

Office of the Public Advocate

Submission to the Victorian Law Reform Commission Review of the *Adoption Act 1984*

The Office of the Public Advocate (OPA) thanks the VLRC for the opportunity to contribute to this review. The Public Advocate makes this submission on the basis of her responsibility to protect and promote the rights and interests of people with disabilities. In the context of this review, the focus is on parents with disabilities and mental illness for whose children adoption may be considered.

Changing context of adoption

The history of adoption in Australia has been comprehensively covered by the discussion paper prepared by the VLRC. Victorian and Australian governments have issued apologies to Aboriginal people whose children were forcibly removed from their care and the unmarried mothers of the 1950s and 1960s whose children were removed from their care through coercive means in recognition that these policies and practices were not in the best interests of the child.

Recent changes in the social context that are leading to a resurgence in interest in adoption are changes to state legislation that integrate adoption into the child protection system and seek to promote adoption as the best solution for children who have been permanently removed from their families.

Underlying premises of current Adoption law.

The underlying premise of adoption is that the parents have the right to decide whether to raise their child themselves or to offer their child for adoption. The choice is to be freely made, albeit that circumstances under which such a decision is made are always extremely difficult.

The responsibilities of the government under the current Act include ensuring that parents receive counselling to ensure that they are providing informed consent to the adoption and regulating the process by which the adoptive parents are chosen.

The courts change the legal status of child on the application of the adoptive parents for an adoption order. This usually happens when the child has been placed with the proposed adoptive parents for a year. The welfare and interests of the child are paramount in the process but there are no specific provisions to ensure that the rights of the child are considered or upheld in the decision of the parents to offer them for adoption.

The Public Advocate considers that a change in the adoption process is needed to reflect the primacy of the welfare, interests and rights of the child rather than the natural or adoptive parents at the centre of the adoption process.

This would require judicial or quasi-judicial oversight from the beginning. We suggest that Human Rights Division of VCAT would provide the appropriate forum

to consider adoption cases. It is based on an inquisitorial rather than an adversarial model, it is accessible, timely and of little or no cost. A specialist jurisdiction with experience in assessing capacity and with the power to order supports would protect the interests and rights of all parties.

OPA proposes the following processes to protect those interests:

- The adoption process is initiated by an application by the child's parents or parent to place their child for adoption.
- This is followed by an initial VCAT hearing to explore the issues and ensure that the decision is freely made, that the child's best interests and human rights are being protected, that alternative permanent care options including kinship care have been fully explored, and that supports that would enable the parent(s) or other family members to raise the child have been provided.
- Following the hearing, there would be a period of three months in which the parents could withdraw their consent without further hearing. If there is no application to withdraw, VCAT can order for the adoption process to proceed.
- After the three month period, it would be open to the relinquishing parent to withdraw consent, but this would require the approval of VCAT.

In addition to these formal legal processes, OPA considers that there be legislated a counselling process prescribed under the new Adoption Act that goes deeper than the current process, which appears to concentrate on informed consent and the provision of information to relinquishing parents. A report of the counselling process is to be provided to VCAT prior to its approval that the child be placed for adoption.

OPA is keen to see the formal recognition in a new Act of the rights of children as outlined in the UN Convention on the Rights of the Child.

- Article 7.1 requires that 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.
- Articles 8.1 requires that 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.
- Article 9.1 requires that 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.

Victoria's *Charter of Human Rights and Responsibilities Act 2006* only applies to public authorities. It may be necessary to see how parents, who are not bound by the Charter, can be required by the law to have regard to the section 17 right on the protection of families and children.

In the case of Aboriginal and Torres Strait Islander children, Aboriginal and Torres Strait Islander communities and their organisations must lead the development of legislation and policy for permanent care of their children based on an understanding of their unique kinship systems and culturally-informed theories of attachment and stability.¹

The integration of adoption and the child protection legislation

In Victoria, until 1 March 2016, the adoption process and the child protection process have always been separate. They have now been linked through the identification in the *Children Youth and Families Act 2005* (CYFA) of adoption as the first preference for children who have been removed permanently from their parents' care. Adoption is given priority over permanent care and any other long term out of home care arrangements including kinship care.

OPA notes that the CYFA is outside the scope of the review of Adoption Act. However, OPA submits that the threshold requirements for adoption in a new Adoption Act not be diminished so that adoption is more readily available without the full, free and informed consent of the parents (hence the process set out above). It is parents with disabilities and mental illness who are especially vulnerable to having their children adopted without consent.

The Public Advocate is opposed to the change in the child protection legislation that elevated adoption as a preferred form of permanent out of home care:

- The adoption of a child away from their parents against the parents' wishes is the most intrusive intervention into family life that is possible in our society. Under the CYFA and as a general principle of social policy, the intrusion of the State into the life of a family should be limited to that necessary to protect the child.
- The adoption program in Victoria is primarily for babies and very young children. Mothers with disabilities and mental illness are identified in the Child Protection Manual Advice on pre-birth notifications as amongst those for whom professionals should consider making pre-birth notifications. OPA has experience of these mothers whose babies are placed on protective orders immediately after birth and never returned to their mother's care. With adoption now being the first permanent care option for babies removed from their mothers, this policy will discriminate against parents with disabilities and mental illness.
- For Aboriginal and Torres Strait Islander children and families, traditional adoption severs the connection for children to their families and communities of origin and is 'never an appropriate care option for Aboriginal and Torres Strait Islander Children, except as it relates to traditional Torres Strait Islander adoption practices'.²

¹ SNAIC July 2016 'Achieving stability for Aboriginal and Torres Strait Islander children in out-of-home care' policy position statement.

² IBID

The prioritisation of adoption over other forms of permanent care, creates a significant moral hazard for child protection authorities. Adoption is demand driven whilst foster care and permanent care arrangements in child protection are supply driven. The demand for adoption is largely from prospective adoptive parents seeking babies or young children.

The moral hazard lies in child protection moving too hastily to place babies on an adoption track without providing the supports and education that may have enabled those children to remain with their parents or be reunified with them. They may also be influenced by the reality that the demand is for young children and that unsuccessful time spent with family will lessen the possibility of finding suitable adoptive parents when children are eventually removed.

There is a fundamental difference between the State's involvement in adoption regarding child protection matters and in matters where the parent has abandoned the child or where the parent(s) have consented to adoption and in cases of adoption as a child protection option. There is a long history of forced adoptions in this country of Stolen Generations of Aboriginal and Torres Strait Islander children where the consent requirement was waived and during the 1960s when removal of children from young mothers took place in secrecy.

In adoptions involving informed consent, the baby or child is in the care of their parent(s) and is relinquished from the care of the natural parents to the care of adoptive parents with the only role of the State being the facilitation of the process and the granting of an Adoption Order by the Court to change the child's legal status.

In cases where adoption is a child protection option and the child is in the care of the State, the child has been removed by the State against the will of the parents in the vast majority of cases. The justification for removal is the risk of harm to the child in the care of their parents. Almost always, the parents want their child returned to them. In these circumstances, it is difficult to see how the parents can give a free and unpressured consent to adoption. At most, it will be a highly constrained consent, rather than free consent.

For this reason, the Public Advocate considers that there should be different approaches to adoption processes depending on whether the child is in the care of the parents or the care of the state when the decision for adoption is made. OPA set out its preliminary thoughts on this process above to suggest a judicial process within VCAT. This should be framed to ensure that a parent, whose child is already under a protective order, is making a genuine, considered decision for their child to be adopted rather than be placed in permanent care or long-term out of home care.

OPA's preference is that where neither family preservation or unification are possible, there should be a preference for permanent care or long-term out of home care. Adoption, if it is to occur, should only be undertaken with the consent of the parent(s). The processes for determining consent to adoption would need to take into account the very significant power imbalance between DHHS and the parent. Hence we consider it necessary that there be VCAT oversight of this process.

Dispensation with consent

Q9: Are grounds for dispensing with consent appropriate for adoption in contemporary Victoria? If not what changes should be made?

The Public Advocate considers that the Court should only be able to dispense with consent if the person cannot be found and that all other current grounds should be removed as these situations are dealt with under the CYFA. We note that the consultation paper states that in practice that this is the only grounds for dispensation with consent that are used. We make the following comments on the present grounds that directly affect parents with disabilities.

The person's physical or mental condition means that they are not capable of properly considering the question of whether they should give consent, and this situation is unlikely to change (this requires a certificate signed by a minimum of two registered medical practitioners).

- Under Article 12(2) of the Convention on the Rights of Persons with a disability, persons with disabilities enjoy legal capacity with others in all aspects of life.
- Article 12(3) of the CRPD, States parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

OPA does not support this ground for dispensing with consent. In addition, OPA does not support any proposal for a substitute decision-maker to be authorised to make such a decision as the decision to place your child for adoption falls into the category of discretionary personal decision comparable to making a decision to marry.

The person has such a physical or mental disability, or is otherwise so impaired that the person would be unable to meet the needs of the child.

In contemporary Victoria, such children are already protected through the provisions of the CYFA. Under the CYFA, Child Protection is required to provide supports to enable the parents to raise their own children before protective orders are made that remove their children permanently. OPA does not support an avenue for the removal of children from parents with disabilities without these supports being provided. Credible research has demonstrated that most parents with disabilities are able to successfully raise their children if provided with appropriate support to do so.

Q10: Adoption with conditions

OPA considers that the Court should in all cases be able to place conditions on adoption orders if it considers that this is in the best interests of the child.

Q11: Contact with family members

OPA considers that all contact arrangements with family members, should be made by the Court or Tribunal as part of a best interests principle. OPA also considers that conditions and contact arrangements should be able to be changed during the child's life by application to the Tribunal.

Q24: Single persons

OPA considers that single people should be able to adopt children on an equal basis with couples. The present situation where a single person is able (through the special circumstances clause) to adopt a disabled child but not a child without a disability is unacceptable. As one member of the VLRC disability consultation group said very eloquently, "It makes no sense to say to a single person that because you are single you cannot have a normal child but we will give you this damaged one over here, when a child with a disability is more likely to need two parents than a child without a disability".

Q39: Birth certificates.

OPA supports the adoption of integrated birth certificates as recommended by the Senate Committee.

Q44: Objects of the Act.

OPA supports the inclusion of an Objects section to clarify the purpose of the Act. OPA generally favours the Queensland legislation but suggests the object be changed as follows:

- To provide for the adoption of children in Victoria and for the access to information about parties to adoption in a way that:
 - (a) Promotes the well-being, rights and best interests of adopted persons throughout their lives,
 - (b) Supports efficient, accountable, accessible, compassionate and respectful practice in the delivery of adoption services,
 - (c) Complies with the Victorian Charter of Human Rights
 - (d) Complies with Australia's obligations under the Hague Convention and under international Conventions, including the Convention on the Rights of the Child.
 - (e) Ensures openness in adoption.

Q45: General principles to guide the exercise of power.

OPA supports the inclusion of two overarching principles:

- that the well-being, rights and best interests of the child are paramount.
- that all parties and families are to be treated with respect and understanding in the process.

OPA asks that the Commission consider these subsidiary principles:

- that where a child is in the care of the State, adoption should be considered the last option for providing for their care after all other options have been found to be unsuitable.³
- that consent to adoption must be free from duress, pressure or coercion.
- that Court/Tribunal dispensation for consent shall only be given when the parents cannot be found.
- that it is preferable for siblings to be placed for adoption together.
- that wider families should be involved in adoption processes wherever possible.
- that except in exceptional circumstances it is in the interests of the child to have contact with their natural parents.
- that an adopted child must be kept informed about their adoption.
- that an adopted child should have access to information about their ethnic or cultural heritage, opportunities to develop and maintain a connection with their ethnicity or culture and opportunities to maintain contact with his or her community or language group.

Q48: Supports after adoption.

OPA considers that the State has a continuing responsibility towards all involved in the adoption of a child. With the changes in the CYFA, OPA considers that the State bears a particularly serious responsibility in cases where the child has been in the care of the State under protective orders at the time of adoption.

OPA agrees that there should be increased requirements in the Adoption Act to provide post-adoption support for all adopted children and their families, including natural families. The supports and proposals canvassed in paragraphs 9.49 to 9.58 would all appear to be in the best interests of the child in certain circumstances.

Consistent with OPA's proposal that VCAT should be able to order supports to a relinquishing parent pre-adoption, VCAT should also be able to order post-adoption supports.

Advertising of children for adoption

The Public Advocate considers that the advertising of children for adoption is a form of human trafficking and should be expressly forbidden under the Act.

³ It is noted that this would require an amendment to the CYFA which is outside the scope of the Commission's review. Nonetheless, this could be achieved in practice through a provision that the parents' full free and informed consent is necessary.