discriminating is in accordance or conforms with the doctrines, beliefs or principles of the religion.⁴¹

13.28 It is not the Commission's function to determine whether particular faith-based organisations providing adoption services in Victoria are entitled to the cover of a religious exception or would be able to defend a claim of discrimination. However, by reason of its terms of reference, it is appropriate for the Commission to address the consequences of the fact that currently a faith-based organisation providing adoption services is relying upon a religious exception so as not to provide some services to LGBTI couples.

37 Ibid s 82(2).

38 Ibid s 81. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(5).

39 *Equal Opportunity Act 2010* (Vic) s 84. See also *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 [309]–[323], [413]–[422], which took a narrow view of 'necessary' for a person to comply with their doctrines, beliefs or principles, in relation to the precursor to s 84 under the *Equal Opportunity Act 1995* (Vic). Generally, corporate bodies are prevented from relying upon this exception to refuse services on the basis of religious beliefs, as the exception applies to individuals not organisations. See also Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) Vol V, 156. The Royal Commission observed that few people are aware of the potential application of *Cobaw*.

40 Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40(2) *Monash University Law Review* 413–14.

41 *Equal Opportunity Act 2010* (Vic) ss 81, 82(2).

Adoption by same-sex couples

- 13.29 The 2015 *Adoption by Same-Sex Couples Legislative Review* considered the legislative amendments required to permit adoption by same-sex couples in Victoria.⁴²
- 13.30 The review recognised that the introduction of same-sex adoption could mean that faith-based organisations providing adoption services may rely on a religious exception under the Equal Opportunity Act to deny services to same-sex couples on the basis of their marital status, sexual orientation and gender identity.⁴³
- 13.31 The review recommended that there should be no specific exemption for adoption services. It recommended that consideration be given to excluding the application of any exemptions or exceptions under the Equal Opportunity Act available to faith-based organisations providing adoption services.⁴⁴
- 13.32 When the Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic) was introduced, clause 17 proposed an amendment to section 82(2) of the Equal Opportunity Act. Clause 17 stipulated:
- Despite subsection (2), Part 4 applies to anything done by a religious body that is an approved agency within the meaning of the Adoption Act 1984 in relation to its exercise of any power or performance of any function or duty under that Act for or with respect to adoption, whether or not the power, function or duty relates to a service for a child within the meaning of that Act or for any other person.⁴⁵
- 13.33 This amendment would:
- ensure that neither same-sex couples, nor children, are unfairly discriminated against in the provision of adoption services. The state is required to act in a non-discriminatory way as a secular provider of services and cannot rely on a religious defence when providing public services. Access to adoption services should be provided equitably, with the welfare and interests of the child concerned to be the paramount consideration.⁴⁶
- 13.34 It was proposed that the amendment was compatible with Charter rights as only individuals have human rights and not organisations.⁴⁷ In any case, it was considered that the right to freedom of religion and belief needed to be balanced against the impact of allowing a discriminatory adoption policy.⁴⁸
- 13.35 There was some opposition to clause 17 of the Bill. Faith-based organisations made submissions to Parliament's Scrutiny of Acts and Regulations Committee.⁴⁹ Submissions outlined concern that the amendment would:
- be contrary to and trespass upon the right of religious bodies to freedom of thought, conscience, religion and belief, under section 14 of the Charter⁵⁰
 - amount to discrimination against people with religious convictions, contrary to section 8 of the Charter⁵¹

42 Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples: Legislative Review* (2015) 3.

43 Ibid 33–8.

44 Ibid 38, Recommendation 6.

45 See, eg, Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic) cl 17; Explanatory Memorandum, Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic) 7. The Bill proposed to insert a new subsection after section 82(2) of the *Equal Opportunity Act 2010* (Vic).

46 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 October 2015, 3557, (Martin Foley, Minister for Equality).

47 Victoria, *Statement of Compatibility*, Legislative Assembly, 7 October 2015, 3556.

48 Ibid.

49 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *58th Parliament Alert Digest*, No 13 of 2015, 20 October 2015.

50 CatholicCare, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 16 October 2015; Victorian Christian Legal Society, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 18 October 2015; Freedom 4 Faith, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 19 October 2015.

51 Freedom 4 Faith, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 19 October 2015. CatholicCare also submitted that cl 17 would be contrary to the right to freedom of association pursuant to s 16 of the Charter: CatholicCare, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 16 October 2015.

- present as an issue for natural parents who, when they consent to an adoption, may not be able to express a wish that their child not be raised by a same-sex couple and would prevent any agency from being able to meet those wishes.⁵²
- 13.36 Submissions also detailed the likely effect of the clause on a faith-based organisation's ability to continue to provide adoption services.⁵³ CatholicCare submitted that it would lose its capacity to provide its adoption support services and adoption information service.⁵⁴
- 13.37 The Scrutiny of Acts and Regulations Committee observed that the removal of the application of the religious bodies exception 'may be to bar an approved agency from acting on the wishes of the parent of a child as to the sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity of the proposed adoptive parents'.⁵⁵
- 13.38 When the Adoption Amendment (Adoption by Same-Sex Couples) Act came into force, the proposed clause 17 was not enacted.
- 13.39 The Commission is not reviewing Parliament's decision regarding clause 17 but is required by the terms of reference to consider the consequences of that decision to ensure Victoria's legislation operates harmoniously.

Discrimination and the provision of services

- 13.40 When the same-sex adoption amendments were considered, the Hon. Martin Foley MP remarked:

Approved adoption agencies, whether faith-based or secular, are providing services on behalf of the government and these services are essentially secular services that should be available to all members of the public.⁵⁶
- 13.41 The ability of publicly funded organisations to discriminate is an issue that has long been debated.
- 13.42 The Victorian Scrutiny of Acts and Regulations Committee, in its 2009 report on *Exceptions and Exemptions to the Equal Opportunity Act 1995*, made recommendations regarding the application of the definition of a religious body under the 1995 Act.⁵⁷
- 13.43 The Committee observed that a religious exception could undermine equality rights if a religious body could rely upon the exception by 'self-declaring that it conducts its activities in accordance with religious doctrines, beliefs or principles'.⁵⁸ It noted that there had 'been a vast expansion in recent years of provision of public services by religiously based organisations as a result of government policies of contracting out service provision'.⁵⁹ The Committee stated that contracting out services:

does not provide a justification for extending the religious exception, especially where the activity is undertaken with public money and to provide services to the whole community, not just a section of the community. The Committee is aware that for many such activities, the funding contracts for the services may provide that discrimination should not occur, but it notes that this may be inadequate to ensure that a person affected could seek a legal remedy for discrimination.⁶⁰

52 Australian Family Association, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 19 October 2015. Giving effect to a natural parent's wishes is discussed in Chapter 12.

53 Freedom 4 Faith, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 19 October 2015; Victorian Christian Legal Society, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same Sex Couples) Bill 2015 (Vic)*, 18 October 2015.

54 CatholicCare, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 16 October 2015.

55 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *58th Parliament Alert Digest*, No 13 of 2015, 20 October 2015, 4.

56 Victoria, *Statement of Compatibility*, Legislative Assembly, 7 October 2015, 3556 (Martin Foley, Minister for Equality).

57 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009) 62–4.

58 Ibid 63.

59 Ibid 64.

60 Ibid.

- 13.44 The Australian Law Reform Commission also identified this issue in its 2016 report, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* when some stakeholders questioned whether religious organisations that perform public services and rely upon exemptions, such as adoption services, should receive public funding.⁶¹ Submissions to the ALRC suggested that restricting funding for religious organisations would in itself be discrimination.⁶² The Australian Christian Lobby submitted:

Religious organisations receiving taxpayer funds should be able to determine their own identity without government interference. It is not the role of government to interfere in a religious organisation’s mission or vision.⁶³

- 13.45 Limitations on religious exceptions available to taxpayer-funded services are reflected in Commonwealth legislation. For example, the religious bodies exemption under the *Sex Discrimination Act 1984* (Cth) does not apply to the practice of a religious body if that body provides Commonwealth-funded aged care services.⁶⁴
- 13.46 In a 2014 article in the *Monash University Law Review*, the authors remarked that:
- The distinction that needs to be made is between situations where governments are ‘purchasing’ services to be delivered through non-government agencies to the general community in a given locality, and situations where the government is providing funding support to a diverse range of bodies that are delivering services, giving the consumer some choice or reflecting the existing different communities.⁶⁵
- 13.47 The authors observed that for governments to permit discrimination where they are purchasing services would be an abdication of their responsibility to provide services to the whole community in that area.⁶⁶
- 13.48 The effect of anti-discrimination laws on faith-based organisations providing adoption services has been observed in overseas jurisdictions. Catholic charities in Boston were denied an exemption from the state’s non-discrimination laws, after which they decided to terminate their adoption services rather than place children with same-sex couples. Similarly in Illinois, the state required publicly funded Catholic charities to provide adoption and foster-care services to same-sex couples on the same grounds as different-sex couples. Rather than comply, the charities closed their doors.⁶⁷
- 13.49 In the United Kingdom, Catholic Care sought to confine its delivery of adoption services to heterosexuals only.⁶⁸ It was unsuccessful in its application to do so. Upon appeal, the tribunal noted:

The legal context in which the Charity comes before the Tribunal is one in which the national authorities, in particular Parliament, have established a very clear framework of equality law which makes discrimination on grounds of sexual orientation unlawful. That is the basic ground rule of public policy established by the national authorities in their assessment of and responding to the needs of society.⁶⁹

61 Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Report No 129 (2016) 148 [5.102].

62 Ibid 149 [5.105].

63 Ibid.

64 *Sex Discrimination Act 1984* (Cth) s 37(2).

65 Joel Harrison and Patrick Parkinson, ‘Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society’ (2014) 40(2) *Monash University Law Review* 413, 446.

66 Ibid.

67 Kerry O’Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and Practice* (Dordrecht Springer, 3rd ed, 2015) 342–3.

68 *Catholic Care (Diocese of Leeds) v the Charity Commission for England and Wales and the Equality and Human Rights Commission* [2010] EWHC 520 (Ch); [2011] EqLR 597. See also, Kerry O’Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and Practice* (Dordrecht Springer, 3rd ed, 2015) 213; CatholicCare, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015* (Vic), 16 October 2015; Freedom 4 Faith, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015* (Vic), 19 October 2015.

69 *Catholic Care (Diocese of Leeds) v the Charity Commission for England and Wales and the Equality and Human Rights Commission* [2012] UKUT 395 (TCC) [47].

- 13.50 In New South Wales⁷⁰ and Western Australia,⁷¹ adoption agencies are permitted to refuse some services on religious grounds.

Responses

- 13.51 In its consultation paper, the Commission asked for submissions on whether the religious bodies exception in the Equal Opportunity Act is consistent with amendments to the Adoption Act that enable same-sex couples and people who do not identify with a specific sex or gender to adopt.
- 13.52 The Commission heard support for the religious bodies' exception to remain in relation to adoption services.⁷² Some of that support related to general opposition to the same-sex adoption laws.⁷³
- 13.53 The Australian Christian Lobby (ACL) submitted that the 'right to freedom of thought, conscience, and religion lies at the foundation of freedom' and is recognised by the Charter and international law.⁷⁴ It asserted that the Catholic position is that the wellbeing of the community and children is best served by having the love and experience of a mother and a father in a 'safe, secure and stable relationship' and adoption by same-sex couples is contrary to this belief.⁷⁵
- 13.54 The ACL submitted that faith-based adoption services may not be able to continue to operate should the religious bodies' exception be removed. It submitted that same-sex couples already have access to other adoption services in Victoria.⁷⁶
- 13.55 A participant at a roundtable with the legal sector told the Commission that denying religious bodies the right to refuse services would have the effect of denying the religious body 'equal opportunity'.⁷⁷
- 13.56 At that same roundtable, the Commission heard from most participants that they do not consider that the religious bodies' exception operates harmoniously with recent amendments to the Adoption Act allowing same-sex couples to adopt.⁷⁸
- 13.57 The Commission heard strong support for the religious bodies' exception not to apply to the provision of adoption services.⁷⁹
- 13.58 Child & Family Services Ballarat, an agency that currently provides adoption services in Victoria, submitted that no accredited adoption agencies should be able to refuse services on the grounds of sex or gender.⁸⁰
- 13.59 The Commission heard concern about agencies being permitted to refuse services to same-sex couples, because adoption is not a religious practice which should warrant being covered by the exception.⁸¹ It was submitted that adoption services should be provided only by secular⁸² agencies and not service providers which rely on an exception and receive public funding.⁸³

70 *Anti-Discrimination Act 1977* (NSW) s 59A. See also *Adoption Act 2000* (NSW) s 45B(2).

71 *Equal Opportunity Act 1984* (WA) ss 35Y, 4(1) (definition of 'services'); Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples: Legislative Review* (2015) 37 [5.15].

72 Submissions 9 (Australian Adoptee Rights Action Group), 12 (Dorothy Long), 15 (Jeremy Orchard), 20 (Name withheld), 22 (Confidential), 33a (Name withheld), 54 (Australian Christian Lobby).

73 Submissions 15 (Jeremy Orchard), 20 (Name withheld).

74 Submission 54 (Australian Christian Lobby).

75 Ibid.

76 Ibid.

77 Consultation 9 (Roundtable with legal sector).

78 Ibid.

79 Submissions 19 (Sharyn White), 21 (Name withheld), 36 (Child & Family Services Ballarat Inc.). See also, Submissions 7 (Name withheld), 8a (Name withheld).

80 Submission 36 (Child & Family Services Ballarat Inc.).

81 Submission 58 (Name withheld).

82 Submission 7 (Name withheld).

83 Consultation 17 (Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby).

- 13.60 The Law Institute of Victoria (LIV) submitted that the religious bodies' exception is not consistent with the Adoption Act. The LIV stated that it is 'fundamentally opposed to discrimination and inequality before the law in any circumstances, including discrimination on the basis of gender identity or sexual orientation'.⁸⁴
- 13.61 When the Adoption Amendment (Adoption by Same-Sex Couples) Act was introduced, the LIV welcomed the amendments but continued to have concerns regarding the religious bodies' exception still applying to adoption services. They submitted that religious freedoms need to be respected but balanced against the right to be treated equally, as well as the best interests of the child.⁸⁵
- 13.62 ARMS (Vic) submitted that there are common assumptions that two parents are better than one, and heterosexual couples are better. It submitted that the concept of family is changing and faith-based organisations need to take this on board, but recognised the difficulty with changing long-held religious beliefs and views.⁸⁶
- 13.63 The Victorian Gay & Lesbian Rights Lobby (VGLRL) told the Commission that the blanket exceptions under the Equal Opportunity Act for educational institutions and religious bodies should be removed, as the exceptions fail to balance the right to freedom of religion and freedom from discrimination.⁸⁷
- 13.64 The VGLRL supported the removal of the broad exceptions in the Equal Opportunity Act on the basis that there is already a general justification defence which allows the tribunal to grant an exemption from any provision in the Act.⁸⁸ This would allow a case-by-case approach and judicial oversight, which would accommodate changing standards and community expectations.⁸⁹
- 13.65 The VGLRL proposed the following options to amend the application of the Equal Opportunity Act:
- 1) Section 82(2)(a) of the Equal Opportunity Act be amended to remove the words 'beliefs or principles'. It considered it would be difficult to ascertain the beliefs or principles of a body corporate.⁹⁰
 - 2) Alternatively, faith-based organisations intending to rely on the exception should notify prospective employers and service users, such as prospective adoptive parents, that it does not provide services to same-sex couples. This would include providing a written policy stating its position that is available to the public upon request, free of charge.⁹¹
 - 3) Alternatively, a limitation on the application of the religious exception under section 82(2) that applies to anything done by a religious body exercising functions of a public nature or a stipulated set of services, such as adoption services.⁹²
- 13.66 Dr Briony Horsfall said that the Adoption Act should be non-discriminatory and the heteronormative nuclear family should not be privileged over other family forms.⁹³
- 13.67 VANISH submitted that it can be argued that there are too many organisations providing adoption services in Victoria, and if the government is concerned about the ideology of an adoption service, it could cease to fund it.⁹⁴

84 Submission 51 (Law Institute of Victoria).

85 Ibid.

86 Submission 39 (ARMS (Vic)).

87 Submission 44 (Victorian Gay & Lesbian Rights Lobby); Victorian Gay & Lesbian Rights Lobby, *Positions Paper: Religious Exemptions* (2016), provided to the Commission 19 September 2016, 7 [4.1] (attached to Submission 44 (Victorian Gay & Lesbian Rights Lobby)).

88 Victorian Gay & Lesbian Rights Lobby, *Positions Paper: Religious Exemptions* (2016), provided to the Commission 19 September 2016 8 [4.3]; Submission 44 (Victorian Gay & Lesbian Rights Lobby).

89 Victorian Gay & Lesbian Rights Lobby, *Positions Paper: Religious Exemptions*, provided to the Commission 19 September 2016 8 [4.4].

90 Submission 44 (Victorian Gay & Lesbian Rights Lobby).

91 Ibid. See, eg, *Equal Opportunity Act 1984* (SA) s 34(3).

92 Submission 44 (Victorian Gay & Lesbian Rights Lobby). This was proposed as part of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 which amended s 37(2)(a) of the *Sex Discrimination Act 1984* (Cth), in relation to the delivery of Commonwealth-funded aged care services.

93 Submission 45 (Dr Briony Horsfall).

94 Submission 34 (VANISH).

Commission's conclusions

- 13.68 Since the introduction of the Adoption Act in 1984, the Charter and the Equal Opportunity Act have provided new rights and protections. However, discrimination that would otherwise be unlawful under those Acts is permitted when there is statutory authority to discriminate,⁹⁵ or when there is an exception or exemption to the application of the Equal Opportunity Act.⁹⁶
- 13.69 The Adoption Act provides authority to discriminate by:
- restricting eligibility to adopt to certain classes of people⁹⁷
 - prescribing criteria to determine an applicant's suitability to adopt⁹⁸
 - permitting natural parents to express wishes about prospective adoptive parents' religion, race and ethnic background.⁹⁹
- 13.70 Discrimination in these forms is intended to protect the best interests and rights of children by ensuring that they are adopted by people who are able to best meet their needs.
- 13.71 However, religious exceptions under the Equal Opportunity Act have enabled faith-based organisations providing adoption services to discriminate and not provide some services to same-sex couples recognised as eligible to adopt by the Adoption Act.
- 13.72 Currently, only CatholicCare is relying upon a religious exception. All regional approved adoption agencies are able to provide services to the LGBTI community. However, the manner in which adoption services in Victoria are provided means that heterosexual couples who are unhappy with the service they receive from their regional adoption agency, or who wish to approach another agency, have the choice of approaching CatholicCare and being put forward as prospective adoptive parents by that agency. This option is not available to LGBTI couples.¹⁰⁰
- 13.73 Though adoption services in Victoria historically have been provided by faith-based organisations, adoption is secular in nature under Australian and Victorian law. Adoption services are funded and administered by the state government. It is not appropriate for the government to fund a body which discriminates against any person eligible to adopt on grounds not related to the best interests of a child.
- 13.74 A number of options were put to the Commission to remove the application of the religious exceptions. Amendments to the specific wording of the religious exceptions under the Equal Opportunity Act are outside the terms of reference and would have consequences beyond the provision of adoption services.¹⁰¹
- 13.75 One proposed option was to require an approved adoption agency relying upon a religious exception to notify prospective adoptive parents and advertise that they do not provide services to same-sex couples.¹⁰² The Secretary has already taken this initiative and advertised on the DHHS website. The Commission considers this does not respond to or remove the effect of discrimination on same-sex couples and future applicants.

⁹⁵ *Equal Opportunity Act 2010* (Vic) s 75.

⁹⁶ *Ibid* pt 5.

⁹⁷ *Adoption Act 1984* (Vic) ss 11–2. This is further discussed in Chapter 10.

⁹⁸ *Ibid* ss 13(3), 15(1)(a); *Adoption Regulations 2008* (Vic) regs 35, 37. This is further discussed in Chapter 11.

⁹⁹ *Adoption Act 1984* (Vic) s 15(1)(b). This is further discussed in Chapter 12.

¹⁰⁰ Centralising the process for selecting adoptive parents may mitigate the risk of discrimination against same-sex couples. See Chapter 12.

¹⁰¹ See, eg, Submission 44 (Victorian Gay & Lesbian Rights Lobby).

¹⁰² *Ibid*.

- 13.76 Parliament recently elected not to restrict the application of the religious bodies' exception to the provision of adoption services as part of the Adoption Amendment (Adoption by Same-Sex Couples) Bill.¹⁰³ A central concern raised during debate was that religious bodies would no longer have the protection of the exception and would not be able to give effect to a natural parent's religious belief that their child should not be raised by a same-sex couple.¹⁰⁴
- 13.77 The Commission does not express a view about the correctness of this analysis and it is unnecessary to examine the concern further, as in Chapter 12 the Commission recommends that the Equal Opportunity Act not apply to the selection of adoptive parents.¹⁰⁵ This recommendation links the natural parents' wishes to the selection criteria and provides certainty to the Secretary and principal officer in giving effect to the natural parent's wishes.
- 13.78 Removing the application of religious exceptions to the provision of adoption services may have consequences. In some overseas jurisdictions, Catholic agencies unable to rely upon a religious exemption have ceased to provide adoption services.¹⁰⁶
- 13.79 In Victoria, submissions by faith-based organisations to Parliament's Scrutiny of Acts and Regulations Committee¹⁰⁷ maintained that to exclude the provision of adoption services from the application of a religious exception might cause a faith-based agency providing adoption services to:
- continue to deny same-sex couples equal access to its service and risk breaching the Equal Opportunity Act¹⁰⁸
 - change its religious convictions¹⁰⁹ or
 - close its adoption service.¹¹⁰
- 13.80 In its submission to the Commission, the Australian Christian Lobby stated that CatholicCare employees may face similar dilemmas and have to decide between quitting their jobs or acting against their religious convictions.¹¹¹
- 13.81 The Adoption Act does not create a right for any welfare organisation to provide adoption services in Victoria. The Act sets out the grounds for a welfare organisation to provide adoption services and the Secretary may grant, refuse, suspend or revoke approvals.¹¹² Approval can be revoked upon the ground that an approved agency has failed to comply with a provision of the Adoption Act or Regulations applicable to it.¹¹³
- 13.82 Ultimately, how best to arrange and manage adoption services and the terms of service arrangements are decisions for the Secretary. If CatholicCare elects to no longer provide adoption services, there are other regional services already providing adoption services across Victoria which could provide services to CatholicCare clients.

103 The Legislative Council omitted clause 17 from the Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015.

104 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *58th Parliament Alert Digest*, No 13 of 2015, 20 October 2015. See, eg, Victoria, *Parliamentary Debates*, Legislative Council, 12 November 2015, 4347, 4364 (Dr Rachel Carling-Jenkins), , 4364 (Jenny Mikakos, Minister for Families and Children), 4364–65 (Gavin Jennings, Special Minister of State).

105 Recommendation 56(b)–(c).

106 See [13.48]–[13.49].

107 See submissions made to the Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *58th Parliament Alert Digest*, No 13 of 2015, 20 October 2015.

108 Australian Christian Lobby, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 15 October 2015; Freedom 4 Faith, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 19 October 2015; Victorian Christian Legal Society, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 18 October 2015.

109 Freedom 4 Faith, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 19 October 2015; Victorian Christian Legal Society, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 18 October 2015.

110 CatholicCare, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 16 October 2015; Freedom 4 Faith, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 19 October 2015; Victorian Christian Legal Society, Submission to Scrutiny of Acts and Regulations Committee, *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015 (Vic)*, 18 October 2015.

111 Submission 54 (Australian Christian Lobby).

112 *Adoption Act 1984* (Vic) ss 21–32.

113 *Ibid* s 24(1)(d).

Options

- 13.83 The Commission has considered three possible options:
- 1) Not to recommend any change to the current effect of the religious exception on the operation of the Adoption Act on the basis that Parliament recently considered its effect under the Adoption Amendment (Adoption by Same-Sex Couples) Bill.
 - 2) Not to recommend any change to the current effect of the religious exception, as the effect of the discrimination is numerically limited. In contrast, the effect on CatholicCare, which is an established adoption agency in Victoria, may result in the organisation no longer providing its adoption services to numerous people.
 - 3) To make recommendations that ensure that the Adoption Act operates harmoniously with the Equal Opportunity Act and that remove unnecessary discrimination by taxpayer-funded approved adoption agencies operating under the Adoption Act.
- 13.84 The Commission considers that option 1 would fail to fulfil the terms of reference to ensure that the Adoption Act operates harmoniously with other relevant laws. The Commission has not followed option 1, as it would not be harmonious with the religious exceptions under the Equal Opportunity Act.
- 13.85 The Commission considers that option 2 is not appropriate. While the services of CatholicCare are undoubtedly commendable and valuable, it is for government, not a private entity, to determine policy. That policy is that adoption is secular in nature, is taxpayer-funded, and it is not the preserve of any particular agency or religious entity.
- 13.86 The Commission considers that option 3 is appropriate.
- 13.87 A 'blanket' religious exception should not apply to the provision of adoption services under the Adoption Act. Discrimination should only be permissible to the extent that the Adoption Act provides, upon grounds that are in the best interests of children.
- 13.88 The Commission recommends that religious exceptions under the Equal Opportunity Act should not apply to approved adoption agencies providing adoption services under the Adoption Act. This recommendation is consistent with the secular nature of adoption, its taxpayer funding, consistent with the relevant legislation, and eliminates discrimination.

Recommendation

- 60** The religious exceptions under the *Equal Opportunity Act 2010* (Vic) should not apply to approved adoption agencies providing adoption services under the Adoption Act.

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14. The role of the court in the adoption process

Introduction

- 14.1 Courts oversee the adoption process in Victoria.
- 14.2 The Supreme Court and the County Court have jurisdiction to hear and determine adoption proceedings.¹ The vast majority of proceedings are heard in the County Court. Accordingly, in this chapter 'the Court' refers to the County Court except where otherwise stated.
- 14.3 The most common roles for the Court are:
 - a) To grant an adoption order, the terms of which have usually been agreed to by the parties prior to coming to court.
 - b) To make decisions that have not already been agreed on by the parties, for example to dispense with a natural parent's consent.²
- 14.4 The Court has an important role in the adoption process, as it is independent from government and adoption agencies. However, the Court's engagement in the adoption process is limited. Most decisions are made by the Secretary or principal officer many months before the filing of an application for adoption.
- 14.5 This chapter is divided into four parts:
 - 1) Pre-adoption decisions.
 - 2) Adoption hearing. This part is divided into two sections:
 - i) Application for an adoption order.
 - ii) Representation of the child.
 - 3) Post-adoption decisions. This part is divided into two sections:
 - i) Variation of conditions in an adoption order.
 - ii) Discharge of an adoption order.
 - 4) Jurisdiction of the Court.

Pre-adoption decisions

Current law and practice

- 14.6 The key decisions before an adoption order is made involve obtaining the consent of the natural parent (in some cases, dispensing with consent), and the placement of the child with a prospective adoptive family. The Court has a limited role in these decisions.

- 14.7 The role of the Court in the consent process is to ensure that consent has been given and the requirements under the *Adoption Act 1984* (Vic) have been complied with.³ A court official may also witness the giving of a natural parent's consent.⁴
- 14.8 In the absence of consent, the Court must consider whether there is an appropriate person to give consent⁵ and if so, decide whether to dispense with their consent.⁶
- 14.9 The Court is unable to make an adoption order if it appears that:
- consent was not given in accordance with the Adoption Act
 - consent was obtained by fraud or duress
 - consent was revoked
 - the consent form was altered without authority
 - the natural parent was not fit to give consent or did not understand the nature of consent
 - the consent form was signed before the birth of the child.⁷
- 14.10 The Court's ability to inquire into the validity of a natural parent's consent is limited. A natural parent who has consented does not usually appear before the Court, as they do not generally have legal standing at an adoption hearing.⁸ The evidence available to the Court that informed consent was given is provided by the Secretary or principal officer of the agency which took the consent.⁹
- 14.11 As applications for an adoption order can be filed up to a year after a child has been placed with the prospective adoptive parents,¹⁰ consideration by the Court of the validity of consent occurs very late in the process, usually at the same time it considers the application for an adoption order.

Dispensing with consent

- 14.12 The Adoption Act permits an application to dispense with the consent of a natural parent to be filed with the Court before the filing of an application for an adoption order, or before prospective adoptive parents have been selected.¹¹ The *Supreme Court (Adoption) Rules 2015* (Vic) require the Secretary or principal officer to attach a copy of any order dispensing with consent to their report to the Court for the making of an adoption order.¹²
- 14.13 County Court data shows that applications to dispense with consent are often filed with the Court only days before, or on the same day as an application to adopt.¹³

Role of the Court during the placement period

- 14.14 Following consent, a child is usually placed with prospective adoptive parents with a view to adoption. During this period, the Secretary or principal officer is the child's guardian.¹⁴
- 14.15 The Court plays no role in the selection of prospective adoptive parents¹⁵ nor in the oversight of the child during the placement period.

³ *Adoption Act 1984* (Vic) s 33(1).

⁴ *Ibid* ss 34(1)–(2). A court registrar also receives any revocation of consent from a natural parent and notifies the Secretary or principal officer: s 41.

⁵ *Ibid* s 33(1)(b).

⁶ *Ibid* s 43. The Commission makes recommendations on the consent provisions in Chapter 8.

⁷ *Ibid* s 42(1).

⁸ *Ibid* ss 16(1)(a), 17.

⁹ *Supreme Court (Adoption) Rules 2015* (Vic) r 23(1)(o).

¹⁰ An application for an adoption order is generally commenced nine to 12 months after placement of a baby and 12 to 24 months after the placement of a child with special needs: Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 78, 93.

¹¹ *Adoption Act 1984* (Vic) s 43(4). See also Department of Human Services, Victoria, *Standards in Adoption* (1986) [2.33] [ix], which state: 'An application to dispense with consent should be lodged in court within 12 months, and preferably earlier, of the caseplanning decision re adoption being made.'

¹² *Supreme Court (Adoption) Rules 2015* (Vic) r 23(3)(e).

¹³ County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission.

¹⁴ *Adoption Act 1984* (Vic) s 46(1).

¹⁵ The selection of adoptive parents is discussed in Chapter 12.

- 14.16 The first time the Court encounters a child is usually at the time of the application for the adoption order. By this time, the child has been living with their prospective adoptive parents for nearly 12 months. This timing shifts the balance in favour of the making of an adoption order.

Preliminary hearing

- 14.17 The Commission heard a proposal for a separate preliminary hearing with the natural parents to give the Court the opportunity to satisfy itself that consent was given freely before the placement of the child.¹⁶
- 14.18 A number of concerns arise with this approach:
- It requires a natural parent to participate in a court process at a particularly vulnerable time.
 - Fear of a court process may cause a natural parent to disengage or disappear.
 - It would dramatically change the established consent process.
- 14.19 One aim of the consent process is to ensure the parent understands the consequences of their decision. Giving evidence to the Court will not necessarily assist in this regard.
- 14.20 Preliminary hearings are a component of adoption proceedings in New South Wales.¹⁷ In 1994, the New South Wales Law Reform Commission proposed that preliminary hearings be held, even in uncontested proceedings, to allow the court to make a variety of decisions earlier in the adoption process, including determining the parties to proceedings and whether the consent of a natural parent should be dispensed with.¹⁸ This would allow court oversight and ensure that the needs of children are properly represented in decision-making processes.¹⁹
- 14.21 In Queensland, while there are no specified 'preliminary hearings', the court can hold a hearing specifically in relation to the issue of consent.²⁰

Commission's conclusions

- 14.22 The Commission does not consider that the Court's oversight is needed in cases where consent is given. However, the Commission sees merit in the Court being required to hold a preliminary hearing to consider any application to dispense with consent.
- 14.23 Currently, this decision is made late in the adoption process. This timing inevitably shifts the balance in favour of dispensing with consent to enable the making of an adoption order, to support the child's need for stability.
- 14.24 In practice, when an application to dispense with consent is filed and is not contested, the Court may consider the application without a hearing.
- 14.25 The Commission considers any application to dispense with consent should be heard in open court at a preliminary hearing, with parties present if they choose to attend, regardless of whether an application is contested. This should occur prior to the placement of a child with prospective adoptive parents. Section 43(4) of the Adoption Act should be amended to reflect this requirement.
- 14.26 Section 43(5) of the Adoption Act should be retained. The Court should retain the power to revoke an order dispensing with the consent of a person at any time before the making of an adoption order.

¹⁶ Consultation 9 (Roundtable with legal sector).

¹⁷ *Adoption Act 2000* (NSW) ss 80–1.

¹⁸ New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Discussion Paper No 34 (1994) 91–3. A preliminary hearing in adoption proceedings was introduced by the Adoption Bill 2000 (NSW). The Bill gave effect, in general, to the recommendations of the New South Wales Law Reform Commission.

¹⁹ New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965* (NSW), Discussion Paper No 34 (1994) 93.

²⁰ *Adoption Act 2009* (Qld) s 177.

- 14.27 An application to dispense with consent currently requires the appointment of a separate representative for the child.²¹ As discussed further below, this does not occur.²² The holding of a preliminary hearing would ensure that the Court hears from an independent legal representative advocating for a child's best interests.
- 14.28 The Commission is mindful that natural parents may be unwilling to participate in a court hearing.²³ Natural parents should be a party to proceedings and should have the right to appear and be heard by the Court.²⁴ However, there should be no implication in the Adoption Act that natural parents be required to attend a preliminary hearing.

Recommendation

- 61** The Adoption Act should require the court to hold a preliminary hearing to determine any application to dispense with consent, prior to the placement of a child with prospective adoptive parents. A hearing should be held regardless of whether an application is contested.

Adoption hearing

- 14.29 An application for an adoption order is generally made 12 months after the placement of the child.²⁵
- 14.30 At an adoption hearing the Court is able to make decisions relating to:
- the making of an adoption order²⁶
 - the making of adoption orders involving children from countries other than Australia (intercountry adoption)²⁷
 - the making of an interim order for the custody of the child in favour of the prospective adoptive parents.²⁸

Application for an adoption order

Current law and practice

- 14.31 The applicants for an adoption order are the prospective adoptive parents. They are required to file affidavit evidence²⁹ which is served on the guardian of the child (the Secretary or principal officer).³⁰ The Secretary or principal officer is required to investigate and report to the Court.³¹

21 *Adoption Act 1984* (Vic) s 106(1)(b).

22 As discussed at [14.72]–[14.76].

23 As discussed at [14.18].

24 As discussed at [14.65].

25 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 62; Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 78, 93.

26 *Adoption Act 1984* (Vic) s 15.

27 *Ibid* ss 69A–B.

28 *Ibid* ss 62–3.

29 *Supreme Court (Adoption) Rules 2015* (Vic) r 9.

30 *Ibid* r 13.

31 *Ibid* r 23. The Secretary or principal officer is only required to investigate the circumstances for a child. They do not report when there is an application to adopt a person over the age of 18 years.

- 14.32 The Court is unable to make an adoption order unless it is satisfied that:
- the applicants satisfy the eligibility criteria³²
 - the applicants satisfy the prescribed requirements relating to approval to adopt³³
 - consideration has been given to any wishes of a natural parent, as to the religion, race or ethnic background of the prospective adoptive parents³⁴
 - consideration has been given to any wishes of a natural parent regarding ongoing contact and information about the child.³⁵ The Court can include these arrangements as conditions to the adoption order.³⁶
 - the welfare and interests of the child will be promoted by the adoption³⁷
 - consent to the adoption has been given by the appropriate people.³⁸

Hearing procedure

- 14.33 The prospective adoptive parents, together with any solicitor, the child and any persons directly related to the matter, such as the Secretary or principal officer, may appear at the hearing.³⁹
- 14.34 Hearings are held *in camera* (in a closed room) so they are private but are relatively informal.⁴⁰ This is consistent with all other Australian jurisdictions which require adoption proceedings to be heard in a closed court.⁴¹
- 14.35 The *County Court Guide to Making an Application for Adoption* describes the hearing process:
- Although the adoption process is extremely formal from the point of view of the application and the documents having to comply with legislative provisions, the actual hearing is held as informally as possible and in a relaxed atmosphere. DO NOT WORRY!
- Judges consider hearing Adoption Applications as one of their more pleasurable duties.⁴²
- 14.36 Friends and family are invited to the hearing and photos and video can be permitted.⁴³ At the conclusion, the Court makes an adoption order which includes any conditions as to the natural parent's contact and access to information,⁴⁴ and makes any direction approving the child's name.⁴⁵ The adoptive parents are issued with a certificate of adoption⁴⁶ and the child's new birth certificate is later issued and provided to the adoptive parents.⁴⁷
- 14.37 In Victoria, the average time between the date of originating summons⁴⁸ to the making of the adoption order is 34 days.⁴⁹

32 *Adoption Act 1984* (Vic) ss 11–2. This is discussed in Chapter 10.

33 *Ibid* s 15(1)(a). This is discussed in Chapter 11.

34 *Ibid* s 15(1)(b). This is discussed in Chapter 12.

35 *Ibid* s 15(1)(c).

36 *Ibid* s 59A.

37 *Ibid* s 15(1)(d).

38 *Ibid* ss 33, 43, 49.

39 *Ibid* ss 17, 107–8.

40 *Ibid* s 107.

41 *Adoption Act 1993* (ACT) s 112; *Adoption Act 2000* (NSW) s 119; *Adoption of Children Act* (NT) s 79; *Adoption Act 2009* (Qld) s 307G; *Adoption Act 1988* (SA) s 24; *Adoption Act 1988* (Tas) s 93; *Adoption Act 1994* (WA) s 133.

42 County Court of Victoria, *A Guide to Making an Adoption Application to the County Court of Victoria* (as at 1 July 2016) 5.

43 *Ibid* 6.

44 *Adoption Act 1984* (Vic) ss 59, 59A.

45 *Ibid* s 56.

46 *Ibid* s 52.

47 *Ibid* ss 70, 77. See also, County Court of Victoria, *A Guide to Making an Adoption Application to the County Court of Victoria* (as at 1 July 2016) 6.

48 Proceedings are initiated by originating summons: *Supreme Court (Adoption) Rules 2015* (Vic) r 6.

49 County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission. The data captures the number of days, not business days.

The presumption of confidentiality

- 14.38 There is a presumption of confidentiality in adoption proceedings.
- 14.39 The Adoption Act and the Supreme Court (Adoption) Rules contain provisions which assume confidentiality in court proceedings:
- The Secretary or principal officer's report to the Court is confidential.⁵⁰ This includes the child's birth certificate.⁵¹
 - All documents filed in the Court are confidential and must be kept in secret and in a place of special security.⁵²
 - Adoption proceedings are heard in closed court.⁵³
 - In an application to dispense with consent, the names of the proposed adoptive parents and the proposed name of the child must not appear on the summons and must not be disclosed to the natural parent.⁵⁴
 - It is an offence to publish the identity of parties to an adoption.⁵⁵
- 14.40 Additionally in Victoria, publication of judicial reasons in adoption proceedings is rare. The Commission identified only one published decision of the Victorian courts under the 1984 Act.⁵⁶ This is in contrast to other jurisdictions. Published adoption decisions are available in Queensland, the Northern Territory, Western Australia, South Australia and the Australian Capital Territory, though there are few reported judgments. New South Wales publishes the greatest number of adoption decisions in Australia. To preserve anonymity, judgments in New South Wales use pseudonyms.⁵⁷
- 14.41 In Victoria, one effect of the presumption of confidentiality is that adoptive parents and natural parents' surnames are not known to each other, unless disclosed voluntarily or by accident.⁵⁸
- 14.42 As discussed in Chapter 1, the non-disclosure of the child's name and the names of the parents appears contrary to the intention of the Adoption Act that adoption in Victoria is 'open'. There is an expectation that the adoptive parents will continue to facilitate contact and the child knows who their natural parents are, yet the names of the persons involved are not disclosed to each other.
- 14.43 The *Adoption of Children Act 1964* (Vic) introduced 'confidential' adoption.⁵⁹ Secrecy was seen as necessary to:
- protect the anonymity of the natural parents
 - protect adopted persons from the stigma of illegitimacy
 - protect the adoptive parents' privacy from the natural parents
 - help adoptive parents to build a good relationship with their child.⁶⁰
- 14.44 These provisions were carried over to the Adoption Act and Rules.

50 *Adoption Act 1984* (Vic) s 83(1)(b); *Supreme Court (Adoption) Rules 2015* (Vic) r 24.

51 *Supreme Court (Adoption) Rules 2015* (Vic) rr 23(3)(a), 24.

52 *Ibid* r 43.

53 *Adoption Act 1984* (Vic) s 107.

54 *Supreme Court (Adoption) Rules 2015* (Vic) r 16.

55 *Adoption Act 1984* (Vic) s 121.

56 *Re Child X* (1989) 13 Fam LR 485. This Supreme Court decision related to the appointment of a separate representative for the child and is discussed at [14.77]–[14.78]. The Victorian Civil and Administrative Tribunal publishes decisions in relation to the information provisions under the *Adoption Act 1984* (Vic). Adoption also arose in two other decisions, one relating to whether an adopted person can be eligible under the *Administration and Probate Act 1958* (Vic), see *Innes-Irons & Anor v Forrest* [2016] VSC 782. The other related to publication by a newspaper of adoption information, see *Herald & Weekly Times Ltd v PQR* [2000] VSC 335.

57 *Adoption Act 2000* (NSW) ss 180–180A. See, eg, *Adoption of AT* [2015] NSWSC 1666 (22 July 2015); *Adoption of J* [2016] NSWSC 1098 (11 August 2016).

58 Consultation 6 (Roundtable with Permanent Care and Adoptive Families). See also Submission 58 (Name withheld).

59 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 73.

60 *Ibid*.

Parties to an adoption hearing

- 14.45 The Adoption Act does not define the parties to adoption proceedings. It gives the court broad discretion to permit anyone it thinks fit to be joined as a party to the proceedings, provided that person is opposing an application.⁶¹
- 14.46 Adoption legislation in most other Australian jurisdictions provides specific definitions of parties to adoption proceedings.⁶²
- 14.47 However, the Adoption Act does prescribe who must be served with a notice of an application, including:⁶³
- any natural parent who has not consented to the adoption or whose consent has not yet been dispensed with
 - any person who is a guardian of the child (the Secretary or principal officer)
 - any person who lives with the child or has the care or custody of the child (the prospective adoptive parents)
 - any other person the court directs notice be given to, if it is in the interests of justice to do so.
- 14.48 Natural parents who have given their consent are not a party to proceedings and are not notified.⁶⁴ If they express the wish to be informed of the making of an adoption order, that happens after the conclusion of the proceedings.⁶⁵

The child as a party to proceedings

- 14.49 The Adoption Act does not recognise a child as a party to adoption proceedings, though the court has the power to do so.⁶⁶
- 14.50 New South Wales,⁶⁷ the Northern Territory,⁶⁸ Queensland⁶⁹ and Western Australia⁷⁰ all name the child as a party.
- 14.51 Similarly, the *Children, Youth and Families Act 2005* (Vic) (the CYF Act) does not define the parties to proceedings. However, children may have standing to participate in the decision-making process if they are legally represented.⁷¹ The *Family Law Act 1975* (Cth) also does not name a child as a party to proceedings.⁷²
- 14.52 The Commission, in its 2010 report on protection applications in the Children's Court, proposed that every child subject to a protection order should be a party to the proceedings.⁷³ The Commission commented:

The failure to afford party status to children in protection proceedings appears to be an historical anomaly that might not be consistent with contemporary human rights protections. Under the Charter, a child who is the subject of a protection application has the right to be recognised 'as a person before the law' and to be treated equally before the law.⁷⁴

61 *Adoption Act 1984* (Vic) s 17. The Act does name people who may be permitted to appear and address the court at the hearing of an application to discharge an adoption order: *ibid* s 19(9).

62 See, eg, *Adoption Act 2000* (NSW) Dictionary: definition of 'parties'; *Adoption of Children Act* (NT) s 40; *Adoption Act 2009* (Qld) Dictionary: definition of 'party'; *Adoption Act 1994* (WA) s 4(1) (definition of 'party to an adoption').

63 *Adoption Act 1984* (Vic) s 16; *Supreme Court (Adoption) Rules 2015* (Vic) r 18.

64 See *Adoption Act 1984* (Vic) ss 16(1)(a), 17.

65 *Ibid* s 44(1)(f).

66 *Ibid* s 17. The Act does prescribe that the Court may permit a child to appear at a hearing of an application to discharge an adoption order, though that appearance is at the discretion of the Court, see *ibid* s 19(9)(a).

67 *Adoption Act 2000* (NSW) Dictionary: definition of 'parties'.

68 *Adoption of Children Act* (NT) s 40(1)(c).

69 *Adoption Act 2009* (Qld) s 233, Dictionary: definition of 'party'.

70 *Adoption Act 1994* (WA) s 4(1) (definition of 'party to an adoption').

71 Briony Horsfall, *Children's Participation Rights During Child Protection Proceedings: Recognition, Legal Representation, and the Redistribution of Care in Victoria's Children's Court* (PhD Thesis, Swinburne University of Technology, Australia, 2016) 39.

72 See, eg, *Family Law Rules 2004* (Cth) rr 6.01–6.02.

73 Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Report No 19 (2010) 317.

74 *Ibid* 317 [8.137].

- 14.53 The *Report of the Protecting Victoria's Vulnerable Children Inquiry* recommended that a child named on a protection application should have the formal status of a party to proceedings.⁷⁵ It was also recommended that only in exceptional circumstances should a child be required to attend any stage of the court process. The Inquiry considered that a child could attend if they had expressed a wish to be present and had the capacity to understand proceedings.⁷⁶

Commission's conclusions

Changes to proceedings

- 14.54 The Commission considers that any court hearing must accommodate the sensitive nature of proceedings, especially for natural parents. Natural parents may wish their views to be heard by the court but not wish to appear.
- 14.55 Natural parents should be made aware that they may choose to appear at a final hearing, make submissions to the court in absentia, appear by audio-visual link, or have their legal representative appear on their behalf.
- 14.56 The presumption of confidentiality in adoption proceedings should be removed. Adoption should not be considered secretive or shameful. The principle of open justice should apply. The court should only be closed at the court's discretion.
- 14.57 Many court rules perpetuate confidentiality and have a chilling effect. The Supreme Court (Adoption) Rules should be reviewed with a view to removing elements that are inconsistent with open adoption. That review should distinguish between confidentiality for protection of children and confidentiality arising from closed adoption practices. It would be of value to consider the approach taken to identifying information in child protection matters and the nature of a child protection hearing.
- 14.58 Publication of judicial reasons would provide greater understanding of adoption practice and law and facilitate open adoption research.
- 14.59 The Commission recommends that the court give reasons in all adoption hearings. The current situation in Victoria is not consistent with open adoption and does not provide transparency. Judicial reasons should be publicly available, unless an order has been made under section 17 of the *Open Courts Act 2013* (Vic), and be anonymised if disclosure poses a risk to the child, the natural parents or the adoptive parents.

Adoption plan

- 14.60 In Chapter 4, the Commission recommends the development of an adoption plan for all adoption placements.⁷⁷
- 14.61 The Commission considers that the court should approve and register an adoption plan before an adoption order is made. This could occur at the adoption hearing.
- 14.62 Registering an adoption plan will make the plan part of the adoption order. Upon registering the plan, the court should be satisfied that the parties understand its provisions, have freely entered into it, and that the terms are in the child's best interests.
- 14.63 If some aspects of an adoption plan cannot be agreed upon or the court considers that any term is not in the best interests of the child, the court should have the power to vary, remove or add terms where satisfied that it is in the best interests of the child.

⁷⁵ Philip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (Department of Premier and Cabinet, 2012) vol 2, 378 (Recommendation 53).

⁷⁶ Ibid.

⁷⁷ Recommendation 14.

Defining parties to proceedings

- 14.64 The Commission considers that the Adoption Act should provide a definition of the parties at each stage of the process. Parties' standing and interests will differ depending on the application before the court.
- 14.65 In preliminary hearings and in all adoption hearings, natural parents should be named as a party. This grants them the right to appear and be heard by the court in decisions that affect them. However, there should be no implication that natural parents be required to attend a hearing.
- 14.66 A child should always be named as a party to adoption proceedings and should have the formal status of a party. Under the Charter, a child has the right to be recognised and be treated equally before the law.⁷⁸
- 14.67 However, a child should not be required to attend a court hearing. If a child has expressed a wish to attend and has the capacity to understand proceedings, they should be permitted to attend with their legal representative.
- 14.68 After an adoption order, parties may come back to the court to vary the order or conditions⁷⁹ or apply to discharge it.⁸⁰ Additionally, in Chapter 4, the Commission recommends the use of adoption plans. If enacted, parties may also come back to the court at a later stage to vary or revoke the terms of an adoption plan.
- 14.69 If those applications are filed in relation to an adopted child, parties should be the same as in the hearing of an application for an adoption order.

Recommendations

- 62** The Adoption Act should define the parties to an adoption hearing in relation to a child:
- Parties to a preliminary hearing should include the child, the natural parents, the Secretary or principal officer, and any other person the court thinks fit.
 - Parties to any other adoption hearing should include the child, the natural parents, the prospective adoptive parents, the Secretary or principal officer, any party to an adoption plan, and any other person the court thinks fit.
- 63** At an adoption hearing, the Adoption Act should require the court to:
- decide any disputed matter in the best interests of the child if an adoption plan, or some aspect of an adoption plan, cannot be agreed upon
 - approve an adoption plan before an adoption order is made. The court should be satisfied that the parties to the adoption plan understand its provisions and have freely entered into it, and that the provisions of the plan are in the child's best interests.
 - vary, remove or add terms about contact to the adoption plan where it considers it is in the best interests of the child to do so
 - register an approved adoption plan, which has the effect of making it part of the adoption order and enforceable as an order of the court.

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Charter of Human Rights and Responsibilities Act 2006 (Vic) s 8(1).
Adoption Act 1984 (Vic) s 60.
Ibid s 19.

- 64** The Adoption Act and *Supreme Court (Adoption) Rules 2015* (Vic) should not contain a presumption of confidentiality in adoption proceedings. Hearings under the Adoption Act should be heard in open court. The court should exercise its discretion in the usual way to determine that certain information is confidential, if disclosure of that information poses a risk to the child, the natural parents or the adoptive parents.
- 65** The Adoption Act should require that judicial reasons be given in all adoption proceedings. Judicial reasons should be publicly available, unless an order has been made under section 17 of the *Open Courts Act 2013* (Vic), and should be anonymised to ensure confidentiality of any matters likely to enable the child, the adoptive parents, or natural parents, to be identified.

Representation of the child

Current law and practice

- 14.70 The United Nations *Convention on the Rights of the Child* recognises that children have the right to be heard in proceedings about them, either directly or through a representative.⁸¹
- 14.71 The Adoption Act recognises in basic terms that a child's wishes should be ascertained. In adoption order proceedings, the court must be satisfied, depending upon the age and understanding of the child, that a child has received counselling and the child's wishes have been ascertained and considered.⁸²
- 14.72 The Adoption Act requires that a separate representative be appointed for a child in the following circumstances:⁸³
- a contested application for an adoption order
 - an application for an order to dispense with consent
 - an application to discharge an adoption order.
- 14.73 Separate representation is required even if these applications are not contested. The Adoption Act also provides the court with a broad power to order representation for the child if necessary.⁸⁴
- 14.74 From 2010 to 2016 a separate representative was appointed for the child in two of 168 applications heard by the court.⁸⁵
- 14.75 County Court data for the same period shows:
- two contested applications for an adoption order
 - two applications to dispense with a natural mother's consent and 14 applications to dispense with a natural father's consent
 - no applications for a discharge of an adoption order made in relation to a child.⁸⁶

81 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12(2); see also art 3.

82 *Adoption Act 1984* (Vic) s 14. Participation of the child is discussed in Chapter 3.

83 *Ibid* s 106(1).

84 *Ibid* s 106(2). The court may order that a child be separately represented on its own motion, or consider appointing a representative if a person makes an application. The range of people who may apply for a child to be separately represented is broad; it includes 'any other person'.

85 County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission. In one case it was unknown whether a representative was appointed.

86 *Ibid*.

- 14.76 The data indicates that a child should have been separately represented in as many as 18 cases, as required by section 106(1) of the Adoption Act. This is not happening.
- 14.77 The Supreme Court of Victoria decision *Re Child X* (1989)⁸⁷ considered an application to the County Court to dispense with the consent of a natural mother, where a child was not separately represented in proceedings until the fifth occasion on which the proceeding was listed for hearing.⁸⁸ A legal aid lawyer appeared at the direction of the Director of Legal Aid 'in an attempt to comply with s 106(1)' but had no instructions from the Court for the purpose of representing the child.⁸⁹
- 14.78 The decision for the Supreme Court was whether the failure to appoint a separate representative for the child at the time the application commenced invalidated the proceedings.⁹⁰ That Court held that it did not and determined that separate representation is not required at the commencement of the application, but the Adoption Act requires representation at the hearing of the application.⁹¹

Legal representation

- 14.79 The appointment of a separate representative for a child in proceedings is often based on whether a child is capable of giving instructions.
- 14.80 The Adoption Act does not set out the duties of the separate representative for the child. There are no published guidelines to provide guidance to the legal representative to fulfil their role.
- 14.81 Two key models are used for the legal representation of a child in Australia. They are a 'best interests' model and a 'direct representation' model.⁹²
- 14.82 In a best interests model the children's lawyer 'determines how the child is represented on the basis of the lawyer's own understanding of the child's best interests'.⁹³
- 14.83 In a direct representation model, the child provides instructions to the lawyer. The lawyer must act in accordance with the child's instructions, irrespective of the lawyer's views. A direct representative has the same duties in relation to the child as they would have in relation to an adult client. They include confidentiality, competent representation, and undivided loyalty.⁹⁴

Best interests model of representation

- 14.84 The Family Law Act uses the best interests model of representation.
- 14.85 The Act provides for the court to appoint an independent children's lawyer (ICL) if it appears 'that the child's interests in the proceedings ought to be independently represented by a lawyer'.⁹⁵ The court may request that representation be arranged by Legal Aid.⁹⁶

87 *Re Child X* (1989) 13 Fam LR 485.

88 Ibid 485.

89 Ibid 486.

90 Ibid.

91 Ibid 486–7.

92 See generally, Felicity Bell, 'Facilitating the Participation of Children in Family Law Processes' (Discussion Paper, Legal Aid NSW, Southern Cross University, Centre for Children and Young People, 2015); Law Society of New South Wales, *Representation Principles for Children's Lawyers* (4th ed, 2014); Rae Kaspiew et al, 'Getting the Word Out: The Role of Independent Children's Lawyers in the Family Law System' (2014) 28(1) *Australian Journal of Family Law* 29; Nicola Ross, 'Two Sides of the Same Coin? Lawyers' Representation of Children and Children's Participation in Legal Proceedings' (Paper presented at 5th World Congress on Family Law and Children's Rights, Halifax, 16–23 August 2009); Nicola Ross, 'Images of Children: Agency, Art 12 and Models for Legal Representation' (2005) 19 *Australian Journal of Family Law* 94.

93 Nicola Ross, 'Two Sides of the Same Coin? Lawyers' Representation of Children and Children's Participation in Legal Proceedings' (Paper presented at 5th World Congress on Family Law and Children's Rights, Halifax, 16–23 August 2009) 2.

94 Law Society of New South Wales, *Representation Principles for Children's Lawyers* (4th ed, 2014) 8.

95 *Family Law Act 1975* (Cth) s 68L(2); *Family Law Rules 2004* (Cth) r 8.02.

96 *Family Law Rules 2004* (Cth) r 8.02(2)(a).

- 14.86 The Family Law Act outlines the duties and obligations of the ICL, including:⁹⁷
- to form an independent view, based on the evidence available, of what is in the best interests of the child⁹⁸
 - to act in what they believe to be the best interests of the child in relation to the proceedings⁹⁹
 - to make a submission to the court suggesting a particular course of action if they believe that it is in the best interests of the child.¹⁰⁰
- 14.87 The Family Law Act also provides specific duties, including that a child's lawyer acts impartially,¹⁰¹ puts the views of the child before the court,¹⁰² and facilitates an agreed resolution of matters, to the extent to which doing so is in the best interests of the child.¹⁰³ Guidance on how to carry out the role is also provided by the *Guidelines for Independent Children's Lawyers*.¹⁰⁴

Direct representation and best interests model

- 14.88 The CYF Act uses both the direct representation and the best interests models of representation.¹⁰⁵
- 14.89 Generally, a child aged 10 years or over must have separate legal representation in child protection matters in the Family Division of the Children's Court.¹⁰⁶
- 14.90 Independent legal representation is not required for a child under 10, or for a child aged 10 or over when the court has decided the child is not mature enough to give instructions.¹⁰⁷ In both cases, in 'exceptional circumstances' the court may decide that it is in the best interests of a child to be legally represented.¹⁰⁸ Legal representation is on a best interests model.¹⁰⁹ The lawyer must act in accordance with what they believe to be in the best interests of the child and communicate the instructions given or wishes expressed by the child as far as practicable to do so.¹¹⁰
- 14.91 Legal representation of a child aged 10 or over is usually on a direct representation basis. A legal practitioner must act in accordance with any instructions given or wishes expressed by the child, so far as it is practicable to do so, having regard to the maturity of the child.¹¹¹
- 14.92 Adoption legislation in Western Australia and New South Wales provides for both direct and best interests representation of a child.¹¹²

Non-legal representation

- 14.93 Unlike other jurisdictions, the Adoption Act does not make provision for the appointment of a non-legal representative for a child.

97 *Family Law Act 1975* (Cth) s 68LA.

98 *Ibid* s 68LA(2)(a).

99 *Ibid* s 68LA(2)(b).

100 *Ibid* s 68LA(3).

101 *Ibid* s 68LA(5)(a).

102 *Ibid* s 68LA(5)(b).

103 *Ibid* s 68LA(5)(e).

104 National Legal Aid, *Guidelines for Independent Children's Lawyers* (2013) <<http://www.nationallegalaid.org/assets/Family-Law/ICL-Guidelines-2013.pdf>>. The guidelines have been endorsed by the Chief Justice of the Family Court of Australia, the Family Court of Western Australia and by the Federal Circuit Court of Australia.

See, *Children, Youth and Families Act 2005* (Vic) s 524.

105 *Ibid* s 525(1).

106 *Ibid* s 524(1B).

107 *Ibid* s 524(4).

108 *Ibid* s 524(11).

109 *Ibid* s 524(11).

110 *Ibid*.

111 *Ibid* s 524(10).

112 *Adoption Act 1994* (WA) s 134(5); *Adoption Act 2000* (NSW) s 122(3).

- 14.94 In Queensland, the court is able to appoint a person to provide support to a child, such as a social worker, a lawyer or other person.¹¹³ In Western Australia, a suitably qualified person must be appointed to represent a child who has a disability that is likely to affect the placement of the child.¹¹⁴
- 14.95 In New South Wales, the court is able to appoint a person to act as a representative if there are special circumstances, such as if the child has special needs due to their age, disability or illness, and the appointment would benefit the child.¹¹⁵ This person is called a guardian *ad litem*.
- 14.96 In civil proceedings, a guardian *ad litem* can act in place of a child and is required to act in the child's best interests. In Family Law Act proceedings, a person may apply to be appointed as a 'case guardian' to manage the affairs of the child in proceedings.¹¹⁶
- 14.97 The 2012 Protecting Victoria's Vulnerable Children Inquiry considered the merits of appointing a guardian *ad litem* in child protection proceedings, but on balance considered it 'would entail an additional and expensive process in the statutory system without a demonstrable benefit over and above the use of properly trained and accredited lawyers'. It recommended the appointment of specialist lawyers in child protection proceedings.¹¹⁷

Responses

- 14.98 In its consultation paper, the Commission asked:
- In what circumstances, if any, should a child have separate legal representation in adoption proceedings?
 - Should the Adoption Act provide guidance about the duties and role of a legal representative?
 - Should the Adoption Act provide for non-legal representation or support of a child in adoption proceedings?

Legal representation

- 14.99 Child & Family Services Ballarat, an approved adoption agency, submitted that one of the fundamental roles of the agency is to communicate the child's wishes and best interests to the court. It submitted that the current provisions in the Adoption Act are sufficient.¹¹⁸ This position was shared by Barnardos Australia, which told the Commission:

In NSW it is generally assumed that the State welfare department or the Agency bringing the application represent the interests of the child.¹¹⁹

- 14.100 Some submissions suggested that children be legally represented at all stages of adoption proceedings.¹²⁰ The National Association for Prevention of Child Abuse and Neglect submitted that wherever possible, the voice of the child should be heard at all times.¹²¹
- 14.101 VANISH submitted that children should have legal representation in any adoption proceeding:

... on the basis of the profound lifelong impact that adoption has on the entirety of the adopted person's life. If the principles of 'best interests of the child' is paramount, and the endeavour to uphold the child's universal rights is genuine, then independent legal representation should be mandatory in every case where adoption or a post-adoption contact plan is being considered.¹²²

¹¹³ *Adoption Act 2009* (Qld) ss 47(2), 236.

¹¹⁴ *Adoption Act 1994* (WA) s 134(1a).

¹¹⁵ *Adoption Act 2000* (NSW) s 123.

¹¹⁶ *Family Law Rules 2004* (Cth), rr 6.08A–6.14.

¹¹⁷ Philip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (Department of Premier and Cabinet, 2012) 377.

¹¹⁸ Submission 36 (Child & Family Services Ballarat Inc.).

¹¹⁹ Submission 50 (Barnardos Australia).

¹²⁰ Submissions 33a (Name withheld), 34 (VANISH), 26 (Adoption Origins Victoria Inc.).

¹²¹ Submission 25 (National Association for Prevention of Child Abuse and Neglect).

¹²² Submission 34 (VANISH).

- 14.102 The Australian Adoptee Rights Action Group told the Commission that a child should be able to be separately represented, if they wish.¹²³ The Law Institute of Victoria (LIV) submitted that a child should be represented when there is a dispute about whether adoption is in the best interests of a child. This would include when there is a contested application, an order to dispense with consent, an application for discharge of an adoption order, or an application in relation to the conditions in orders relating to contact.¹²⁴
- 14.103 Dr Patricia Harper supported the provisions for legal representation in the CYF Act, which provide for both a direct and best interests model. Dr Harper submitted that 'it is difficult to argue that different provisions should apply as between the adoption and child protection jurisdictions given the similarities between the matters considered, and the outcomes sought'.¹²⁵
- 14.104 Dr Briony Horsfall, whose doctoral thesis examined children's participation in child protection proceedings,¹²⁶ submitted that children should have legal representation as early as possible.¹²⁷
- 14.105 She raised concerns with the use of age limits in jurisdictions, which determine when a child should have legal representation. She submitted that limits provide clear interpretation of legislation and are cost-effective for financially limited legal aid services. However, age limits of themselves are subjective. If an age limit applied to legal representation in adoption, Dr Horsfall submitted that it should be consistent with other age thresholds for children under other Victorian legislation. For example:
- the age of criminal responsibility for children is 10
 - children who are 10 have the opportunity to participate in child protection proceedings.¹²⁸
- 14.106 Dr Horsfall considered that the Act should contain a rebuttable presumption of direct representation of a child who is younger than 10, to account for a situation where a child holds strong views different to those of a lawyer advocating for their best interests.¹²⁹
- 14.107 Adoption Origins Victoria considered that all children (and parents) should have legal representation at all stages. They considered there should be:
- direct representation if the child is aged over 10; or
 - best interests representation if the child is below the age of 10.¹³⁰
- 14.108 Others considered that children over 12 should have legal representation.¹³¹ Fae Cuff told the Commission that if she had been asked at the age of 12, she could have made an informed decision about her adoption. She submitted that children should have legal representation if they are mature enough to verbalise their concerns.¹³²
- 14.109 Grandparents Victoria supported children having legal representation. It considered that the Act should provide guidance as to the role of the lawyer.¹³³ OzChild told the Commission that there should be guidance about the role of a separate representative for the child in adoption proceedings, based on the best interests of the child.¹³⁴

123 Submission 9 (Australian Adoptee Rights Action Group).

124 Submission 51 (Law Institute of Victoria).

125 Submission 57 (Patricia Harper).

126 Briony Horsfall, *Children's Participation Rights During Child Protection Proceedings: Recognition, Legal Representation, and the Redistribution of Care in Victoria's Children's Court* (PhD Thesis, Swinburne University of Technology, Australia, 2016).

127 Submission 45 (Dr Briony Horsfall).

128 Ibid.

129 Ibid.

130 Submission 26 (Adoption Origins Victoria Inc.). See also Submission 51 (Law Institute of Victoria).

131 Submission 21 (Name withheld).

132 Submission 23 (Fae Cuff).

133 Submission 11a (Grandparents Victoria Inc./Kinship Carers Victoria).

134 Submission 35 (OzChild). See also Submissions 34 (VANISH), 58 (Name withheld).

- 14.110 One submitter said that whether the legal representative follows the instructions of the child should depend upon the age of the child and their capacity to provide those views.¹³⁵ ARMS (Vic), which supports children expressing their views in proceedings, considered that these views should not be determinative in proceedings due to the risk that children's views can be manipulated.¹³⁶
- 14.111 Members of the legal sector expressed divided views about legal representation for children. One participant at a roundtable suggested that theoretically, the right model would be to have two lawyers for a child—one to represent their best interests and the other direct representation. Another participant questioned whether there was sufficient controversy within the court to warrant such a high level of legal representation. In cases where there is no contest to an order being made, they suggested that separate representation was not necessary.¹³⁷
- 14.112 Professor the Hon. Nahum Mushin suggested that the court have the discretion to appoint separate legal representation for the child. He said that in any contested matter or application to dispense with consent, a child should have a separate representative.¹³⁸

Non-legal representation or support

- 14.113 The Commission also heard support for non-legal representation of a child.¹³⁹
- 14.114 OzChild submitted that there should be the option to appoint a guardian *ad litem*, similar to the provisions in New South Wales, when special circumstances warrant and the child would benefit.¹⁴⁰
- 14.115 Child & Family Services Ballarat supported the appointment of a person with special expertise, if needed, such as a psychologist, to act in the best interests of the child.¹⁴¹
- 14.116 VANISH supported the appointment of a guardian *ad litem* in all proceedings.¹⁴² Permanent Care and Adoptive Families also told the Commission that it supports the appointment of an advocate for the child, similar to the appointment of a guardian *ad litem* in adoption proceedings in the United Kingdom.¹⁴³
- 14.117 The Victorian Council of Social Service submitted that independent advocates with early childhood experience should be available to represent a child in proceedings.¹⁴⁴ Other submissions saw benefit in a person trusted by the child supporting them, such as a foster parent, family member or social worker.¹⁴⁵
- 14.118 Professor the Hon. Nahum Mushin suggested that in some cases children should have non-legal representation. Ideally the representative would be a friend and professionally capable of giving advice.¹⁴⁶
- 14.119 Some participants at a roundtable with the legal sector did not support the appointment of a representative other than a lawyer for a child. They said this was unnecessary because lawyers work within the tenets of procedural fairness and legal rights.¹⁴⁷

135 Submission 7 (Name withheld).

136 Consultation 4 (ARMS (Vic)).

137 Consultation 9 (Roundtable with legal sector).

138 Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

139 Submission 23 (Fae Cuff).

140 Submission 35 (OzChild).

141 Submission 36 (Child & Family Services Ballarat Inc.).

142 Submission 34 (VANISH).

143 Submission 37 (Permanent Care and Adoptive Families).

144 Submission 48 (Victorian Council of Social Service).

145 Submission 7 (Name withheld).

146 Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

147 Consultation 9 (Roundtable with legal sector). See also, Submission 51 (Law Institute of Victoria). The LIV submitted that the Act should not provide for non-legal representation or support for a child, if a child has separate legal representation.

Commission's conclusions

- 14.120 A child's right to be heard in proceedings is recognised in the United Nations *Convention on the Rights of the Child*.¹⁴⁸
- 14.121 Appointment of a separate representative for the child should not depend upon a child's capacity to give instructions. If a child is too young to express views or understand the nature of adoption, it is important that a lawyer is available to advocate for their best interests.
- 14.122 The Secretary or principal officer does not represent the child. They represent the views and interests of DHHS or the approved adoption agency and make submissions about what they consider to be the best interests of the child. The role of the Secretary or principal officer is conflicted.¹⁴⁹ When making decisions, they are required to balance the interests and views of the child, the natural parents, adoptive parents and their own interests.
- 14.123 The Commission considers that an ICL should be appointed for all children in adoption proceedings, regardless of whether proceedings are contested.
- 14.124 The current provisions under section 106 of the Adoption Act are not sufficient to recognise the right for children to participate. Furthermore, County Court data indicates that the appointment of a separate representative rarely occurs.
- 14.125 An ICL should be appointed as early as possible to represent the child throughout the adoption process:
- *At a preliminary hearing*—An ICL should be appointed to represent a child at any application to dispense with consent, whether that application is contested or not. Any hearing should be heard in court and not dealt with on the papers.
 - *During the negotiation of an adoption plan*—The Secretary and the court should develop a mechanism for the Secretary to apply to the court for appointment of an ICL for the child, after the necessary consents for a child to be adopted have been given and the period for consent to be revoked has passed. The ICL should represent the child in the development of an adoption plan. The long-term implications of the plan for the child are significant and it is important that a child's interests are independently represented throughout that process.
 - *At a final hearing*—An ICL should represent a child at a hearing to determine an application for an adoption order and the approval or determination of the terms of an adoption plan.
 - *At any subsequent hearings*—As discussed below, parties may return to the court after the adoption in certain circumstances. The child should have independent legal representation during any court proceeding regarding an application to vary or revoke the terms of an adoption plan or conditions of an adoption order made under the current Adoption Act, or any application to discharge an adoption order.
- 14.126 The Commission has considered the cost implications of ICLs in adoption proceedings. During the last six years, there were 168 applications and orders for the adoption of a child. This equates to approximately 28 matters per year.¹⁵⁰ In light of the significance of adoption decisions and their lifelong effects, the Commission considers the cost is justified.

¹⁴⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
¹⁴⁹ This is discussed at [12.86] above.

¹⁵⁰ County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission. There were 168 applications and orders for the adoption of a child, 74 in relation to adults and two not specified.

- 14.127 The representation of children is a specialist role. In Victoria, there are established procedures for the appointment of lawyers for children.¹⁵¹ The Independent Children's Lawyer Panel is maintained by Victoria Legal Aid.¹⁵²
- 14.128 The Commission considers that in adoption proceedings, an ICL should act in accordance with the direct representation model for children aged over 10. If a child is under 10 or is not mature enough to give instructions, the best interests model should be used. The lawyer should communicate to the court any wishes expressed by the child to the extent that it is practicable to do so.
- 14.129 The Commission also considers that the Adoption Act should make provision for the court to order that the Secretary or principal officer appoint a guardian *ad litem* to support a child in proceedings, if the court considers that an appointment would be in the best interests of the child. This person should not be an employee of DHHS or an approved adoption agency.

Recommendations

- 66** The Adoption Act should require the court to appoint an independent children's lawyer in all adoption proceedings, regardless of whether the proceedings are contested. The Act should:
- provide for an independent children's lawyer to be appointed:
 - after the necessary consents for a child to be adopted have been given and the period for consent to be revoked has passed
 - upon application to dispense with a parent's consent
 - permit the independent children's lawyer to represent the child in the development of an adoption plan
 - require the independent children's lawyer to act in accordance with the direct representation model for children over the age of 10 years. If a child is under the age of 10 or is aged 10 or over and not mature enough to give instructions, the best interests model of representation should be used.
- 67** The Adoption Act should provide for the court to direct the Secretary or principal officer to appoint a person to support a child in proceedings, if it is in the child's best interests. This person should not be an employee of the Department or an approved adoption agency.

¹⁵¹ See, eg, *Family Law Act 1975* (Cth) s 68L(2); *Family Law Rules 2004* (Cth) r 8.02(2)(a). See also *Children, Youth and Families Act 2005* (Vic) s 524. The Children's Court of Victoria website provides information to children about how to obtain a lawyer in child protection proceedings: <<http://www.childrenscourt.vic.gov.au/information-children/child-protection-cases>>.

¹⁵² See, eg, *Legal Aid Act 1978* (Vic) s 29A; Victoria Legal Aid, *Information Package: Independent Children's Lawyer Panel* (2014). See also, Victoria Legal Aid, *Information Package: Child Protection Panel 2014* (2014).

Post-adoption decisions

14.130 Following the making of an adoption order, parties can return to the court upon application to:

- vary or revoke the conditions in an adoption order¹⁵³
- discharge an adoption order¹⁵⁴
- access adoption information¹⁵⁵
- recognise the validity of a foreign adoption.¹⁵⁶

14.131 In the next sections, the Commission considers the role of the court in relation to applications to vary or revoke conditions in an adoption order and applications to discharge adoption orders.

Variation of conditions in an adoption order

Current law and practice

14.132 An adoption order may be subject to conditions in relation to natural parents' or relatives' rights to have contact with the child,¹⁵⁷ or in relation to the adoptive parents providing information about the child to the natural parents.¹⁵⁸

14.133 The court can vary or revoke conditions on an adoption order, if satisfied that it is in the best interests of the child.¹⁵⁹

14.134 An application to vary or revoke conditions can be brought by an adoptive parent, a natural parent, or by or on behalf of an adopted child.¹⁶⁰ Any application must be accompanied by a report from an approved counsellor.¹⁶¹

14.135 If conditions regarding contact and information exchange were not agreed to and reflected in the adoption order, a natural parent will need the consent of the adoptive parent to have any such conditions made later. The court is unable to grant a person a right of access, or greater rights of access, unless by agreement of the adoptive parents, and the court is satisfied that the wishes of the child have been ascertained.¹⁶²

14.136 In the absence of agreement from the adoptive parents, the only court option available to a natural parent is an application to the Family Court as a person 'concerned with the care, welfare or development of the child'.¹⁶³

14.137 In 2010, Dr Phillipa Castle observed that when contact relationships had broken down, the law in Victoria was 'not a useful tool of repair':

The only case heard, was heard in the Family Court (Adoption Orders and contests are made in the County Court), and only went forward because the child told the Family Court clinician that she wanted contact. The perception is that alone, the birthmother has little power.¹⁶⁴

¹⁵³ *Adoption Act 1984* (Vic) s 60.

¹⁵⁴ *Ibid* s 19.

¹⁵⁵ This is discussed in Chapter 16.

¹⁵⁶ *Adoption Act 1984* (Vic) ss 67(6), 69.

¹⁵⁷ *Ibid* s 59A(c).

¹⁵⁸ *Ibid* s 59A(d).

¹⁵⁹ *Ibid* ss 60(1)–(2).

¹⁶⁰ *Ibid* s 60(3). A natural parent who did not give their consent to the adoption cannot make an application under s 60: see s 60(3)(b).

¹⁶¹ *Ibid* s 60(4).

¹⁶² *Ibid* s 60(5).

¹⁶³ *Family Law Act 1975* (Cth) s 65C(c). A natural parent could apply to the Family Court for contact under a parenting order.

¹⁶⁴ Phillipa Castle, *A Unique Loss: the Experience of Birthmothers in Open Adoption* (PhD Thesis, Victoria University, Melbourne, Australia, 2010) 246.

Commission's conclusions

- 14.138 In Chapter 4, the Commission recommends contact and information exchange provisions should be reflected in an adoption plan which is registered with the court, as opposed to conditions in an adoption order.¹⁶⁵
- 14.139 If parties find that conflict arises in relation to an adoption plan, they should first seek the assistance of an approved adoption agency or other post-adoption support service.¹⁶⁶
- 14.140 The Commission considers that parties should attend mediation to attempt to resolve a dispute, before filing an application to the court.¹⁶⁷ In Chapter 15, the Commission recommends that the Secretary develop a specialist mediation service to assist families in negotiating conflict in any adoption arrangement (Recommendation 72(b)).
- 14.141 The court should require certification from the mediation service to the effect that mediation has been attempted or is not suitable, before considering an application to vary or revoke the terms of an adoption plan or conditions of an adoption order.
- 14.142 Any new agreement the parties want reflected in an adoption plan should be filed and registered with the court. Unless the court is not satisfied that the terms are in the best interests of the child, this should not require an appearance by the parties at court.
- 14.143 If agreement cannot be reached, access to the court should be available to an adopted child, an adoptive parent, any party to an adoption plan, and a natural parent. This should include a natural parent whose consent was dispensed with and who is not a party to an adoption plan.
- 14.144 Section 60(4) of the Adoption Act currently requires that an application to the court be accompanied by a report from an approved counsellor. Though counselling should still be available to parties, a report from a counsellor should not be required. This section should be removed.

Application for variation or revocation

- 14.145 Registration of an adoption plan enables the plan to be recognised as a legal document and included on the court file.¹⁶⁸ The Commission considers that parties should be able to come back to court to apply to vary or revoke conditions in an adoption plan.
- 14.146 Conditions on an adoption order relating to contact and information exchange made under the 1984 Act can be varied or revoked in limited circumstances. Access to the court for this purpose should remain. However, several provisions of the Adoption Act require amendment for consistency with the principles of openness and the rights of adopted persons:
- Section 60(3) should be amended to enable an adopted child or a person on behalf of a child, an adoptive parent, or a natural parent, including a natural parent whose consent was dispensed with, to apply to vary or revoke the conditions of an adoption order.
 - Section 60(5) should be removed. It is not in the interests of justice or in the best interests of a child that adoptive parents can prevent a natural parent from applying to the court. The court's discretion should not be fettered and it should be open to the court to grant a person rights of contact or greater rights of contact.

¹⁶⁵ Registration of an adoption plan is discussed at [14.60]–[14.63]. See also, Recommendation 14.
¹⁶⁶ This is discussed in Chapter 15.
¹⁶⁷ This is discussed in Chapter 15.
¹⁶⁸ This is discussed in Chapter 4. Registration of an adoption plan is discussed at [14.60]–[14.63].

Recommendation

- 68** The Adoption Act should permit an adopted child, a natural parent (including a natural parent whose consent was dispensed with and is not a party to an adoption plan), an adoptive parent, any party to an adoption plan, or any other person the court thinks fit, to apply to the court for variation or revocation of the terms or conditions of an adoption plan or conditions under an adoption order made under the Adoption Act. In considering an application, the court should:
- require certification from the mediation service developed by the Secretary, to the effect that mediation has been attempted or is not suitable, before considering an application
 - be satisfied that the wishes of the child have been ascertained and given due consideration, as far as practicable
 - be satisfied that any decision made is in the best interests of the child
 - be able to grant a person a right of contact or greater rights of contact with an adopted child, if it is in the best interests of the child.

Discharge of adoption orders

Current law and practice

- 14.147 Adoption orders are considered more permanent than orders under the CYF Act¹⁶⁹ and Family Law Act,¹⁷⁰ as they do not automatically expire when an adopted child turns 18. However, adoption orders can be discharged by the court.
- 14.148 An adopted child or adult, a natural parent, an adoptive parent, or the Secretary or principal officer, may apply to the court to discharge an adoption order, if:¹⁷¹
- the order, or consent given for that order, was obtained by fraud, duress or other improper means, or
 - special circumstances exist for the order to be discharged.
- 14.149 The term ‘special circumstances’ is defined in the Adoption Act to include ‘an irretrievable breakdown of the relationship between the adoptive parents and the adopted person’.¹⁷²
- 14.150 The court can direct an investigation into the circumstances of an application (known as a section 19(3) investigation).¹⁷³ The investigation can be undertaken by the Secretary, or a nominated person from the Department of Justice and Regulation, who makes enquiries and files a confidential report with the court.¹⁷⁴
- 14.151 The court must be satisfied that ‘the welfare and interests of the child would be promoted by the discharge of the adoption order’.¹⁷⁵

¹⁶⁹ See, eg, *Children, Youth and Families Act 2005* (Vic) ss 321(1)(a),(c).

¹⁷⁰ See, eg, *Family Law Act 1975* (Cth) s 65H(2).

¹⁷¹ *Adoption Act 1984* (Vic) s 19(1).

¹⁷² *Ibid* s 19(2)(b).

¹⁷³ *Ibid* s 19(3).

¹⁷⁴ *Ibid* s 19(4).

¹⁷⁵ *Ibid* ss 19(5)–(5A).

The effect of a discharge order

14.152 The effect of a discharge order is that:

- any consent given to the adoption ceases to have effect¹⁷⁶
- the 'rights, privileges, duties, liabilities and relationships of the child and of all other persons', shall be as if the adoption order had not been made.¹⁷⁷

14.153 The discharge of an adoption order severs an adopted person's legal relationship with their adoptive family and reinstates their legal relationship with their family of origin.¹⁷⁸ It also reinstates their original birth certificate, their rights of inheritance from their natural parents and their legal relationship with any biological siblings or wider family.

14.154 Children and those over the age of 18 are both subject to the same legal test.¹⁷⁹ The Adoption Act does not provide for a 'no fault' discharge or reflect a person's autonomy to choose their identity once they are an adult.

14.155 From 2010 to 2016 there were 17 applications for discharge. All applications were made by adults and all were granted by the court. In 16 cases, the court directed a section 19(3) investigation.¹⁸⁰

Responses

14.156 The Commission was told that the grounds upon which an application to discharge an adoption order can be made should be amended.

14.157 Some submissions stated that it was 'virtually impossible' to discharge an adoption order.¹⁸¹ Others stated that it should be a person's 'right' to seek a discharge of their adoption order and restore their original birth certificate.¹⁸²

14.158 Adoption Origins Victoria proposed that the Adoption Act should contain a 'no fault' discharge to enable adoptive persons over the age of 18 years to easily apply to discharge their own order. Adoption Origins Victoria explained that the requirement in the Adoption Act of 'special circumstances' almost always requires that the person has suffered abuse. It submitted that:

To many adopted adults who seek a discharge, the relationship with the adopters is irrelevant to their right to live as the person they were when they were born and have the ancestry they had when they were born.¹⁸³

14.159 Adoption Origins Victoria considered that the Adoption Act 'ignores the rights of adopted adults' and binds them to a contract that they did not consent to.¹⁸⁴

Commission's conclusions

Adopted child

14.160 Judicial oversight is required to ensure that the discharge of an adoption order would be in the best interests of a child. The current legal threshold set out in section 19 is appropriate for applications to discharge an order in relation to an adopted child.

14.161 The tests set out in sections 19(1)–(2) and 19(5A) should remain for applications to discharge an order in relation to an adopted child.

¹⁷⁶ Ibid s 19(6).

¹⁷⁷ Ibid s 19(8). This is without prejudice to 'anything lawfully done, the consequences of anything lawfully done, or any proprietary right or interest that became vested in any person' while the adoption order was in force.

¹⁷⁸ See, eg, *Adoption Act 1984* (Vic) ss 19(6), (8). The court can also make consequential or ancillary orders, including orders relating to the name of the child, the ownership of property, the custody and guardianship of the child, or the domicile of the child: ss 19(7)–(8).

¹⁷⁹ Ibid s 19.

¹⁸⁰ County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission.

¹⁸¹ Submissions 13 (Dr Catherine Lynch JD), 14 (Samuel Morley).

¹⁸² Submission 31 (Name withheld).

¹⁸³ Submission 26 (Adoption Origins Victoria Inc.).

¹⁸⁴ Ibid.

Adopted adult

- 14.162 A number of people can bring an application to the court to discharge an adoption order, including the adopted person, the adoptive parents and natural parents.¹⁸⁵
- 14.163 The tests in section 19 are appropriate for applications to discharge an order in relation to an adopted person who is over the age of 18, if the application is filed by a person¹⁸⁶ who is not the adopted person.
- 14.164 For example, an adoptive parent should not be able to apply to discharge an order without establishing, to the court's satisfaction, that there has been fraud, duress or improper means, or that there are special circumstances to warrant an application, as the effect of the discharge would be to legally exclude their adopted adult child from their family, a decision that may not be in the adopted person's welfare and interests.
- 14.165 The Adoption Act should apply a different test to applications to discharge an adoption order filed by an adopted person over the age of 18.

Application filed by an adopted adult

- 14.166 To apply for a discharge of an adoption order, section 19(1) requires that the order or consent was obtained by fraud, duress or other improper means. This is a high threshold for an adult adopted person to meet. Alternatively, they must establish 'special circumstances' which justify that the order be discharged, such as an irretrievable breakdown or abuse in their relationship with their adoptive parents.¹⁸⁷
- 14.167 It is not clear whether the current tests in section 19(1) are difficult to satisfy, as judicial reasons are not published. In any case, the Commission considers that these tests do not reflect an adopted adult's autonomy to choose who they are. A person adopted as an infant had no say in their parentage or in the change of their identity. Adopted adults may wish to discharge their adoption order for a wide range of reasons. They should have greater access to the court for this purpose.
- 14.168 The Commission considers that the tests set out in sections 19(1) and 19(5A) should not apply to an application brought by an adopted person over 18.
- 14.169 The Adoption Act should not impose a barrier to an adult adoptee applying to the court for a discharge of an adoption order but should require the court to be satisfied that the discharge of an adoption order is appropriate and desirable in all the circumstances.
- 14.170 The Commission acknowledges that discharging an adoption order has implications such as reinstating a person's right to inherit from their natural parents and severing their right to inherit from their adoptive parents. It is open to the court to make any orders relating to the ownership of property.¹⁸⁸ The court should continue to have the ability to make ancillary orders when discharging an adoption order.¹⁸⁹
- 14.171 The Commission observes that the court has made 17 such orders in the previous six years. Its recommendation does not change the consequence of discharge orders.

Parties to an application to discharge an adoption order

- 14.172 Under section 19(9) of the Adoption Act, the child, the natural parents, the adoptive parents, the Secretary or principal officer, and any other person who the court determines has a sufficient interest in the matter, may appear and be heard at the hearing of an application to discharge an adoption order.

¹⁸⁵ *Adoption Act 1984* (Vic) s 19(2)(a).

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid* ss 19(1)(b), 2(b). See, eg, Submission 26 (Adoption Origins Victoria Inc.).

¹⁸⁸ *Adoption Act 1984* (Vic) s 19(7)(b).

¹⁸⁹ *Ibid* s 19(7).

- 14.173 The Commission recommends that the Adoption Act should prescribe the parties to proceedings rather than it be discretionary. This should ensure that parties, including the natural parents and adopted parents, are advised of any application to discharge an adoption order and permit them the right to appear and be heard by the court in relation to an application.
- 14.174 It is important that all parties understand the legal effect and the possible consequences of discharging an adoption order. The court should ensure that they are advised of those consequences when they are notified of proceedings.
- 14.175 The Adoption Act should differentiate between parties to the discharge of an adoption order which relates to an adopted child or to an adopted person over the age of 18.
- 14.176 Parties to an application in relation to an adopted adult should include the adopted person, the natural parents and the adopted parents.
- 14.177 Parties to an adoption plan or the Secretary or principal officer should not be parties to proceedings for a discharge of an adoption order that relates to an adopted person over the age of 18. The terms of any adoption plan¹⁹⁰ or conditions under an adoption order cease to have effect once an adopted person is over the age of 18,¹⁹¹ and the views of the Secretary or principal officer are no longer relevant.

Recommendations

69 The Adoption Act should:

- a. define the parties to an application to discharge an adoption order:
 - i. in relation to an adopted person over 18, to include the adopted person, the natural parents, the adoptive parents, and any other person the court determines has a sufficient interest in the matter
 - ii. in relation to an adopted child, to include the adopted child, the natural parents, the adoptive parents, the Secretary or principal officer, any party to an adoption plan, and any other person the court determines has a sufficient interest in the matter.
- b. require that the parties are advised of the legal effect of discharging an adoption order, when they are notified of proceedings.

70 The Adoption Act should provide that an application to discharge an adoption order filed by an adopted person over the age of 18 should only require the court to be satisfied that the discharge of the order is appropriate and desirable in all the circumstances.

Jurisdiction of the court

- 14.178 The Australian Constitution gives the Commonwealth powers with respect to marriage,¹⁹² divorce and matrimonial causes (parental rights, custody and guardianship of infants).¹⁹³ Child protection and adoption matters are within the jurisdiction of the states.

¹⁹⁰ Adoption plans are discussed in Chapter 4.
¹⁹¹ *Adoption Act 1984* (Vic) s 61.
¹⁹² *Australian Constitution* s 51(xxi).
¹⁹³ *Ibid* s 51(xxii).

- 14.179 In Victoria, the Supreme Court, and at the option of the applicant, the County Court, have jurisdiction in adoption matters.¹⁹⁴ In practice, most proceedings under the Adoption Act are heard and determined by the County Court.

Current law and practice

- 14.180 The Court's jurisdiction under the Adoption Act is limited to hearing adoption applications, where:
- an applicant is resident or domiciled in Victoria and a child, who is able to be adopted, is present in Victoria, or
 - a child is born in Victoria and under the guardianship of the Secretary or principal officer.¹⁹⁵

The County Court

- 14.181 The County Court is a major trial court in Victoria. It exercises civil jurisdiction and criminal jurisdiction and hears appeals from the Magistrates' Court and from the criminal and family divisions of the Children's Court. The Court has large civil, commercial and criminal jurisdictions.¹⁹⁶ It is not a specialist children's court.
- 14.182 In addition to adoption proceedings, the Court also hears proceedings under the *Status of Children Act 1974* (Vic) in relation to substitute parentage orders. These orders relate to children born as a result of a surrogacy arrangement.¹⁹⁷ Adoption and substitute parentage matters are heard in the same County Court list.¹⁹⁸
- 14.183 The County Court does not exercise jurisdiction under the CYF Act (except on appeal)¹⁹⁹ or the Family Law Act.
- 14.184 Under the Adoption Act, there is provision for the Court to make alternative orders relating to a child when they do not make an adoption order. Section 18 of the Adoption Act provides:
- If the Court refuses an application for an order for the adoption of a child, the Court may make such order for the care and control of the child or for the making of any further application under this Act as it thinks fit.²⁰⁰
- 14.185 It appears that this section was included in the Act in recognition of the *Children (Guardianship and Custody) Act 1984* (Vic), which was introduced at the same time as the Adoption Act and 'guardianship or custody' offered a less formal alternative to adoption.²⁰¹ This Act has since been repealed.²⁰² It is not known if the Court has ever made an order pursuant to section 18.

Alternatives to the County Court

- 14.186 During the Commission's consultation and submission processes, the question of the appropriate court to hear adoption proceedings was discussed.

¹⁹⁴ *Adoption Act 1984* (Vic) s 6.

¹⁹⁵ *Ibid* s 7(1).

¹⁹⁶ See County Court of Victoria, *About Us* <<https://www.countycourt.vic.gov.au/about-us>>

¹⁹⁷ See also, *Assisted Reproductive Treatment Act 2008* (Vic).

¹⁹⁸ Applications are heard in the 'Adoption and Substitute Parentage List': County Court of Victoria, *2014–15 Annual Report*, 34.

¹⁹⁹ *Children, Youth and Families Act 2005* (Vic) s 328.

²⁰⁰ *Adoption Act 1984* (Vic) s 18.

²⁰¹ Explanatory Memorandum, *Children (Guardianship and Custody) Bill 1984* (Vic).

²⁰² The *Children (Guardianship and Custody) Act 1984* (Vic) was repealed in 1991 by the *Children and Young Persons Act 1989* (Vic). The later Act was repealed by the *Children, Youth and Families Act 2005* (Vic).

- 14.187 This issue was canvassed in Victoria in 1983 by the *Adoption Legislation Review Committee*. In considering the appropriate forum to determine adoption matters, the Committee developed the following seven principles:
- 'Adoption matters should be considered within an environment which minimises the adversary process in relation to contested cases and includes the process of conciliation.'²⁰³
 - 'Adoption matters should be considered within an environment which is more flexible and less formal than the traditional court setting.'²⁰⁴
 - 'Adoption matters should be considered within an environment in which multidisciplinary expertise is available to the decision-making body.'²⁰⁵
 - 'Adoption matters should be considered within an environment which ensures that the welfare and interests of the child are adequately represented in all cases.'²⁰⁶
 - 'Adoption matters should be considered within an environment which allows for the consideration and determination of all matters relating to the child.'²⁰⁷
 - 'Adoption matters should be considered within an environment which is required by legislation to expedite its business in cases where a child's permanent family life is being affected.'²⁰⁸
 - 'Adoption matters should be considered within an environment which involves the minimum of cost to individuals, agencies, and society.'²⁰⁹
- 14.188 The Committee considered the Family Court, an Adoption Tribunal, and the Supreme Court or County Court as potential options.²¹⁰ It recommended that adoption matters be determined by a family court, vested with state and federal jurisdiction. This would permit the court to determine all family related matters for the child.²¹¹
- 14.189 The Committee did not consider the Children's Court as an option but the Commission notes that the Family Division of the Children's Court was not established until the *Children and Young Persons Act 1989* (Vic) and was not established as a jurisdiction independent of the Magistrates' Court until 2000.²¹²
- 14.190 In Victoria, the Family Court of Australia, the Federal Circuit Court of Australia and in limited circumstances, the Magistrates' Court of Victoria, exercise jurisdiction under the Family Law Act.²¹³ However, the Family Court has exclusive jurisdiction in relation to adoption matters²¹⁴ when a step-parent approaches the Family Court to apply for leave to adopt.²¹⁵

Responses

- 14.191 The Commission received submissions about the appropriateness of the County Court exercising jurisdiction in adoption proceedings.
- 14.192 Some were of the view that the Court was not the most appropriate jurisdiction to hear matters relating to children.²¹⁶ The primary reason was that it is not a specialist children's court.²¹⁷

203 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 248.

204 Ibid.

205 Ibid 249.

206 Ibid.

207 Ibid.

208 Ibid.

209 Ibid.

210 Ibid 251–4.

211 Ibid 255 Recommendation 211.

212 See *Children and Young Persons (Appointment of President) Act 2000* (Vic).

213 *Family Law Act 1975* (Cth) ss 27–33C, 69J, 69N.

214 See Family Court of Australia, Protocol for the Division of Work between the Family Court of Australia and the Federal Circuit Court (12 April 2013) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/protocol-for-division-of-work-fcoa-fcc>>.

215 *Family Law Act 1975* (Cth) s 60G. This is discussed in Chapter 10.

216 Consultations 4 (ARMS (Vic)), 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

217 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

- 14.193 Suggestions for an alternative jurisdiction included:
- the Family Court of Australia
 - the Children’s Court of Victoria
 - the Victorian Civil and Administrative Tribunal —Human Rights Division (VCAT)
 - the Koori Court (a division of the Magistrates’ Court of Victoria).
- 14.194 ARMS (Vic) submitted that adoption proceedings should be heard by the Family Court,²¹⁸ which has an established infrastructure and services.²¹⁹ This view was well supported.²²⁰
- 14.195 Concerns raised about the Family Court were the constitutional barriers to it being able to exercise jurisdiction, and a concern that it was already overloaded with demand.²²¹
- 14.196 Professor the Hon. Nahum Mushin acknowledged the limitations on the County Court’s jurisdiction, observing that when assessing a child’s best interests, the court has only two options: it can either make the adoption order, or not. The Court is unable to make an alternative order that may better serve the child’s interests.²²² He supported the Family Court having jurisdiction, but he considered the referral of powers to the Commonwealth unlikely.²²³
- 14.197 The Commission also heard support for the Children’s Court of Victoria to exercise jurisdiction.²²⁴ Reasons included:
- The Children’s Court is a specialist children’s jurisdiction.²²⁵
 - The Court hears similar proceedings, assessing children’s best interests, on a daily basis.²²⁶
 - The Court’s judicial officers have training in children’s issues, such as attachment.²²⁷
 - There is access to the Children’s Court Clinic.²²⁸
- 14.198 Concerns raised about the Children’s Court related to the lack of fit between adoption matters with a court that hears youth crime and child protection matters.²²⁹ However, it was acknowledged that such matters could be resolved by appropriate listing of cases within the Family Division of that court.²³⁰
- 14.199 Concern was expressed that transferring adoption matters into the Children’s Court might cause adoption to be ranked as the ‘higher option’ to permanent care.²³¹ Berry Street expressed this concern in light of the permanency objectives under the CYF Act which appear to rank adoption higher than permanent care orders.²³²
- 14.200 The Office of the Public Advocate submitted that the Human Rights Division of VCAT would provide an appropriate forum for adoption matters. The benefits would include: that it employs an ‘inquisitorial rather than an adversarial model, it is accessible, timely and of little or no cost’. It submitted that as a specialist jurisdiction with experience in assessing capacity, VCAT also has the power to order supports that would protect the interest of parties.²³³

218 Submission 39 (ARMS (Vic)).

219 Consultation 9 (Roundtable with legal sector).

220 Submission 33a (Name withheld); Consultations 9 (Roundtable with legal sector), 26 (Roundtable with groups and individuals representing children’s interests), 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

221 Consultation 9 (Roundtable with legal sector).

222 Consultation 38 (Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University).

223 Ibid.

224 Submission 60 (Berry Street); Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

225 Consultation 9 (Roundtable with legal sector).

226 Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

227 Consultation 26 (Roundtable with groups and individuals representing children’s interests).

228 Consultation 9 (Roundtable with legal sector).

229 Consultations 9 (Roundtable with legal sector), 26 (Roundtable with groups and individuals representing children’s interests).

230 Ibid.

231 Consultation 26 (Roundtable with groups and individuals representing children’s interests). See also Submission 60 (Berry Street).

232 Submission 60 (Berry Street).

233 Submission 49 (Office of the Public Advocate).

- 14.201 A participant at a consultation with the Aboriginal and Torres Strait Islander peak bodies and agencies suggested that the Koori Court could be an option to hear adoption matters. Another participant suggested the Koori Family Hearing Day in the Broadmeadows Children's Court as an alternative.²³⁴
- 14.202 The Commission also heard support for the County Court to retain jurisdiction because it has an existing mechanism and experience in adoption, and its cost and accessibility make it preferable to the Supreme Court.²³⁵
- 14.203 Reasons against adoption matters continuing to be heard in the County Court were that the cost is prohibitive for natural parents to go back to the Court so as to seek contact when the adoptive parents prevent it.²³⁶

Commission's conclusions

- 14.204 The seven principles developed by the Adoption Legislation Review Committee in 1983, discussed at [14.187], are still relevant today.
- 14.205 In this report, the Commission has made recommendations about the objects of the Adoption Act, the principles of the Act and the best interests principles which should be applied by the court and all decision makers throughout the adoption process.²³⁷
- 14.206 It is not practical to propose that the Family Court exercise jurisdiction under the Adoption Act. To do so would require significant legislative amendments, such as:
- adopting the Western Australian model of Family Court, which exercises both federal and state jurisdiction
 - amending the Australian Constitution to vest the Commonwealth with powers in relation to adoption matters, or
 - amending the Family Law Act to allow the Family Court to exercise powers referred by the state including adoption matters.²³⁸ Further, as noted in [14.195], the Family Court has resource limitations.
- 14.207 The Commission does not consider that VCAT is an appropriate alternative jurisdiction. While it is appropriate that VCAT has jurisdiction in some administrative aspects of adoption (as recommended in Recommendation 87 as to review of the release of information), it would be inappropriate to recommend that VCAT be given a wholly new and different jurisdiction, namely adoption.
- 14.208 While the Commission respects the proposal, made at the roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies, that the Koori Court could exercise adoption jurisdiction, the Koori Court has a specialist jurisdiction which would require extensive change and funding to undertake adoption matters.
- 14.209 Adoption is a separate legal framework from the child protection framework. In adoption, the consent of a child's natural parents is the fundamental requirement, and there is usually no risk of harm to the child. Although the Children's Court is a specialist children's jurisdiction the Commission considers there is a lack of fit between the adoption and child protection jurisdictions.
- 14.210 In this report, the Commission recommends a number of changes to County Court process in adoption matters. However the Commission considers affirmatively that the appropriate course is for that Court, with its established expertise, to continue to be the Court in Victoria exercising adoption jurisdiction.

²³⁴ Consultation 21 (Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies).

²³⁵ Consultation 9 (Roundtable with legal sector).

²³⁶ Submission 33a (Name withheld).

²³⁷ These are discussed in Chapters 2 and 5.

²³⁸ These alternatives are consistent with suggestions made by the Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 251.

Adoption support

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15. Adoption support

Introduction

- 15.1 In this chapter, the Commission reviews the provision for adoption support in the *Adoption Act 1984* (Vic) and whether it sufficiently reflects the need for support required by people affected by adoption.
- 15.2 In the past it has been considered that support after an adoption order is made is unnecessary. There is now a realisation that ongoing support is needed to help all parties to adoption manage its effects at a range of times and key points in their lives.
- 15.3 This chapter examines the lifelong, intergenerational effects of adoption, the changing views on the need for post-adoption support, and how that need can be better reflected in the Adoption Act. The Commission considers the role that the state should play in providing post-adoption support.
- 15.4 This chapter also discusses the lack of comprehensive data and research on adoption services, which means that little is known about the long-term success and effects of open adoption.

Adoption support in Victoria

Current law and practice

- 15.5 There is limited provision in the Adoption Act and *Adoption Regulations 2008* (Vic) for support services after an adoption order is made.
- 15.6 The main provisions for support are the Adoption Act's information provisions.¹ Other support provisions include:
- support for an Aboriginal agency to facilitate contact between an Aboriginal and Torres Strait Islander child and relatives or members of the Aboriginal and Torres Strait Islander community²
 - financial or other assistance in limited circumstances.³

Financial assistance

- 15.7 The Adoption Act allows the Secretary to:
- make grants or provide other financial or other assistance on such terms and conditions as the Secretary determines to a person or persons with whom a child of a prescribed class has been placed for the purposes of adoption or to an adoptive parent, or adoptive parents, of a child of a prescribed class.⁴

1 This is discussed in Chapter 16.
2 This is discussed in Chapter 7.
3 *Adoption Act 1984* (Vic) s 105.
4 Ibid.

- 15.8 The Adoption Regulations define the prescribed classes of children as:
- (a) children with a physical, sensory, intellectual or emotional disability;
 - (b) children of a family group who have been adopted by the same adoptive parent or parents, or placed with the same person or persons for the purposes of adoption;
 - (c) children who the Secretary considers have unusual or difficult circumstances.⁵
- 15.9 DHHS policy considers that payments to families may be appropriate when:
- adoption is the preferred legal framework in which to place a child and the unavailability of payments would prevent an adoption from proceeding
 - the child has special needs, including 'developmental delay; intellectual or physical disability; forms part of a sibling group' or is 'otherwise not able to be placed'.⁶
- 15.10 These provisions reflect an understanding that post-adoption support is only needed in special circumstances, at the discretion of the Secretary.

Support for adopted children with special needs

- 15.11 The 1983 report of the *Adoption Legislation Review Committee*, which led to the implementation of the Adoption Act, considered the factors limiting the placement of children with special needs. They observed that at the time there was little funding available, and time dedicated, to finding a home for children with special needs.⁷
- 15.12 That Committee recommended that a system of 'subsidised adoption' be developed in Victoria to facilitate the placement of children with special needs with families who may otherwise be unable to afford to care for these children.⁸ The Committee supported the approach to subsidised adoptions in the United States.⁹
- 15.13 Since the Adoption Act was enacted, there has been little amendment to the provision for financial assistance.¹⁰
- 15.14 Post-adoption support provided in other Australian jurisdictions is varied.¹¹ In Queensland, a guiding principle under the *Adoption Act 2009* (Qld), is that:
- the same protection, support and resources should be available to an adopted person regardless of whether the adoption was a local adoption, intercountry adoption or adoption by a step-parent.¹²

Other assistance

- 15.15 The Adoption Act empowers the Secretary to provide 'other assistance' on terms at its discretion and in special circumstances, but the nature of that assistance is not made clear.¹³

Support during placement

- 15.16 During the child's placement with the prospective adoptive parents, the Secretary or principal officer, as the child's guardian, has legal responsibility for the child's welfare. Adoption agencies monitor and supervise the placement.¹⁴

⁵ *Adoption Regulations 2008* (Vic) reg 42.

⁶ Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 142.

⁷ Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 34.

⁸ Ibid 39 Recommendation 13.

⁹ Ibid 34. See generally, ibid 287–295.

¹⁰ *Adoption Act 1984* (Vic) s 105. Since 1984, there has been variation to terminology only.

¹¹ *Adoption Act 1993* (ACT) s 108A; *Adoption Act 2000* (NSW) ss 10(2)(f), 201(1); *Adoption Regulation 2015* (NSW) reg 131; *Adoption of Children Act* (NT) s 85; *Adoption Act 1988* (SA) s 26; *Adoption Act 1988* (Tas) s 92; *Adoption Act 1994* (WA) s 140.

¹² *Adoption Act 2009* (Qld) s 6(2)(i). See also, *Adoption Act 2000* (NSW) s 7(i). An object of the New South Wales Act is to provide for the giving, in certain situations, of post-adoption financial and other support.

¹³ *Adoption Act 1984* (Vic) s 105.

¹⁴ Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 56.

- 15.17 An adoption worker may make home visits to the adoptive parents to 'assess the adjustment of the child and parents, to check whether the developmental needs of the child are being addressed and to address any issues arising from the placement.'¹⁵ During this period, contact between the child and their natural parents may occur. It is seen as the role of the adoption agency to facilitate this process and ensure that contact is positive for all parties.¹⁶
- 15.18 The need to support prospective adoptive parents following the placement of the child is well established:
- Research suggests that access to adequate services and supports for both the adopted child and the adoptive family is essential for positive outcomes, especially for intercountry and special needs adoptions. Pre-adoption preparation and ongoing support programs have been identified as important factors that contribute to successful outcomes. Emotional support provided to adoptive parents by family and friends is also important for the success of an adoption.¹⁷

Support after the adoption

- 15.19 After the adoption order is made, generally families are advised that they can seek the assistance of their adoption agency regarding issues relating to contact, if future problems arise.¹⁸ However, support can be limited, as agency funding is not expressly allocated to provide this service.
- 15.20 Support is also provided by agencies which are established for that purpose. For example, VANISH assists people searching for adoption information and for people from whom they have been separated by adoption, and provides support services to those affected by adoption.¹⁹ Permanent Care and Adoptive Families provides services and opportunities for families involved in permanent care or adoption to share their experiences and seek information and support.²⁰
- 15.21 An adoption order may include conditions relating to ongoing information for natural parents²¹ about the child and conditions for ongoing contact with the child.²²
- 15.22 Conditions relating to the exchange of information envisage an ongoing role for adoption agencies, as they require the Secretary or principal officer to facilitate information exchange until the child turns 18.²³
- 15.23 A 2000 research study aimed at understanding successful contact in Victoria and how it is facilitated, found that contact can work best when there are outreach mechanisms to facilitate relationships:
- The challenge for social work practice in open adoption, given the centrality of the needs of the child for healthy identity formation, is to develop support and outreach mechanisms which facilitate positive relationships between families from pre-placement onwards, for an indefinite period.²⁴

¹⁵ Ibid 57.

¹⁶ Ibid 58.

¹⁷ Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series No 62 (2015) 97.

¹⁸ Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 58.

¹⁹ Submission 34 (VANISH).

²⁰ See Permanent Care and Adoptive Families (2013) <<http://www.pcafamilies.org.au>>.

²¹ *Adoption Act 1984* (Vic) s 59A(d).

²² Ibid s 59A(c). The Commission makes recommendations regarding conditions in an adoption order in Chapter 4.

²³ *Adoption Act 1984* (Vic) s 59A(d).

²⁴ Jennifer Rice and Susan Powell, 'Towards Understanding Successful Contact in Open Adoption of Infants: A Description and Exploration of Access in Open Adoption in Victoria' (Paper presented at 7th Australian Conference on Adoption, Tasmania, 15–17 May 2000) 10.

Factors relating to a breakdown in contact arrangements

- 15.24 Dr Phillipa Castle's research showed that of the natural mothers she spoke to in Victoria, three (20 per cent) experienced a complete breakdown in their contact with their child. One mother opted to cease contact. The other two mothers had experienced a breakdown in contact despite requests for contact.²⁵
- 15.25 DHHS policy explains the reasons that contact arrangements in an adoption order may break down, including:²⁶
- Natural parents may struggle with contact, either avoiding contact or demanding more, related to them mourning for the loss of the child.
 - Natural parents may struggle to maintain contact—it may cause an intense emotional reaction and activate feelings of guilt, shame and loss.
 - Adoptive parents may change their view about ongoing contact—they may be reluctant to share information or be unsympathetic towards the natural parent.
 - The adoptive person may struggle with issues relating to their identity, loss or feelings of rejection by their natural parents.
- 15.26 DHHS policy allows for people to approach the adoption agencies for assistance when contact breaks down and agencies may refer them to appropriate services.²⁷ However, ongoing support or facilitation of contact arrangements by adoption agencies or other professionals is not provided for in adoption law.

Changing views on post-adoption support

- 15.27 There is wide recognition of the lifelong effects of adoption.²⁸ The immense grief and trauma experienced by people affected by past forced adoption practices was acknowledged in the 2012 Victorian Parliamentary apology for past adoption practices²⁹ and in the 2013 national apology by the Australian Government.³⁰
- 15.28 The Australian Government made a commitment to providing access to specialist counselling and support services to those affected.³¹ In Victoria, Relationships Australia (Victoria) is the Australian Government-funded provider of support services for past forced adoption practices.³²
- 15.29 Issues in adoption are not limited to those affected by past forced adoption practices. Adoption is a 'lifelong, intergenerational process'.³³
- 15.30 Following the making of an adoption order, the state has limited involvement in the lives of adoptive families. Adoptive parents are seen as accepting full responsibility for a child and their future needs.³⁴
- 15.31 The state's withdrawal after the making of an adoption order has traditionally meant that 'the focus for service provision was on the pre-adoption stage; once an order was made then no further professional intrusion was generally either available or wanted'.³⁵

25 Phillipa Castle, *A Unique Loss: The Experience of Birthmothers in Open Adoption* (PhD Thesis, Victoria University, Melbourne, Australia, 2010) 60.

26 Department of Human Services, Victoria, *Adoption and Permanent Care Learning Guide, Part 2 Infant Adoption* (2005) 66–7.

27 Ibid 67.

28 This is discussed in Chapter 1.

29 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 October 2012, 4771, 4779 (Ted Baillieu, Premier).

30 Motions of apology were moved in the House of Representatives and the Senate and passed on 3 December 2013 and 14 May 2013: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 December 2013, 1414, 1415 (Christopher Pyne, Minister for Education); Commonwealth, *Parliamentary Debates*, Senate, 14 May 2013, 2404–06 (Christine Milne, Leader of the Greens, Senator).

31 Julia Gillard, Department of Prime Minister and Cabinet, Australia, *National Apology for Forced Adoptions*, PM Transcripts: Transcripts from the Prime Ministers of Australia (21 March 2013) <<http://pmtranscripts.pmc.gov.au/release/transcript-19165>>.

32 Department of Social Services, Australia, *Families and Children: Providers of Support Services Funded by the Australian Government* (5 December 2016) <<https://www.dss.gov.au>>.

33 Deborah Silverstein and Sharon Kaplan, *Lifelong Issues in Adoption, Working with Older Adoptees: A source book of innovative models* (1988) 45–53.

34 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 142.

35 Kerry O'Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and Practice* (Dordrecht Springer, 2015) 444.

A need for support

- 15.32 Post-adoption support has been identified as a critical element of a successful adoption arrangement.³⁶
- 15.33 The need for ongoing support after adoption is reflected in both the *National Principles in Adoption*³⁷ and in the *Victorian Standards in Adoption*.³⁸
- 15.34 The National Principles recognise that ‘counselling and support services should be available to children and their family’.³⁹ The principles specify that:
- Openness in adoption should be achieved with the least possible state intervention, but professional support and advice should be available to families.⁴⁰
 - Counselling and support should be available to natural parents throughout the revocation of consent period⁴¹ and post-adoption counselling and support services should be available to natural parents.⁴²
 - Post-placement support is a crucial part of the adoption process.⁴³
- 15.35 The Principles do not limit these obligations to children with special needs.
- 15.36 Nor do the *Victorian Standards in Adoption* limit the expectation of support to children with special needs. However, the Standards observe that after the granting of an adoption order, the ongoing role of adoption agencies should be minimal. An objective of the Standards is to enhance the capacity of community services and self-help groups to assist adoptive families and to create a climate where parties do not require agency involvement.⁴⁴
- 15.37 Though the Commission is considering adoption support under a system of open adoption, research into the effects of forced adoption is of some relevance to the lifelong experience of adoption and the service needs of adopted persons.
- 15.38 An Australian Institute of Family Studies (AIFS) study on past adoption experiences ‘found that the majority of adoptees had lower levels of wellbeing and higher levels of psychological distress compared with Australian population norms’.⁴⁵
- 15.39 In 2015, the AIFS developed good-practice principles for service providers working with people affected by forced adoption practices and family separation. It identified that good practice involves service delivery models that can respond to the needs of adopted persons, are attuned to the complex needs of those affected, provide a range of services (mental and relationship health, physical health, social and economic wellbeing), provide intensive and ongoing counselling (both psychological and psychiatric) and provide flexible and individually tailored care.⁴⁶ An integrated, trauma-informed approach to service delivery was recommended.⁴⁷

36 See generally, Toni Beauchamp, *Post-Adoption Support Services: A Critical Element in Successful and Permanent Adoptions*, Policy Paper (Social Justice, UnitingCare Children, Young People and Families, 2014).

37 In 1993, the Community and Disability Services Ministers Conference (CDSMC) ratified the National Principles in Adoption. These were reviewed in 1997 to incorporate Australia’s obligations under the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*. The CDSMC has since been disbanded as part of streamlining the Council of Australian Governments system. It is unclear whether there has been further work on this issue. The 1997 National Principles in Adoption are available on the DHS website at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/national-principles-in-adoption-1997>>.

38 Department of Human Services, Victoria, *Standards in Adoption* (1986).

39 Community and Disability Services Ministers Conference, *National Principles in Adoption 1997*, Principle 1(4).

40 Ibid Principle 4(2).

41 Ibid Principle 5(5).

42 Ibid Principle 5(10).

43 Ibid Principle 6(8)(1).

44 Department of Human Services, Victoria, *Standards in Adoption* (1986) 90 [6.4.2].

45 Australian Institute of Family Studies, ‘Past Adoption Practices Have a Life-Long Impact’ (Media Release, 22 August 2012) <<https://aifs.gov.au/media-releases/past-adoption-practices-have-life-long-impact>>. See also Pauline Kenny et al, ‘Past Adoption Experiences: National Research Study on the Service Response to Past Adoption Practices’ (Research Report No 21, Australian Institute of Family Studies, 2012).

46 Pauline Kenny, et al, ‘Good Practice Principles in Providing Services to Those Affected by Forced Adoption and Family Separation’ (Australian Institute of Family Studies, 2015) 5.

47 Ibid 6.

Issues that may arise

- 15.40 Shifting views about adoption support recognise that adoptive families may face issues associated with adoption,⁴⁸ even under a system of open adoption.
- 15.41 A 2013 study led by Minnesota psychologist Margaret A Keyes found that a reported suicide attempt was approximately four times more likely in adoptees compared with non-adoptees. She found that:

Although the majority of adopted individuals are well adjusted, adolescent adoptees experience a greater risk for disruptive behavior disorders and, to a lesser extent, internalizing disorders than comparably aged nonadopted individuals. Furthermore, in young adulthood, adoptees have increased odds of being diagnosed with substance use and other psychiatric disorders relative to nonadoptees.⁴⁹

- 15.42 In Victoria, the DHHS manual identifies the issues that most commonly arise for adoptive parents. They include 'communicating with pre-schoolers about adoption, or dealing with identity issues which arise in middle childhood and adolescence'.⁵⁰
- 15.43 Dr Phillipa Castle's research focused on the experiences of natural mothers in Victoria. Dr Castle found that:

Relinquishment is an ongoing process. It is not static but exists temporally and developmentally, so the risks continue. Several points of vulnerability along the continuum were identified. Depression was activated (particularly in those with a predisposition) by significant adoption related events. These included the relinquishment itself, the child turning 18 years of age, reunification and the birth of subsequent children.⁵¹

Adoption disruption and adoption dissolution

- 15.44 The success of adoption in Australia is largely unknown. In some families, an adoption placement might break down.
- 15.45 'Adoption disruption' describes the breakdown in a placement of a child with their adoptive parents. 'Adoption dissolution' describes the breakdown of an adoptive placement after the making of an adoption order.⁵²
- 15.46 If a breakdown occurs, adoption agencies would only become involved if they are approached for assistance.⁵³ For very serious breakdowns, the Adoption Act provides for the discharge of adoption orders.⁵⁴
- 15.47 The Australian Institute of Health and Welfare (AIHW), in its annual reporting of adoption data, noted that data collection on adoption disruption focuses on intercountry adoption and only captures the 12 months following the placement of the child.⁵⁵ The AIHW suggested:

To understand adoption in Australia, it is important to know how adoptees and adoptive families fare after an adoption is finalised. However, once an adoption is finalised it is difficult to identify an adoptee in administrative data, as they are legally no different from a child still living with their non-adoptive parent(s), and there is no requirement

48 Department of Human Services, *Adoption and Permanent Care Procedures Manual* (2004) 143. See also Deborah Silverstein and Sharon Kaplan, 'Lifelong Issues in Adoption', *Working with Older Adoptees: A source book of innovative models* (1988) 45–53. Silverstein and Kaplan identified seven core issues of adoption which affect adopted people, adoptive parents and natural parents: loss, rejection, guilt/shame, grief, identity, intimacy and control.

49 Margaret Keyes et al, 'Risk of Suicide Attempt in Adopted and Nonadopted Offspring' (2013) 132(4) *Pediatrics* 639. See also, Submission 34 (VANISH).

50 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 143.

51 Phillipa Castle, *A Unique Loss: The Experience of Birthmothers in Open Adoption* (PhD Thesis, Victoria University, Melbourne, Australia, 2010) 253.

52 As defined by Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series No 62 (2015) 45.

53 Department of Human Services, Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 90–1.

54 This is discussed in Chapter 14. County Court of Victoria, *Adoption Data* (1 July 2010–30 June 2016), collected by the Commission, shows that applications to discharge adoption orders are generally filed by adult adopted people.

55 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series No 62 (2015) 45.

for adoptees to report their adoptive status. This makes gathering data on access to supports by adoptees and their adoptive families difficult. For the same reasons, the long-term outcomes of adoption (such as rates of disruption or levels of educational attainment) cannot be explored.⁵⁶

- 15.48 Of course, a 'breakdown' is not the only measure of failure or success. The quality of life or family relationships for people adopted under the Adoption Act is largely unknown. There is no qualitative research or longitudinal studies on this cohort.
- 15.49 A number of overseas studies consider the effect of adoption through the lens of adoption disruption. As adoption systems in those jurisdictions differ from Victoria, these studies may have limited application in the Victorian context.
- 15.50 In the United Kingdom, a research study by the University of Bristol looked at adoption outcomes. It found that post-adoption, the average rate of formal disruption was 3.2 per cent.⁵⁷ A supplementary survey showed that 66 per cent of participants reported that the adoption was going well.⁵⁸
- 15.51 Studies in the United States looking at adoptions from foster care have estimated the rate of children's re-entry into the state care system as 9.5 per cent and formal dissolution of adoption orders in 2.2 per cent of cases.⁵⁹

Responses

- 15.52 In its consultation paper, the Commission asked whether there should be increased requirements in the Adoption Act to provide post-adoption support. The Commission asked for feedback on:
- Who should be responsible for providing this support?
 - What type of post-adoption support should be provided, and in what circumstances?
 - Who should be eligible for it?

Responsibility for providing post-adoption support

- 15.53 Most people felt funding for post-adoption services should be provided by the state.⁶⁰
- 15.54 Some people proposed that the state has a duty of care to provide adoption support services.⁶¹ The Australian Association of Social Workers (AASW) submitted 'that governments have responsibilities to provide adequate and appropriate life-long post-adoption services for families, adoptive families and adoptees'.⁶²
- 15.55 Thomas Graham put it strongly:
- The State, as the architect and legal owner of adoption, has a duty of care to provide adequate support services so that adopted people and adoptive parents don't have to walk the adoption journey alone.

56 Ibid 98. A recent United Kingdom research study considered the prevalence of adoption disruption. That study is not easily comparable to Victoria or Australia, but contained some interesting observations: Julie Selwyn et al, 'Beyond the Adoption Order: Challenges, Interventions and Adoption Disruption' (Research Report, Hadley Centre for Adoption and Foster Care Studies, University of Bristol School for Policy Studies, 2014).

57 This was over a 12-year period: Julie Selwyn and Judith Masson, 'Adoption, Special Guardianship and Residence Orders: A Comparison of Disruption Rates' (2015) 44 *Family Law Journal* 1709, 1712; Meredith Carter and Associates, 'The Potential of Permanent Care' (Background Paper, Centre for Excellence in Child and Family Welfare Inc, 2015) 17.

58 Meredith Carter and Associates, 'The Potential of Permanent Care' (Background Paper, Centre for Excellence in Child and Family Welfare Inc, 2015) 17.

59 Ibid.

60 Submissions 7 (Name withheld), 18 (Dan Barron), 34 (VANISH), 49 (Office of the Public Advocate); Consultation 16 (Professor Meredith Temple-Smith).

61 Submission 43 (Thomas Graham); Consultation 16 (Professor Meredith Temple-Smith).

62 Submission 42 (Australian Association of Social Workers).

The State cannot step aside, or outside, and transfer all risk, responsibility and costs to the adoptive parent, while the child is growing up, or to the adopted persons, when as an adult, they have to deal with the ongoing legacy issues of their adoption.⁶³

- 15.56 The Institute of Open Adoption Studies submitted that even though adoption provides a family for life, it does not bring to an end the responsibility of 'society or adoption agencies towards children with special needs: promoting adoption should be accompanied by promoting post-adoption support services'.⁶⁴
- 15.57 The Commission heard that approved adoption agencies are not appropriately funded to provide post-adoption support.⁶⁵ A person who attends an adoption support group funded by VANISH told the Commission that a lack of funding has meant that the group can only meet once every three months and the infrequency of support had a negative effect.⁶⁶
- 15.58 Adopt Change submitted that the Commonwealth and state governments should work harmoniously to provide post-adoption support within a national framework.⁶⁷
- 15.59 Professor Meredith Temple-Smith told the Commission that adoption support should be funded by DHHS but the service should be provided by an independent provider. She explained that adoptive parents were reluctant to approach DHHS to raise issues about the support they required, feeling that the child could be removed or it could affect the likelihood of being able to adopt again in the future.⁶⁸
- 15.60 An independent provider of post-adoption support services was also suggested by Dr Briony Horsfall. She submitted that it would offer neutrality and other advantages, including 'a trustworthy, less-stigmatised and unbiased pre and post adoption service'. Dr Horsfall's proposal envisaged the centralisation of adoption services to be provided by the independent authority.⁶⁹
- 15.61 VANISH proposed that post-adoption services be delivered by organisations independent of those providers who arrange adoptions.⁷⁰

Availability of support

- 15.62 Connections UnitingCare submitted that post-adoption support is already available on an 'as needed' basis and there is agency flexibility to provide support, depending upon a family's needs.⁷¹
- 15.63 A practitioner from an adoption agency told the Commission of the services their agency provides, including:
- phone support
 - peer support
 - referrals and linking to therapeutic services
 - contact support, including re-engaging natural parents who have lost contact, and supporting ongoing contact as needed.⁷²
- 15.64 The practitioner explained that the continued provision of post-adoption support relies on ongoing funding.⁷³

63 Submission 43 (Thomas Graham).

64 Submission 27 (Institute of Open Adoption Studies, University of Sydney).

65 Consultation 31 (SS).

66 Submission 20 (Name withheld).

67 Submission 41 (Adopt Change).

68 Consultation 16 (Professor Meredith Temple-Smith).

69 Submission 45 (Dr Briony Horsfall). Dr Horsfall proposed an independent centralised adoption authority similar to the Victorian Assisted Reproductive Treatment Authority.

70 Submission 34 (VANISH).

71 Submission 29 (Connections UnitingCare).

72 Submission 17 (Name withheld).

73 Ibid.

- 15.65 VANISH told the Commission that following the State apology for forced adoption, VANISH was funded to provide training for professionals. However, funding was insufficient to properly train enough professionals. It was also funded to provide counselling and support and although the program was oversubscribed, funding was not ongoing.⁷⁴
- 15.66 Some adoptive parents said that they felt comfortable with the level and availability of support. One parent felt that they were able to contact their caseworker if they needed to.⁷⁵ Another adoptive parent told the Commission that she never considered that she did not have enough support available to her, as her agency had made it clear that she could contact them if she needed help in the future to facilitate contact with the natural parents.⁷⁶
- 15.67 Other parents told the Commission that once an order is made, support from the approved agencies ends.⁷⁷ One parent compared the difference in approach between permanent care orders and adoption. They explained that in permanent care, while agencies are no longer involved, they are watching to make sure you keep up the agreed contact arrangements, but with an adoption order, it is final and there is a view that once the order is made, support is no longer required.⁷⁸

Duration of support

- 15.68 Submissions to the Commission were clear that support needs to be available to effectively respond to the needs of people affected by adoption, not just during the adopted person's childhood, but over their lifetime.⁷⁹ This support was considered critical to the maintenance of contact between natural parents and children and the long-term best interests of adoptive people.⁸⁰
- 15.69 The AASW told the Commission that post-adoption support should be provided in recognition that adoption does not stop once an order is made and may affect people for their entire lifetime.⁸¹
- 15.70 Barnardos Australia, which provides adoption services in New South Wales, submitted that it does not support the automatic or compulsory involvement of the state with an adoptive family. However, it acknowledged the importance of discretion to provide ongoing support. In its experience, in the small number of situations where adoptive families experience difficulties, resources should be available to adoption agencies to help families on a short-term basis.⁸²
- 15.71 The Commission heard that adoptive parents felt that there was a lack of support options and services to help them navigate the years ahead and the ongoing contact between the child and their natural parents. The initial education and training program was considered helpful for raising awareness of issues that may face an adopted child, but it only scratched the surface and did not allow for ongoing education and support during a child's lifetime.⁸³
- 15.72 People told the Commission that even in adulthood, adopted people need support for issues relating to their adoption.⁸⁴

74 Consultation 25 (VANISH).
75 Submission 32 (Name withheld).
76 Consultation 36 (Kylie Martens).
77 Consultation 6 (Roundtable with Permanent Care and Adoptive Families).
78 Ibid.
79 Submissions 23 (Fae Cuff), 33a (Name withheld).
80 Submission 30 (Name withheld).
81 Consultation 24 (Australian Association of Social Workers).
82 Submission 50 (Barnardos Australia).
83 Submission 32 (Name withheld).
84 Submission 3 (Leilani Hannah); Consultation 16 (Professor Meredith Temple-Smith).

Type of support required

- 15.73 There was general agreement in submissions and consultations about the types of support needed, which included specialist adoption services, specialist counselling, access and support to adoption information, mediation, peer support, training and information.⁸⁵
- 15.74 OzChild submitted that post-adoption support should acknowledge that the circumstances of adopted children and adoptive parents change over time. It considered that access to support from an agency experienced in adoption is needed to respond to individual needs, whether it be individual counselling, attending a support group, or receiving information or advice.⁸⁶
- 15.75 ARMS (Vic) proposed ongoing, proactive engagement with adoptive families and an ongoing role by the adoption agency.⁸⁷
- 15.76 The AASW said that the degree of support needed varies from person to person and over their lifespan, so a variety of services needs to be available. The AASW said the legislation should identify the key types of support that need to be considered, but post-adoption support should be a key consideration of the Act.⁸⁸
- 15.77 The Australian Psychological Society emphasised the importance of support being tailored and flexible to meet individual needs, which is particularly critical to children with special needs.⁸⁹
- 15.78 The AASW referred to the findings of the AIFS on the needs of people affected by past adoption practices, which mirror what their members suggest as necessary support services for adoption.⁹⁰ In brief, key supports proposed by the AIFS include:
- 24-hour advice, support, information and referral services
 - peer support groups
 - adoption-specific support services—‘one-stop-shop’ for service delivery
 - professional and specialised support—counselling, therapeutic interventions, social workers and psychologists
 - priority access to health services—medical, psychological and psychiatric
 - professional support available to family members
 - primary and allied health services which understand the effect of adoption.⁹¹
- 15.79 Linking families with specialist services and services which respond to the particular needs of diverse communities was considered important. The Bendigo and District Aboriginal Co-operative highlighted a need to provide post-adoption support to children beyond the age of 18, as issues relating to adoption, especially for Aboriginal and Torres Strait Islander children, can arise any time in their life. They said that an Aboriginal Community Controlled Organisation should stay involved and assist in providing this support.⁹²
- 15.80 Submissions stressed the importance of the role that peers and support groups such as Permanent Care and Adoptive Families (PCA Families) play.⁹³

85 See, eg, Submissions 34 (VANISH), 37 (Permanent Care and Adoptive Families).

86 Submission 35 (OzChild).

87 Submission 39 (ARMS (Vic)).

88 Consultation 24 (Australian Association of Social Workers).

89 Submission 46 (Australian Psychological Society).

90 Submission 42 (Australian Association of Social Workers); Pauline Kenny et al, ‘Past Adoption Experiences: National Research Study on the Service Response to Past Adoption Practices’ (Research Report No 21, Australian Institute of Family Studies, 2012).

91 Submission 42 (Australian Association of Social Workers).

92 Consultation 29 (Staff at the Bendigo and District Aboriginal Co-operative).

93 Submissions 18 (Dan Barron), 32 (Name withheld); Consultation 36 (Kylie Martens).

- 15.81 PCA Families strongly supported increased provisions for post-adoption support in the Adoption Act. It proposed that services should provide professional and peer support to both permanent care and adoptive families. This should 'include preventive work, early intervention, ongoing education and crisis support' that is routinely available and on an ongoing basis in 'recognition of the delayed psychological development caused by early neglect and abuse'.⁹⁴

Assistance with contact

- 15.82 Professor Meredith Temple-Smith said that contact between the child and their family of origin is critical. Challenges in managing that contact would be assisted by better information about contact, and skilled support. She said better support would have improved the contact experience for her family and the children's family of origin.⁹⁵
- 15.83 Professor Temple-Smith said that adopted people should be able to seek advice and assistance about contact with their family of origin to assist with the transition into adulthood, when they are expected to manage the contact themselves.⁹⁶
- 15.84 Another adoptive parent told the Commission of the practical difficulties she experienced trying find the natural parents and arrange contact, without third-party facilitation.⁹⁷
- 15.85 An adoptive parent identified gaps in the current adoption service provision during the placement period. The parent submitted that adoptive parents do not have the same support as other new parents, such as a maternal health nurse or mother's groups, and 'are required to quickly get in the headspace of contact and navigating a relationship that is very fraught and emotional'.⁹⁸ The parent explained that:

birth parents post placement will often be in a very vulnerable and emotional state. They are suddenly required to navigate a relationship with the people who are now the parents of their child. They arrive at contact with empty arms and they leave with empty arms. In between these two sets of parents is a vulnerable child, looking to both for clues and signals about how to feel and respond. At the time when each party is at its most raw and vulnerable and circumstances are the most challenging, they are left alon[e] to try and work out a relationship. This is wrong and all of them should be given support if they want it for as long as they need after placement. While our social worker was fantastic and went above and beyond the call to attend our first two contacts (which made an incredible difference), we were the exception and most people we know were left to manage on their own.⁹⁹

- 15.86 The adoptive parent submitted that adoption support should be offered by a government-funded independent agency, which would provide a range of services including maternal health nurses who specialise in adoption and permanent care, social workers who can provide advice specific to adoption and facilitate contact, referral services, training, and peer support.¹⁰⁰

Eligibility to access services

- 15.87 Some people proposed that adoption support be available to the child, the adoptive parents and the natural parents.¹⁰¹ Others proposed extending services to natural relatives.¹⁰² VANISH proposed that anyone eligible to receive adoption information should receive support to access it.¹⁰³

94 Submission 37 (Permanent Care and Adoptive Families).
95 Consultation 16 (Professor Meredith Temple-Smith).
96 Ibid.
97 Consultation 6 (Roundtable with Permanent Care and Adoptive Families).
98 Submission 58 (Name withheld).
99 Ibid.
100 Ibid.
101 Consultations 31 (SS), 32 (Ann Jukes and Gabrielle Hitch).
102 Consultation 25 (VANISH).
103 Ibid.

- 15.88 Grandparents Victoria said that support should be available to adoptive parents to provide them with training to equip them to respond to problems that arise throughout an adopted child's life, and to help foster resilience.¹⁰⁴ Child & Family Services Ballarat submitted that both adoptive and natural family members who have been a party to an adoption should be eligible for support.¹⁰⁵
- 15.89 ARMS (Vic) submitted that the natural parents and family all need ongoing support. It also recognised the need for support for adoptive parents who may not have come to terms with the grief of not having their own babies, and who may be hesitant to ask for support for fear of the adoption agencies thinking they are not good enough.¹⁰⁶

Commission's conclusions

- 15.90 There was a very strong response from a variety of people involved in adoption that there is a greater need for support services in adoption, including post-adoption.
- 15.91 Adoption has lifelong effects and a variety of needs arise for those involved. The Commission considers that appropriate adoption support should be provided at all stages of adoption, including after adoption. In Chapter 2, it recommends that this be an object of the Adoption Act. The Commission considers that the state has a responsibility to establish and maintain adoption support.
- 15.92 The Commission considers that adopted children and adults, natural parents, adoptive parents and parties to an adoption plan should be able to access adoption support. Access to support should also include natural relatives¹⁰⁷ and the natural children of adopted people.¹⁰⁸ This recognises the far-reaching effects of adoption and ensures that eligibility for support is consistent with access to adoption information under the Adoption Act.

Applications for financial assistance

- 15.93 Section 105 of the Adoption Act and regulation 42 of the Adoption Regulations restrict access to grants of financial assistance to families with adopted children who have special needs. It is important that these families continue to be able to access financial assistance on a needs basis, but the rights of access should extend to a wider group of people affected by adoption.
- 15.94 The Commission considers that the Secretary should develop a transparent and publicly available application process to enable all eligible people to apply to the Secretary for financial assistance. The Secretary should provide assistance on the basis of identified need.
- 15.95 Any decision of the Secretary in response to an application should be provided to the applicant in writing with detailed reasons. The decision should be subject to an internal review procedure. The Adoption Act should provide that the person may also apply to the Victorian and Civil Administrative Tribunal for review of a decision of the Secretary.

Adoption agencies and other organisations

- 15.96 The Commission has heard that the ongoing role of approved agencies is constrained and although some agencies try to support families post-adoption, their funding for this purpose is limited.

104 Consultation 2 (Grandparents Victoria).
 105 Submission 36 (Child & Family Services Ballarat Inc.).
 106 Submission 39 (ARMS (Vic)).
 107 As defined by *Adoption Act 1984* (Vic) s 97(1).
 108 As defined by *Adoption Act 1984* (Vic) s 96A(1).

- 15.97 Effective funding would ensure that adoption agencies have a continuing role post-adoption to provide support and advice to families and continue to facilitate the terms of an adoption plan, or conditions under an adoption order. Not all families will require this assistance but it should be available if required.
- 15.98 The Secretary or principal officer should be required to provide assistance to people who are negotiating an adoption plan, and post-adoption support when families need assistance to comply with or vary the terms of the plan, including facilitating contact arrangements. This practical support should be available to families on an ongoing basis.

Specialist services

- 15.99 The lack of appropriate and specialist services for people affected by adoption in Victoria is clear. The Commonwealth funds services for people affected by forced adoption. This funding is not available to people affected by adoption under a system of open adoption.
- 15.100 The Commission considers that it is the responsibility of the State Government to establish and maintain, as relevant, appropriate services, and link families with those services as required. Effective service provision requires a clear entry point and pathway for all eligible people, and requires access to a wide range of services that respond to their particular needs.
- 15.101 The Commission has heard many suggestions about how services should be provided, including suggestions that there be an independent body that provides adoption services as a 'one-stop-shop'. There is merit in an independent body providing adoption services in this manner. However, the way services are provided is ultimately a decision for the Secretary.
- 15.102 The Commission considers that there should be a wide range of services available to people affected by adoption. Services should include, but not be limited to, professional support such as specialist counselling and other therapeutic support, access to mainstream services such as health providers, and peer support groups.
- 15.103 Eligible people should be able to access services prior to the making of an adoption order or after adoption, regardless of when an adoption order was made.

Mediation services

- 15.104 If conflict has arisen which affects the operation of an adoption plan and an approved adoption agency is unable to facilitate resolution of a dispute, all eligible people should be able to access a mediation service funded by the Secretary.
- 15.105 For this purpose, the Commission considers that a mediation process will provide a safe, flexible and effective forum to assist families when contact arrangements, information exchange or an adoption plan breaks down.
- 15.106 An attempt to hold a mediation should be a prerequisite to any application to the court post-adoption to vary or revoke the terms of an adoption plan or conditions in an adoption order made under the 1984 Act. The Commission makes recommendations about the court process in Chapter 14.

Data and research

- 15.107 Effective adoption support should be evidence-based.
- 15.108 Almost all available evidence about the long-term effects of adoption is based on experiences of forced, closed adoption practices.¹⁰⁹
- 15.109 Available adoption data in Victoria is also limited. The Commission sought detailed data from DHHS in relation to adoption numbers, practices and services. Unfortunately, the data ultimately provided was inconsistent and unclear and the Commission was not able to rely on it.
- 15.110 Reported data is currently limited to the data required to inform the AIHW annual adoption report. However, the AIHW also acknowledges the current limitations on its reporting on adoption disruption and the success of open adoption in Australia. It is not known how adopted persons and their adoptive families fare after an adoption is finalised.¹¹⁰ The lack of data and research on adoption outcomes means that the long-term outcomes of open adoption are largely unknown. Consideration should be given to undertaking longitudinal research into the effects of open adoption on children.
- 15.111 To support the operation of the Adoption Act and to enable effective provision of adoption services, data collection should be designed to assist the Secretary to understand how the services are being provided and enable evaluation on whether they meet the needs of children and other clients. It is essential for this information to be collected accurately, as it should provide an evidence base to improve policy and performance in this area.
- 15.112 The Commission recommends that the Secretary maintain comprehensive statewide data on the operation and delivery of adoption services, including support and mediation services. This data should be reported annually.

Recommendations

- 71** The Adoption Act and Adoption Regulations should extend the power of the Secretary to provide grants of financial assistance to adopted children and adults, natural parents, adoptive parents, parties to an adoption plan, natural relatives and natural children of adopted people.
 - a. Eligible people should be able to apply for financial assistance either prior to, or at any time after, the making of an adoption order.
 - b. Any decision of the Secretary should be in writing with detailed reasons and subject to internal review.
 - c. The Adoption Act should allow a person whose interests are affected by a decision of the Secretary to apply to the Victorian Civil and Administrative Tribunal for review.

¹⁰⁹
¹¹⁰

The lack of research into open adoption is discussed at [1.101].
Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, Child Welfare Series No 65 (2016) 96.

- 72** The Adoption Act should require the Secretary to establish and maintain adoption and post-adoption support services. These services should be accessible to adopted children and adults, natural parents, adoptive parents, parties to an adoption plan, natural relatives and natural children of adopted people. The Secretary should:
- a. establish and maintain, as relevant, adoption services, including:
 - i. adoption support services provided by approved adoption agencies and other appropriate organisations
 - ii. specialised adoption support services (including specialist counselling, psychological services, psychiatric services)
 - b. develop a specialist mediation service to assist families in negotiating conflict in relation to any adoption arrangements
 - c. maintain, and report annually, comprehensive, reliable, consistent statewide data on the operation and delivery of adoption services, including support and mediation services.

Access to adoption information

300 Introduction

301 The need for a new access to information scheme

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16. Access to adoption information

Introduction

- 16.1 A number of the recommendations in this report reinforce the need for adopted people to know about the family into which they were born and ideally to have the opportunity to sustain relationships with their natural parents, grandparents, siblings and other relatives.
- 16.2 For many, and particularly those who were adopted before the current *Adoption Act 1984* (Vic) came into effect, the only way to discover their own early history, original identity and family is by examining information contained in records that were created or compiled when they were adopted.
- 16.3 Before 1984, during the era of closed adoption, information was kept confidential. The Adoption Act introduced provisions that made information available.¹ These continue to be important. In 2014–15, 616 requests for information were made.² Most were by people adopted before 1984.³ The Commission has recommended that the importance of the access to information provisions be reflected in the objects of the Adoption Act.⁴
- 16.4 This chapter discusses the provisions contained in Part VI of the Adoption Act, which provide adopted people and their families with access to information about the adoption. The Commission was asked to make recommendations to modernise the Adoption Act and address any gaps in Part VI. It has identified measures to improve the access available, as well as the privacy protections; but, as discussed in Chapter 2, modernising the Adoption Act requires more than piecemeal amendments to the current provisions.
- 16.5 The structure and language of the Act need to be substantially revised and for this reason the Commission has recommended that it be replaced completely with new legislation.
- 16.6 Part VI needs significant revision. The provisions do not set out clearly what information may be made available on request, and under what conditions. The language used and concepts applied contain inconsistencies that appear arbitrary or accidental.
- 16.7 The need for a new scheme for providing access to adoption information is discussed in the next section. The following sections propose specific recommendations about the features of the scheme.

1 Victoria was the first jurisdiction in Australia to enable adopted people to obtain their original birth certificate and provide them with access to information.

2 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series No 62 (2015) 31–2.

3 See *ibid.* The largest group seeking information remains people affected by adoptions that occurred before 1984. In 2014–15, nearly 90% of adult adopted people who applied for information were over the age of 35.

4 See Chapter 2.

The need for a new access to information scheme

- 16.8 Part VI of the Adoption Act came into effect two years after the *Freedom of Information Act 1982* (Vic) extended the community's access to information in the possession of the Victorian Government.⁵ In general terms, Part VI regulates access to information held in records about adoptions that were negotiated or arranged by the Secretary, an approved agency or an organisation approved as a private adoption agency under the *Adoption of Children Act 1964* (Vic).⁶
- 16.9 Access to these records is prohibited unless permitted by Part VI. Access under the Freedom of Information Act is available only to a person who has applied to adopt a child, to seek access to their application and any records generated in the course of assessing it.
- 16.10 Excluding regulation by the Freedom of Information Act in all other cases allowed for a separate access scheme to be established under the Adoption Act. Rather than relying on the generally applicable provisions of the Freedom of Information Act, Part VI of the Adoption Act establishes conditions of access that depend on whether the applicant is an adopted person, a natural or adoptive parent of an adopted person, or is related to the adopted person in another specified way. The conditions of access serve to mitigate the effect of access on the privacy of people other than the applicant who may be mentioned in the information.
- 16.11 Regulating access under the Adoption Act enabled a tailored approach to be taken in view of the sensitivity of the information and its significance to the applicant. However, the scheme established by Part VI does not contain features of the Freedom of Information Act that ensure transparency and accountability in responding to requests. These include, for example:
- statutory time limits for processing requests⁷
 - rights for a person to correct or amend information that is inaccurate, incomplete, out-of-date or would give an misleading impression⁸
 - requirements for agencies to give written reasons for decisions to deny access⁹
 - procedures for internal review of decisions to deny access¹⁰
 - inexpensive procedures for external review of decisions by the Victorian Civil and Administrative Tribunal (VCAT).¹¹
- 16.12 The Commission considers that there is no reason why a person applying for access to information under the Adoption Act should not have the same rights of review and correction as they would have if they made a request under the Freedom of Information Act. Similarly, there is no reason why the Department of Health and Human Services (DHHS) should be subject to different standards of accountability.
- 16.13 In addition, the Part VI access scheme does not incorporate the features of subsequent legislation that regulates the handling of personal information by government agencies and protects privacy:
- The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) recognises the right of a person not to have their privacy arbitrarily interfered with.¹²

5 The access to information provisions of the Freedom of Information Act came into operation on 5 July 1983. Part VI of the Adoption Act came into operation on 15 April 1985.

6 *Adoption Act 1984* (Vic) s 83(1).

7 *Freedom of Information Act 1982* (Vic) s 21.

8 *Ibid* s 39.

9 *Ibid* s 27.

10 See *ibid* s 27(1) (d).

11 *Ibid* s 50.

12 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).

- The *Privacy and Data Protection Act 2014* (Vic), and its predecessor legislation the *Information Privacy Act 2001* (Vic), requires government agencies to collect, store, use and disclose personal information in accordance with a set of Information Privacy Principles. 'Personal information' is information or an opinion about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.¹³
- The *Health Records Act 2001* (Vic) requires a person's health information to be handled in accordance with a set of Health Privacy Principles. 'Health information' includes personal information or opinion about a person's health, disability, use of health services, donation of body parts, organs or body substances, and genetic information.¹⁴

16.14 Where the Adoption Act is inconsistent with a provision in the Privacy and Data Protection Act or the Health Records Act, the Adoption Act prevails.¹⁵ Otherwise, the information to which Part VI provides access must be handled in accordance with the Information Privacy Principles and Health Privacy Principles.

New access to information scheme

- 16.15 In modernising the Adoption Act, all provisions concerning the collection, generation, storage, use and disclosure of personal information should expressly incorporate, where relevant and appropriate, the requirements or features of the Information Privacy Principles and Health Privacy Principles. For example, they should ensure that people about whom information is collected are aware of the collection, the purpose of collection, to whom information of that kind is usually disclosed, and their right to have access to the information and correct it if necessary. In addition, the structure and wording of provisions that set out when information may be disclosed, and the right of a person identified in the information to correct or amend it, could also be based on the approach taken in equivalent parts of the Information Privacy Principles and Health Privacy Principles.
- 16.16 The Commission considers that the changes necessary to modernise the structure, language and content of Part VI are so extensive that the current access scheme should be replaced with a new one. While DHHS should be responsible for designing the new scheme, and has long experience and significant responsibilities under the current scheme, it should consult with the Privacy and Data Protection Commissioner, the Health Services Commissioner and the Ombudsman to ensure that it incorporates contemporary standards of transparency, accountability and fairness in the management of personal information by Victorian government agencies.
- 16.17 The new access to information scheme should apply to information in the possession or under the control of the Secretary or an agency relating to an adoption that was negotiated or arranged at any time under current or corresponding previous legislation. The present scheme similarly applies to information about adoptions which were arranged before the current Adoption Act came into effect.

13 *Privacy and Data Protection Act 2014* (Vic) s 3 (definition of 'personal information').
14 *Health Records Act 2001* (Vic) s 3 (definition of 'health information').
15 *Health Records Act 2001* (Vic) s 7; *Privacy and Data Protection Act 2014* (Vic) s 6.

Recommendation

- 73** The access to information scheme set out in Part VI of the Adoption Act should be replaced with a new scheme, designed by the Secretary in consultation with the Privacy and Data Protection Commissioner, the Health Services Commissioner and the Ombudsman, that incorporates contemporary standards of transparency, accountability and fairness in the management of personal information by Victorian government agencies.

Features of a new access to information scheme

- 16.18 Although the details of the new scheme will be identified during the design process, issues were raised in submissions and during consultations which need to be addressed.
- 16.19 Approximately 25 per cent of submissions addressed access to adoption information.¹⁶ The subject was also discussed in consultations with adopted people, natural parents, approved agencies, the DHHS adoption information service FIND (Family Information and Network Discovery), the Registry of Births, Deaths and Marriages (BDM) and VANISH.
- 16.20 The following issues were raised:
- lack of clarity about what information people are entitled to¹⁷
 - difficulties and delays in obtaining information¹⁸
 - mandatory interviews¹⁹
 - access to information by adopted children and relatives²⁰
 - access to information by friends and partners of adopted people²¹
 - access to family members' birth certificates and marriage certificates²²
 - protection of privacy²³
 - review of decisions.²⁴
- 16.21 The proposals outlined below, which have emerged from these consultations and from research by the Commission, should be taken into account when designing features of the new access scheme.

Consistency and coordination of access to information schemes

- 16.22 Adopted people, their adoptive parents, natural parents, natural relatives and adult children can seek access to information under the Adoption Act from FIND and three approved agencies.²⁵

16 Fifteen of the 61 submissions the Commission received.

17 Submissions 16 (Name withheld), 34 (VANISH).

18 Submissions 3 (Leilani Hannah), 5 (Confidential), 16 (Name withheld), 20 (Name withheld), 34 (VANISH); Consultations 11 (Trevor Smith), 31 (SS).

19 Submissions 20 (Name withheld), 34 (VANISH); Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

20 Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 20 (Name withheld), 21 (Name withheld), 29 (Connections UnitingCare), 34 (VANISH), 39 (ARMS (Vic)).

21 Submission 5 (Confidential).

22 Submissions 24 (Independent Regional Mothers Combined), 34 (VANISH); Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

23 Submission 34 (VANISH).

24 Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

25 One approved agency does not provide an access to information service.

- 16.23 Each of these organisations operates as a ‘relevant authority’ for the purposes of the access to information provisions.²⁶ The relevant authorities assess requests for access, locate the information, obtain it from BDM, courts or other organisations, and provide it to the applicant in accordance with the Adoption Act.
- 16.24 In addition, DHHS and every approved agency is required to operate an Adoption Information Service to receive applications for access, provide advice about the access scheme, arrange for counselling, and ‘facilitate the provision of information to a person [on] the Adoption Information Register’.²⁷ The distinction in the Adoption Act between relevant authorities and adoption information services is confusing²⁸ but, in practice, there is no material difference. FIND and the approved agencies which operate as relevant authorities carry out the functions of an adoption information service. The term ‘relevant authority’ is used in this chapter to refer to the body which deals with applications for access to information.
- 16.25 The relevant authorities operate independently. FIND functions according to a set of internal guidelines and the approved agencies operate according to their own procedures.
- 16.26 The relevant authorities do not have the same powers. The Secretary has information-collection powers (exercised by FIND) that are not available to the other relevant authorities. The Secretary may request the court and any agency, body or person to provide information to the Secretary.²⁹ The other relevant authorities may ask the Registrar of BDM for certain information contained in the BDM Register, but otherwise cannot request information from other approved agencies, bodies or persons. They need FIND (exercising the power of the Secretary) to obtain records from the court for them.³⁰ An approved agency told the Commission that this inability to obtain records direct from the court causes delays in responding to applications.³¹
- 16.27 The Commission was also told in submissions and during consultations that decisions made about access are inconsistent across relevant authorities.³² This is unsurprising. Inconsistencies in decision making and standards of service are inevitable where the Secretary does not have responsibility for the administration of the provisions by approved agencies.
- 16.28 The Commission considers that centralising access to information services within DHHS would improve consistency and also address the problems that arise from approved agencies’ lack of information-collection powers. It is not appropriate that approved agencies have the same powers as the Secretary. Powers to require another government agency to provide information should reside with a government body that is directly and permanently accountable for how the powers are exercised, rather than with a non-government agency. This also gives the government agencies supplying information a higher degree of certainty that the information will be handled and protected to a known and consistent standard.
- 16.29 Centralisation is also a practical solution. FIND already deals with approximately 90 per cent of applications.³³ Although in a centralised system FIND would have the additional task of collecting records from approved agencies, it would be relieved of the task of collecting information from other agencies on behalf of approved agencies.

²⁶ *Adoption Act 1984* (Vic) s 82 (definition of ‘relevant authority’).

²⁷ *Ibid* s 102.

²⁸ An application for information about an adopted person is made to a relevant authority under Division 2 of the Adoption Act but an adoption information service receives the application under Division 3. In addition, an adopted person must apply to the Secretary for a copy of their original birth certificate: *Adoption Act 1984* (Vic) s 92.

²⁹ *Adoption Act 1984* (Vic) ss 86, 90(1)(ii). An approved agency, ‘other body or person’ must comply with a request from the Secretary ‘so far as [they are] able to do so’: s 123.

³⁰ Consultation 14 (Roundtable discussion with agencies involved in providing adoption information). The Commission was also told in consultations that approved agencies seek assistance from FIND to obtain certificates from BDM.

³¹ Consultation 14 (Roundtable discussion with agencies involved in providing adoption information). Some submissions complained about delays.

³² Submission 34 (VANISH).

³³ Email correspondence from the Department of Health and Human Services, to the Commission, 28 November 2016. Between 2009 and 2013 FIND handled more than 4000 applications: Department of Health and Human Services, Victoria, *Data Collections: Response to Information Request from the Victorian Law Reform Commission*, provided to the Commission 29 July 2016, 5 August 2016.

Recommendation

- 74** The new access to information scheme should provide for the Secretary to be solely responsible for the powers and functions that are currently shared among multiple 'relevant agencies'.

Information covered by the scheme

- 16.30 Part VI regulates access to 'information about an adopted person' contained in:
- a record of, or in the possession or control of, the Secretary or an agency relating to an adoption negotiated or arranged by the Secretary or an agency
 - a report provided to the court on behalf of the Secretary or a principal officer about a proposed adoption
 - an adopted person's birth certificate.³⁴
- 16.31 In designing a new access to information scheme, it would be useful to review the number and type of records being generated and consider whether there should be different rules for access to any of them, or even exemption from the scheme. For example, the Commission recommends that natural parents considering adoption receive options counselling from an independent counsellor.³⁵ The success of this initiative may depend on the counsellor being able to assure the parents that no one else will have access to any notes of the counselling sessions.
- 16.32 'Information about an adopted person' is defined as information about that person or their natural parents or relatives which the relevant authority considers is reasonably likely to be true and does not unreasonably disclose information relating to anyone's personal affairs.³⁶ There are two problems with this definition:
- The definition does not refer to information about an adoptive parent, yet there are provisions in Part VI concerning access to information from which the adoptive parents may be identified.³⁷
 - The definition anticipates decisions by a relevant authority about the content of the information and the reasonableness of disclosing it. Information which falls within the definition when one person requests it may not be within the definition if requested by someone else.
- 16.33 Schemes in other states and territories define information more clearly. Some specify the information that people may obtain. The Western Australian scheme expressly gives people access to court records³⁸ and the adoptee's birth registration.³⁹ The New South Wales legislation lists the information and records which people are entitled to receive.⁴⁰ For adopted people, this includes:
- birth details (including the time of birth, and child's weight and length at birth)
 - date on which the person was placed with the adoptive parents
 - copy of the adoption order
 - copy of the instrument of consent and any associated documents relating to the social and medical history of the adopted person provided by a natural parent

34 *Adoption Act 1984* (Vic) s 83(1).

35 See Chapter 8.

36 *Adoption Act 1984* (Vic) s 91.

37 *Ibid* ss 95(1), 97(2).

38 *Adoption Act 1994* (WA) ss 84, 89(4), 90(4).

39 *Ibid* ss 85, 89(1), 90(1).

40 See, eg, *Adoption Regulation 2015* (NSW) regs 93–101.

- the reason for a natural parent's adoption decision, as stated by them or recorded before the adoption was made
- copies of reports of any medical examinations of the adopted person carried out before the adoption order was made
- any document certifying particulars of the birth, marriage or death of a natural parent, non-adopted sibling or adopted brother or sister
- any other document, report, photograph or recording relating to the adopted person that contains information about their origins.⁴¹

Recommendation

- 75** The definition of the information to which access may be granted under the new access to information scheme should provide a simple yet comprehensive description that does not pre-empt decisions about how to respond to a request for access to it.

Eligibility to request information

- 16.34 The primary means by which the Adoption Act controls access to information about an adopted person is by specifying who has a right to apply for access. Those who have this right are:
- adopted people
 - adoptive parents
 - natural parents
 - natural relatives (a brother, sister, uncle, aunt and grandparent)
 - natural adult children of adopted people.
- 16.35 Compared with the existing provisions, the *Assisted Reproductive Treatment Act 2008* (Vic) (ART Act) provides a clearer and simpler model for setting out eligibility to apply for information.⁴²
- 16.36 Those who are eligible to apply for access to information under the Adoption Act may apply to a relevant authority. Other people may seek access to information by applying to the County Court. The application to the Court must include a report from the Secretary or an approved counsellor and the Court may grant access if satisfied there are special circumstances which make access desirable.⁴³
- 16.37 Some people proposed that a non-biological child of an adopted person should have the same right to apply for access to information as that available to a natural child.⁴⁴ While the Commission did not receive enough evidence to reach a concluded view, the proposal warrants consideration when the new scheme is being designed because:
- the current provision does not take account of the various ways families are formed today. A 'natural child' is defined as a son or daughter of an adopted person 'where the relationship is of the whole blood'.⁴⁵ This would exclude some children born through assisted reproduction and surrogacy.

⁴¹ Ibid reg 93. This regulation applies to people adopted after 1 January 2010.

⁴² *Assisted Reproductive Treatment Act 2008* (Vic) s 56, as amended by the *Assisted Reproductive Treatment Amendment Act 2016* (Vic) s 13.

⁴³ *Adoption Act 1984* (Vic) s 100.

⁴⁴ Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

⁴⁵ *Adoption Act 1984* (Vic) s 96A(1).

- the current provision could create a situation where, within one family, a natural child could obtain information about their parent's background through a relevant authority whereas another (non-biological) child would have to apply to the County Court and satisfy a 'special circumstances' test to be granted access.
 - the current provision is premised on biological connection being the basis on which access to information should be permitted.⁴⁶ As an adoption worker observed, information about their parents' background and their family may be important to the non-biological children of adopted people.⁴⁷
- 16.38 An approved agency submitted that 'an elderly or ill [natural] parent or adopted person' should be able to authorise someone else, 'such as a child, partner or sibling', to exercise their rights on their behalf.⁴⁸ While certain relatives would be able to apply for access to information using their own rights under the Adoption Act,⁴⁹ they do not have the same access to identifying information as adopted people and natural parents.⁵⁰ A partner or friend would have to apply to the County Court for access to the information.
- 16.39 The Commission considers that there should be a simpler way for an adopted person and other eligible people who are unable to make an application to obtain information. They should be able to sign a written authority for another person to be given access in defined circumstances.⁵¹ The situations where this can occur should be confined due to the sensitivity of the information, which concerns not just the person providing the authority. For example, it may be appropriate to limit the option to situations where an eligible person is physically unable to make the application themselves.

Recommendation

- 76** The new access to information scheme should enable people who are eligible to apply for information under the Adoption Act to authorise another person to apply on their behalf in specified circumstances.

Guidelines about information decisions

- 16.40 An authority's response to a request for access to information under the Adoption Act requires assessments to be made of the relevance and sensitivity of the information and the effect on anyone whom it directly or indirectly identifies. Decision makers may reach different conclusions about, for example:
- whether the information is reasonably likely to be true⁵²
 - whether providing access will unreasonably disclose information about a person's personal affairs⁵³
 - whether information of a medical or psychiatric nature should be disclosed to a medical practitioner nominated by the applicant, in the interests of protecting the applicant's physical or mental health or wellbeing⁵⁴

⁴⁶ The right of natural children exists to 'ensure that the children of adopted people are able to find out about their biological background': Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4249, 4250 (Pauline Toner, Minister for Community Welfare Services). Elsewhere in Australia only lineal descendants of an adopted person have a right to apply for information: *Adoption Act 1993* (ACT) s 58 (definition of 'associated person'); *Adoption Act 1988* (SA) s 27; *Adoption Act 1994* (WA) ss 81 (definition of 'descendant'), 89, 90. See also *Assisted Reproductive Treatment Act 2008* (Vic) s 60, as amended by the *Assisted Reproductive Treatment Amendment Act 2016* (Vic) s 19.

⁴⁷ Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

⁴⁸ Submission 29 (Connections UnitingCare).

⁴⁹ The Commission recommends below that the circumstances in which information can be disclosed to natural relatives should be expanded.

⁵⁰ See paragraphs [16.89]–[16.90] below.

⁵¹ See, eg, *Health Records Act 2001* (Vic) s 30.

⁵² *Adoption Act 1984* (Vic) s 91(a).

⁵³ *Ibid* s 91(b).

⁵⁴ *Ibid* s 89.

- whether the whereabouts of an adopted person or an adopted person's natural parent or grandparent, brother, sister, uncle or aunt may directly or indirectly be ascertained from the information⁵⁵
 - the weight given to the wishes expressed by an adopted person under 18.⁵⁶
- 16.41 Comments were made in consultations about how these assessments can lead to inconsistent responses to a request for information. One person who applied for the records relating to her adoption on two separate occasions, years apart, received less information the second time.⁵⁷
- 16.42 A representative of a relevant authority described the interpretation of the term 'personal affairs' as a subjective assessment. Decision makers might reach different conclusions about whether a disclosure would be unreasonable.⁵⁸
- 16.43 The Commission considers that clear, publicly accessible guidelines are necessary to guide decisions and promote consistent decision making.⁵⁹ Guidelines would help applicants as well as the agencies which respond to requests for access. At a minimum, they should provide guidance about any powers or discretions decision makers may have to exercise.⁶⁰
- 16.44 Greater consistency would also be fostered by introducing avenues for internal review and external review by VCAT, discussed below.

Recommendation

- 77** The Adoption Act should require the Secretary to develop and publish guidelines on providing access to information under the new access to information scheme.

Privacy

Protection of information

- 16.45 Part VI includes measures to balance one person's right to have access to information with another's right to privacy. In many cases, those who have rights to apply for access and those whose information is protected by various means from unreasonable disclosure, are the same people. The complexity of some provisions increases the difficulty.
- 16.46 The Adoption Act protects privacy by:
- defining 'information about an adopted person' in a way that requires the relevant authority to be satisfied that the information does not unreasonably disclose information relating to the 'personal affairs of a natural parent, a relative or any other person'⁶¹
 - prescribing rights of access to different identifying information, depending on whether the applicant is the adopted person and, if not, the nature of the applicant's relationship to the adopted person⁶²

⁵⁵ Ibid ss 93(2)(b), 95(1).

⁵⁶ Ibid s 95(2)(a)(i).

⁵⁷ Consultation 31 (SS).

⁵⁸ Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

⁵⁹ The Adoption Legislation Review Committee recommended that 'the Adoption Information Service publicise guidelines on what type of information is available to those involved in adoption': Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 100, 104 (Recommendation 71).

⁶⁰ In New South Wales the Secretary is required to exercise discretions in accordance with guidelines set out in the *Adoption Act 2000* (NSW) ss 133E(5), 133G(6), 136A(5); *Adoption Regulation 2015* (NSW) regs 106–9. Agencies which provide adoption information must comply with guidelines in the regulations: *Adoption Act 2000* (NSW) s 142; *Adoption Regulation 2015* (NSW) regs 105, 110. The CEO in Western Australia must maintain a code of practice covering the release of identifying and non-identifying information, contacting a party on someone's behalf and negotiating with parties about contact: *Adoption Act 1994* (WA) s 79(1)(h).

⁶¹ *Adoption Act 1984* (Vic) s 91(b).

⁶² Ibid ss 93–8.

- permitting in some cases the disclosure of identifying information only with the agreement or consent of the person concerned⁶³
- in other cases, allowing for the wishes of the person concerned to be considered when making a decision about disclosing information about them⁶⁴
- allowing people to register their wishes about disclosure of information about them and being contacted.⁶⁵

16.47 At July 2016, 980 people on the adoption information register had registered a wish that they did not want their personal details disclosed to another person. This represents less than three per cent of the total number of people registered at that time (36,602). More than half of the people who registered this wish were natural parents. Nearly a quarter were people who had been adopted.⁶⁶

Information about a person's affairs or from which the person's identity or whereabouts could be ascertained

16.48 Concerns were raised with the Commission about the Adoption Act's requirements that relevant authorities ensure that information released:

- does not unreasonably disclose the 'personal affairs' of a person, and
- in specific cases, does not disclose information from which, indirectly or directly, the identity and/or whereabouts of a person may be ascertained.

16.49 The Adoption Act does not specify what 'information about personal affairs' includes and the question has not been judicially considered. A similar term is used in the Freedom of Information Act to protect personal information. It states that 'information relating to the personal affairs of any person' includes:

- information 'that identifies any person or discloses their address or location'
- information 'from which any person's identity, address or location can reasonably be determined'.⁶⁷

16.50 References in the Adoption Act to the personal affairs of a person may have been intended to have the same meaning. Alternatively, the definition in the Freedom of Information Act can be seen as another way of describing information from which, indirectly or directly, the identity and/or whereabouts of a person may be ascertained. Perhaps all three terms refer to the same kind of information.

16.51 Information about a person's personal affairs has also been seen as capturing a wider amount of information, beyond details of the person's identity and whereabouts, to include information about their life, activities, interests or other matters. For example, a relevant authority decided that it was unable to grant an adopted person access to information about the assessment of her adoptive parents because it concerned their 'personal affairs'. The County Court later granted the person access to the information.⁶⁸

16.52 In practice, relevant authorities remove ('redact') from the documents that applicants are given information which is considered to be about a person's personal affairs, or from which a person's identity could be ascertained.

16.53 VANISH, which runs a specialised, government-funded search service and has assisted many people affected by adoption over 25 years, called for these terms to be agreed and clearly defined in the Adoption Act.⁶⁹

16.54 The new access to information provisions should provide clarity and certainty. The

63 Ibid ss 93(2)(c), 94(2)–(3), 95(2), 96A(4), 97(3), 103(4).

64 Ibid s 95(2).

65 Ibid s 103(3).

66 Department of Health and Human Services, Victoria, *Data Collections: Response to Information Request from the Victorian Law Reform Commission*, provided to the Commission 29 July 2016, 5 August 2016.

67 *Freedom of Information Act 1982* (Vic) s 33(9).

68 Consultation 31 (SS).

69 Submission 34 (VANISH).

current provisions leave too much to interpretation. This creates uncertainty, which can cause disputes. There is scope for disagreement between applicants and agencies and between agencies. Lack of clarity can also lead to inconsistent decision making. Decision makers may interpret and apply the law differently, particularly when they have to make subjective assessments.⁷⁰

- 16.55 The new access to information provisions should aim to increase consistency in decision making. As discussed above, this could be improved if all decision makers followed the same guidelines. A more significant step would be to replace the different terms relating to personal information with a single term. To protect the privacy of information to different degrees in different circumstances, it would be better to introduce rules that apply to the circumstances rather than relying on fine distinctions between how the information that is to be protected is described.
- 16.56 DHHS is required to comply with the Freedom of Information Act and information privacy legislation in other contexts, and has years of experience in interpreting and applying them. The Commission has considered whether there is value in using terms and definitions in this legislation in the new access to information scheme. There is a question whether the benefits of this would outweigh the cost, disruption to services and risk of inadvertently undermining existing access and privacy rights. This evaluation should be made as part of designing the new scheme.

Recommendation

- 78** The new access to information scheme should describe more clearly the information that may be released under the Adoption Act, and the circumstances in which it may be released.

Notification

- 16.57 A clear theme of information privacy legislation is that privacy is not the same as secrecy. The principles with which organisations must comply under privacy legislation require openness with the person concerned about the information they handle. Importantly, the person concerned should be made aware of what information the organisation holds, and the purposes for which it may be used and disclosed.
- 16.58 VANISH proposed that people should be notified when information about them is going to be released under the Adoption Act.⁷¹ Ordinarily, people are notified if a relevant authority needs their agreement or consent to disclose the information, or is acting as an intermediary for someone who is seeking contact with a family member. Consent may be given subject to conditions.
- 16.59 The Adoption Act provides for only one circumstance where a person must be notified about a disclosure for which their agreement or consent is not required: an adopted person must be notified if their adult child seeks information about the adopted person's natural parent (the applicant's grandparent).⁷² The adopted person's natural parent need not be notified, and nor is their consent required. ARMS (Vic) submitted that:

Natural parents should be notified if the adult child of an adopted person is seeking to receive identifying information about them and it needs to be monitored very carefully.⁷³

⁷⁰ Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).
⁷¹ Submission 34 (VANISH).
⁷² *Adoption Act 1984* (Vic) s 98(2)(aa).
⁷³ Submission 39 (ARMS (Vic)).

- 16.60 Introducing a more general obligation to notify would be consistent with a requirement placed on the Registrar of BDM by the ART Act, which provides that:
- If the Registrar intends to disclose identifying information under this Division, the Registrar must make all reasonable efforts to give notice of the intended disclosure to the person to whom the information relates.⁷⁴
- 16.61 It is likely that DHHS and approved agencies hold a great deal of personal information about people who are unaware that the records exist or what they contain. Where their consent or agreement is required, they are made aware of the request for access and the information that could be disclosed. Where the information may be disclosed without their consent, it would be fair and in accordance with good privacy practice to notify them of the disclosure and enable them to see what has been disclosed.
- 16.62 A further courtesy and privacy-sensitive step would be to give them time to correct the information or add their comments to the information if they consider it wrong or misleading, before it is given to the person who requested access to it. This would be consistent with the requirements of the Freedom of Information Act, the Information Privacy Principles and Health Privacy Principles.⁷⁵ As recommended below, if the material may cause distress to the person, the Secretary should be required to advise them and offer counselling.

Recommendation

- 79** When providing access to information under the Adoption Act which does not require the consent of the person to whom the information relates, the Secretary should be required to:
- a. make all reasonable efforts to give notice of the intended disclosure to the person to whom the information relates and
 - b. where practicable, give the person a reasonable opportunity before the information is disclosed to correct or add comments to any of the information that is inaccurate, incomplete, out of date or would give a misleading impression.

Power to disclose information to applicant

- 16.63 Part VI specifies when a relevant authority can disclose information to an applicant.
- 16.64 In some cases, the relevant authority cannot release identifying information about a person unless they have given written consent.⁷⁶ In other situations, a person's consent is not required. Adults who were adopted and their natural parents can obtain identifying information about each other without the consent of the other party.⁷⁷
- 16.65 Other conditions may apply, depending on the type of application. In some cases, release of information is at a decision maker's discretion.⁷⁸
- 16.66 The particular issues raised in submissions and consultations are discussed below.

⁷⁴ *Assisted Reproductive Treatment Act 2008* (Vic) s 62, as amended by the *Assisted Reproductive Treatment Amendment Act 2016* (Vic) s 22.

⁷⁵ *Freedom of Information Act 1982* (Vic) s 39, Health Privacy Principle 6.5, Information Privacy Principle 6.8.

⁷⁶ *Adoption Act 1984* (Vic) ss 93(2)(c), 94(3), 95(2)(b), 96A(4), 97(3).

⁷⁷ *Ibid* ss 93(1), 96(1)(b).

⁷⁸ See, eg, *ibid* ss 95(2)(b), 97(3)(b).

Access by adopted children

- 16.67 A relevant authority cannot disclose any information to an adopted child under 18 who applies for access, unless their adoptive parents agreed to the making of the application.⁷⁹
- 16.68 VANISH and ARMS (Vic) submitted that adoptive parents' agreement should not be required and children should be entitled to information in the 'open adoption era'.⁸⁰
- 16.69 The current provision is inconsistent with the right of donor-conceived children to apply to the Registrar of BDM and receive information about the donor under the ART Act.⁸¹ The Registrar must disclose identifying information to the child if:
- their parent or guardian consented to the making of the application or
 - a counsellor provided counselling to the child and assessed the child as 'sufficiently mature to understand the consequences of the disclosure'.⁸²
- 16.70 These limitations do not apply to applications for non-identifying information: the Registrar must disclose non-identifying information to the child.⁸³
- 16.71 The ART Act was enacted following a report by this Commission, which stated:
- The commission believes that children who want to obtain information about donors, whether identifying or non-identifying, should be able to access that information without the need for the consent or assistance of their parents. Many children become particularly curious about donors and other issues concerning their identity in their early teenage years.
- We recommend that a child be able to apply for information about a donor at any age, but that the release of the information should remain subject to an assessment by a counsellor that the child has sufficient maturity to understand the nature of the information and the possible consequences of making contact with the donor.⁸⁴
- 16.72 The Commission's conclusion was informed by advice from John Tobin, a law professor at the University of Melbourne, that making a child's access to information conditional on their parents' consent is:
- 'incompatible' with the child's right to 'receive information identifying his or her biological parents' under article 7 of the United Nations *Convention on the Rights of the Child* (CRC)
 - 'an unnecessary obstacle for a child with sufficient maturity to secure the realisation of his or her right to obtain identifying information'.⁸⁵
- 16.73 The situations of adopted and donor-conceived children are analogous.⁸⁶ Adopted children should have the same right to apply for and receive information under the Adoption Act as donor-conceived children have under the ART Act. This would uphold children's rights to equality under the Charter⁸⁷ and their right to know their natural parents under article 7 of the CRC.⁸⁸

79 Ibid s 94(2).

80 Submissions 34 (VANISH), 39 (ARMS (Vic)). VANISH submitted there might be exceptional circumstances, for example safety reasons, where a child should not be given information without their adoptive parents' consent.

81 *Assisted Reproductive Treatment Act 2008* (Vic) ss 56, 57, 59, as amended by the *Assisted Reproductive Treatment Amendment Act 2016* (Vic) ss 13, 16, 18; s 3 (definition of 'child').

82 *Assisted Reproductive Treatment Act 2008* (Vic) s 59, as amended by the *Assisted Reproductive Treatment Amendment Act 2016* (Vic) s 18.

83 *Assisted Reproductive Treatment Act 2008* (Vic) s 57, as amended by the *Assisted Reproductive Treatment Amendment Act 2016* (Vic) s 16.

84 Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption*, Report No 12 (2007) 157, Recommendation 95.

85 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, 2004) 35, 46.

86 Ruth McNair, *Outcomes for Children Born of A.R.T in a Diverse Range of Families* (Victorian Law Reform Commission, 2005) 39–41; Law Reform Committee, Parliament of Victoria, *Inquiry into Access by Donor-Conceived People to Information about Donors* (2012) 38, 60–1; Sonia Allan, 'Psycho-social, ethical and legal arguments for and against the retrospective release of information about donors to donor-conceived individuals in Australia' (2011) 19 *Journal of Law and Medicine* 354, 361.

87 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3).

88 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Recommendation

- 80** The new access to information scheme should enable an adopted child under 18 years of age to receive, on application:
- a. non-identifying information about their natural parents without needing the agreement of their adoptive parents
 - b. information disclosing the identity of their natural parents, either:
 - i. with their adoptive parents' agreement, or
 - ii. after receiving counselling from a counsellor who assesses the child as sufficiently mature to understand the consequences of the disclosure.

Access by the parties to the adoption where the child is under 18

16.74 A further limitation on adopted children's access to information is that a relevant authority cannot disclose information that may identify the natural parents to an adopted child, or to their adoptive parents, unless the authority obtains written consent from the natural parent.⁸⁹

16.75 These provisions are relevant where the adopted child and adoptive parents do not have contact with the natural parents and do not know their full names. This still occurs under open adoption, as an adoptive mother told the Commission:

[An] anomaly in the system is that the birth parents and adoptive parents are only given each other's first names and do not exchange addresses (although obviously over time that is likely to change if there is ongoing contact).

...

For example in our case we have two first names and a mobile number which no longer works. We have no way to have contact with our child's birth parents even though he wants to see them and we would like to have regular contact. We have kept our details up to date with DHHS and write them a letter annually which gets placed on the file, but with a bit more information we could possibly continue contact.⁹⁰

16.76 Adopted children and adoptive parents who apply to relevant authorities for access to information about the natural parents generally only receive non-identifying information. FIND responded to four applications from adopted children and 67 applications from adoptive parents between July 2009 and July 2013.⁹¹

16.77 The current scheme operates inconsistently with the child's right to know the identity of their natural parents under article 7 of the CRC and does not meet their need for this information. As Patricia Harper submitted:

research has amply demonstrated the importance to a child—and particularly to the development of their sense of self identity—of having information about and contact with their parents, siblings, grandparents and extended family members.⁹²

⁸⁹ *Adoption Act 1984* (Vic) ss 94(3), 98(2).

⁹⁰ Submission 58 (Name withheld).

⁹¹ Department of Health and Human Services, Victoria, *Data Collections: Response to Information Request from the Victorian Law Reform Commission*, provided to the Commission 29 July 2016, 5 August 2016. The ages of the adoptive parents' children at the time of the applications is not known.

⁹² Submission 57 (Patricia Harper).

- 16.78 Access to this information is particularly important during adolescence.⁹³ In 2014–15, three people aged 18–19 and seven people aged 20–24 applied for identifying information,⁹⁴ demonstrating their need for the information as they entered adulthood.
- 16.79 A major theme of this report is that greater openness is needed in Victorian adoptions.⁹⁵ The Commission considers that children who are adopted in future and those who have been adopted and are still under 18 need easier access to identifying information about their natural parents. This need outweighs the interests of natural parents who wish to continue to keep their identities private.
- 16.80 In Chapter 6, the Commission recommends that integrated birth certificates showing the names of both the adoptive parents and natural parents be introduced in Victoria.⁹⁶ It further recommends that the certificates be available to adopted children on the terms proposed in Recommendation 80 above.⁹⁷ This means that, if the recommendations are implemented, the natural parents' identities will be disclosed to the child and the adoptive parents.⁹⁸ Corresponding changes should be made to the access to information scheme.
- 16.81 The Commission sees no reason why, in future adoptions, the original birth certificate should not be provided to the adoptive family when the adoption order is made. As well as upholding children's rights under article 7 of the CRC, this may encourage open adoption arrangements between the adoptive family and natural parents.
- 16.82 Children who have been adopted under the Adoption Act are not entitled to have access to their original birth certificate until they turn 18.⁹⁹ This age restriction should be removed, consistently with Recommendation 80.
- 16.83 Adoptive parents should be able to obtain a copy of the original birth certificate, on their child's behalf while the child is under 18, to enable them to support their child to understand their origins and identity.¹⁰⁰ In 2010, adoptive parents in New South Wales were given access to their child's original birth certificate to 'enable adopted children to have an accurate picture of their identity from an early age'.¹⁰¹
- 16.84 Natural parents' access to information about the identities of the adoptive parents and whereabouts of the adopted child is currently subject to the adoptive parents' consent.¹⁰² A relevant authority must also consider the wishes of the child and may withhold any information to give effect to them.¹⁰³
- 16.85 VANISH submitted that:
- mothers and fathers (if living) should have access to information about their child, unless there are exceptional circumstances as to why this should not be the case (e.g. it is deemed unsafe to do so).¹⁰⁴
- 16.86 The Commission considers that natural parents are entitled to know the names of the adopted child and adoptive parents. It is not appropriate that adoptive parents control the disclosure of this information. Their consent should not be required if a natural parent

93 John Tobin, *The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission, 2004) 46; Ruth McNair, *Outcomes for Children Born of A.R.T in a Diverse Range of Families* (Victorian Law Reform Commission, 2005) 40; Adoption Legislative Review Committee, Family and Children's Services, Western Australia, *Final Report: A New Approach to Adoption* (1991) 80.

94 Department of Health and Human Services, *Data Collections for Australian Institute of Health and Welfare, Adoptions Australia (2014–15)*, provided to the Victorian Law Reform Commission on 29 July 2016.

95 See in particular Chapter 4.

96 Subject to security and cost implications: Recommendation 24.

97 See Recommendation 25.

98 The Commission also recommends in Chapter 4 that, before a child is placed with the prospective adoptive parents, the natural parents and prospective adoptive parents negotiate an adoption plan for contact arrangements after the adoption.

99 *Adoption Act 1984* (Vic) ss 73(3), 92(2).

100 This is consistent with the BDM Access Policy that enables all parents to have access to their child's birth certificate, on the child's behalf, where they are under 18: Births, Deaths and Marriages Victoria, Department of Justice and Regulation, Victoria, *Access Policy* (23 March 2015) 7.4.0 <<http://bdm.vic.gov.au/utility/about+bdm/legislation+and+policies/>>.

101 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 September 2008, 10111, (Linda Burney, Minister for Community Services).

102 *Adoption Act 1984* (Vic) s 95(2)(a)(ii).

103 *Ibid* s 95(2)(a)(i), (b).

104 Submission 34 (VANISH).

seeks information that identifies or may identify the adopted child or adoptive parents. In accordance with Recommendation 79 above relating to notification, the Secretary should make all reasonable efforts to notify the adoptive parents before the information is released to the natural parent.

- 16.87 In addition, consistently with the recommendations made in Chapter 3, the child should have the opportunity to express their views about the disclosure of the information. The Secretary should seek the child's views before the information is disclosed and convey those views to the natural parent.
- 16.88 The Commission recognises that information about a person's identity can enable a person to discover their whereabouts. The privacy protections in the new scheme should ensure that the Secretary has the power not to disclose information that identifies or may identify the adopted person or adoptive parents to a natural parent or anyone else where this may give rise to a risk to the safety or wellbeing of the adopted person or adoptive family.

Recommendations

- 81** The Adoption Act should provide that, after an adoption order is made, a copy of the child's original birth certificate is issued to the adoptive parents.
- 82** The new access to information scheme should enable:
- adopted children to obtain the child's original birth certificate and other information which identifies or may identify the natural parents without the natural parents' consent
 - adoptive parents to obtain the child's original birth certificate (consistently with the BDM access policy) and other information which identifies or may identify the natural parents without the natural parents' consent
 - natural parents to obtain information which identifies or may identify the adopted child and adoptive parents without the adoptive parents' consent. Before disclosing the information to the natural parent, the Secretary should seek the child's views and communicate them to the natural parent.

Access by natural relatives

- 16.89 While the Adoption Act recognises that natural grandparents, siblings, uncles and aunts have needs for information about their adopted relative, it only permits identifying information to be disclosed to them in limited circumstances. A relevant authority cannot disclose information revealing the identity of the adoptive parents or whereabouts of the adopted child unless it has obtained written consent from the adoptive parents, considered the child's wishes, and satisfied itself that circumstances exist which make the disclosure desirable.¹⁰⁵
- 16.90 These limitations mean that, in practice, natural relatives generally only receive non-identifying information about an adopted person. Comments were made that grandparents and other relatives should have greater access to information.¹⁰⁶

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¹⁰⁶

Adoption Act 1984 (Vic) s 97.

Submissions 11a (Grandparents Victoria Inc./Kinship Carers Victoria), 20 (Name withheld), 21 (Name withheld), 29 (Connections UnitingCare).

- 16.91 The current provision does not appear to meet the needs of natural relatives. Approximately 3300 natural relatives are registered on Victoria's adoption information register.¹⁰⁷ Between July 2009 and July 2013, FIND received 680 applications for non-identifying information from natural relatives.¹⁰⁸ It is likely that many applicants were seeking identifying information and perhaps contact with the adopted person. VANISH told the Commission:
- There are many reasons why a natural relative might want information and/or to contact an adopted person or a natural parent. 'Just wanting to know' is the most common reason cited, but there are also more practical reasons—such as disclosing life threatening medical information, or the applicant ... would like to find the adopted person (ie their sibling, grandchild or nephew/niece).¹⁰⁹
- 16.92 As discussed in Chapter 4, siblings have a particular need for contact with and information about each other.
- 16.93 The Commission considers the current provision is unduly restrictive. Natural relatives' access to identifying information about an adopted relative should be made easier, to reflect their needs for the information, especially those of grandparents and siblings, and also to enable adopted people to have contact with their family of origin.
- 16.94 The requirement that a relevant authority must be satisfied that the circumstances justify disclosure of identifying information to a natural relative is unnecessary and should be removed.
- 16.95 The Commission considered whether consent requirements should be retained. VANISH submitted that it is important that the consent of both the adopted person and natural parent be sought. It told the Commission about situations, 'in both closed adoption and open adoption', where an adopted person and natural parent have become 'isolated and disconnected from each other' because 'well-meaning relatives' have made contact with the adopted person against the natural parent's wishes.¹¹⁰
- 16.96 Another view was that a grandparent should have access to information about the adopted person on the same terms as those which apply to an adopted person's access to information about the grandparent.¹¹¹ An adopted person who is 18 years old or over can receive identifying information about a natural relative without their consent.¹¹²
- 16.97 The Commission is not in a position to reach a conclusion, because it did not receive any evidence from adopted people on this question. It should be considered in the design of the new scheme. The Commission notes that the records of an adoption concern the adopted person and natural parent foremost. There is a question whether natural relatives should be entitled to all of this information, as opposed to information that simply identifies the adopted person. VANISH proposed that natural relatives should have differing levels of access to information, according to their connection to the adopted person. It proposed that the Adoption Act specify a 'hierarchy of rights', whereby the natural relatives most closely affected by the adoption—grandparents and siblings—have greater access to information than other relatives, such as uncles and aunts.¹¹³ A model like this may be appropriate. The degree of access and specific information that should be available to applicants under the new access to information scheme should be reviewed and decided in the design of the scheme.

107 Department of Health and Human Services, Victoria, *Data Collections: Response to Information Request from the Victorian Law Reform Commission*, provided to the Commission 29 July 2016, 5 August 2016.

108 Ibid.

109 Submission 34 (VANISH).

110 Ibid.

111 Submission 29 (Connections UnitingCare).

112 *Adoption Act 1984* (Vic) s 93.

113 Submission 34 (VANISH).

- 16.98 The Commission considers that the conditions which currently apply to applications where a child is under 18 are appropriate. Currently, a relevant authority cannot release identifying information to a natural relative unless it has obtained written consent from the adoptive parents and considered any wishes expressed by the child. In this situation, the consent requirement appropriately respects the privacy of the adoptive family. As discussed above, the child should have the opportunity to express their views on the natural relative's application for the information (regardless of the whether the adoptive parents give their consent to disclosure of the information). The Secretary should seek the child's views before any information is disclosed and convey their views to the natural relative.

Recommendation

- 83** The new access to information scheme should provide natural relatives with easier access to information that discloses the identity of an adopted person who is 18 or older, including by removing the current requirement that a relevant authority must be satisfied that circumstances exist which make disclosure of the information desirable.

Access to medical information

- 16.99 One reason some adopted people seek information under the Adoption Act is to obtain information about their family medical history.
- 16.100 A relevant authority can provide medical information that is contained in the records relating to the adoption.¹¹⁴ Typically, information in the records includes information about the adopted person's birth (such as weight, delivery and time) and about natural parents' medical conditions.¹¹⁵ FIND informed the Commission that information about conditions or events which may have a genetic component, such as mental illness or miscarriages, is provided to adopted people.¹¹⁶
- 16.101 Unless an adopted person is in contact with their natural parents or natural relatives, they may not have any way of obtaining additional or up-to-date family medical history information. Generally, a person's medical information cannot be disclosed to anyone else without their consent or authorisation.¹¹⁷
- 16.102 One person proposed that FIND might be able to help an adopted person obtain medical history information, particularly where a natural parent does not want to have contact with the adopted person.¹¹⁸ He suggested that FIND might contact the natural parent to ask for the information and pass it on to the adopted person. Similar mechanisms are available in other states.¹¹⁹
- 16.103 The approach taken in Queensland provides a useful model for facilitating access to information to adopted people, natural parents and natural relatives. In Queensland, the chief executive may:
- contact a natural parent of an adopted person to obtain information about their medical history or a natural relative's medical history
 - disclose to an adopted person information about the medical history of a natural parent or natural relative

¹¹⁴ *Adoption Act 1984* (Vic) s 89.

¹¹⁵ Email correspondence from the Department of Health and Human Services, to the Commission, 28 November 2016.

¹¹⁶ *Ibid*; Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

¹¹⁷ *Health Records Act 2001* (Vic).

¹¹⁸ Consultation 11 (Trevor Smith).

¹¹⁹ See, eg, *Adoption Act 1994* (WA) s 109.

- disclose to a natural parent or natural relative information about the adopted person's medical history that relates to a condition that may have been inherited from a natural relative.¹²⁰
- 16.104 A person contacted is not required to give the information requested.¹²¹ The chief executive can only disclose identifying information if:
- the Act permits the chief executive to give the identifying information and the person who provided the information has not asked the chief executive not to disclose the information, or
 - the chief executive is satisfied there is an unacceptable risk that a person's health may be significantly adversely affected if the information is not given or there are other exceptional circumstances in which the disclosure is justified.¹²²
- 16.105 At the request of a person who is an adopted person, natural parent or other relative of an adopted person, the chief executive may give the information to a medical practitioner nominated by the person instead of giving it directly to the person.¹²³

Recommendation

- 84** The new access to information scheme should provide a means by which the Secretary may facilitate the exchange of non-identifying medical information between adopted people and their natural parents and natural relatives.

Access to information about unnamed fathers

- 16.106 A common problem in adoptions made before 1984 is that fathers were not identified and therefore not named on children's birth certificates.¹²⁴ Consequently, many adopted people, including some who consulted with the Commission, do not know their fathers' names.¹²⁵ This problem still occurs.¹²⁶
- 16.107 Under the Adoption Act, an adopted person may apply to a relevant authority for access to information about their natural parents. A 'natural parent' is a person named as a parent in the birth registration entry relating to the adopted person.¹²⁷ The Adoption Act specifies when a man not named in the birth registration entry is recognised as an adopted person's father.¹²⁸
- 16.108 If the adoption records contain information about a man who may be the adopted person's father but does not meet the definition of 'natural parent', the relevant authority may not be able to disclose the information to the adopted person.
- 16.109 Recent amendments to the Queensland *Adoption Act 2009* (Qld) enable an adopted person to receive information in the records about a man who may be the person's father but does not meet the Act's definition.¹²⁹ The chief executive must give the person any information held by the chief executive about the man's identity, with a notice stating that the identity of the person's natural father is not confirmed. The chief executive may include reasons if appropriate.

120 *Adoption Act 2009* (Qld) ss 276(1)–(3).

121 *Ibid* s 276(8).

122 *Ibid* s 276(4).

123 *Ibid* s 276(6).

124 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 12, 249, 252–4; Submission 57 (Patricia Harper).

125 See Chapter 8.

126 Consultation 13 (Roundtable with approved adoption agencies).

127 *Adoption Act 1984* (Vic) s 82 (definition of 'natural parent').

128 *Ibid*.

129 *Adoption Act 2009* (Qld) ss 256A, 263A.

- 16.110 The Commission considers a measure like this may help some adopted people to trace their fathers.

Recommendation

- 85** The new access to information scheme should enable the Secretary to give to an adopted person, on request, information contained in the records relating to the adoption concerning the identity of a man who may be the person's natural father but does not meet the definition of 'natural parent' currently set out in section 82 of the Adoption Act. The Secretary should be required to give the person a notice stating that the identity of the person's natural father is not confirmed and, if appropriate in the circumstances, the reasons why the information is not confirmed.

Counselling

- 16.111 Access to information under Part VI is generally available only if the applicant has attended an interview with an approved counsellor.¹³⁰
- 16.112 In practice, the counsellor explains the rights of access under the Adoption Act and how people can be affected by learning information about an adoption.
- 16.113 Different views about the requirement to attend an interview were expressed in consultations and submissions. Although the provision applies to anyone who applies for access, the comments received concerned the effects of the requirement on an adopted person.
- 16.114 VANISH told the Commission:
- ... many adopted people report the application and release of information processes to be disempowering; they report feeling vulnerable and upset that they are not considered 'fit' or 'responsible' enough to receive their records without the mandatory interview.¹³¹
- 16.115 VANISH submitted that the interview should be optional.¹³² Another person submitted that adopted people 'should not have to undergo a counselling interview' but rather should be provided with their records without delay.¹³³
- 16.116 Other views were more positive. An adopted person described how information can affect people and that there can be a need for continuing support:
- Parties to the release of adoption information should be offered free, on-going counselling as this process can be very traumatic. The impact of the release of information may not be obvious for many years. Changes in circumstances for an adoptee (such as having your own children) can trigger on-going mental health problems related to their own unresolved adoption issues.¹³⁴
- 16.117 Relevant authorities told the Commission that the interviews are valuable.¹³⁵ Connections UnitingCare submitted that the interview is necessary 'for the individual to gain an understanding [of] the social, historical and political context of records'.¹³⁶

¹³⁰ *Adoption Act 1984* (Vic) s 87. The requirement does not apply if the adopted person has already exchanged information with 'another person referred to in the original birth certificate relating to the adopted person' that may identify that person or a relative of the adopted person.

¹³¹ Submission 34 (VANISH).

¹³² Ibid.

¹³³ Submission 20 (Name withheld).

¹³⁴ Submission 7 (Name withheld).

¹³⁵ Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

¹³⁶ Submission 29 (Connections UnitingCare).

- 16.118 It is apparent that the key issue is not whether an interview may be useful, but that it is mandatory.
- 16.119 The Commission considers that the interview should be available to all applicants but it should not be mandatory. It is reasonable to expect that whether an applicant will understand the information and how well they will cope with learning the details it contains, will depend upon their individual circumstances and the type and content of the information.
- 16.120 An applicant who has not seen the information may not realise that they will need help in understanding and coming to terms with what the information reveals. The information and opinions expressed in the records, particularly those created when the adoption process was shrouded in secrecy, can be harsh, unfair, inaccurate and hurtful.¹³⁷ Even merely factual material that is expressed accurately and without judgment can be distressing to learn if unexpected. For this reason, the Commission does not consider it would be prudent to remove the requirement without placing an obligation on the Secretary to alert the applicant where, given the content of the information, there is a risk to the applicant's health and wellbeing upon being given access to it.¹³⁸ This might include situations where the information indicates that:
- an adopted person was conceived as a result of incest or a sexual assault of his or her natural mother
 - an adopted person has an hereditary condition seriously affecting the current, or which could seriously affect the future, physical or mental health of the adopted person or any descendant of the adopted person.¹³⁹

Recommendation

- 86** The current requirement for an applicant for access to information to be interviewed by an approved counsellor in section 87 of the Adoption Act should be replaced with an obligation on the Secretary to:
- a. offer applicants counselling before providing them with access to information
 - b. advise an applicant if the information could reasonably be expected to be distressing to the applicant.

Review of decisions

- 16.121 As discussed at the beginning of the chapter, the modernisation of the access to information scheme provides an opportunity to introduce features that can ensure that:
- the scheme contains transparent information management processes
 - decision makers are accountable for how they respond to requests for access to adoption information.
- 16.122 These features should include the establishment of avenues for the internal and external review of decisions about those requests. No such avenues are provided by the Adoption Act.

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Submission 34 (VANISH).
See, eg, *Adoption Regulation 2015* (NSW) reg 105.
Ibid reg 105(2).

Internal review

- 16.123 An internal review mechanism provides an inexpensive means for an applicant to have a decision reviewed. It can also be a quality assurance measure. It may identify the need to provide more training, guidance or resources or to take other action to improve the consistency of decisions made and the efficiency with which access requests are handled. An internal review would be a prerequisite to seeking external review.
- 16.124 There are many examples of internal review procedures in Victorian government administration. DHHS already has them in place for the review of its decisions under the Freedom of Information Act and other legislation. The Commission has not formed a view about the process that should apply to review of decisions about access to information under the Adoption Act, as it considers that this is a matter to be addressed in the design of the new access to information scheme.

External review

- 16.125 A person whose request for access to information is declined either because the necessary agreement or consent by a person to whom the information relates was not obtained, or because they are not entitled to obtain the information under the Act, may apply to the County Court for an order permitting access.¹⁴⁰ In these cases, the Court may permit the information to be released if 'it is in the best interests of the applicant that the information be given' and 'special circumstances exist which make it desirable' to release the information.¹⁴¹
- 16.126 This procedure is not expressly a means for reviewing the relevant authority's decision but does enable the applicant to challenge the result. The Commission is aware of only one application being made to the County Court, and it resulted in the applicant being granted access. This cannot be seen as a measure of the level of applicants' satisfaction with information decisions. Going to court is a formal, intimidating and expensive experience.
- 16.127 A more accessible and less costly alternative should be available. In some states and territories, decisions about access to adoption information can be reviewed externally by administrative tribunals, after being reviewed internally by government decision makers.¹⁴²
- 16.128 VCAT is the appropriate external review body in Victoria because it:
- currently has power to review decisions about the assessment of people applying for approval to adopt¹⁴³
 - has expertise in matters concerning release of information, through reviews of decisions under the Freedom of Information Act.¹⁴⁴

Recommendation

- 87** Decisions of the Secretary under the new access to information scheme relating to the disclosure of information should be subject to internal review within the Department of Health and Human Services and external review by the Victorian Civil and Administrative Tribunal.

¹⁴⁰ *Adoption Act 1984* (Vic) s 99.

¹⁴¹ *Ibid.*

¹⁴² *Adoption Act 1993* (ACT) pt 7A; *Adoption Regulation 1993* (ACT) reg 30, sch 2 items 5–7; *Adoption Act 2000* (NSW) ch 10; *Adoption Act 1988* (Tas) s 86A–86C; *Adoption Act 1994* (WA) ss 110–13.

¹⁴³ *Adoption Act 1984* (Vic) s 129A.

¹⁴⁴ *Freedom of Information Act 1982* (Vic) s 50.

The adoption information register

- 16.129 The Adoption Act requires DHHS and each approved agency to keep an Adoption Information Register.¹⁴⁵ People who are entitled to apply for information under the Adoption Act are able to ask for their name, contact details and preferences about exchanging information with anyone else on the register, either currently or in the future, to be recorded in it.
- 16.130 Name and address information on the register must not be disclosed without the person's consent, unless disclosure is otherwise authorised by the Act.¹⁴⁶ This means that if someone has a right to obtain the information without the consent of the person concerned, it will prevail over any wishes by that person that the information be kept confidential.
- 16.131 The Commission did not receive any information from the community about the effectiveness of the register.
- 16.132 In practice, the register does not operate as conveyed by the relevant provisions of the Adoption Act:
- The information recorded on the register is more detailed and, if the person wishes, may also contain health and education details and information about the circumstances surrounding the adoption.¹⁴⁷
 - Information about people applying for access to information is routinely entered into the register by FIND rather than only on application.¹⁴⁸
 - The information is cross-matched and verified against electoral records (excluding silent electors), on an ad hoc basis at FIND's request.¹⁴⁹
 - Information is included about people who are not eligible to apply for information under the Adoption Act but who would like to provide information in case of future registration by an adopted person.¹⁵⁰
- 16.133 Currently, the purpose of the register is not clear, particularly its relevance to the decisions being made about providing access to information. If the register were being established today, in accordance with the requirements of contemporary legislation regarding the management of personal information, the relevant statutory provisions would specify:
- why it was established
 - what the information may be used and disclosed for
 - to whom the information is normally disclosed
 - how those on the register can correct or remove the information if they wish.
- 16.134 The Commission considers that the new access to information scheme should specify the purpose of the register and provide accurate and complete details of its operation. These details would include, for example:
- the scope of information it may contain
 - who may apply to have their details recorded
 - the discretion (if any) of the Secretary to include additional information or expand the eligibility criteria for those who may apply to be on the register.

¹⁴⁵ *Adoption Act 1984* (Vic) s 103.

¹⁴⁶ *Ibid* s 103(4).

¹⁴⁷ Department of Health and Human Services, Victoria, *Access to Information about an Adoption: Information Sheet for Adopted Persons, Natural Parents and Other Family* (2015) 4 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/national-principles-in-adoption-1997>>.

¹⁴⁸ Department of Human Services, Victoria, *Adoption Records – Family Information Networks and Discovery* (9 January 2017) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/national-principles-in-adoption-1997>>.

¹⁴⁹ *Ibid*.

¹⁵⁰ Department of Health and Human Services, Victoria, *Access to Information about an Adoption: Information Sheet for Adopted Persons, Natural Parents and Other Family* (2015) 4 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/national-principles-in-adoption-1997>>.

- 16.135 VANISH told the Commission that agencies should be required to convey the wishes a person registers about disclosure of information and receiving contact from the person who is seeking information.¹⁵¹ The Adoption Act does not require this but the Commission understands it ordinarily happens in practice.
- 16.136 The Commission considers that the Adoption Act should expressly require the Secretary to convey a person's registered wishes. This would formalise existing practice, reflect what was intended when the legislation was introduced,¹⁵² provide clarity and give a person assurance that their wishes will be passed on to the other party, even though it may not prevent the release of information.

Recommendation

- 88** The provisions in the new access to information scheme concerning the Adoption Information Register should:
- specify the purpose of the register
 - provide accurate and complete details of its operation
 - require the Secretary to convey to a person who has requested access to information about a person whose details are on the register, the registered person's wishes about the disclosure of information and being contacted.

Power to collect 'current information' from BDM

- 16.137 As well as facilitating access to information in adoption records, FIND helps people to locate and make contact with family members.¹⁵³ It has facilitated contact between people in nearly 12,500 cases.¹⁵⁴ This role is not required by or clearly reflected in the Adoption Act.
- 16.138 The Commission was told that access to 'current information' in the BDM register is often needed to find family members who have changed their name, for example after marrying.¹⁵⁵ Comments were made that it is unclear whether BDM can provide this information to a relevant authority.¹⁵⁶
- 16.139 As discussed above, the Secretary may request any agency, body or person to provide information to the Secretary, where the information to which an application relates is not contained in records in the possession or under the control of the Secretary.¹⁵⁷ An agency, body or person must comply with a request from the Secretary 'so far as [they are] able to do so'.¹⁵⁸
- 16.140 The Adoption Act makes clear that the Secretary's power to collect information includes the power to ask the Registrar of BDM for any information contained in the BDM Register about the natural parents or natural relatives, if requested by the adopted person.¹⁵⁹

151 Submission 34 (VANISH).

152 Adoption Legislation Review Committee, Parliament of Victoria, *Report of Adoption Legislation Review Committee* (1983) 92; Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4250 (Pauline Toner, Minister for Community Welfare Services).

153 Department of Human Services, Victoria, *Adoption Records - Family Information Networks and Discovery* (9 January 2017) <<http://www.dhs.vic.gov.au/for-individuals/applying-for-documents-and-records/adoption-and-family-records/adoption-and-family-information-networks-and-discovery>>.

154 As at July 2016. Department of Health and Human Services, Victoria, *Data Collections: Response to Information Request from the Victorian Law Reform Commission*, provided to the Commission 29 July 2016, 5 August 2016.

155 Submission 34 (VANISH); Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

156 Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

157 *Adoption Act 1984* (Vic) s 90(1)(ii).

158 *Ibid* s 123.

159 *Ibid* ss 90(2)–(3). A natural relative is a grandparent, brother, sister, uncle or aunt of the adopted person, where the relationship is of the whole-blood or half-blood.

It is silent about other types of application, but the Secretary's broad information-collection power may include the power to ask the Registrar for any information in the BDM Register about the adopted person, if requested by a natural parent.

- 16.141 It is important that the Secretary's power to collect information from the BDM Register and the Registrar's obligations in response to a request from the Secretary are clearly defined, because the Registrar is subject to obligations under the *Births, Deaths and Marriages Registration Act 1996* (Vic) (BDMR Act) and other legislation. When providing information from the BDM Register, the Registrar must 'as far as practicable' protect the person to whom the information relates from 'unjustified intrusion on their privacy'.¹⁶⁰
- 16.142 Access to other people's birth and marriage certificates was a contentious issue in consultations. A relevant authority stated that the information is necessary for it to be able to perform the authority's functions properly.¹⁶¹ VANISH told the Commission that natural parents cannot obtain the current information they need 'to locate their son or daughter'.¹⁶² Independent Regional Mothers Combined submitted:
- it must always be part of our law—that no person can obtain copies of another person's birth and marriage certificates WITHOUT THE PERMISSION of the person's name appearing on the certificate (this does not include original birth certificate of son/daughter as equality exists as both mother and son/daughter can obtain a copy of this certificate).¹⁶³
- 16.143 Under the Registrar's Access Policy,¹⁶⁴ provided the Registrar is satisfied that the person has an adequate reason for wanting the access:¹⁶⁵
- a person may be given access to another person's birth, change of name or marriage certificate with their written authority¹⁶⁶
 - a person's child may have access to their parent's birth, marriage or death certificate in specified circumstances.¹⁶⁷
- 16.144 The issue of access to people's birth, marriage and change of name certificates highlights the tension between the benefits of providing personal information to people affected by adoption and the privacy principles reflected in the BDMR Act and Access Policy. The issue is complex and concerns the Registrar of BDM, the Secretary of DHHS and the Privacy and Data Protection Commissioner. This tension should be resolved in the design of the new access to information scheme in a way that balances privacy principles with the needs of people affected by adoption.¹⁶⁸
- 16.145 Comments were also made to the Commission that adopted people should be able to obtain their original birth certificate direct from BDM, rather than through a relevant authority.¹⁶⁹ It is appropriate that this proposal be considered in the design of the new scheme.

¹⁶⁰ *Births, Deaths and Marriages Registration Act 1996* (Vic) ss 44, 48.

¹⁶¹ Consultation 14 (Roundtable discussion with agencies involved in providing adoption information).

¹⁶² Submission 34 (VANISH).

¹⁶³ Submission 24 (Independent Regional Mothers Combined).

¹⁶⁴ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 47; Births, Deaths and Marriages Victoria, Department of Justice and Regulation, Victoria, *Access Policy* (23 March 2015).

¹⁶⁵ *Births, Deaths and Marriages Registration Act 1996* (Vic) s 48.

¹⁶⁶ Births, Deaths and Marriages Victoria, Department of Justice and Regulation, Victoria, *Access Policy* (23 March 2015) 7.3.1.

¹⁶⁷ Ibid 7.5.0. For example, only a child of the marriage or a party to the marriage may be granted access to the marriage certificate and, if a party to the marriage is living, only with their written authority.

¹⁶⁸ The New South Wales *Adoption Act 2000* (NSW) and *Adoption Regulation 2015* (NSW) specifically give people access to other people's birth, death and marriage certificates: *Adoption Act 2000* (NSW) ss 133C, 133E, 133G, 134; *Adoption Regulation 2015* (NSW) regs 93, 95, 97, 99.

¹⁶⁹ Submission 34 (VANISH).

Conclusion

17. Conclusion

- 17.1 Adoption law and practice is complex and multi-layered. It has profound significance for those to whom it applies. Although adoption is no longer a common practice, it attracts enormous community interest, and widely divergent views about how it should operate.
- 17.2 The Commission was asked to consider the best interests of the child as paramount in decisions about adoption. Adoption has lifelong effects, so decision making must also consider the interests of the adopted person as an adult.
- 17.3 While the Commission accepts that adoption can provide permanency and stability to a child, it can also cause psychological and emotional harm to the child and their natural parents. There are also ongoing, intergenerational effects of changing a person's identity and severing their legal relationship with their family.
- 17.4 In this report the Commission has tried to ensure that the voices of adopted people are heard. It has made recommendations to facilitate greater openness in the adoption process, while providing for appropriate protection for those who may be at risk of harm. It addresses parties' need for professional and financial support, before and after the adoption.
- 17.5 The Commission expresses its appreciation of the substantial contribution to this report made by people with experience of, or affected by adoption; by organisations with responsibility for caring for vulnerable children; by adoption agencies and agencies that provide access to information about adoption, as well as professionals with specialist knowledge in adoption law and practice.
- 17.6 The Commission is pleased to have had the opportunity to contribute to modernisation and reform of this significant area of law.
- 17.7 The Commission commends this report to you.

Appendices

Appendix A: Submissions

- 1 Name withheld
- 2 Ellena Dorothy Helen Stewart Biggs
- 3 Leilani Hannah
- 4 Confidential
- 5 Confidential
- 6 Name withheld
- 7 Name withheld
- 8a Name withheld
- 8b Name withheld
- 9 Australian Adoptee Rights Action Group
- 10 Confidential
- 11a Grandparents Victoria Inc./Kinship Carers Victoria
- 11b Grandparents Victoria Inc./Kinship Carers Victoria
- 12 Dorothy Long
- 13 Dr Catherine Lynch JD
- 14 Samuel Morley
- 15 Jeremy Orchard
- 16 Name withheld
- 17 Name withheld
- 18 Dan Barron
- 19 Sharyn White
- 20 Name withheld
- 21 Name withheld
- 22 Confidential
- 23 Fae Cuff
- 24 Independent Regional Mothers Combined
- 25 National Association for Prevention of Child Abuse and Neglect
- 26 Adoption Origins Victoria Inc.

- 27 Institute of Open Adoption Studies, University of Sydney
- 28a Confidential
- 28b Confidential
- 29 Connections UnitingCare
- 30 Name withheld
- 31 Name withheld
- 32 Name withheld
- 33a Name withheld
- 33b Name withheld
- 34 VANISH
- 35 OzChild
- 36 Child & Family Services Ballarat Inc.
- 37 Permanent Care and Adoptive Families
- 38 Women's Forum Australia
- 39 ARMS (Vic)
- 40 Confidential
- 41 Adopt Change
- 42 Australian Association of Social Workers
- 43 Thomas Graham
- 44 Victorian Gay & Lesbian Rights Lobby
- 45 Dr Briony Horsfall
- 46 Australian Psychological Society
- 47 Youth Disability Advocacy Service
- 48 Victorian Council of Social Service
- 49 Office of the Public Advocate
- 50 Barnardos Australia
- 51 Law Institute of Victoria
- 52 Commission for Children and Young People
- 53 SNAICC—National Voice for our Children
- 54 Australian Christian Lobby
- 55 CREATE Foundation
- 56 Centre for Excellence in Child and Family Welfare Inc.
- 57 Patricia Harper
- 58 Name withheld
- 59 Karleen Gribble BRurSc PhD
- 60 Berry Street
- 61 Name withheld

Appendix B: Consultations

- 1 Bounce Youth Leaders (convened by Orygen: The National Centre of Excellence in Youth Mental Health)
- 2 Grandparents Victoria
- 3 Confidential
- 4 ARMS (Vic)
- 5 Roundtable with disability and mental health sector
- 6 Roundtable with Permanent Care and Adoptive Families
- 7 Bobby Richards
- 8 Harold Hall
- 9 Roundtable with legal sector
- 10 Confidential
- 11 Trevor Smith
- 12 Adoption Origins Victoria Inc.
- 13 Roundtable with approved adoption agencies
- 14 Roundtable discussion with agencies involved in providing adoption information
- 15 Roundtable with culturally and linguistically diverse representative agencies
- 16 Professor Meredith Temple-Smith
- 17 Rainbow Families Council and the Victorian Gay & Lesbian Rights Lobby
- 18 Fiona De Vries
- 19 Chrissie Davies
- 20 Brenda Coughlan, Spokesperson for Independent Regional Mothers
- 21 Roundtable with Aboriginal and Torres Strait Islander peak bodies and agencies
- 22 Fae Cuff
- 23 Wathaurong Aboriginal Co-operative
- 24 Australian Association of Social Workers
- 25 VANISH
- 26 Roundtable with groups and individuals representing children's interests

- 27 Australian Adoptee Rights Action Group
- 28 Hannah Penney
- 29 Staff at the Bendigo and District Aboriginal Co-operative
- 30 Jillian Ebbott
- 31 SS
- 32 Ann Jukes and Gabrielle Hitch
- 33 Confidential
- 34 Elaine Taylor
- 35 Confidential
- 36 Kylie Martens
- 37 Working Party for the Recognition of Torres Strait Islander Child Rearing Practices
- 38 Professor the Honourable Nahum Mushin, Adjunct Professor of Law, Monash University

Appendix C: NSW Government Guide to Drafting an Adoption Plan



GUIDE TO DRAFTING AN ADOPTION PLAN

Adoption Act 2000 (NSW) Section 46 – 51
Adoption Regulation 2015 (NSW) Clause 75 & 76

This guide is to be read in conjunction with the Fact Sheet 'Registration of Adoption Plans'.

What is an adoption plan?

An adoption plan supports a child to remain connected to their birth family and cultural origins.

An adoption plan is a plan agreed on by two or more of the parties to an adoption. The parties to an adoption are the child(ren), the proposed adoptive parents, a birth parent who has given consent to their child(ren)'s adoption, and may include the Secretary of the Department of Family and Community Services (FACS) or the Principal Officer of an Accredited Adoption Service Provider. A birth parent who has not given consent to the child(ren)'s adoption but who has agreed to the adoption plan is to be treated as a party to the adoption and adoption plan for the purposes of sections 46 - 51 and section 90 of the *Adoption Act 2000* ("The Act").

What can be included in the adoption plan?

The arrangements for contact between a child and their birth family including the exchange of information in relation to the child's medical background, development, important life events, the ways in which a child will be assisted to develop a healthy and positive cultural identity, and how they will maintain a connection with that heritage.

The adoption plan must contain:

- a statement of the means and nature by which contact between the child and the child's family and siblings is to be maintained, including people authorised to have contact with the child, purposes of the contact, frequency of contact and location of contact,
- details of the ways in which the child is to be assisted to develop a healthy and positive cultural identity and of ways in which links with the child's cultural heritage are to be fostered,
- a description of the type of information to be exchanged under the plan,
- a statement of the frequency of exchange of information,
- details of provision to be made for any financial and other assistance arrangements that the Secretary has agreed be included in the plan under section 201 (2) of the Act,
- a statement of the period for which the plan is to have effect.

For adoptions of children in out-of-home care, FACS is required to sign all adoption plans as FACS is responsible for post adoption payments and support (with the exception of matters managed by an agency with delegated parental responsibility).

How is an adoption plan developed?

An adoption plan should be negotiated between the child(ren), proposed adoptive parents and the birth family. Any expressed wishes by the child(ren) or birth parents must be taken into consideration. The adoption plan must suit the needs and best interests of the child(ren). The adoption plan should be realistic and where possible have been trialled throughout the planning phase.

It is important to remember that an adoption plan should reflect the individual circumstances of the particular case and tailored towards those individual circumstances. Consideration should also be given to whether separate maternal and paternal adoption plans should be prepared.

What happens to the adoption plan?

The adoption plan is filed with the child(ren)'s adoption application at the NSW Supreme Court. Pursuant to section 50 of the Act, an adoption plan may be registered. An adoption plan that is registered has effect, on the making of the adoption order, as if it were part of the order, thus being enforceable.

How is an adoption plan formally reviewed?

The adoption plan itself, depending upon how it is drafted, may have inherent flexibility to cater for different events which may arise over time. The Court has the power to review an adoption plan, if a party to the plan applies to the Court asking for a review.

- Please use the following format when drafting an adoption plan.
- Please remove any references in **blue**, **red** or sections in **black** that are not applicable to the child(ren)'s specific needs. Ensure all instructions including this box are removed off the final document.
- Please remove the Guide to Drafting an Adoption Plan document

MATERNAL / PATERNAL ADOPTION PLAN

This plan is in relation to contact arrangements between:

(delete or add any persons as necessary)

- //Child's Full Legal Name// ("//First Name//"), //date of birth//
- //Child's Full Legal Name// ("//First Name//"), //date of birth// (delete/add as needed)
- //First Name// and //First Name//, proposed adoptive parent(s) (Add surname where appropriate)
- //Full Legal Name// ("//First Name//"), mother
- //Full Legal Name// ("//First Name//"), father or putative father
- //Full Legal Name// ("//First Name//"), sibling or maternal/paternal half sibling; and
- //Full Legal Name// ("//First Name//"), maternal/paternal grandparents/aunt/uncle.

The parties to the adoption and this adoption plan are the subject child(ren), proposed adoptive parent(s), a birth parent(s) who has/have given consent to the child(ren)'s adoption, the Secretary, NSW Department of Family and Community Services or the appropriate Principal Officer (delete if not applicable). A birth parent who has not given consent to the child(ren)'s adoption but who has agreed to the adoption plan is to be treated as a party to the adoption and adoption plan for the purposes of sections 46 -51 and section 90 of the *Adoption Act 2000*.

It is agreed by the signatories to this plan, that this adoption plan is not to be deemed as giving consent for the adoption of //child(ren)'s first name//. (delete if the birth parent(s) relevant to this plan has given consent)

[Where matter is agreed to be registered include the following statement]

The parties, in consultation with //birth mother's first name// and/or //birth father's first name// have agreed to seek registration of this adoption plan.

PURPOSE OF THE PLAN:

It is acknowledged that these mutually agreed arrangements will support //child(ren)'s first name// with his/her/their development and assist him/her/them to be connected with and build on his/her/their knowledge of his/her/their birth family and his/her/their sense of identity. Birth family contact is an opportunity for maintaining connections between //child(ren)'s first name// and members of his/her/their birth family.

It is envisaged that the current arrangements will continue until //child(ren)'s first name// reaches //insert// years of age.

THE ARRANGEMENTS FOR CONTACT:

[The history of birth family contact is to be detailed in the Affidavit of Delegate/Principal Officer or Adoptive Applicant. A summary is not required to be included in this plan].

It is recognised that the nature of contact should be structured in such a way that will best meet //child(ren)'s first name//'s needs, taking into consideration at all times, his/her/their age, stage of development and any expressed wishes.

(a) Face-to-face contact:

Outlined under each of the following sub-headings is how face-to-face contact between //child(ren)'s first name//s and each birth family member will be maintained.

[Detail the: frequency; location; duration; who will attend; how contact will be arranged; and any supervision requirements. Contact can be as flexible or as prescriptive as is required in the particular circumstances. If a plan is to be registered, the provisions of the plan need to be clear and specific].

[Where there are no plans for contact consider including the following statement]

//Birth family member(s) name// has indicated that they do not wish for face-to-face contact with //child(ren)'s first name// at this time. Should they request contact at any time in the future, then face-to-face contact will occur as agreed between //child(ren)'s first name//, //PAP first name//, //PAP first name// and //Birth family member(s) name//.

(i) Birth Parents/Mother/Father

[Where child's birth mother or father has not had face-to-face contact for a significant period consider including the following statement]

//PAP first name// and //PAP first name// are supportive of contact occurring between //child(ren)'s first name// and //Birth mother first name// and/or //Birth father first name//. Contact arrangements will take into account //child(ren)'s first name//s age, development and expressed wishes.

//Birth mother first name// and/or //Birth father first name// may be asked to meet with //PAP first name// and //PAP first name// and/or provide some basic information about themselves including photographs. //PAP first name// and //PAP first name// can use this to assist //child(ren)'s first name// know about //Birth mother first name// and/or //Birth father first name//. Contact will occur as agreed between //PAP first name//, //PAP first name//, and //Birth mother first name// and/or //Birth father first name//.

[Where child's paternity is unknown, a statement must be included to outline what would occur should a putative father request contact and/or information. Consider including the following statement.]

//PAP first name// and //PAP first name// are supportive of //child(ren)'s first name// having information about his/her/their father should paternity be confirmed. Should a putative father come forward in the future he may be required to undergo DNA testing prior to any contact occurring. Contact arrangements will take into account //child(ren)'s first name//s age, development and expressed wishes. The father may be asked to meet with //PAP first name// and //PAP first name// and/or provide some basic information about himself including photographs. //PAP first name// and //PAP first name// can use this to assist //child(ren)'s first name// know about his/her/their father. Contact will occur as agreed between //child(ren)'s first name//s, //PAP first name//, //PAP first name// and the father.

[Where matter is agreed to be, or likely to be registered, include the following statement]

Failing these arrangements, contact is to occur on the //number// //day of week// of //months// at //time// for //number// hour/s at //insert location//.

For example: Failing these arrangements, contact is to occur on the third Saturday of March, June, September and December at 11.00am for 1 hour at Centennial Park, Sydney.

(ii) Siblings

[Include the following statement in all plans and detail how contact with the siblings will occur if known]

Should //child(ren)'s first name// have any siblings born following the making of an adoption order //PAP first name// and //PAP first name// agree to support and facilitate contact between them.

[Where siblings have not had face-to-face contact for a significant period consider including the below statement]

//PAP first name// and //PAP first name// are supportive of contact occurring between //child(ren)'s first name// and //sibling(s) first name//. Contact arrangements will take into account //child(ren)'s first name//'s age, development and expressed wishes. //sibling(s) first name// may be asked to meet with //PAP first name// and //PAP first name// and/or provide some basic information about themselves including photographs. //PAP first name// and //PAP first name// can use this to assist //child(ren)'s first name// know about //sibling(s) first name//. Contact will occur as agreed between //child(ren)'s first name//, //PAP first name//, //PAP first name// and //sibling(s) first name//.

(iii) Significant Others

(b) Telephone and electronic communication:

Outlined under each of the following sub-headings is how telephone and/or electronic communication between //child(ren)'s first name// and their birth family members.

[Detail the: frequency and type of contact e.g. telephone, email, Facebook, Skype etc. Contact can be as flexible or prescriptive as is required in the particular circumstances.]

[Where the child is too young for telephone/electronic contact include the following statement]

Due to //child(ren)'s first name//'s age telephone contact is not an appropriate method of contact at this time. It is recommended that telephone contact between //child(ren)'s first name// and //Name//, occur in the future when //child(ren)'s first name// is older and is able to communicate more clearly. This should occur as agreed between //PAP first name// and //PAP first name// and //Name//. Telephone calls between //child(ren)'s first name// and //Name// will be facilitated by //PAP first name// and //PAP first name//.

(i) Birth Parents/Mother/Father

(ii) Siblings

(iii) Significant Others

(c) Information exchange including photographs/gifts etc:

Outlined under each of the following sub-headings is how information will be exchanged between //child(ren)'s first name// and their birth family members.

[Detail what each participant is agreeing to send, receive and/or reply to including the type of information being exchanged and frequency eg. school reports, updated health/medical issues, information about significant events, exchange around birthdays Christmas period and school holidays.]

[Include the following statement where relevant]

//PAP first name// and //PAP first name// agree to contact the //Birth mother first name// and/or //Birth father first name// directly or via an agency in the event of //child(ren)'s first name// sustaining a serious illness, injury or in the event of death.

(i) Birth Parents/Mother/Father

(ii) Siblings

(iii) Significant Others

IDENTITY AND CULTURAL HERITAGE:

[Detail the cultural background of the child(ren), proposed adoptive parent(s) and each birth parent. Outline the ways in which the child(ren) will be assisted to develop a healthy and positive cultural identity and how they will maintain a connection with that heritage. This is not limited to, but may include: contact with significant family members and other people of this heritage, education, cultural

activities, food, language, music, art, dress style, totems or cultural practices specific to the child's family. Include details of what actions will be undertaken and by whom.]

[For Aboriginal or Torres Strait Islander children, these provisions should be made after consultation with a local, community-based and relevant Aboriginal or Torres Strait Islander organisation.]

RELIGIOUS UPBRINGING: (delete if not applicable)

[Detail the religious background of the child(ren), proposed adoptive parents and each birth parent. Outline the ways in which the child(ren) will be assisted to develop a healthy and positive religious identity. Include details of what actions will be undertaken and by whom.]

FINANCIAL ASSISTANCE: (delete if not applicable)

[Detail any contingency or specific financial arrangements that will support the child(ren)]

[For grandfathered OOHC Adoptions only - detail any financial assistance that the proposed adoptive parents require on the making of an adoption order (any financial support is to be pre-approved by way of a financial submission by the relevant FACS delegate)]

CONTACT DETAILS: (delete contacts that are not applicable)

//Proposed Adoptive Parent(s)//
//Postal Address//
//Email Address//
//Telephone or Mobile//

//Birth Mother/Father or Significant Other//
//Postal Address//
//Email Address//
//Telephone or Mobile//

FACS' Adoption Information Unit
Locked Bag 4028
Ashfield NSW 2131
(02) 9716 3005
1300 799 023 (toll free within NSW only)

//Name of relevant Agency or CSC//
//Address//
//Suburb, NSW Post Code//
//Phone Number//

CONCLUDING STATEMENTS:

If the people whom this plan relates to are in direct contact with each other, they need to advise each other of changes in their addresses and contact numbers as soon as possible.

It is the responsibility of each person whom this plan relates to, to advise FACS' Adoption Information Unit of changes in their address and contact numbers as soon as possible. (delete if not applicable)

Should there be any difficulties that arise in carrying out the adoption plan, please contact FACS' Adoption Information Unit. (delete if not applicable)

The adoption plan can be reviewed by the Court at the request of any of the parties to the plan.

SIGNATURES TO THE ADOPTION PLAN IN RELATION TO //CHILD'S FULL NAME//:

[Remove any names of people who will not be signing the final adoption plan. Signatures must occur on a page with text]

//Full Name of Child//

Date

//Full Name Birth Mother//

Date

//Full Name Birth Father//

Date

//Proposed Adoptive Parent//

Date

//Proposed Adoptive Parent//

Date

//Name//

Date

//Manager Casework or Name of Role//

//Insert CSC or Agency Name//

Delegate of the Secretary / Principal Officer

//Department of Family & Community Services// or //Accredited Adoption Service Provider Name//

(delete if not applicable)

Appendix D: Adoption Act 1994 (WA)

Schedule 2—Rights and responsibilities to be balanced in adoption plans

1. Infancy

- (1) A significant feature of the infancy stage is that the child needs to be able to trust others to care for and nurture the child. The child has the right —
 - (a) to be cared for and nurtured; and
 - (b) to develop attachment to the adoptive family without undue disruption by the birth parents.
- (2) Before consenting to the child's adoption, the child's birth parents have the right to make an informed and unpressured decision about the child's future. After consenting to the child's adoption, the child's birth parents have the right to negotiate as to the provision of information and the extent of any contact between the parties.
- (3) There is no right to adopt a child. The adoptive or prospective adoptive parent with whom the child is placed with a view to the child's adoption has the right to bond to the child.

2. Childhood

- (1) A significant feature of the childhood stage is the development of autonomy and initiative. The child has the right —
 - (a) to belong to a secure family system, extending to friends, schooling and neighbourhood activities; and
 - (b) to know about the adoption in a manner appropriate to the child and the child's stage of development.
- (2) The birth parents have a responsibility during this stage to respect the privacy of the child's adoptive family.
- (3) The adoptive parent has the right —
 - (a) to rear the child without undue disruption by the birth parents; and
 - (b) to family privacy,and a responsibility to inform the child of the adoption.

3. Adolescence

- (1) A significant feature of adolescence is the development of the child's sense of identity. The child has the right to resolve identity issues and is to be responsible for the effects of his or her actions on others if access to information is made available.
- (2) The birth parents have a responsibility to be aware of the child's needs when responding to requests for information about the child's origins.
- (3) The adoptive parent has the right —
 - (a) to rear the child without undue disruption by the birth parents; and
 - (b) to family privacy,and has a responsibility to support the child during any identity crisis and be responsive to the child's needs.

4. Adulthood

- (1) A significant feature of adulthood is forming and consolidating relationships. The child's right to information about the birth parents increases in importance as the child approaches adulthood.
- (2) The birth parents' right to information about the child increases in importance as the child approaches adulthood.
- (3) The adoptive parent's right to control the exchange of information and any contact between the child and the birth parents lessens as the child approaches adulthood.

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