

# SUBMISSION REGARDING REVIEW OF THE ADOPTION ACT 1984 TO VICTORIAN LAW REFORM COMMISSION

By Adoption & Permanent Care Program at Child & Family Service inc, Ballarat

## CONSULTATION PAPER QUESTIONS:

### Chapter 5 The best interests and rights of the child

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?*

We support consistent terminology in the legislation and regulations as identified in the discussion paper, including that “the best interests of the child shall be the paramount consideration”.

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?*

We support the idea of guidance being included in the Adoption Act in relation to factors that need to be considered when determining what is a child’s best interests.

We recommend decisions take into account:

- the need to promote a child’s long term stability, including the relationship with their adoptive family,
- The need to protect them from harm
- promoting the child’s developmental needs
- supporting the child’s connection to their biological family (particularly siblings)
- culture of origin.

A child’s expressed wishes also need to be considered, as per the current legislation.

From our perspective, in terms of Adoption, these factors are all important for a child’s long term well-being.

The biological parent’s wishes should also form part of the consideration for the decision making about the adoption, particularly if they have strong views about the type of family they would like their child placed with. Without this consideration, it can affect the degree of openness in the adoption. However, it is our view, that priority or balance should be given in favour of factors relating to the child and their bests interest, over that of the parents, where those interests are in conflict.

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?*

As indicated in the consultation document, it is current practice of our program that any children generally placed through adoption are two years younger than the youngest existing child in the family and that further children are not introduced to the family for a period of two years.

If this was to be a requirement of the legislation then the need to allow some flexibility should be considered. Examples would include when placing siblings or in special circumstances where it is assessed as appropriate for these age differences to be different than the indicated practice. This may be necessary when considering a special needs adoption where different factors may need to be considered.

4. *Should the Adoption Act include a principle requiring decision makers to consider placing siblings for adoption in the same family? If not, in what other ways could the Adoption Act ensure that sibling relationships are considered in decisions about adoption?*

We would be open to a principle which requires consideration be given to placing siblings together. We believe this would however need to 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.

For siblings who are unable to be placed together, then a principal or standard condition on an adoption order that allows for current or future siblings to be able to have contact with the Adoption child could be considered.

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?*

In principal we support obtaining as much information as possible about a child's parental history and background, to assist them into the future. Such information is important to children from a health and identity perspective.

However, in practice, we are not in a position to force the biological mother to disclose the biological father's information to us, and seeking information out from other parties potentially would breach privacy. We often have situations where biological mothers have not disclosed their pregnancy to family or friends. We would discuss the reasons why it is important to disclose this information through the relinquishment counselling process but often there are reasons why they are not prepared to disclose this information e.g.: rape, violent relationship, father unknown through one night relationship. In this case we would ask them to sign a statutory declaration. We would not support breaching privacy to seek out this information.

If the mother does name the father (but no address is provided) then we need to attempt to contact them under the legislation and can only dispense with consent when there have been attempts to located them. S.43 (2) sets out the requirements, however many of these requirements are unable to be followed by community based organisation due to changes in privacy laws and changes in access to Commonwealth government organisations (like Medicare and Centrelink).

We are of the view that this section of the legislation needs to be reviewed and updated in line with other legislative and practice changes since the adoption act was made.

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?*

Our response to question 5 highlights some of the practice challenges with regard to this issue, and they also relate to our response to this question.

When a child has been born of circumstances related to rape, incest or significant family violence, it is our position that the act should allow capacity – in limited circumstances – to apply to the court to dispense in seeking contact with the father to consent to an adoption.

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

It is our view from our practice experience that the current timeframes for consent are adequate. Our agency would not rush through consent after the fourteen days, but consent would be signed when we were sure the parent was very clear about their decision to relinquish. 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.

It is our perspective that the requirements as they are presently are a minimum and by extending the period of time for consent this may affect our ability to respond to each specific situation. We would also be concerned about any impact on the stability of the child and impact on a child if delayed decision making occurs, especially if they are in a temporary placement, such as Foster Care, until placed with an adoptive family.

While not part of the legislation, specific training for court staff that assists them to witness consents should occur, so they understand their obligations in this situation and to ensure that consents are fully informed. These court staff should be the oversight for this process, not a rubber stamp.

8. *Should any other people be consulted about, or required to consent to an adoption? If so, who?*

It is our view that consent would generally only sit with biological parents. This is most relevant in situations related to infant adoptions.

However, in situations where the adoption relates to a child, it is our view that consideration should be given to the capacity of the child to contribute to the decision, or to determine their capacity to consent.

9. *Are the grounds for dispensing with consent appropriate for adoption in contemporary Victoria? If not, what changes should be made?*

With the changes to the Children, Youth and Families Act 2005, which outlines a preference for Adoption over permanent care for infants and children, we are of the view that this section of the legislation needs some further consideration.

As an agency, CAFS have already been contacted by Permanent care parents who have children on permanent care orders, and are now seeking to determine if they can adopt the child, including whether they can dispense with parents consent. In addition, consultation has occurred regarding children removed from parental care by DHHS, and a decision has been made for that child not to return to parental care in the future. It is our advice from DHHS that while the CYFA have made these changes, in practice the general principal would be that if parents are not wanting to consent then a permanent care order should be pursued, as the intention is not to seek to dispense with biological parents consent, as per the current adoption legislation. It is our view that, in practice, the changes to the CYFA will not result in an increase of adoption while the consent requirements remain as they presently are.

We would be recommending further clarity in the legislation in these circumstances. We would support consideration of similar requirements to that of step-parent adoption. We want to avoid any suggestion of forced adoptions particularly given current practice focusses on the choice of the biological parents, but balanced with the need to consider a child's best interests.

We would consider:

- that the court not make an order for the adoption of a child unless it is satisfied that the Permanent Care Order or Family Law 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
- that an Adoption Order would make better provision for the welfare and interests of the child.

This should however not preclude adults, placed on Permanent Care orders as children, subsequently applying for an adoption order should they wish to.

10. *Should the court be able to put conditions on an adoption order in a broader range of circumstances if it is in the best interests of the child? These circumstances might include situations where:*

*(a) the court has dispensed with the consent of a parent but it is in the best interests of the child to have contact with the parent or with relatives of that parent*

*(b) consent was given but the adoptive parents and the birth parent giving consent have not agreed about contact or exchanging information about the child.*

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 interest's 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?*

For both Question 10 and 11, the court should be able to determine in a child's best interests conditions for contact that is not reliant upon the wishes of the parent, or based upon the agreement of the biological and adoptive parents. Adoption in Victoria is open and regardless of conditions on the order it would be the expectation of our agency that Adoptive parents are open to supporting the child to have contact with biological family and to discussing a child's origins. Consideration could be given to including a standard condition on an adoption order (like the standard condition now included on Permanent Care Order), for the Adoptive parents to support ongoing relationships with biological family, the children's identity and culture.

*12. Are there any other issues within the terms of reference that should be considered in determining the best interests of the child and balancing the rights and interests of other people with an interest in the adoption? If yes, what are they?*

No other comments.

*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?*

Adoptions in Victoria are generally not adversarial and are based upon choice and wishes. It would be a rare circumstance where a person's consent is dispensed with. In terms of children the majority of adoptions are for infants who would not be in a position to provide consent to adoption. The only older child adoptions that we have managed as a program are step-parent/relative adoptions and in these circumstances we would be talking to children of an appropriate age regarding their wishes and views about being adopted. Where a child has expressed that they don't want this to occur, we have not been prepared to recommend that the adoption proceed. We would see this a fundamentally the role of our organisation to consider and provide information to the court in terms of the adoption, not only the wishes but also whether it is in a child's best interests. We feel the current provisions of the act are sufficient.

*14. In what circumstances, if any, should a child have separate legal representation in adoption proceedings?*

Please see question 13.

*15. Should the Adoption Act provide guidance about the duties and role of a legal representative? For example, should a lawyer act in what they think is the best interests of the child, or should they follow the instructions of the child even if they don't think this is in the child's best interests?*

See question 13. Should it be considered that a child needs separate representation in an application for an adoption order, we would support non-legal representation as per question 16.

16. *Should the Adoption Act provide for non-legal representation or support of a child in adoption proceedings? If yes, what kind of representation or support should this be?*

If it is determined a child needs separate representation in an adoption proceeding, we would support this being a person appointed by the court, who can act in a child's best interests but has particular expertise in adoption matters, for example a psychologist who has this expertise. Adoption is relatively rare with only a small numbers of adoptions occurring in Victoria. This means that often legal representative have limited experience and understanding of adoption which would limit their capacity to act in a child's best interests.

## **Chapter 6 Aboriginal and Torres Strait Islander children and the best interest's principle**

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?*
18. *Should there be separate rules and guidelines that apply only to the adoption of Aboriginal and Torres Strait Islander children? If yes, is the child placement principle in the Adoption Act (section 50) an appropriate mechanism? If not, what changes should be made?*
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?*
20. *Should the Adoption Act require that adoption be considered for Aboriginal and Torres Strait Islander children only where there is no other appropriate alternative?*
21. *Should there be different principles for the adoption of Aboriginal children as compared to Torres Strait Islander children? For example, should there be a separate child placement principle for Torres Strait Islander children as compared to Aboriginal children as is the case in New South Wales adoption law?*
22. *Should parents of Aboriginal and Torres Strait Islander children retain the ability that parents of other children do not have, to put conditions on their consent to the adoption of their children? If not, what options should there be to protect the connection of Aboriginal and Torres Strait Islander children to country, kin, language and community?*

As an organisation we have not arranged an Adoption for a known Aboriginal or Torres Strait Islander child and feel that comments should be provided from Aboriginal agencies and those who have facilitated Adoption of Aboriginal children who have greater expertise in this area.

## **Chapter 7 Eligibility, suitability, contemporary attitudes and the law**

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?*

We would support consistency in the co-habitation requirement for all couples.

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?*

We support legislative equality for single people to be able to adopt, with the same criteria as couples and as has been opened up to same-sex couples.

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?*

We would support that all organisations accredited to carry out adoption services should not be able to refuse to provide services based upon sex or gender.

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?*

We support that the current provisions of the legislation are appropriate.

27. *Are the suitability criteria in the Adoption Regulations appropriate? Should any criteria be added, removed or changed?*

We would support that the current suitability of criteria covered in the Adoption Regulations is adequate and feel it provides sufficient guidance. Detail around applying these criteria should form part of policy and procedure documents. Putting this level of detail into the Adoption Regulations may not allow for flexibility, should there be further research or evidence that needs to be applied in these circumstances and may lock programs into outdated practice, given legislative change can be slow, as evidenced by the current Adoption Legislation in Victoria.

28. *Should the requirements applicants must satisfy for approval to adopt be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make this clearer?*

See question 27.

29. *Should the steps in the assessment process be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make the assessment process clearer?*

30. *Could any other improvements be made to the assessment process? If yes, what improvements could be made?*

Question 29 & 30

We would not be opposed to the general assessment and approval process for applicants being outlined in the Adoption Act and/ or Adoption Regulations.

However, we would recommend the need to have flexibility to ensure this was not overly prescriptive, given the length of time that changes are made to legislation and the risks that these requirements could become outdated. For example the current Adoption & Permanent Care Procedures manual has not been updated since 2004, so elements are legislatively out of date, although we note that the practice as outlined in the manual is still valid in terms of current research and practice in Adoption. If the content of the Information sessions or Education groups was prescriptive in the Adoption Act or Regulations, this would not allow updates to this essential information based upon current research, and this is vital to ensure applicants are able to be supported with information to act in the best interests of the child they may adopt.

Outside of the legislation, a standardisation of the basic information and education sessions run by the Adoption agencies would be useful, to ensure that all applicants receive the same information. This is however a practice issue rather than a legislative issue in our view.

31. *Should the process by which adoptive parents are selected be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make the selection process clearer?*

We would support clarity being provided in the Adoption Regulations regarding how a child is match to an Adoptive family based upon the process as outlined in the Adoption & Permanent Care Procedures manual and learning guide. Again this needs to provide generally for the process.

From our perspective we would support the following process:

- biological families being able to express their wishes about the family they would like their child placed with (as stated earlier this is important in an open adoption arrangement),
- then based upon these wishes and the child's needs, three to four families across the state would be identified that fit both the child's needs and the parents wishes.
- Should the parent's wishes not fit with the child's needs, then child's needs (as indicated in the best interest section) should take priority but this should be discussed with the biological parents.
- Parents should be encouraged to have a say about the family they wish their child to be placed with and given a de-identified document with information.
- The final decision/ ratification should be done via a panel chaired by the Principal Officer of the agency, to ensure the child's best interests are the focus.



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?*

As outlined in question 31, we support biological parents being able to express their wishes and any other views that are important to them, and support the proposals as outlined in section 7.144 of the consultation document.

### **Chapter 8 Information and identity**

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?*

34. *Do any problems arise when people seek adoption information through an adoption information service? If yes, what are the problems and what legal changes, if any, are required to address them?*

35. *Are the rights to adoption information and the limitations on those rights fair to all people involved in the adoption process? If not, what changes are needed?*

36. *Is the balance in the Adoption Act between providing access to information and protecting people's privacy appropriate? If not, what changes are needed?*

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

38. *Should the provisions of the Adoption Act relating to the release of adoption information be made clearer? If yes, what changes are needed?*

39. *How should an adopted person's identity be reflected on their birth certificate?*

40. *If a different form of birth certificate were available to adopted people, what legal status should it have?*

41. *Are there any problems with introducing integrated birth certificates or another form of birth certificate? If yes, what are the problems and how could they be addressed?*

42. *Is changing a child's given names consistent with the best interests of the child?*

43. *In what circumstances (if any) should the Adoption Act allow a child's given names to be changed?*

Child & Family Services does not have approved counsellors under part VI – Access to Information in the Adoption Act. This service is provided by FIND and we have practice guidelines with them regarding the process with Adoptions we have made, and working collaboratively.

We note that this section of the legislation which significantly restricts access to information after an adoption order is made, does not apply pre an adoption order and the Adoption Act is silent

regarding who can access what information pre an adoption order. We believe this means that information could be disclosed prior to an adoption order being made that would be an offence after the Adoption Order is granted.

In our experience, the disclosure of information to other services prior to an Adoption order being made (for instance, Doctors, Hospitals, Medicare, Centrelink etc), can be complex. Particular Commonwealth agencies often want access to information (eg biological parents details, copies of the consent to Adopt documents, which they indicate they would hold for up to 2 years), that could lead to a disclosure of biological parents details to the Adoptive family (where this hasn't been disclosed) after an Adoption Order. This could potentially be a breach of the Adoption Act.

Guidance in the Adoption Act regarding information that can be disclosed and to whom prior to an Adoption Order being made is, in our view, needed, including what information the Adoptive family should have access to, both to decide whether they can take on the placement but also to support the child's identity development.

While Adoption is considered open, and we would talk to a biological parent regarding the information disclosed to the Adoptive family, and visa versa, this is not covered in the legislation. If the biological parent chooses to have no involvement in the child's life there could be a gap in the information they can access regarding making sense of their adoption.

## **Chapter 9 Modernisation and operation of the Adoption Act**

*44. Should the Adoption Act include a section identifying the main object of the Act? If yes, how should the main object be described?*

We would support this being included, and would recommend the following elements be considered for inclusion in drafting the main object:

- be based upon the information set out in the Best Interest's section
- To outline that the child and their needs are at the centre of any decision making
- To consider that the child's safety and long term stability are the basis of decision making
- that adoption should be an open process where the child has access to information regarding their biological family, culture to support their identity development.

*45. Should the Adoption Act include general principles to guide the exercise of power? If yes, what should these principles be?*

Principals to guide practice should be outlined as per question 2.

*46. Is there terminology in the Adoption Act that should be changed because it is unclear, outdated or inconsistent with other law? If yes, what are the issues and what changes would be appropriate?*

We would support an update in terminology as outlined in the consultation document to align with other legislation, eg – changing terms of Guardianship and Custody to parental responsibility, access with contact etc.

*47. Are there requirements in the Adoption Act or Adoption Regulations that are out of step with contemporary technology or unduly burdensome without providing effective additional safeguards? If yes, what are they and what would provide appropriate alternatives?*

See question 5.

48. *Should there be increased requirements in the Adoption Act to provide postadoption 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?*

As an organisation CAFS is funded by DHHS to provide some post placement support to families who may seek this it, this includes specific funding for children's with disabilities. This can include helping family with the complex issues around adoption as identified in section 9.52 of the consultation document. We would support changes to the Adoption Act that identified that this support could be offered should an Adoptive or biological family member who have been party to the adoption process seek this out.

It would be helpful for agencies to be provided with a document after the consent period is expired that identifies that agency as having Guardianship of the child. Currently the consent document (combined with showing people the relevant part of the legislation) is the only way to prove this.

**Further questions from Round Table Consultation on the 29<sup>th</sup> of August 2016:**

- *How do you decide whether an interpreter is required and how are interpreters used in the adoption process (i.e. are they present at all stages of counselling and consent once the need for an interpreter has been identified)?*

We would be guided by our agency policy and procedures regarding the use of interpreters, and would support their inclusion at all stages of the process given the complexity of discussions held.

- *How do you determine whether someone has capacity to consent? At the meeting the Gillick competency test was discussed in relation to young people.*

If we had concern about someone's capacity to consent we would seek independent legal advice regarding the requirements of the legislation and how we navigate this process depending upon what our concerns were. A clear process in the Adoption Act would assist.

- *What are your current processes for taking consent from young people?*

Consents from young people would be taken in the same way as any consent, with the above question being considered and ensuring they have the capacity to consent. In the cases we have had regarding young people under 18, their family have been actively involved and supporting them to make the decision that is best for them, either to adopt or to keep the child. To date we have no information that we have been in a situation where a young person under 18 years is being pressured into making a decision they didn't want to make. Again we would need legal advice if we thought this was happening.

- *What is your process for taking consent from someone where there may be concerns about their capacity to consent because of something like an acquired brain injury, intellectual disability or mental illness?*

See above – we would also encourage them to engage with an independent advocate.

- *Is the County Court the appropriate court to hear adoption matters? If not, which court would be most appropriate?*

We have no particular views on this issue.