Victorian Law Reform Commission Review of the *Adoption Act 1984* (Vic.)

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Introduction

This submission may be published on the VLRC website under my name.

My submission focuses on selected questions raised in the Review of the *Adoption Act 1984* Consultation Paper 2016. The views expressed in this submission are my own and not representative of any previous, current or future employer or organisation I am associated with.

I welcome this opportunity to provide socio-legal and empirical information to the Commission. This submission is based on my experience of completing a Doctoral Thesis (in Sociology) on children's participation in the Children's Court of Victoria, as well as over eight years as a researcher in the child protection, family law and family violence sectors.

I wish to acknowledge that language is a powerful and complex matter in the adoption space. This submission refers to biological parents and adoptive parent/s for consistency and brevity. I do so with no intended offence to individuals who have been affected by adoption.

This submission contains the following sections:

The United Nations Convention on the Rights of the Child

This submission is informed by the United Nations Convention on the Rights of the Child (UNCRC) and encourages the VLRC to uphold the principles of provision, protection and participation. In the adoption context, the provision and protection of children's rights also necessitates the right of participation to the fullest extent possible. Furthermore, although this submission makes recommendations about the provision, protection, and participation rights of Victorian children who may be subject to adoption, adoption must always be a decision of last resort when alternative legal pathways for family care are impossible, including Permanent Care Orders under the *Children Youth and Families Act 2005* (Vic) (CYFA) and parenting orders under the *Family Law Act 1975* (Cth) (FLA). A child must also be ensured their identity and meaningful opportunities to maintain safe relationships with their family of origin, culture and community, as reflected in the following whole or part Articles.

Article 3

1. *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*.

2. States Parties undertake to ensure the child *such protection and care as is necessary* for his or her well-being, *taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her*, and, to this end, shall take all appropriate legislative and administrative measures.

3. *States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities*, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 7

1. The *child shall be registered immediately after birth* and shall have *the right from birth to a name,* the right to acquire a nationality and. as far as possible, *the right to know and be cared for by his or her parents*.

Article 8

1. States Parties undertake to respect *the right of the child to preserve his or her identity, including nationality, name and family relations* as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that *a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child*. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, *all interested parties shall be given an opportunity to participate in the proceedings and make their views known*.

3. States Parties shall respect the right of the child who is separated from one or both parents *to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests*.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views *the right to express those views freely in all matters affecting the child*, the

views of the child being given *due weight* in accordance with the age and maturity of the child.

2. 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.

Article 20

1. *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State*.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. *When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background*.

Article 21

States Parties that recognise 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.

Consideration should also be given to the General Comments on Article 3 (UN Committee 2013) and Article 12 (UN Committee 2009) that provide guidance on the implementation of these Articles.

The UNCRC sets a minimum standard to which signatory nations, like Australia, should comply. Successive concluding observations for Australia by the UN Committee on the Rights of the Child (2012, 2005) have highlighted our failure to incorporate the Convention into domestic law. However, the FLA now sets a precedent to recognise the UNCRC and to give effect to these minimum standards in domestic law (*Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth)). This provides a model for the Adoption Act to similarly enshrine the UNCRC to some extent. Any sections identifying the main objects of the Act and general principles could include reference to consistency with the UNCRC to the fullest extent possible.

The *Charter of Human Rights and Responsibilities 2006* (Vic.)

As the VLRC would of course already be aware, the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic.) (the Charter) affords provisions that are relevant to the Adoption Act and that any changes to the Act should be consistent with. This includes, but is not limited to the following.

Section 17 of the Charter provides:

> 1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
>
> 2) Every child has the right, without discrimination, to such protection as in his or her best interests and is needed by him or her by reason of being a child.

Section 24 of the Charter provides that:

> (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Justice Bell (Bell J in *Department of Humans Services v Sanding* [2011] VSC 42) has determined that the Charter is applicable to child welfare proceedings. The judgment by Justice Bell was the first Victorian Supreme Court appeal to apply the Charter to children's rights. In doing so, he further concluded that magistrates should consider children as parties to civil proceedings, and that they should be afforded judicial fairness, have the right to a fair hearing, and have their rights considered consistent with the Charter (s.24), even though the CYFA does not formally recognise them as parties (Bell J 2011, paras.202-204). The Children's Court is a specialist jurisdiction with discretion to inform itself and proceed as it thinks fit, "provided that the information on which it acts is sufficiently reliable and probative to form a proper basis for its decision", according to Justice Bell (2011, para.153). These provisions in the Charter serve as a minimum standard to inform modernisation of the Adoption Act and its practice directions applicable to whichever forum these decisions are going to be made.

The Charter provides only minimum standards because international research, reviews and the UN Committee on the Rights of the Child have assessed the Charter as insufficient for children's rights. Prior to the successive changes made to the CYFA since 2013, Lundy and colleagues (2012) identified Victoria as at the forefront for children's rights relative to other Australian jurisdictions, in part because of the Charter and the availability of direct legal representation (i.e., instructions) in child protection proceedings. However, Lundy et al. acknowledged that the Charter does not incorporate the breadth of children's rights that are in the UNCRC. Likewise, the Charter was insufficient in the UN Committee's (2012, para.11) periodic review, in part because of "fragmentation and inconsistencies" for children and their rights within and between states and territories. The Government has also displayed an ability to overturn case law through enacting contrary legislation or overlooking inconsistencies between the Charter and Acts of Parliament in legislation that clearly remove rights that children had previously been entitled to (for example, *Justice Legislation Amendment (Cancellation of Parole and other Matters) Act 2013* (Vic.); Young 2015). Any sections identifying the main objects of the Act and general principles could include reference to consistency with the Charter.

Introduction to PhD research: *Children's Participation Rights During Child Protection Proceedings: Recognition, Legal Representation, and the Redistribution of Care in Victoria's Children's Court*

This submission draws on my PhD research. My research was the first ever in Australia (and in any international jurisdiction) to have conducted an ethnographic study with lawyers and children and to have had access to Children's Court files and unpublished judgments. I conducted these two large studies as part of a PhD project analysing participation rights in decisions about children's best interests in child protection proceedings. The thesis is publically available through Swinburne University: http://hdl.handle.net/1959.3/414213.

Part one of my research involved a case file analysis and analysis of magistrates' unreported judgements in 50 contested proceedings between July 2010 and June 2011. I also collected data on 2008-2009 and 2009-2010 (reviewing over 150 cases in total). Although the data collected represents a relatively small number of children relative to the whole child protection system, it must be noted that this data does actually represent all cases that reached a final contest hearing with a judicial decision during the 2010-2011 period.

Part two of my research involved an ethnography using participant observation of lawyers who represented children. Further detail about the ethnography findings is publically available in Horsfall (2013). Victoria Legal Aid funded these lawyers, either as employees or by way of grants to private practitioners. Data were collected on a sample of 50 cases between July 2011 and March 2012. A total of 37 lawyers participated. Fifty-six children were observed with their lawyer, 43% of whom were between six and 10 years old and 57% were 11 years and older.

Independent empirical evidence is desperately needed about the process of child protection court proceedings and the implications for children and young people in Australia. This is also the case 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 FLA since 2006 (see for example, Kaspiew et al. 2015, Evaluation of the 2012 family violence amendments: Synthesis report).

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?

A child's best interests is "a dynamic concept that requires an assessment appropriate to the specific context" in which it is levied (UN Committee 2013, p.3). The UNCRC did not define 'best interests'. Instead, Article 3 is a normative statement that underpins all other rights (Freeman 2007). The UN Committee released a General Comment on Article 3 in 2013 to facilitate interpretation and application, focusing on paragraph 1 of the Article. The UN Committee (2013) acknowledged that best interests is a dynamic concept, so requires appropriate assessment according to the specific context in which it is being applied. Furthermore, any judgment about a child's best interests cannot override obligations to respect all other rights provided for under the UNCRC (UN Committee 2013).

Conceptually, best interests can be shaped by personal values, social norms, and political objectives that do not necessarily reflect children's rights (Dempsey 2004; Freeman 1997; Skivenes 2010). For example, my ethnography and case file study both identified that the Department of Human Services (now Department of Health and Human Services, DHHS) and parents can hold positions in decision-making process and make agreements by consent that do not necessarily reflect children's views, safety concerns or care needs. Therefore, it is critical that any definition of children's best interests under a set of principles in the Adoption Act address contemporary understanding of children's rights, minimise conflicts of interests in parties that are involved in a decision about best interests, and include provisions for updated knowledge that informs children's rights (e.g., advances in child development).

Defining the concept of children's best interests has been the subject of lengthy debate internationally and in Australia (Archard & Skivenes 2010; Bates 2005; Freeman 1997, 2007; Hansen & Ainsworth 2009; Thomas 2002). After conducting an analysis of legislation in Norway and the UK, Archard and Skivenes (2010) recommend a non-exhaustive list of considerations in legislation as an effective way to guide decisions about best interests. This approach has potential to minimise interference from the biases and subjective preferences of those who make law and make decisions about a child's best interests (Archard & Skivenes 2010). It also could reduce uncertainty for professionals and families in a particular legal system as they navigate each decision being made. Section 10 of the CYFA provides a comprehensive list of best interests principles that contains the language of rights for children as individuals and interrelated rights of families together. In this way, Section 10 of the Victorian CYFA goes some way to address the problems of indeterminacy, subjectivity, and bias that best interests can be prone to. This can serve as a model for Adoption Act reform.

Problems with the FLA definition of best interests provide lessons for amendment to the Adoption Act. The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) was necessary to correct imbalances in best interests established by earlier amendments in 2006 that had in effect prioritised shared parental responsibility and maintaining a meaningful relationship with both parents after separation over protecting children from harm. This provides a caution about having any particular principles in a best interests definition weighted more heavily than others. Each child's best interests are individual in nature.

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?

Any principles defining best interests and other principles for deciding adoption should include an obligation to place siblings together to the fullest extent possible.

Separation of siblings signifies another consequence of unstable care arrangements and breakup of a child's family (Hegar 2005; Shlonsky et al. 2005). The experience of separation from siblings causes additional trauma and breaking up of their family life for children living in out-of-home care. There are weak legislative obligations upon the state to ensure siblings remain living together or maintain close contact under the CYFA, and the fragmentation problems in that system restrict the Children's Court from making orders to improve sibling placement (*DOHS v B siblings; H siblings* [2009] VChC 4; Hegar 2005). The decision to keep siblings together or not in OOHC is made by the DoHHS under administrative powers and my research points to serious problems with those decisions. Sibling separation affected 80% of the 74 eldest children and young people who had at least one sibling and a finalised contested hearing in the Children's Court of Victoria in 2010-2011.

If siblings are separated by adoption, then the right to contact should also be featured in the best interests of each child, including siblings that may not yet be born at the time of one sibling is adopted. Furthermore, if a child is adopted and a future sibling is subject to removal from a parent's care, legislation should contain a provision that the older sibling's adoptive family is to be informed as early as possible. This would be consistent with prioritising kinship care as well as sibling contact. Should the younger sibling be subsequently considered for permanent care or adoption and no other kinship placement has been available, then the older sibling's adoptive family should also be informed and provided appropriate support and opportunity to consider adopting the younger sibling. Again, legislation can articulate such provisions.

7. Should any changes be made to the current consent provisions?

If yes, what changes?

Yes, changes should be made to the current consent provisions. The following propositions have advantages and disadvantages. I also defer to the Office of the Public Advocate on this matter (including questions 8 and 9 below). However, some requirements for granting of consent or dispensing with consent to adoption on the part of a biological parent, child, or appropriate extended family member (see proposal below) are necessary given the seriousness of the decision. However, there may be unintended consequences to the binary options available – to consent or not.

The current requirement of consent for contact conditions to be attached to adoption orders can be seen to have a (likely unintended) coercive effect. The implication is that contact may not be ensured should a biological parent not consent or consent is dispensed with.

Furthermore, consent may also be experienced as a non-choice for a range of other social structural and personal reasons, including the resources available to a parent, quality of pre-adoption advice and counselling received, and shame. It should also be noted that prohibitions on the Children's Court and the retrospective and cumulative

time-limits for reunification in CYFA could potentially put in place a chain of events that push parents to consent to adoption. For example, Castle (2014) conducted a small-scale but in-depth qualitative study involving interviews with biological mothers who had experienced historical or recent adoption of their child. Despite unequivocally declaring the adoption to decision to be their own by consent, there nevertheless presented issues of non-choice and force in their experiences.

Another consideration is that parents may not want to be seen to consent to adoption (including for fear, shame, or not wanting their child to think they were simply given up). Fro example, Ross and Cashmore (2016) observed that parents may be uncomfortable giving consent to adoption but may still be allowed to participate. These issues cast consent with significant complexity.

By contrast, a third option is available in the making of protective orders and intervention orders in the Children's' Court. Parties to a case have a right to decide they consent, do not oppose (i.e., are unopposed), or oppose. A child or young person with direct representation can also consent, not oppose, or oppose an order. Although it is uncommon, extended family members may also be joined as parties and consent, oppose, or unoppose and order.

Applying a third option of 'not opposing' or being 'unopposed' to an adoption application offers advantages: reducing unintended adversarial contested proceedings, allowing children and young people to participate in a process with legal representation without having to take up a position opposing or consenting, and providing an alternative position to biological parents who want to participate in the process (particularly in relation to decisions about contact) without having to take up a position that may be perceived as hostile (opposing) or relinquishing a child (consent).

However this proposal does present disadvantages in relation to the conditions for dispensing with consent, ensuring the requirements for being unopposed are equivalent to consent (i.e., no coercion), and vulnerability of participants. A potential way to compensate for these disadvantages would be to require judicial review and approval, including a careful assessment of any exiting Children's Court file, and evidence contained in that file. I would defer to the Law Institute of Victoria, Victoria Legal Aid, and the Office of the Public Advocate for further advice on any advantages and disadvantages of this proposal.

Furthermore, it should be noted that consent between parties does not automatically translate to a child's best interests (as noted in question 2). In the Family Division, the Children's Court cannot make an order that it considers to not be in the best interests of a child, irrespective of consent by all parties. Any consent order should be subject to judicial review and approval. There is some merit to including such a provision in the Adoption Act as an added safeguard to decisions being made in the best interests of each child (see Magistrate Power 2016, at 5.21).

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

If so, who? And;

9. Are the grounds for dispensing with consent appropriate for adoption in contemporary Victoria?

If not, what changes should be made?

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. The first two circumstances may be applicable subject to: one, evidence of meaningful and timely attempts to locate a biological parent by an independent authority, and two, medical evidence of at least two medical practitioners *and* appointment of an advocate (e.g., Office of the Public Advocate) for a person.

An additional consideration in the conditions for dispensing with consent concerns the possibility of legislating for *family finding* and the involvement of suitable extended family members (e.g., a grandparent) in the planning and decision-making about adoption. First, family finding should be undertaken by an independent authority, to the extent that it is safe to do so, in cases where attempts to locate a biological parent are necessary. Family finding should also ensure that adult extended family members (and siblings under 18 years of age) have been identified and provided timely information and meaningfully opportunity for involvement when a child is being placed for adoption. Family finding is particularly important for children who have experienced child protection intervention and who may have become separated or estranged from family members as a result. For example, the United States *Fostering Connections to Success and Increasing Adoptions Act* (H.R. 6893/P.L. 110-351) includes notice to relatives within 30 days of a child removed from home (section 103) and an obligation to place siblings together unless contrary to the safety or wellbeing of a child (section 206). Similar provision could be made in the Adoption Act for family finding to be satisfied within a minimum 30 days of an adoption plan or application.

Second, as noted above in my response to question 7, extended family members can be grated permission to be joined as parties in child protection proceedings. Extended family members should be able to participate in the process of planning and deciding adoption, including applications for the making of an adoption order. This would also permit a second-tier of consent from an extended family member who has a significant relationship with a child, in the event that the court dispensed with consent by a biological parent. Also, as noted in question 4, provisions should also be made to inform, support, and encourage involvement of adoptive parents of a sibling, and the sibling themselves, in circumstances where another sibling is being placed for adoption. These types of provision would help to support long-term family relationships and identity for a child who experiences adoption. Provision may also be made for 'other person of importance to the child' to account for Aboriginal or cultural kin networks. I direct the VLRC to the Victorian Aboriginal Child Care Agency (VACCA) and SNAICC for advice on family finding and participation of extended family members and persons of significance to a child in consenting to adoption.

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. And;

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?

Contact, rather than access, is a preferable way to describe face-to-face, virtual (including Skype), and non-face-to-face (e.g., letters, email text message) communication between a child and another person of significance.

See my response to question 8 and 9 for reasons why a third option between consent and opposing an adoption application may be advantageous for the making of orders and conditions on orders subject to a child's best interests, including contact conditions.

Empowering the court to attach contact conditions to adoption orders would make the Court consistent with the operation of the FLA. In family law cases, the courts can assign parental responsibility to a single party, but still provide contact conditions consistent with what is considered to be in a child's best interests. Such conditions can provide for minimum contact arrangements in the absence of agreement between parties, supervision, graduated changes in arrangements over time, and that children's views to be respected. In adoption, this would reflect the adoptive parent/s as acquiring sole parental responsibility, but with the court being able to order contact conditions with parents, siblings or other significant persons to a child as determined in their best interests.

Conditions might include, but not be limited to, provision of contact (frequency, supervision, and form of contact), family services (e.g., to direct the Department to ensure a specific support service that a child is receiving be continued for a period of time post-adoption) or for post-adoption support (e.g., family therapy or mediation to encourage improvement in the quality of relationship between an adoptive parent/s and biological parent). Conditions would need to be determined on a case-by-case basis according to each child's best interests, not predetermined minimum or maximum limits.

In the child protection context, the instructions of children and young people must be taken into account by the Court and their views given appropriate weight according to section 10(3)(d) of the CYFA. The determination of the frequency and manner of contact by the Children's Court also involves weighing up the other best interests principles as set out in s.10, such as the safety of the child, the need to preserve and

promote the relationship between parent and child. This is another advantage of having best interests principles defined in the legislation.

My PhD research was the first to empirically document what children and young people instruct about their care and contact experiences in any child protection jurisdiction in Australia. Both the case file and ethnography studies found that children and young people most frequently wanted to have a say about their care and contact arrangements – these were the two aspects of child protection intervention that impacted their daily life experiences. Children did not *always* want to return to their parents care or have more contact with a parent, but instead have views about their care and safety that are informed by their own lived experiences. The reasons children and young people want to give instructions about these two issues are highly complex and reflect their personal experiences of parental care, Departmental care and individual contexts.

The importance of a court's power to order safe contact conditions according to each individual child's best interests were highlighted in my research when considering how children's views could be different or similar to a parent's views about contact arrangements. When children were seeking more contact with a parent, the parent was also supporting contact, but the Department often opposed that course of action. This included cases where the child was consenting. However, some children gave instructions opposing an increase in contact or were in favour of reducing contact when a parent (most often a father) was seeking more contact. Some children were highly cautious about the frequency and supervision of contact with their parents, especially with fathers, and were seeking the certainty and authority of legal protection from the Court to manage contact arrangements.

An obligation on the DHHS to consider contact and to provide evidence for their position on contact could be enshrined in the Adoption act via a requirement for an Adoption Plan and in any application being made for a child who has currently or recently been subject to statutory child protection involvement. (See question 45 Adoption Plan proposal)

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?

Biological age limits have been applied in many jurisdictions as a strategy to manage assessments about each child's capacity to participate in legal proceedings. Lansdown (2005) identifies some advantages to using age limits as a presumption for capacity. It can offer a clear interpretation of legislation applied to types of representation for children of certain ages. It is cost effective for financially-limited legal aid services, so individual assessments do not need to be done for each child. Age presumptions may minimise adults' subjective judgements about capacity that could otherwise exclude children from participation.

However, biological age limits are still subjective. This disadvantage is illustrated in the variability of age thresholds for children accessing legal representation in child protection proceedings in different countries, and between Australian states and territories (Duquette 2005; McNamee, James & James 2005; Monahan 2008; Ross 2008). Age limits applicable to adoption, whether for legal representation or consent,

should be consistent with other age thresholds for rights and responsibilities that Victorian children are subject to.

Children in Victoria currently have an age of criminal responsibility from 10 years old. This is quite young and has been subject to criticism in concluding remarks by the UN Committee on the Convention of the Rights of the Child. Nonetheless, until this age is lifted, it is appropriate that any age thresholds for adoption be consistent with this watermark of children's rights and responsibilities. Also, it would ensure that children 10 years of age and older who have had the opportunity to participate with legal representation in decisions made about them in the child protection jurisdiction, can continue to have access to the same standard of rights in adoption planning and decisions.

There are two ways in which a softer boundary of age for consent may be provided for children and young people 10 years and older. First, 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 (see question 14 and 15).

Second, there may be qualifiers introduced to account for circumstances where a child or young person is 10 years of age or older but has been deemed not mature enough to participate with direct representation and consent. Similar to dispensing with consent for a parent, this would need to be conditional on independent medical or psychological advice and appointment of a best interests lawyer to serve as alternative representation for the child.

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

Building on form my response to question 13, all children should have a legal representative appointed at the earliest possible opportunity when an Adoption Plan (see question 45) is underway and irrespective of consent between parties. Recognition of all children and young people as parties to adoption proceedings and entitled to legal representation would be a positive step towards addressing their legal status. This would include best interest representation for children not yet born who are subject to an Adoption Plan post-birth. The question remains as to how all children and young people can be legally recognised as having participation rights in a way that can enable those rights to be implemented in this context. Approaches to participation that might only give a magistrate access to a child's views, like a judicial interview or report from a social science consultant, neglect the wider functions of children's participation rights that lawyers can support in addition to children's views.

The approach to legislating representation of children and young people recommended by the Protecting Victoria's Vulnerable Children (PVVC) Inquiry (2012, p.378) holds the strongest likelihood of achieving participation rights for all children and young people in adoption processes, dependent upon application conditions. In summary, the Inquiry recommended all children be recognised as parties to child protection proceedings, consistent with the findings of the VLRC (2010). This would make it clear that the Victorian Charter applies to children. Most significantly, the PVVC Inquiry recommended direct representation for children 10

years and older and best interests representation for younger children and those children otherwise not able to give any instructions to a lawyer (see question 13).

The age threshold of 10 years would be compatible with the age of criminal responsibility in Victoria, thereby setting a consistent approach to the existing responsibilities upon children. Inclusion of a rebuttable presumption for direct representation would account for circumstances where that model was appropriate for a child younger than 10 years old. A rebuttal would apply, for example, if a child held strong views about a matter that were not the same as the views of their lawyer as to what was in their best interests.

A further condition could provide for a child 10 years of age or older who did not want to instruct a lawyer on at least one matter to then be afforded the opportunity to have best interests representation, subject to agreement with their lawyer about that course of action. Their lawyer could continue to represent that child, conditional upon the child's consent and so long as the lawyer had not yet formally acted in any significant capacity that presented an ethical conflict. For example, this would account for circumstances where a child preferred to not give any instructions but still wanted to have the opportunity to participate in a way that their lawyer was still obliged to put their views to the court or in alternative dispute resolution (see question 15).

A requisite increase in funding would be necessary for Victoria Legal Aid services and funding for training lawyers in this area of expertise.

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?

Yes, guidance should be provide as to the duties and role of a direct representative and best interests representative for a child. Even though children's views are a meaningful component of exercising participation and safety, the findings of my PhD research showed that participation means more than having a decision-maker hear a child's views. Participation rights in child protection proceedings also encompassed scaffolding to support choices about the extent of participation in a particular matter and over time, advocacy during informal and formal negotiations, advocacy inside the courtroom, timely access to information, having decisions explained, and passage agent support for children throughout the experience of statutory child protection involvement. This was consistent with the key elements of 'space', 'voice', 'audience' and 'influence' identified by Lundy (2007) as necessary for meaningful participation. These findings can also be understood to apply to adoption proceedings for the roles and duties of both the direct representative and best interests representative roles proposed here. More specific duties for each type of role are provided below.

Although not addressed specifically by this question, I wish to take this opportunity to emphasise the duties of other adults in adoption matters – biological parent/s, prospective adoptive parent/s, the Department and the court – to support (or not interfere with) a child's participation and to give "due weight" to children's views (UNCRC Article 12). In other words, all involved in an adoption have a legal and

ethical duty to recognise the child as a participant in decisions that affect them. This duty should be addressed in any definition of best interests and in any procedural guidelines for the development of Adoption Plans, alternative dispute resolution decision-making, and court proceedings.

Justice Bell in *Department of Human Services v Sanding* (2011, paras.29-31) acknowledged the consistency between the CYFA section 10(3)(d) and the UNCRC Article 12, and that the procedural guidelines (s.552) oblige the Children's Count to facilitate children's participation. According to Justice Bell, the Court is also required to explain the meaning and effect of an order to the child as plainly and simply as possible (para.31). Justice Bell pointed out that magistrates could ensure participation by enabling children to obtain legal representation (para.32). These principles should also apply to decisions made under the Adoption Act.

Direct representation

Consistent with the *previous* version of the CYFA (pre-2013), a direct representative should have a duty to act in a manner consistent with a child's views or instructions to the extent practicable, irrespective of the forum in which they may be acting (Adoption Plan meeting, Conciliation Conference or other alternative dispute resolution, and court hearing – see question 45). This duty should apply even if a child's views were not consistent with the lawyer's option as to the child's best interests. It is not the duty of the child (or any person) to always act in their own best interests. The child's participation should not be subject to a higher level of scrutiny than any other person. For example, an adult would not be excluded from instructing a lawyer if he or she held a position that was not in their own best interests.

I specify pre-2013 of the CYFA because the *Justice Legislation Amendment* placed limitations on children and young people's ability to participate with direct representation that are more stringent that adults are subject to. As I have documented through the PhD ethnography and case file study, partial instructions meant children could instruct their lawyer about one or more, but not necessarily all, the issues being decided in a case. However, the *Justice Legislation Amendment* to the CYFA now compels children to give instructions about "the primary issues in dispute" (s.524(1B)(a)). This condition imposes an expectation that children instruct about matters that do not concern them, or matters they should not be required to deal with. Emphasising the presence of adult disputes to justify children's participation with direct representation also positions children unfairly as tiebreakers in a situation where they have little status or control (Rešetar & Emery 2008). Also, compelling children to instruct on primary legal matters in disputes potentially dismisses what issues might be important from a child's perspective. Both the PhD ethnography and case file study documented how children's views sometimes diverged from those of either parent or the Department even though the child agreed with them on some issues, and they could raise different concerns about their safety, care and contact arrangements that had not been identified by parents or the Department.

Best Interests representation

Best interests representation requires a lawyer to form an opinion, based on evidence, the law and their expertise, about what outcome is in the best interests of a child. The primary difference between the models essentially means a lawyer effecting direct

representation is obliged to act consistent with the child's views, whereas a best interests lawyer is not.

Legislative provisions are recommended to enable lawyers to perform best interests representation, which could address some of the barriers identified in my PhD research. Specifically, information-sharing obligations could be legislated to improve timely access to information for lawyers and cooperation from the adoptive parent/s, Department and biological parent/s. This would establish the forensic function of best interests representation in the legislation. An obligation for lawyers to meet with a child represented on a best interests basis, with an exception for exceptional circumstances, would also give a clear duty to facilitate participation and provide justification for the adoptive parent/s, Department and biological parents to enable a child to meet with the lawyer.

An Independent Children's Lawyer is a specific type of best interests representative that is legislated under the FLA. The role is often confused with best interests representative in the child protection jurisdiction, but it is distinct. A large-scale Australian study by Kaspiew and colleagues (2013) about Independent Children's Lawyers, who act as best interests representatives in the family law jurisdiction, identified three dimensions of practice: facilitating participation of the child; forensic investigation and evidence gathering; and litigation management, including being an honest broker to facilitate settlements. The elements of the Independent Children's Lawyer role could be legislated in the Adoption Act to specify the duties of a best interests representative.

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?

Any provisions for non-legal representation should supplement, not replace, legal representation for a child.

The introduction of non-legal representation would require significant investment on top of the recruitment, training and accreditation on a new body of professionals. Decisions would have to be made as to minimum prerequisites for applicants to any such non-legal representation service (e.g., undergraduate or postgraduate degree in social work, psychology, law). A complaints mechanism would also need to be established for children who might experience this form of representation, just as lawyers may be subject to complaints (i.e., the Legal Services Board and Commissioner). Another disadvantage of non-legal representation is that it may not appropriately correct power imbalances between a child and other adults who may have legal advice or representation in a decision.

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? And;

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?

Yes, there must be positive duties prescribed for the Secretary of DHHS to make reasonable inquiries as to whether a child being placed for adoption is of Aboriginal and/or Torres Strait Islander descent. There must also be separate rules and guidelines that apply to the adoption of an Aboriginal or Torres Strait Islander child. I defer to submissions by VACCA, Aboriginal community organisation and the SNAICC (2016) Policy Position Statement for establishing what those duties, rules and guidelines should be. In addition, any similar specific provisions for Aboriginal and Torres Strait Islander children should also apply to my proposal to legislate for family finding.

I wish to point out that the Department's practice in this area is and has been poor, including compliance with the Indigenous Child Placement Principle. For example, almost half of all Aboriginal children in out-of-home care in during 2012-13 in Victoria did not have arrangements consistent with the placement principles (AIHW 2014, Table A32). The SNAICC (2013, p.12) has also noted that just 22% of Aboriginal children in out-of-home care were supported by an Aboriginal agency in Victoria. If compliance with family finding and identification of Aboriginal and Torres Strait Islander children is not improved earlier in child protection practice, then I fear that it will be deemed 'too late' or 'too hard' to do so at the point when adoption is being considered.

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? And;

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? And;

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?

The Adoption Act should be non-discriminatory. The heteronormative nuclear family should not be privileged over other family forms. For example, the Australian Institute of Family Studies notes that of the 5,584,000 families in Australia as of

2011, 10.6% were one-parent families with dependent children and 5.3% were single parent families with non-dependent children (see: https://aifs.gov.au/facts-and-figures/types-families-australia). Furthermore, there is equal access to reproductive treatment in Victoria for single and lesbian women. This means there should be no requirement for co-habitation or discrimination permitted to people who identify as Lesbian, Gay, Bisexual, or Transgender.

Adoption services in Victoria should be proved by an independent, non-religious statutory organisation, similar to the model established with the Victorian Assisted Reproductive Treatment Authority (VARTA, see https://www.varta.org.au). This would ensure services were non-discriminatory, subject to appropriate complaint mechanisms and held accountable through regulatory oversight.

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? And;

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? And;

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? And;

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? And;

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

And;

38. Should the provisions of the Adoption Act relating to the release of adoption information be made clearer?

If yes, what changes are needed?

As I briefly introduced on question 25, adoption services in Victoria should primarily be provided by an independent statutory organisation, similar to the model established with the Victorian Assisted Reproductive Treatment Authority (VARTA, see https://www.varta.org.au).

Having a neutral, independent authority would offer a number of advantages, including offering a trustworthy, less-stigmatised and unbiased pre and post adoption service. This would be especially important for families who have had prior contact with the Department and its agencies for child protection intervention and for families who had not had prior history with child protection. The breadth of professionals employed by this authority would need to have appropriate qualifications, including legal and social science expertise (e.g., specialised psychologists). Similar to VARTA, this would require appropriate funding, annual reporting to parliament, and

independent external periodic review for evaluation, service improvement and research. This would also take over the functions performed by the Family Information Network and Discovery (FIND).

Such an authority could provide, but not be limited to, the following services:

- An Adoption Registry to maintain records of adoptions made in Victoria.
- An Adoption Linking Service to manage access to non-identifiable and identifiable information for adopted children, biological parents, adoptive parents, extended biological family members, and future family members of the adopted child (e.g., their adult children who may be seeking medical information). This service would be similar to donor-linking performed through VARTA.
- Pre-adoption and post-adoption services, including 'options' counselling and post-adoption counselling for any child or their adoptive or biological family member directly affected by the adoption.
- A contact service, where supervised face-to-face contact or non-face-to-face contact (e.g., letters) may be managed.
- Therapeutic programs to support birth parents on how to manage post-adoption contact (including experiencing any supervision, emotional management and behaviour)
- A family finding service.

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

And;

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

An original birth certificate should be maintained, as would be consistent with the UNCRC Articles 7 and 8 and the right to universal birth registration in Australia (Gerber and Castan 2015). Adoption certificate should have same status as birth certificate and account for any order permitting that a child's surname be changed; with the requisite legal provisions to ensure such status is possible.

45. Should the Adoption Act include general principles to guide the exercise of power?

If yes, what should these principles be?

Answering this question requires consideration about *who* should exercise power and implement any general principles for adoption.

Fragmentation in the child protection legal system constitutes an access to justice problem for parents and children because remedies for a particular issue may be splintered across multiple statutory settings (see Productivity Commission, 2014). Statutory powers in child protection cases are divided between the Children's Court, the Department, and the Victorian Civil and Administrative Appeals Tribunal (VCAT). For example, currently the Children's Court does not have power to intervene in administrative and case planning decisions made by the Department. This

includes the type of out-of-home care placement, if siblings live together or not, and contact arrangements between parents and children and siblings in circumstances when the Department has full guardianship rights in relation to a child, of which guardianship is always a matter of last resort (*DOHS v B siblings; H siblings* [2009] VChC 4). Fragmentation has increased since the 2014 Amendments to the CYFA. Amendments to the Adoption Act should seek to minimise the extent of legal fragmentation for children and their families. I propose the following.

At a minimum, a two-stage process for adoption planning and decision-making though a specialised court is required to ensure appropriate oversight and checks-and-balances in the complex power dynamics between the child, biological parent/s, adoptive parent/s, and the DHHS (if child protection is currently or recently involved). Both of these processes should be vested with the Children's Court of Victoria, as a specialised, independent institution of child and family socio-legal decision-making. First, an Adoption Plan process could be established. Second, the Children's Court should be vested with powers to make Adoption Orders and oversee Adoption Planning via the establishment of a specialist list.

Building on my proposal for an independent, statutory Adoption Authority (question 38), the Adoption Planning could involve, but not be limited to:

- The steps required for family finding.
- Pre-adoption family assessments (e.g., a Children's Court Clinic assessment and any family therapy or support services recommended).
- The process of pre-adoption counselling for the biological parent/s, proposed adoptive parent/s, child or young person, and any significant extended family member who may be involved in the process (e.g., sibling, grandparent).
- Current and any future contact arrangements being proposed and reasons for these.
- Culture and identity planning (e.g., preparation of a birth family history or story for the child, cultural planning for Aboriginal and Torres Strait Islander children).
- Intentions as to the child's name and reasons for these.
- Appointment of legal representation and legal advice, including for all children (as per direct representation and best interests representation proposal questions 13, 14 and 15).

The Adoption Planning process should involve the proposed independent Adoption Authority and be available through the Children's Court. The Adoption Plan should be submitted to the Court as part of any application for the making of an Adoption Order.

As well as the availability of the independent specialist Children's Court Clinic, another advantage of vesting power to order adoption with the Children's Court under a specialist list is that less-adversarial decision-making methods can be made available. Under the CYFA (section 217(1)) the Family Division may refer any application to a Conciliation Conference. Conciliation Conferences are a form of alternative dispute resolution. An independent trained convenor employed by the Children's Court conducts conferences. Parties can be legally represented and if so, their lawyer engages in preparation processes and is allowed to be present to give advice and ensure clients understand options, consequences and outcomes (VLA 2011). Further research is required to assess the extent to which children's

participation rights are effectively implemented in Conciliation Conference's however. Alternative dispute resolution may not be appropriate in every case. For example, the extent of power imbalances between a victim and perpetrator of family violence can make dispute resolution an unsafe and unfair process. Nor is it appropriate for making findings of fact about evidence.

A potential disadvantage with vesting power in the Children's Court for adoption is that appeals may be more readily made to the Supreme Court. This disadvantage could be managed by setting criteria for establishing merit for an appeal application, as is often the case in other types of legal areas.

However, if it is deemed not possible for the Children's Court to have this role, then a specialist list should be established in the County Court, with a panel of specialised judges who are trained to hear adoption applications. There should also be powers to refer applications to Conciliation Conferences and to the Children's Court Clinic via a relationship established between the County Court and Children's Court. The foundation for such referral powers may be based on the authority of the President of the Children's Court, who is already a County Court judge. Judges or magistrates in a specialist adoption list should not be limited to one judicial officer in any setting so that the responsibility is shared and potential for development of unconscious bias is minimised.

Requisite funding must be given to the Children's Court and Children's Court Clinic (and County Court if that is the case) to manage the additional caseload, provide Conciliation Conferences and other services, train staff and magistrates (or judges) and accommodate or repurpose facilities on-site or off-site for the Court.

Irrespective of whether powers for adoption are vested with the Children's Court or County Court, judicial determinations should be subject publication in a de-identified format. This would be consistent with open justice principles and transparency for public confidence in legal institutions. It would also provide a resource for case law, particularly to establish merit for appeal. Judgments may also be examined for evaluation and research purposes to examine the implementation of the Adoption Act and identify strengths, limitations or unintended consequences of the legislation. For example, the Australian Institute of Family Studies evaluation of the 2012 family violence amendments to the FLA included a study of judgments, which was able to record how the legislation was being applied, including determinations about children's best interests and assessments of risk (Kaspiew et al 2015).

Written judgments are a record for the child and other parties to a decision and guidance should be provided to encourage these decisions to be communicated in a child-friendly way. One of the findings from my PhD case file study in the Children's Court was that the Court had not been appropriately resourced to develop publication of judgments and there were no conventions to guide magistrates in how judgments should be written, structured or formatted for readers who may include the child or young person. A strong example of child-friendly judgments in family matters has recently come from the UK (see The Honourable Mr Justice Peter Jackson [2016] EWFC 9 http://www.bailii.org/ew/cases/EWFC/HCJ/2016/9.html). At the outset, Justice Jackson stated that he intended the judgment to be written in such a way so that the mother and older children could understand. Readers of the judgment can see this is the case through the choice of language and explanation provided about the evidence, law and reasons for the decision. Yet, the case was a complex child protection matter. Therefore, guidance could be provided as to the preparation and

child-friendly language of judgments in judicial determinations and for the write-up of a decision record in cases settled fully by consent.

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?

Yes, please see my response to questions 33-38 and question 45 for the proposed independent Adoption Authority.

At this point, I wish to add further justification for the proposed independent Adoption Authority. Such a model would help to reduce conflicts of interests between the DHHS and it's non-government agencies that have financial and other interests in securing adoption of children living in out-of-home care. While the intention to increase stability and permanency for children is strong, there is nevertheless an important and complex history of forced adoption for which the state and non-government (mainly religious) organisations were complicit (Higgins, Kenny, Sweid, & Ockenden 2014). In addition, the need for post-adoption support can continue long after any state child protection department and/or agency have ceased involvement (Higgins et al. 2014; Higgins, Kenny & Morley 2016).

The adoption service model in New South Wales provides important lessons for Victoria on what not to do. Independent research beginning to emerge from New South Wales is raising concerns about the implementation of adoption law, quality of pre-adoption assessment in the context of arbitrary short timeframes, delivery of pre and post adoption support services, and gaps in the available socio-legal research evidence (see for example the discussion by Ross and Cashmore 2016).

Furthermore, the NSW non-government agency, Barnardos, is an institution with a religious history and a history of involvement in child migration and forced adoption, but it is now acting as a lead adoption agency and researcher (see: http://www.barnardos.org.au/what-we-do/the-centre-for-excellence-in-open-adoption/about-the-centre/). It is conducting adoption research while at the same time advocating for more adoption and providing adoption services. This presents a conflict of interest on multiple levels. For example, any organisation conducting such influential research should not have a vested interest in finding positive outcomes. It is also advertising children for adoption, which is a clear violation of these children's rights to privacy and dignity, as well as an unethical practice. Therefore, this is not a suitable model for Victoria to emulate. Having an independent, publically funded authority that is established under the Adoption Act would be a positive step for the provision of quality services that the public can have confidence in, provide a structural basis for minimising conflicts of interests and be subject to governance that must uphold the best interests of children in all its functions.

References

Archard, D & Skivenes, M 2010, 'Deciding Best Interests: General Principles and the Cases of Norway and the UK', *Journal of Children's Services*, vol. 5, no. 4, pp. 43-54.

Australian Institute of Health Welfare 2014, *Child Protection Australia: 2012-13,* Australian Institute of Health Welfare, Canberra, <http://www.aihw.gov.au/publication-detail/?id=60129547965%3E>.

Bates, F 2005, 'Children's Best Interests in Australia: Camouflage, Persiflage or What?', *International Family Law*, pp. 138-145.

Castle, P 2014, 'Current open adoptions: Mothers' perspectives' in A Hayes & D Higgins, *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia,* Australian Institute of Family Studies, Melbourne.

Dempsey, D 2004, 'Donor, Father or Parent? Conceiving Paternity in the Australian Family Court', *International Journal of Law, Policy and the Family*, vol. 18, no. 1, pp. 76-102.

Duquette, DN 2005, 'Two Distinct Roles/Bright Line Test', *Nevada Law Journal*, vol. 6, p. 1240.

Freeman, M 1997, 'The Best Interests of the Child? Is the Best Interests of the Child in the Best Interests of Children?', *International Journal of Law, Policy and the Family*, vol. 11, no. 3, pp. 360-388.

Freeman, M 2007, 'Article 3. The Best Interests of the Child', in A Alen, V Lanotte, J Verhellen, E Ang, F Berghmans and M Verheyde (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff Publishers, Leiden.

Gerber, P & Castan, M 2015, The Right to Universal Birth Registration in Australia, in M Castan and P Gerber (eds), *Proof of Birth*, Future Leaders, Albert Park.

Hansen, P & Ainsworth, F 2009, 'The 'Best Interests of the Child' Thesis: Some Thoughts from Australia', *International Journal of Social Welfare*, vol. 18, no. 4, pp. 431-439.

Hegar, RL 2005, 'Sibling Placement in Foster Care and Adoption: An Overview of International Research', *Children and Youth Services Review*, vol. 27, no. 7, pp. 717-739.

Higgins, D., Kenny, P., Sweid, R., & Ockenden, L. (2014). *Forced Adoption Support Services Scoping Study: Report for the Department of Social Services by the Australian Institute of Family Studies*, Australian Institute of Family Studies, Melbourne, available from: https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/forced-adoption-support-services-scoping-study

Higgins, D., Kenny, P., & Morley, S. (2016). *Forced Adoption National Practice Principles: Guidelines and principles for specialist services for Australians affected by forced adoption and forced family separation practices of the past*, Australian Institute of Family Studies, Melbourne, available from: https://aifs.gov.au/sites/default/files/fass-practice-principles.pdf

Horsfall, B. (2013). Breathing Life Into Children's Participation: Empirical Observations of Lawyer-Child Relations in Child Protection Proceedings, *New Zealand Law Review*, 3, 429-444.

Kaspiew, R, Carson, R, Moore, S, De Maio, J, Deblaquiere, J & Horsfall, B 2013, *Independent Children's Lawyers Study Final Report,* Australian Institute of Family Studies, Melbourne, and Attorney-General's Department, Canberra, <https://www.ag.gov.au/Publications/Documents/IndependentChildrensLawyersStudy/IndependentChildrensLawyerStudyFinalReport.pdf.>.

Kaspiew, R, Carson, R, Dunstan, J, Qu, L, Horsfall, B, De Maio, J et al. 2015, *Evaluation of the 2012 family violence amendments: Synthesis report (Evaluation of the 2012 Family Violence Amendments),* Australian Institute of Family Studies, Melbourne. https://aifs.gov.au/sites/default/files/efva2012-synthesis-report.pdf

Lansdown, G 2005, *The Evolving Capacities of the Child,* UNICEF Innocenti Research Centre, Florence, Italy.

Lundy, L 2007, ''Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child', *British Educational Research Journal*, vol. 33, no. 6, pp. 927-942.

Lundy, L, Kilkelly, U, Bryrne, B & Lang, J 2012, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries,* UNICEF United Kingdom, London, <http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCimplentationreport.pdf>.

McNamee, S, James, A & James, A 2005, 'Family Law and the Construction of Childhood in England and Wales', in J Goddard, S McNamee, A James and A James (eds.), *The Politics of Childhood: International Perspectives, Contemporary Developments*, Palgrave Macmillan, Hampshire, pp. 226-244.

Monahan, G 2008, 'Autonomy Vs. Beneficence: Ethics and the Representation of Children and Young People in Legal Proceedings', *QUT Law and Justice Journal*, vol. 8, no. 2.

Power P 2016, Research Materials Family Division – Child Protection, Children's Court of Victoria, Melbourne, http://www.childrenscourt.vic.gov.au/legal/research-materials/child-protection.

Protecting Victoria's Vulnerable Children Panel of Inquiry 2012, *Report of the Protecting Victoria's Vulnerable Children Inquiry,* Department of Premier and Cabinet, Melbourne, Victoria, <http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html>.

Productivity Commission 2014, *Access to Justice Arrangements - Productivity Commission Inquiry Report No.72,* Australian Government, Canberra, <http://www.pc.gov.au/inquiries/completed/access-justice/reportfiles/360/report.html%3E>.

Rešetar, B & Emery, RE 2008, 'Children's Rights in European Legal Proceedings: Why Are Family Practices So Different from Legal Theories?', *Family Court Review*, vol. 46, no. 1, pp. 65-77.

Ross, N 2008, 'Legal Representation of Children', in G Monahan and L Young (eds.), *Children and the Law in Australia*, LexisNexis Butterworths, Chatswood, pp. 544-573.

Ross N & Cashmore J 2016, 'Adoption reforms in New South Wales style: A comparative look', *Australian Journal of Family Law*, 30, pp. 51-75

Secretariat of National Aboriginal and Islander Child Care 2013, *Response to Issues Paper 4: Preventing Sexual Abuse of Children in out- of-Home Care*, Royal Commission Into Institutional Responses to Child Sexual Abuse, Canberra, <http://childabuseroyalcommission.gov.au/getattachment/d0986ed4-22a8-4eb7-834d-e3460902bb75/52-Secretariat-of-National-Aboriginal-and-Islander%3E>.

Skivenes, M 2010, 'Judging the Child's Best Interests', *Acta Sociologica*, vol. 53, no. 4, pp. 339-353.

Shlonsky, A, Bellamy, J, Elkins, J & Ashare, CJ 2005, 'The Other Kin: Setting the Course for Research, Policy, and Practice with Siblings in Foster Care', *Children and Youth Services Review*, vol. 27, no. 7, pp. 697-716.

Thomas, N 2002, *Children, Family and the State: Decision-Making and Child Participation,* The Policy Press, Bristol.

United Nations 1989, *Convention on the Rights of the Child,* United Nations, New York, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx%3E>.

United Nations Committee on the Rights of the Child 2005, *UN Committee on the Rights of the Child: Concluding Observations, Australia,* United Nations, New York.

United Nations Committee on the Rights of the Child 2009, *General Comment No. 12 (2009) on the Right of the Child to Be Heard,* United Nations, New York, <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>.

United Nations Committee on the Rights of the Child 2012, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia,* United Nations, New York, <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf>.

United Nations Committee on the Rights of the Child 2013, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1),* United Nations, New York, <http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG. pdf>.

Victorian Law Reform Commission 2010, *Protection Applications in the Children's Court,* Victorian Law Reform Commission, Melbourne, <http://www.lawreform.vic.gov.au/sites/default/files/PACC.pdf%3E>.

Victoria Legal Aid 2011, *Submission to the Protecting Victoria's Vulnerable Children Inquiry: Empowering Children and Families to Negotiate Workable Outcomes Based on Strengths and Needs,* Victoria Legal Aid, Melbourne, <http://www.childprotectioninquiry.vic.gov.au/images/stories/submissions/victoria-legal-aid.pdf%3E>.

Young, MB 2015, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Victorian Government Printer, Melbourne, < https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>.

Published Cases

Department of Human Services v B Siblings; H Siblings [2009] VChC 4

Secretary to the Department of Human Services v Sanding [2011] VSC 42