



THE UNIVERSITY OF
SYDNEY

INSTITUTE OF OPEN ADOPTION STUDIES

VICTORIAN LAW REFORM COMMISSION

SUBMISSION: REVIEW OF THE ADOPTION ACT 1984

SUZANNE POPE

16 September 2016

2016/sequence number

In partnership with



INTRODUCTION

In December 2015 the Attorney-General, on behalf of the Victorian Government asked the Victorian Law Reform Commission to review Victoria's adoption laws and make recommendations to ensure they meet the needs of the children and families they affect.

On 10 August 2016 the Victorian Law Reform Commission published a consultation paper for the modernisation of the Adoption Act 1984 and the Adoption Regulations 2008. The consultation paper was developed by the Commission in response to a request from the Victorian Attorney-General. The Commission is asked to report by 28 February 2017.

ADOPTION ACT REVIEW - TERMS OF REFERENCE

The Terms of Reference for the consultation are:

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.

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

- ensure the best interests and rights of the child are the foremost consideration in any decision made under the Adoption Act
- 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
- uphold principles set out in the Charter of Human Rights and Responsibilities and the United Nations Convention on the Rights of the Child
- improve the operation of the Adoption Act and Adoption Regulations including, but not limited to:
 1. addressing any gaps in current information provisions
 2. clearly articulating legislative practice and procedural requirements, for example in relation to assessment of adoption applicants
 3. 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:

- intercountry adoption programs or commercial surrogacy: these matters are more appropriately considered at a national level
- 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
- 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.

RESPONSE TO THE CONSULTATION PAPER

This response is made on behalf of the Institute of Open Adoption Studies (the Institute). The Institute is an independent centre formed by a consortium from the University of Sydney and Barnardos Australia. The Institute is the first of its kind in Australia to be publicly funded and is being hosted by the Faculty of Education and Social Work.

The Institute objectives, first and foremost, are about children and their best interests, with a focus on matters relating to open adoption (involving contact between birth and adoptive families) for children and young people in out-of-home care (when reunification with their family is not appropriate).

The Institute's strategic vision is to bring about a positive change in the culture, policy, and practice of permanency planning in NSW so that open adoption is seen as a realistic, credible, and evidence-based option that provides a safe home for life for greater numbers of suitable children in NSW. The sole focus of the Institute will be for children who have been permanently removed from the care of parents by Children's Courts within NSW.

The Institute is cognisant of the diverse views concerning adoption and able to liaise with multiple internal and external stakeholders including researchers, Out of Home Care (OOHC) and adoption practitioners, the judiciary, and community members affected by adoption.¹

While adoption in one form or another has been occurring across human history, the formal adoption process sanctioned by the state is a more recent phenomenon.² Over time the focus of adoption has shifted from meeting the needs of the adopting adults to the welfare and best interest of the child. This shift in emphasis has required policy makers to ask the question; can adoption contribute to improving outcomes for children. There is the need to understand whether adoption ameliorates the impact of early adversity, and if it provides more stability and permanency than other forms of care.

This submission prepared by the Institute does not attempt to address all of the questions posed by the Law Reform Commission consultation draft. The response focuses on the adoption literature and available research evidence that may help to inform the enquiry.

NEED FOR EVIDENCE

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.

It is well known that children who remain with abusive and neglectful parents, and children who suffer institutional deprivation are at very high risk of seriously impaired psychosocial development.³ There has been a vast body of research generated by the interest in the interaction of nature and nurture questions posted by adoption. In general, children who are adopted, particularly as infants, compare favourably with normal populations of children.⁴ Brodzinsky (2006) found that the vast

¹ An account of the history of adoption practices in Australia can be found in Marshall A & McDonald M (2001) *The Many-sided Triangle: Adoption in Australia*, Melbourne University Press.

² Howe, D. (2009) *Nature, Nurture and Narratives*. International Advances in Adoption Research for Practice. John Wiley & Sons Ltd. 3-16

³ Howe, D. (2006) Developmental Attachment Psychotherapy with Fostered and Adopted Children. *Child and Adolescent Mental Health* 11(3) 128-134.

⁴ Howe, D. (1998) *Patterns of Adoption: Nature, Nurture and Psychosocial Development*. Blackwell Science, Oxford.

majority of adopted children were well within normal ranges of adjustment. Even older children tend to do well psychologically when adopted.⁵ However, there are significant qualifications. The earlier the age at which the child was first exposed to the maltreatment or deprivation, the more traumatic the experience and the longer the child lived under those adverse conditions, the less complete is the level of psychosocial recovery.⁶

In 2002 the United Kingdom (UK) the then Labour government passed *the Adoption and Children Act*. The Act encourages practitioners to focus on planning for permanence for 'looked after children' and to increase the number of children adopted, or otherwise placed permanently, from care.⁷ In the United States of America (USA), the *Adoption and Safe Families Act 1997*, provides that in making decisions about removing a child from or returning a child to the care of its parents, the child's health and safety are paramount. The federal government encourages adoption through providing funding incentives for states to improve their adoption rates, subsidies for those who adopted children, and requiring states to document their efforts to move children towards adoption.⁸

This increased emphasis in the UK and USA on adoption as a permanency placement option for children in public care has led to a rise in the amount and quality of research on adoption and other forms of permanent placement. Private foundations and special interest groups have invested in adoption research, such as the British Association for Adoption and Fostering (BAAF), and the Donaldson Adoption Institute in the USA. There has also been extensive research and collection of statistical data relating to adoption undertaken and published by government and government-funded or assisted research centres and foundations, particularly in the UK and the USA.

AUSTRALIAN CONTEXT

The New South Wales (NSW) government included 'permanent placement principles' as a key addition to *Children and Young Persons (Care and Protection Act) 1998*. The principles aim to provide the best outcomes for children and young people in out-of-home care. These principles give greater prominence to open adoption as a means of providing some children with a safe home for life.⁹ By enshrining permanent placement principles in the *Children and Young Persons (Care and Protection) Act 1998*, the Government seeks to make it clear that for non-Indigenous children, restoration to the birth family, guardianship and open adoption are preferred over the long term allocation of parental responsibility to the Minister and long-term out-of-home care (OOHC).

In January 2015, the NSW Premier announced a \$2.8 million package to establish an Institute of Open Adoption Studies (the Institute) to focus on matters relating to open adoption for children and young people in out-of-home care (when reunification with their family is not appropriate). The Institute is a joint venture between the University of Sydney and Barnardos Australia founded on a partnership between a non-government agency with extensive experience in the practice of open adoption, and an academic centre with a diverse, internationally renowned community of scholars, staff and students.

The partnership with Barnardos will also draw on their research program established through the Barnardos Centre for Excellence in Open Adoption. The Centre for Excellence is currently undertaking the first Australian study, with international collaborators, into the outcomes of open adoption for more than 200 children.

⁵ Brodzinsky, D (2006) Family structural openness and communication openness as predictors in the adjustment of adopted children. *Adoption quarterly*, 9(4) 1-18.

⁶ O'Connor, T.G., Rutter, M., Beckett, C. et al. (2000) The effects of global severe privation on cognitive competence: Extension and longitudinal follow – up. *Child Development*, 71, 376 – 90.

⁷ See Thomas (2013) for a summary of UK government policies and initiatives 2002-2012.

⁸ Groze V Houlihan L & Wood Z B (2005) *Overview of adoption, in Child welfare for the twenty-first century: a handbook of practices, policies and programs*. G P Mallon and P McHess (eds) NY: Columbia University Press, 2005.

⁹ *Issues Paper for Institute of Open Adoption*. (2015) NSW Department of Family and Community Services

The institute will play a critical role in delivering applied research to enhance understanding of good practice in open adoptions from out-of-home care. The Institute aims to achieve this goal by building a research community of practice to draw together academia with the child protection and out-of-home sector and greater community to understand when open adoption (both generally and for individual children) should occur and why.

While it is accepted that the institute will focus on issues within the control of the NSW Government in relation to adoption of children, it is envisaged that the knowledge generated and dialogue fostered by the research agenda will benefit adoption practice in Australia more generally.

The Institute research agenda will target three specific areas of enquiry. These are:

1. **Family engagement and support** - to examine what are the best approaches to assist children, birth parents and adoptive parents before, during and post-adoption.
2. **Open adoption practice enablers and barriers** - to enhance understanding of good practice in open adoption and the barriers to open adoption in NSW.
3. **Court and judiciary role and functions** - exploring the impact of legislative changes in NSW that have shifted emphasis to a preference for adoption over long-term foster care.

The review of the *Adoption Act 1984* (Vic) currently being undertaken by the Victorian Law Reform Commission provides the ideal opportunity to consider the need for quality research to underpin proposed changes to legislation. While a broader community debate related to open adoption should be encouraged, there is a need to move the conversation away from ideology and towards the research evidence. The questions posed by the consultation, in relation to how best to meet the needs of the children and their families, requires robust evidence and evaluation. Recommendations for changing current processes and practices need to be informed by the best available evidence, and by the lived experiences of children and their families, both birth and adopted.

CONSULTATION QUESTIONS

1. Should the Adoption Act use consistent terminology to guide decision makers in a decision relating to adoption? If not, in what circumstances should terminology other than the best interests of the child be used?

Applying an evidence based approach to policy and practice will be hampered if there is ambiguity or inconsistency in the terms and definitions used. The lack of clearly defined and standardised (and therefore comparable) outcome measures of the wellbeing of children and young people in Australia has been identified. The Australian Research Alliance for Children and Youth (ARACY) and the Common Approach to Assessment and Referral (CAARS) Taskforce commissioned a review into the development of a common approach to assessment, referral and support for early interventions for children and families in need.¹⁰ A consistent theme emerging from the consultations conducted for the review was the requirement for a common language and a shared understanding of what defines the 'needs' of vulnerable children and families.

The general adoption of definitions and standardisation of measures of wellbeing would lead to documentation of outcomes for adopted young people within a general population framework, incorporating both positive and negative outcomes and facilitating progress towards de-stigmatising of adoption, a trend which has occurred with other types of formerly stigmatised families. It would also enable comparisons between the outcomes of different types of permanent placement, such as guardianship.

2. Should the Adoption Act provide guidance about how to determine what is in a child's best interests? If yes:

a. What should decision makers be required to consider?

b. Should all the matters have equal weight or should some be weighted more heavily than others?

c. If some matters should be weighted more heavily than others, what are they?

Very young children are particularly vulnerable to abuse or neglect. A range of studies have found that children are more likely to be killed in their own home by their own family members than by anyone else or anywhere else in society.¹¹ A study in the USA that reviewed data over a 25 year period found that of children who were murdered, 61% were killed by their parents.¹²

In England, infants under the age of one year are nearly three times as likely as other children to be made the subjects of child protection plans (i.e. become substantiated cases) in response to physical abuse and over twice as likely in response to neglect. In addition, almost half (45%) of reviews into the practices of local authorities and other agencies in the light of a child death or serious injury, where abuse and neglect are suspected (serious case reviews) involve a child under the age of one. Before their first birthdays infants are also eight times as likely as other children to become the victims of homicide.¹³

In NSW the rate of reporting of children aged less than one year 1 is considerably higher than for all other age groups. For every 1,000 children aged less than one year in NSW, 136 were reported to FACS in 2006/07.¹⁴

¹⁰ Allen Consulting Group 2009, *Protecting children: A common approach to identifying and supporting children and families in need*, Interim Report to the Australian Research Alliance for Children & Youth, December 2009, Sydney.

¹¹ Browne, K. D., & Lynch, M. A. (1995) The nature and extent of child homicide and fatal abuse. *Child Abuse Review*, 4, 309–316.

¹² Friedman, S. H., Horwitz, S.M., & Resnick, P. J. (2005). Child murder by mothers: A critical analysis of the current state of knowledge and a research agenda. *American Journal of Psychiatry*, 162, 1578–1587.

¹³ Cuthbert, C., Rayns, G., & Stanley, K. (2011). *All Babies Count: Prevention and Protection for Vulnerable Babies*. London: NSPCC.

¹⁴ http://www.community.nsw.gov.au/__data/assets/pdf_file/0019/321571/stats_trends_reporting.pdf

Very young children are not only more likely to suffer maltreatment, they are also highly vulnerable to its consequences. There is now a compelling evidence base which shows that the early environment, and the first three years of life in particular, play a major role in shaping children's cognitive, socio-emotional and behavioural development. Abusive parenting has severe negative consequences for all aspects of children's future learning, behaviour and health, and these may persist well into adulthood.¹⁵

Two UK studies that explored data from cohorts of neglected children returning home from care found extensive evidence of children being returned to, or remaining in very damaging family circumstances, where parents had been unable to address the problems that had originally led to concerns about the children's welfare; these studies showed a high proportion of parents either unable or unwilling to access appropriate, specialist support.¹⁶

Analysis of child protection reports in NSW found that over half (57.5%) of the children reported in July-September 2004 were re-reported within 12 months. There were over 18% of children with five or more prior reports that were re-reported within one week compared with 10.0% of children with no prior reports. The Department's data show that the more reports that have been received about a child, the more likely it is that the child will be reported again within 12 months. Of the children with more than 10 reports, 85.7% were re-reported. After six months, over two-thirds of the children with five or more prior reports had been re-reported whereas less than one-third of first reports had been re-reported. Children with multiple prior reports were not only more likely to be re-reported, they were also likely to be re-reported multiple times in the following 12 months.¹⁷

There is little doubt that in cases where children are suffering, or likely to suffer, significant harm, indecisive actions and delays in professional decision-making have a negative impact on children's long-term health and wellbeing.^{18 19}

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.

There is a growing body of research that indicates that open adoption can support the best interests of children in providing placement stability, optimising children's developmental outcomes, and assisting in their healthy identity formation.

The literature suggests that compared to long-term foster care, adoption offers several advantages in regards to stability, sense of wellbeing, permanence, and developmental outcomes. The breakdown of foster care placements can have a more detrimental impact on adjustment, relationships, and mental health than the initial removal from the family.^{20 21} Adoptions, in

¹⁵ Brown, R., & Ward, H. (2012). Decision-Making within a Child's Timeframe. London: Childhood Wellbeing Research Centre (Available at: <http://www.cwrc.ac.uk/resources/773>).

¹⁶ Farmer, E., & Lutman, E. (2012). Effective Working with Neglected Children and their Families: Linking Interventions with Long-term Outcomes. London: Jessica Kingsley Publishers.

¹⁷ http://www.community.nsw.gov.au/__data/assets/pdf_file/0019/321571/stats_trends_reporting.pdf

¹⁸ Daniel, B., Taylor, J., & Scott, J. (2011) Recognizing and Helping the Neglected child: Evidence-Based Practise. London: Jessica Kingsley Publishers.

¹⁹ Wade, J., Biehal, N., Farrelly, N., & Sinclair, I. (2011). Caring for Abused and Neglected Children: making right decisions for reunification or long-term care. London: Jessica Kingsley Publishers.

²⁰ Lewis E., Dozier M., Ackerman, J., & Sepulveda-Kozakowski, S. (2007). The effect of placement instability © 2016 The Australian Psychological Society 11 A conceptual model of psychosocial adjustment on adopted children's inhibitory control abilities and oppositional behaviour. *Developmental Psychology*, 43, 1415–1427.

²¹ J.P. Ryan, JP and Testa M.F. (2005). Child maltreatment and juvenile delinquency: Investigating the role of placement and placement instability. *Children and Youth Services Review* (27)227–249

comparison, are less prone to disruption than foster care placements.^{22 23} Recent research has also found that adoptive parents allocate more personal, economic, cultural and social resources to their children than genetic parents do.^{24 25}

The United Kingdom government has been actively encouraging local authorities to increase the number of adoptions and to avoid delays by establishing targets, monitoring and offering funding incentives.²⁶ This strong emphasis on avoiding delays in placing children for adoption is based on the premise that adoption facilitates developmental recovery. There has also been a government investment in open adoption research.

Under the NSW *Adoption Act 2000* for adoption proceedings before the Supreme Court, the court must find that adoption is 'clearly preferable' to other orders. The Supreme Court has said that this requires "*something more than a slight preponderance of consideration in favour of adoption over the alternatives.*" This does not require satisfaction "*beyond reasonable doubt*" but instead that adoption be "*obviously, plainly or manifestly preferable to any other action that could be taken by law.*"²⁷

In response to each adoption application the Supreme Court must independently determine whether adoption is the clearly preferred option for the child²⁸ and if it decides it is not, may make other orders including allocating parental responsibility to the Minister.²⁹

3. Should the Adoption Act have requirements about the age differences between the adopted child and any other children in the family? If yes, what requirements?

There is a lack of sound evidence to guide decision 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.³⁰ 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.

Reviewing available datasets with a sound methodological approach to analysis could assist in meeting many practice knowledge gaps with little resource expenditure, so long as such administrative data is collected and stored in ways that enable easy retrieval for research purposes.

5. Should there be a greater obligation to identify and contact the father of the child to obtain his consent to an adoption? If yes, what steps are reasonable to try to obtain a father's consent?

Birth father literature is sparse and there are few studies into the nature and relationship of birth fathers in contested and uncontested adoptions in Australia. The change in the trends of adoption in recent history has seen a marked decline of infant adoptions, from the peak of the late 1960s, to

²² Quinton D & Selwyn J (2006) Adoption: research, policy and practice, *Child and family law quarterly*, 18, 459-477

²³ Selwyn, J., Wijedasa, D., & Meakings, S. (2014). *Beyond the adoption order: Challenges interventions and adoption disruption*. London: Department for Education.

²⁴ Gibson K (2009) Differential parental investment in families with both adopted and genetic children. *Evolution and Human Behaviour*, 30, 184-189.

²⁵ Hamilton L, Cheng S. & Powell B (2007) Adoptive parents: Evaluating the importance of biological ties for parental investment. *American Sociological Review*, 72, 95-116.

²⁶ Thomas C (2013) Adoption for looked after children: messages from research: An overview of the Adoption Research Initiative, BAAF.

²⁷ *Department of Community Services v D 37 FamLR 595* at [25].

²⁸ *Adoption Act 2000*, section 90(3)

²⁹ *Adoption Act 2000*, section 92

³⁰ Cited in Bullock R (2014) *Adoption & Fostering* 38(1): 3-4

now where the majority of children have spent time in Out of Home Care (OOHC) and adoptions take place as an alternative to birth family care.^{31 32 33}

A UK study of 20 English birth fathers whose children were adopted from public care by Clifton (2012), found that contemporary fathers are likely to be older, more vulnerable and to have spent time parenting their child.³⁴ All fathers in this study were poor, unemployed and poorly educated and seven had previous children adopted or placed in alternative care. Many of the birth fathers had remained in a relationship with the birth mother, however, this was frequently characterised as volatile and intermittent. The men reported feeling humiliated and disempowered by the court process, where their parenting failings were exposed and criticised. Many men expressed anger at the system they saw as unfair and intrusive, few were able to consider their child's needs before their own.³⁵

The small sample size of Clifton's study limits the ability to generalise his findings. However, it does provide an insight into the distress experienced by birth fathers that have had their children removed by authorities. The post-adoption period was characterised as a significant stressor in a life already affected by substance and mental health issues. While there are a range of supports available to birth fathers, their angry behaviour and rejection of assistance may make it difficult for them to respond to assistance. There remains a lack of services with the skills to respond men in emotional distress (Clifton 2012).

The involvement of birth fathers in the adoption process, particularly when adoption is contested, is a subject that needs further examination.³⁶ There is some evidence of the importance of acknowledging birth fathers' existence and providing them with support throughout the adoption and fostering decision-making processes.³⁷ Adoption support and contact may lessen the impact and sense of loss. Accessing appropriate services in a timely manner is not only important for parents and birth relatives' own well-being, but may help them to adjust to a new role and hence contribute to contact in a way that is beneficial to their child.³⁸

However, as Clifton reported *birth fathers are often troubled and troublesome, and may misuse drugs and alcohol, be harder to engage and continue to pose a threat to women and children (while at the same time expressing grief and loss over their adopted child)*.³⁹

6. Are there any situations when no attempts should be made to contact the father to seek his consent to an adoption? If yes, what are they?

It may not always be either possible or appropriate to engage some fathers. For example, where fathers have been violent or abusive and it may not be safe for staff or families to engage with these men. There is increasing evidence that even when a father has not been violent toward their child(ren), the father's violence toward the mother is damaging to children's social and emotional development.⁴⁰

³¹ Lewis J (2004) Adoption: the nature of policy shifts in England and Wales, 1972-2002. *International Journal of Law, Policy and Family* 18(20): 235-255.

³² Thornburn J (2005) Stability through adoption for children in care. In: Axford N, Berry V, Little M and Morpeth L (eds) *Forty Years of Research, Policy and Practice in Children's Services*. Chichester: John Wiley and Sons.

³³ Clayton G and Clifton J (2016) The birth fathers of adopted children: differences and continuities over a 30-year period. *Adoption & Fostering* 40(2): 153-166

³⁴ Clifton J (2012) Birth fathers and their adopted children: fighting, withdrawing or connecting. *Adoption & Fostering* 36(2): 43-56.

³⁵ Clifton J (2012) Birth Fathers and their adopted children: fighting, withdrawing or connecting. *Adoption & Fostering* 36(2): 43-56

³⁶ Neil E, Cossar J, Lorgelly P and Young J (2010) *Helping Birth Families: Services, costs and outcomes*. London: BAAF.

³⁷ Clifton J, Horne J and Smith C (2014) Did birth relative attendance at adoption panels assist decision making? Evaluating the Suffolk experience. *Adoption & Fostering* 38(1): 22-36.

³⁸ Cossar J and Neil, E (2010) Supporting the Birth Relatives of Adopted Children: How Accessible Are Services? *British Journal of Social Work* 40. 1368

³⁹ Clayton G and Clifton J (2016) The birth fathers of adopted children: differences and continuities over a 30-year period. *Adoption & Fostering* 40(2): 162-163

⁴⁰ Fletcher, R., May, C., St George, J., Stoker, L., and Oshan, M. (2014). *Engaging fathers: Evidence review*. Canberra: Australian Research Alliance for Children and Youth (ARACY).

An Australian survey of new mothers found that 29 per cent of mothers reported partner abuse in the first 4 years postpartum⁴¹ and both physical and psychological abuse during pregnancy have been linked to adverse birth outcomes.⁴² The study by Clifton (2012) found that the influence of the fathers' rights agenda incorporated a complex mix of injustice, selfishness and outrage.^{43 44} In some cases this may lead to some men rejecting criticisms against them and adopting an oppositional stance to social services and the courts. They externalised blame for the child protection crisis, investing energy in self-justification. Even after the adoption, some fathers continued to complain, litigate and even threaten violence.⁴⁵

7 Should any changes be made to the current consent provisions? If yes, what changes?

In NSW two key principles in adoption law include the rights and interests of the parents in decisions about a child's adoption, and the centrality of independent scrutiny of these decisions by the courts.⁴⁶ When parents do not consent to the adoption of their children, the process becomes much more complex and lengthier. Recent amendments to the Adoption Act 2000 (NSW) legislation have made two important changes in relation to the likely speed and ease of finalising adoptions.⁴⁷

The first is the introduction of specified time frames for decisions about returning children to their parents. For children younger than two years of age, the Children's Court is required to make a decision, within six months of an interim order, and to accept the statutory department's assessment of whether or not there is a realistic possibility of restoration; for a child aged two and older, the time period is within 12 months of the interim order.⁴⁸

The second change is to make distinct provision for long-term carers to adopt, as opposed to the previously under-utilised and now repealed option of sole guardianship orders.⁴⁹ The adoption legislation has been amended to streamline the process for authorised carers who apply to adopt a child or young person in out-of-home care.⁵⁰

These changes are in addition to conditions for dispensing with the consent of parents, which are:

⁴¹ Gartland D., Hemphill S. A. Hegarty K. and Brown S. J. 2011. Intimate partner violence during pregnancy and the first year postpartum in an Australian pregnancy cohort study. *Maternal and child health journal*, 15,570-578

⁴² Gentry, J., & Bailey, B. A. (2014). Psychological intimate partner violence during pregnancy and birth outcomes: Threat of violence versus other verbal and emotional abuse. *Violence and Victims*, 29(3), 383-392

⁴³ Clifton J (2012) Birth fathers and their adopted children: fighting, withdrawing or connecting. *Adoption & Fostering* 36(2): 43–56.

⁴⁴ Collier R and Sheldon S (eds) (2006) *Fathers' Rights Activism and Legal Reform in Comparative Perspective*. Oxford: Hart.

⁴⁵ Clayton G and Clifton J (2016) The birth fathers of adopted children: differences and continuities over a 30-year period. *Adoption & Fostering* 40(2): 153-166

⁴⁶ S Harris-Short 'Holding onto the Past? Adoption, Birth Parents and the Law in the Twenty-First Century' in R Probert and C Barton (Eds) *Fifty Years in Family Law: Essays for Stephen Cretney*, Intersentia, Cambridge, 2012, 147-160, 148. 152.

⁴⁷ Cashmore J and Ross N (2015) Adoption reforms New South Wales style: A comparative look. In press

⁴⁸ Section 83 (5) and (5A) of the Children and Young Persons (Care and Protection) Act 1998 (NSW) as amended by the Child Protection Legislation Amendment Act 2014. See also Second Reading Speech for Child Protection Legislation Amendment Bill 2013, NSW, Parliamentary Debates, Legislative Assembly, Wednesday 26 March 2014, 27886 (Pru Goward, Minister for Family and Community Services).

⁴⁹ New South Wales Discussion Paper, above n 13, at 34 refers to the under-utilisation of these orders, but provides no further evidence in support. The Special Inquiry into Child Protection in New South Wales (2008) noted that between 133 and 149 parental responsibility orders were made to a non-relative in matters between 2005 and 2008: Volume 2, 604, Table 16.6. It is now possible for long-term carers to apply, with the consent of the Director-General, or through a designated agency, for a guardianship order: s 79B (1) (b) and s 79B (1) (c) The Children and Young Persons (Care and Protection) Act 1998 (NSW) as amended by the Child Protection Amendment Act 2014. This may be in line with the preferences not only of carers but of older children who wish to remain with carers but retain a legal relationship with parents.

⁵⁰ See sections 45F, 45G and 45H inserted into the Adoption Act 2000 (NSW) by the Child Protection Amendment Act 2014 (NSW). See also *A Safe Home for Life*, the government response to the New South Wales Discussion Paper pp 38-39.

(a) where the authorised carers are making an application for the adoption of a child who has 'established a stable relationship with those carers' and the adoption 'by those carers will promote the child's welfare' and

(b) where 'there is serious cause for concern for the welfare of the child and it is in the best interests of the child to override the wishes of the parent or person who has parental responsibility.'⁵¹ However, parents who do not consent to the adoption can now participate in the development of the adoption plan to a greater extent than before the amendment of the *Adoption Act* in 2014.⁵²

11. How should adoption law provide for the child's contact with family members other than parents?

For example:

a. Should contact arrangements be considered as part of a best interests principle?

b. Should a decision maker, such as DHHS, be required to consider contact with family members other than parents after an adoption?

c. Should the court be required to consider making conditions for contact with family members other than parents after an adoption?

The research evidence is clear that there are advantages to all parties if some form of post-adoption contact is maintained. Contact may include the child's previous carers,⁵³ as well as their kinship network. The true application of the principles of open adoption is where the adoptive arrangements promote both the building of a relationship between the birth and adoptive families through ongoing contact and also the sharing of information and conversations between the birth and adoptive families about the adoption arrangement. Building the relationships that form an essential part of open adoption requires people, both as carers and adoptive parents, to assume active roles in the child's contact with birth family. Open adoption contains the notion that contact will generally be promoted unless it can be demonstrated that it will not be beneficial (usually, but not necessarily) to the child.

For birth parents contact with their relinquished child can help them resolve their grief and loss. Most studies indicate that the overwhelming need of birth parents is to know their child is well and happy. Without contact the parent may experience the living death of the child who is developing in ways that they can only imagine.⁵⁴ In some cases of contested adoptions the perceived lack of future opportunity for contact may motivate parents to oppose the adoption. The reassurance that there will be an established plan for contact may lead some parents to not contest the adoption.⁵⁵

This indicates that, in general, if there is freedom for parties to set their own levels, contact tends to move from limited and indirect contact to more open contact, and to change, sometimes significantly, over time.⁵⁶ Research studies also suggest that contact assists children to come to terms with some of the difficult aspects of their past lives. One of the advantages of contact is that reality replaces speculation and children's need for information can be met.⁵⁷

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

⁵¹ Section 67 (c) and (d) Adoption Act 2000 (NSW) as amended by the Adoption Amendment Act 2006 (NSW).

⁵² Section 46 (2A) and (2B) Adoption Act 2000 as amended by the Child Protection Legislation Amendment Act 2014.

⁵³ Boswell S, Cudmore L (2014) 'The children were fine' acknowledging complex feelings in the move from foster care into adoption. *Adoption & Fostering* 38(1) 5-21

⁵⁴ Rockel and Ryburn, *Adoption Today: Change and Choice in New Zealand* (Octopus/Reed, 1988)

⁵⁵ Fratter, *Perspectives on Adoption with Contact: Implications for Policy and Practice* (Cranfield University PhD, 1995).

⁵⁶ McRoy (1991) American experience and research on openness' *Adoption and Fostering* 15 (4) 99-110;

⁵⁷ Silber and Dorner (1990) *Children of Open Adoption and Their Families*. Corona Publishing Company.

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.⁵⁸ A study by Dominick of 156 adopting parents in New Zealand reported that only two families believed that contact diminished the strength of attachment between them and their child, three-quarters of parents believed that contact enhanced feelings of attachment, and the remainder felt that the influence was neutral.⁵⁹

13. In some states and territories, children aged 12 and over consent to an adoption. Should this be required in Victoria? If not, are there any changes that should be made to the Adoption Act to ensure it provides appropriately for the views and wishes of the child?

The consent provision should give consideration to the wishes and views of the child. A child over the age of 16 is deemed competent to give consent, but children under 16 are not deemed competent so must demonstrate this. This is commonly known as 'Gillick competence' (or demonstrable task-specific competence)⁶⁰, where a child is able to consent if they can demonstrate they have the necessary emotional maturity and intellectual ability to understand the consequences of their decision.⁶¹

Best practice should be to always involve the child in decision making where appropriate. Every child's level of competence needs to be assessed and will depend on a range of factors, including the individual child's abilities and previous experience. It should not be assumed that a child with learning difficulties is not competent to make their own decisions. Children who are not competent to consent for themselves should still be involved in the decision-making process as much as possible and their views taken into account.⁶²

17 Should there be a positive duty on the Secretary of DHHS to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal or Torres Strait Islander child? If yes, what type of inquiry might be reasonable?

In the majority of NSW cases where Aboriginal children in out-of-home care have been adopted since 2011, their Aboriginal heritage became known after placement and during the adoption process and/or the children were of an age to give consent to their own adoption.

19. Should there be a requirement that in any adoption of an Aboriginal or Torres Strait Islander child the first preference is to place a child for adoption with Aboriginal or Torres Strait Islander extended family or relatives? If not, what should the order of preference be for placing Aboriginal and Torres Strait Islander children for adoption?

In NSW adoption is the last preference for permanency placement for Aboriginal and Torres Strait Islander children.

NSW recognises that:

- adoption is not a concept that exists in Aboriginal customary law and is therefore an inappropriate care option for Aboriginal children as a general rule⁶³
- customary adoption is a concept known to Torres Strait Islanders but is different to the concept as defined in Australian law.⁶⁴

⁵⁸ Rowe and Thoburn, in Fratter et al, (1991) *Permanent Family Placement: A Decade of Experience*. BAAF, chapters 1-3, at 7-57.

⁵⁹ Dominick, *Early Contact in Adoption: Contact Between Birth Mothers and Adoptive Parents at the Time of and After Adoption* (Department of Social Welfare, New Zealand, 1988), Research Series No 10.

⁶⁰ Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112.

⁶¹ Cornock M. *Nursing Standard*. <http://dx.doi.org/10.7748/ns.29.30.28.s28>. 25 March 2015

⁶² *Seeking consent: working with children*. Department of Health, London (2001)

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4007005

⁶³ *Adoption Act 2000*, sections 35(1), 36

⁶⁴ See generally: Marshall, A & McDonald, M (2001) *The many sided triangle: adoption in Australia*. Melbourne University Press, Melbourne, 148-170.

Therefore NSW adoption laws for both Aboriginal and Torres Strait Islander children, emphasise the “placement principles” that apply whenever state intervention occurs for the child’s safety welfare and well-being.⁶⁵

23. To be able to adopt, couples in domestic relationships are required to prove that they live together and have lived together for two years. This requirement does not apply to other couples such as married couples.

a. Is a co-habitation requirement consistent with contemporary family life and the best interests of the child?

b. If yes, should a co-habitation requirement apply to all couples equally?

The *Adoption and Children Act of 2002* represented the most significant overhaul of UK adoption law in 26 years (Department of Education and Skills, 2003), in part because it aligned adoption law with the *Children Act of 1989* to make the child’s welfare and needs the paramount consideration in the adoption process. Furthermore, the Act ensured the needed support for people who were considering adoption, it allowed for unmarried couples (including same sex couples) to adopt jointly, and it established independent review in the assessment of prospective adoptive parents. The Act also strengthened the entitlement of the child, adoptive parents and birth parents to post - adoption support services. It also allowed for the arrangement of child advocacy services and increased supervision of the local authority’s review of child cases.⁶⁶

The most important characteristics needed for potential adoptive parents have been identified by McRoy et al. as commitment, flexibility, determination and a sense of humour.⁶⁷ Neil also identified willingness for open and supportive communication as qualities that contribute to successful adoptions.⁶⁸

24. Single people can adopt a child only if there are ‘special circumstances in relation to the child’ which make the adoption ‘desirable’. a. Is this requirement consistent with the best interests of the child? b. Should this requirement be amended? If yes, what criteria should apply to adoptions by single people?

The research indicates that it is more important to assess the qualities of people wishing to adopt. There is good evidence that a wide range of adults can make suitable adoptive parents. Arbitrary restrictions about characteristics such as age and marital status may exclude those who can parent well.⁶⁹ McRoy *et al.* reported that over one - third of the parents who successfully adopted the older children with special needs in the Collaboration to AdoptUsKids programme, were not ‘traditional’ married couples.⁷⁰

Another example includes the study by Rutter *et al.* that found many of the parents who had adopted children from Romanian orphanages had been rejected by British adoption agencies, often on the grounds of their age. Yet the adoption breakdown rate in this sample was virtually non-existent.⁷¹

⁶⁵ *Adoption Act 2000*, sections 35 (Aboriginal child) and 39 (Torres Strait Islander child)

⁶⁶ Children’s social care reform: a vision for change, January 2016. Department of Education and Skills

⁶⁷ McRoy, R.G. (1999) *Special Needs Adoptions*, Garland Publishing, Inc., New York .

⁶⁸ Neil E (2009) The Corresponding Experiences of Adoptive Parents and Birth Relatives in Open Adoptions *International Advances in Adoption Research for Practice*, John Wiley & Sons Ltd. 269-293.

⁶⁹ Wrobel GM and Neil E (2009) Connecting Research to Practice. *International Advances in Adoption Research for Practice*, John Wiley & Sons Ltd. 317-326.

⁷⁰ McRoy RG, Lynch CJ, Chanmugam A, Madden E and Ayers–Lopez S (2009) Children from Care CAN Be Adopted. *International Advances in Adoption Research for Practice*, John Wiley & Sons Ltd. 317-326.

⁷¹ Rutter, M. and the English and Romanian Adoptees Study Team (1998) Developmental catch up and deficit following adoption after severe global early privation. *Journal of Child Psychology and Psychiatry*, **39**, 465 – 7.

25. A religious body that provides adoption services may refuse to provide services to same-sex couples and people who do not identify with a specific sex or gender, if the body acts in accordance with its religious doctrines, beliefs or principles. Is this 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?

Consideration should be given to whether it is appropriate for faith based organisations to be the lead agencies in the provision of adoption advice and services. Expert opinion and professional services must be independent, impartial and based on objective research

26. Step-parents and relatives of a child can only adopt a child in their care in limited circumstances. Parenting orders under the Family Law Act are the preferred option in these situations. Is this appropriate? If not, what changes are needed?

See previous comments to questions 23 and 24.

32. Is it appropriate that birth parents are able to express wishes about the religion, race and ethnic background of adoptive parents? What matters should parents be able to express wishes about? Should other matters be included in the Adoption Act?

In Australia, ethnicity must be considered in relation to three kinds of adoption:

- The adoption of children of ethnic minorities in Australia (what UK research refers to as minority ethnic adoptions) in so-called ethnically 'matched' placements
- Adoption by parents of a different ethnicity to adopted children –sometimes referred to as 'transracial adoptions'
- Adoption of Aboriginal and Torres Strait Islander children.

In the UK there have been concerns for some time about the shortage of minority ethnic adopters and in particular, the need for black, black mixed-parentage and mixed-relationship adopters. As a result children and young people appear less likely than white children to find a family and remain longer in the care system. A study by Selwyn et al. (2004) examined the barriers that stand in the way of people coming forward to adopt. These barriers include reluctance by minority ethnic adults to approach social services departments, the persistence of myths about what kinds of people make suitable adopters and social services' lack of strategic planning in this area.⁷² Selwyn et al. reported that when the focus for adoption was on ethnicity, rather than the child's other needs, children were often seen as 'hard to place'. They noted that adoptions were often delayed due to difficulties in finding an appropriate ethnic match for children. Such delays meant that children were often older at the time of adoption, a factor associated with a greater risk of adoption breakdown.

It is acknowledged that the Australian population is diverse and comprises a broad range of ethnicities; over 237 languages are spoken in Sydney and nearly 40% of residents speak a language other than English at home (Australian Bureau of Statistics Census, 2011). However, there do not appear to be any studies of how Australia's ethnic minority groups view adoption, nor on adoption outcomes for children of minority ethnicity.

Both the USA and the UK have enacted legislation to prioritise placement for adoption over finding a match ethnically. The US Federal Government passed the *Multiethnic Placement Act* in 1994 and the *Interethnic Adoption Provisions* in 1996 to eliminate discrimination on the basis of race, colour or national origin of child or parent. Similarly in the UK, in March 2014, the Coalition government passed an amendment to the *Children and Families Act* to the effect that consideration of a child's religious persuasion, racial origin and cultural and linguistic background was not to take priority over considerations relating to the welfare and best interests of the child.

⁷² Selwyn, J Frazer L and Fitzgerald A (2004) *Finding adoptive families for black, Asian and black mixed-parentage children: agency policy and practice*. NCH and Hadley Centre for Adoption and Foster Care Studies, University of Bristol.

A study of 254 children, seven to thirteen years after placement, half in 'matched' ethnicity adoption placements and the remainder in transracial placements, reported no differences in disruption rates between the children in matched placements and those in transracial placements overall.⁷³ Other studies have suggested that adoption outcomes are similar for children regardless of placement ethnicity match. Using data from a large sample of transracial and same race-adopted adolescents in the *National Longitudinal Study of Adolescent Health*, Burrow and Finley (2004) found that transracial adoptees had similar outcomes to their same-race adopted counterparts across measures of academic functioning, familial relationships, psychological adjustment, and physical health.⁷⁴

It is important to note, however, that given the unique mix of ethnic diversity of Australia, it is inappropriate to extrapolate findings from international research to the Australian context. However, the conclusions by Silverman and Feigelman (1990), from their USA based research, that good outcomes are best achieved with a nurturing environment that acknowledges physical differences, is open about the child's origins and addresses potential conflicts of cultural norms, is likely to apply to most contexts.⁷⁵

It is recommended that consultations be held with the relevant cultural groups and multicultural services to explore concepts and attitudes towards adoption. Consideration should also be given to the ability of adoptive families to foster cultural development of the child.

33. Should any other people have rights to adoption information under the Adoption Act? If yes, who should be given these rights and what should their rights be?

Personal records and adoption information should only be available to the people affected by the adoption.

37. What factors should be taken into account in deciding to release identifying information about a person?

There should be strong commitment to maintaining the quality and integrity of all records relating to adoption.

Howe and Feast (2000) studied adult adopted people who had decided to go on a journey and search for their birth parents. Most respondents talked about their experiences in very positive terms, particularly those adopted as babies. The majority described their childhoods as happy, and they felt loved and that they belonged in their families. However, about a half of all adopted people, including many of those who spoke positively, said that nevertheless they did feel slightly different – they were aware of physical and personality contrasts. They also found that women are twice as likely to search for birth families as men.⁷⁶

⁷³ Moffatt P G and Thoburn J (2001) Outcomes of permanent family placement for children of minority ethnic origin. *Child and Family Social Work*, 6(1).

⁷⁴ Burrow A L and Finley G E (2004) Transracial, same-race adoptions, and the need for multiple measures of adolescent adjustment. *American Journal of Orthopsychiatry* 74(4). 577-583.

⁷⁵ Silverman A R and Feigelman W (1990) Adjustment in interracial adoptees – an overview, in Brodzinsky d M Schechter MD (eds) *The psychology of adoption*, NY 187-200.

⁷⁶ Howe D and Feast J (2000) *Adoption, Search and Reunion: the Long-term Experience of Adopted Adults*. BAAF, London

48. Should there be increased requirements in the Adoption Act to provide post-adoption support? If yes:

a. Who should be responsible for providing this support?

b. What type of post-adoption support should be provided, and in what circumstances?

c. Who should be eligible for it?

Adoption may provide a child with a family for life, but this does not mean it can be seen as a way to end the responsibilities of either society or adoption agencies towards children with special needs: promoting adoption should be accompanied by promoting post-adoption support services.⁷⁷

Many children adopted from care have experienced painful, fragmented, unstable and chaotic beginnings to their lives, and evidence suggests that a high proportion, as many as 72%, have experienced abuse or neglect.⁷⁸ These children have often suffered from psychological, sexual or physical abuse, neglect and malnutrition, exposure in the family to drugs and alcohol, parental mental health problems and domestic violence.⁷⁹ This often results in a range of emotional and behavioural challenges, leading to some adopted children being more likely to experience physical, emotional, cognitive, educational and social development needs,⁸⁰ and being at greater risk of poor mental health throughout their life span.⁸¹

In both the UK and USA there is growing recognition of the need to improve the therapeutic support for adopted children as highlighted by Pennington,⁸² with the aim to address and reverse the emotional, psychological and developmental traumas they may have suffered in their early lives. For example, the UK response included the launch of the national Adoption Support Fund (ASF) in May 2015, which provided funds of £19.3 million over two years to improve adopted families access to therapeutic support, including growing local markets of therapeutic providers. This program was extended in January 2016 to provide support to families over the next 4 years.⁸³

In 2015 the UK Department of Education commissioned a review of available evidence relating to 15 adoption support therapeutic interventions. The report of the main findings was released in June 2016.⁸⁴ Its overall aims were to better understand key post-adoption therapeutic interventions for children and families; to examine the extent of the existing evidence on their effectiveness in achieving successful outcomes for adopted children and their families; and to identify gaps and make recommendations on what future research is needed.

In the USA a four-year, nationwide prospective study was conducted by McRoy et al. of 161 adoptive families, in order to identify factors associated with their successful outcomes. When families were asked about the post-adoption services they were receiving, financial support and adoption subsidies were most commonly reported. Assistance with routine medical and dental care was also highly rated. The most common services sought by families were psychological and educational therapies, to address the child's needs. In addition to post-adoption supports for their children, more than half of families identified supports for themselves. This included support from

⁷⁷ Wrobel GM and Neil E (2009) Connecting Research to Practice. *International Advances in Adoption Research for Practice*, John Wiley & Sons Ltd. 317-326.

⁷⁸ Selwyn, J., Wijedasa, D., and Meakings, S. (2014). *Beyond the Adoption Order: Challenges, Interventions and Adoption Disruptions*, London: HM Government.

⁷⁹ Lewis, J. and Ghate, D. (2015) *Adoption Support Fund Market Review and Implementation. Working Paper 1: Rapid Evidence Review: Adoptive Families' Needs and Experiences of Adoption Support Services*. London: HM Government and The Colbrooke Centre.

⁸⁰ Richardson, J. and Lelliott, P. (2003) Mental health of looked after children, *Advances in Psychiatric Treatment* (9), 249-51.

⁸¹ Saunders, L. and Broad, B. (1997) *The Health Needs of Young People Leaving Care*, Leicester: De Montfort University.

⁸² Pennington, E. (2012) *It Takes a Village to Raise a Child*, London: Adoption UK.

⁸³ *Children's social care reform: a vision for change* (2016) Department of Education, UK

⁸⁴ Stock L, Spielhofer T and Gieve M (2016) Independent Evidence Review: Post Adoption Services. The Tavistock Institute of Human Relations (TIHR). UK

other adoptive parents and 47% reported using family therapy. Only three per cent of families indicated that they did not use any post adoption services.⁸⁵

⁸⁵ McRoy RG, Lynch CJ, Chanmugam A, Madden E and Ayers-Lopez S (2009) Children from Care CAN Be Adopted. *International Advances in Adoption Research for Practice*, John Wiley & Sons Ltd. 317-326.