LAW INSTITUTE VICTORIA

Victorian Law Reform Commission

REVIEW OF THE ADOPTION ACT 1984

To: Victorian Law Reform Commission
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INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector representing over 19,000 members.

This submission has been prepared by members of the LIV Family Law Section, Administrative Law and Human Rights Section and Reconciliation Advancement Committee. It is intended to be a public submission and the LIV has no objections to the Victorian Law Reform Commission publishing this submission on its website.

The LIV initiated a working group made up of private practitioners who work directly in adoption matters and in child protection. This submission reflects their experience and expertise.

For convenience, this submission is organised using headings from the Consultation Paper to which this submission directly responds.

The LIV thanks the Victorian Law Reform Commission for providing us with the opportunity to attend the roundtable consultations and provide written submissions in this review.

THE BEST INTERESTS OF THE CHILD

Question 1 and 2: Should the Adoption Act use consistent terminology to guide decisions makers? Should the Adoption Act provide guidance about how to determine what is in a child's best interests? What should decision makers be required to consider etc.

Recommendation One

The LIV submits that the Adoption Act and Regulations be amended to require that the "best interests of the child" shall be the paramount consideration rather than the 'welfare and interests'.

Recommendation Two

The LIV submits that the Adoption Act should provide guidance as to the factors to be taken into account when determining what is in the child's best interests.

Subject to the best interests of the child being paramount, equal weight should be placed on the other principles and/or factors.

The Adoption Act should include additional principles concerning Aboriginal and Torres Strait Islander children consistent with the FLA and CYFA.

Presently, section 9 of the Adoption Act 1984 (Vic) provides that 'In the administration of this Act, the welfare and interests of the child concerned shall be regarded as the paramount consideration'.

The terminology is repeated in other sections of the Act, for example section 15(1) (c) which provides that a Court shall not make an order for the adoption of a child unless the Court is satisfied that the 'welfare and interests of the child will be promoted by the adoption'.

This would align the Adoption Act with the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("the Hague Convention"), as well as State and Federal legislation including the Family Law Act 1975 (FLA) and Children, Youth and Families Act 2005 (Vic) (CYFA) both of which have the 'best interests of the child' as the paramount consideration in relation to decision making. With these amendments, the Adoption Act would also better reflect community attitudes and contemporary law.

Our members consider that prescribing the matters to be taken into account when considering what is in the best interests of a child is likely to assist in the application of the principle. This is important if the best interest's principle is to form the basis of decision making and process under the Adoption Act.

While the FLA and CYFA do provide guidance about what is in the best interests of a child, each of those Acts has a different emphasis from the Adoption Act. Providing guidance, including factors to consider when determining what is in the child's best interests, specifically within and for the Adoption Act will assist to determine how this to be achieved specifically for adoption matters. Guidance from the FLA or CYFA should be read in the context of decisions made pursuant to that legislation, and with an acknowledgment of the inherent difference in the permanency of orders made under the Adoption Act.

Adoption legislation in some other States includes objects which serve to highlight this difference. By way of example, section 5 of the Adoption Act 2009 (Qld) sets out the 'Main Objects of the Act' and includes an objective that adoption 'promotes the wellbeing and best interests of adopted persons throughout their lives'. Similar language exists in the Adoption Act 2000 (NSW) which at section 7 stipulates an object of the Act is 'to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice'.

The emphasis is added, but reiterates the longevity of the effect of adoption orders. It is submitted that it is appropriate that decision makers should be able to consider factors which are relevant not only to the child's welfare in childhood, but whether an order or process under the Adoption Act is likely to be in their best interests throughout their life (or for the remainder of their life in the case of adult adoptions).

Regard may be had to comparable legislation in States which have undergone recent reform, such as section 8(2) of the Adoption Act 2000 (NSW). It is submitted that if the Adoption Act is to

legislate guidance for determining a child's best interests, it should at a minimum provide for a consideration of the following (see section 60CC FLA):

a. any wishes expressed by the child;

b. the child's age, maturity, level of understanding, gender, background and family relationships of the child;

c. the child's physical, emotional and educational needs, including the child's sense of personal, family and cultural identity;

d. any disability that the child has;

e. any wishes expressed by either or both of the parents of the child;

f. the relationship that the child has with his or her parents and siblings (if any) and any significant other people (including relatives);

g. the attitude of each proposed adoptive parent to the child and to the responsibilities of parenthood;

h. the nature of the relationship of the child with each proposed adoptive parent;

i. the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child;

j. the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect, ill treatment or family violence;

k. the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.

The Adoption and Children Act 2002 (UK) includes at paragraph 4(f) of section 1 some additional considerations which, if not deemed overly prescriptive, may be appropriate for inclusion insofar as they relate to the child's relationship to relatives or other relevant people. Those considerations require the court or adoption agency to have regard to,

> "…. (f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant including:
>
> (i) the likelihood of any such relationship continuing and the value to the child of its doing so;

(ii) the ability and willingness of any of the child's relatives, or any such person, to provide the child with a secure environment in which the child can develop and otherwise meet the child's needs;

(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

It is not submitted that any of the above considerations should be given greater weight than others.

Subject to the best interests of the child being paramount, equal weight can be placed on the other principles for which the decision maker is to have regard, as in other state Adoption Acts.

In addition to the factors listed above, the Act should include additional principles concerning Aboriginal and Torres Strait Islander persons. This approach is consistent with the FLA and CYFA. Inclusion of specific principles would aim to address the specific cultural needs and family structures of this group of people. It would also seek to address the historical and ongoing overrepresentation of Aboriginal and Torres Strait Islander people in the child protection system, and the continuing impact of the policies that created the 'stolen generation'. This is discussed more below under the heading "Aboriginal Children".

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

Apart from requiring a minimum age for the adoptive parents, there should not be any requirements about the age differences between the adopted child and any other children or other members of the family. The best interests of the child should be the paramount consideration and the discretion to determine what is in a child's best interest should not be fettered by including restrictions as to age.

Question 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?

The Adoption Act should include a principle requiring decision makers to consider placing siblings for adoption in the same family provided that the paramount consideration is the best interest of the child.

The legislative treatment of siblings with reference to the best interest of the child is different as between family law and child protection jurisdictions. For example, section 60CC (3) (b) (i) and (d) (ii) FLA includes as a factor that the Court must take into account when determining the best interests of the child the nature of the child's relationship with any other persons who are significant to the child and the likely effect of any changes to the child's circumstances including the effect of any separation from any other child with whom they have been living. While siblings are not expressly mentioned, this section enables them to be considered and in most cases the Family Court finds it to be in the best interest of the child to be placed with their siblings. In child protection, section 10(3) of the CYFA requires the Court to consider, "the need to strengthen, preserve and promote positive relationships between the child, their parents, family members and persons significant to the child."

In both jurisdictions, there is a clear desirability to keep children of the same family and those whom are significant to the child (but may not be technically classed as siblings) together provided it is in the best interests of the child to do so.

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

Yes, there should be a greater obligation to identify and contact the father of the child to at least notify him of the proposed adoption and provide him with an opportunity to provide consent. The steps which would be reasonable to take are those which are required to comply with the service provisions in civil procedure.

Consent should only be dispensed with in extreme cases where it is in the best interests of the child to do so.

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

Attempts should only be made to contact 'the father' as that term is defined in the Status of Children Act 1974 (Vic). This would exclude the need to contact a 'father' who was a sperm donor in an artificial reproductive procedure and who is not legally presumed to be the father of the child in accordance with that Act. See Section 15 of that Act[1].

[1]Section 15 of the Status of Children Act 1974 (Vic) provides an irrebuttable presumption that a man who produced semen used in a procedure following which a woman with no partner became pregnant is not the father of the child. http://www.austlii.edu.au/au/legis/vic/consol_act/soca1974199/s15.html

Otherwise, all reasonable efforts should be made to seek the consent of both parents.

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

LIV members consider it is important that both parents be required to consent to an adoption as is this is a central aspect of open adoption in Victoria.

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

Any persons who would reasonably be considered to be a person significant to the child in the context of the best interest principle should be informed about the proposed adoption to allow them time to consider and obtain legal advice. These persons should not be required to consent to an adoption but should at least be provided procedural fairness and the opportunity to consider and be advised about whether they had standing and an arguable case that the child should be placed in their care prior to being adopted out of the family.

Question 9: Are there any grounds for dispensing with consent for adoption appropriate in contemporary Victoria?

Recommendation Three

The ground in s 43 of the Adoption Act should be amended.

The LIV considers that section 43 of the Adoption Act should be amended. However, there is no overall consensus between our members in relation to those amendments.

For example:

- Some LIV members consider that the amendments should reflect how this issue is treated in the Queensland Adoption Act 2009. In Queensland, the issue is framed as, “the applicant cannot locate the relevant parent after making all reasonable enquiries”.

- There was consensus between all members who contributed to this submission that s43 (1)(e)[2] should be removed.
- Some LIV members consider that s43(i)(e) should be replaced with wording that is similarly framed to Queensland, i.e. s39(1)(e) of the Queensland Adoption Act that "the court is satisfied the relevant parent (i) is not, and will not be within a time frame appropriate to the child's age and circumstances, willing and able to protect the child from harm and meet the child's need for long term stable care, and …"
- Other LIV members consider that sections 43(1) (c) to (h) inclusive should be completely removed as these grounds could, although they are not presently, be applied to many parents who are involved with the Victorian child protection system, notwithstanding that they may ultimately be able to safely parent their child.

Recommendation Four

The Court should not dispense with the consent of both parents unless satisfied that to do so is in the best interests of the child.

Some LIV members are concerned that unless the provisions of s.43 are strengthened so as to only permit dispensation of consent in the most extreme of circumstance (i.e. parent cannot be found or the parent is significantly mentally or physically impaired), this section will be used to increase the number of children adopted from within the Victorian child protection system whose parents are unable to address the issues affecting their parenting within the restrictive cumulative time period created by Children Youth & Families (Permanent Care & Other matters) Amendment Act 2014 (Vic) which came into effect on 1 March, 2016.

This concern has been heightened by the new emphasis on adoption in the CYFA coupled with the reduction in the ability of the Children's Court to effectively oversee care arrangements of children in state care.

[2] Section 43(1)(e) of the Adoption Act provides that the Court may dispense with the consent of a person where it is satisfied that… the person has for a period of not less than one year failed without reasonable cause to discharge the obligations of a parent of a child.

These members advocate that significant amendment to s.43 is required as it otherwise creates an unnecessarily low evidential threshold to justify dispensation of the requirement of consent of a parent. It would be concerning if consideration of the current section 43(i) (c) to (h) grounds were considered in the context of the CYFA Act. The LIV notes that there is a widespread view among service providers in the child protection sector that the time periods in the amended CYFA are insufficient to enable the parties to address the concerns which led to child protection's involvement. Further, that in many instances the parties ability to access services depends on factors outside of their control, including resourcing of service providers (often by the government), waiting times etc. era.

The LIV considers that it is important to require consent from both parents and efforts to obtain consent from both parents and inform all other relevant parties of the proposed adoption should be increased.

Consent should only be dispensed with in rare circumstances.

Question 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.

The Court should be able to include conditions on an adoption order including that the adoptive parents facilitate the child spending time with their natural parents or other persons significant to the child or requiring the adoptive parents to provide ongoing information about the child to the natural parents when the court determines it is in the best interest of the child to do so.

It is the right of the child to know where they came from and spend time, if appropriate, with their natural parents and/or family members. This approach is consistent with open adoption, the United Nations Convention on the Rights of the Child and the making of orders in relation to children in the Family Courts under the FLA. These orders should be enforceable as they are with FLA orders.

Question 11 How should adoption law provide for the child's contact with family members other than parents? For example: (a) Should contact arrangements be considered as part of a best interest's principle? (b) Should a decision maker, such as DHHS, be required to consider contact with family members other than parents after an adoption? (c) Should the court be required to consider making conditions for contact with family members other than parents after an adoption?

See response for Question 10 above.

The LIV considers that ‘spend time’, ‘live’ and/or ‘communicate with’ orders should be considered as part of the best interests principle in adoption law. This is required to ensure that the Victorian Adoption Act properly reflects the contemporary understanding of and principles contained in United Nations Convention on the Rights of the Child, in particular to uphold and protect the right of a child to their identity and their family.

The approach of adoption law should mirror the approach taken by the Family Courts which routinely makes orders requiring certain parties to facilitate the child spending time with, communicating with or, if there is no direct contact or communication, requiring the party with primary care of the child to keep other parties informed about the child. The experience of our members is that in most cases, the child once they are older actively seeks out the parent from whom they have been estranged or had little contact with and, in the case of children who have been removed from their families by child protection, return to their family once they turn 18. These types of orders are important to enhance and preserve the relationship between that party and the child in case the child wishes to pursue their relationship with their family as an adult.

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

The Report of the Protecting Victoria’s Vulnerable Children Inquiry (known as the ‘Cummins Inquiry’[3]) recommended that children before the Children’s Court be legally represented on direct instructions at 10 years (7 years was the previous practice) to make this consistent with the age of criminal responsibility.

The LIV recommends that, consistent with principles in Cummins:

1. children 10 years and over should be represented on direct instructions in adoption proceedings.
2. any child younger than 10 years or who is unable to instruct a lawyer, be appointed a best interests lawyer.

[3] http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html

Such appointments will ensure that a child's voice is independently put to the court and allow the Court to properly assess the child's views and determine the appropriate weight to be given to them having regard to the best interests of the child and individual factors of each case.

Question 14 and 15: In what circumstances, if any, should a child have separate legal representation in adoption proceedings? Should the Adoption Act provide guidance about the duties and role of a legal representative?

Recommendation Five

A child should have separate legal representation in adoption proceedings when there is a dispute about whether adoption is in the best interests of that child

There should be a direct instructions model for children 10 years and older and best interests instruction model for children younger than 10 years or where the child lacks capacity.

Where there is a contest about whether the adoption is in the best interests of the child then a child should have separate legal representation. This could include a contested application for adoption, an application for an order to dispense with the consent of a person to the making of an adoption order, an application to discharge an adoption order or an application in relation to conditions in orders for a party to facilitate the child spending time with or communicating with a family member or someone else significant to them.

The Act should provide guidance about the duties and role of the separate legal representative and emphasise that the separate representative must act in the best interests of the child.

Question 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?

Recommendation Six

The Adoption Act should not provide for non-legal representation or support of a child in adoption proceedings if the child has a separate legal representative.

LIV members consider that a separate legal representative is appropriate and it is not necessary to draw in other professionals, given a report by a professional is required in any case for adoption applications. The Act could provide guidance to the separate legal representative of the child to require them to actively turn their mind to obtaining support for the child without the Act requiring that support must be provided.

The separate legal representative should be able to obtain records from other courts relevant to the child and enable them to be put before the Court (e.g. reports from the Family Court or Children's Court). This would ensure the best evidence is before the Court when it determines what is in the best interests of the child.

ABORIGINAL CHILDREN

Question 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? What type of inquiry?

Recommendation Seven

There should be a positive duty on the Secretary of DHHS to make reasonable inquiries as to whether a child in out of home care is an Aboriginal or Torres Strait Islander child, to give proper and meaningful effect to the Aboriginal Child Placement Principles.

The LIV considers there should be a positive duty on the Secretary of DHHS to make reasonable inquiries as to whether a child, that is to be placed for adoption, is an Aboriginal or Torres Strait Islander child, to give proper and meaningful effect to the Aboriginal Child Placement Principle[4].

The Aboriginal Child Placement Principle is intended to protect and uphold the specific rights of an Aboriginal child's right to be raised in his or her own culture, and to the importance and value of family, extended family, kinship networks, culture and community in raising Aboriginal and Torres Strait Islander children. The proper application of these principles requires that any decision to remove an Aboriginal child must be made as last resort. If no reasonable inquiry is made as to the child's Aboriginality, then that child is unable to exercise their right to identity, culture and community.

The LIV submits that the Secretary should be subject to a positive duty to make all reasonable inquires as to the existence of a child's Aboriginal or Torres Strait Islander heritage under the

[4] http://www.dhs.vic.gov.au/__data/assets/pdf_file/0006/580614/aboriginal-child-placement-principle-guide-2002.pdf

Adoption Act. The LIV recognises the vital role Aboriginal child welfare organisations play, and recommends that the process of inquiry is informed and approved by Aboriginal child welfare organisations, such as VACCA.

While it is acknowledged that the terms of reference do not include CYFA, it must be noted that the restrictive time periods imposed by the new CYFA are insufficient to allow time for the Secretary to make such enquiries and then, if the child is identified as having Aboriginal or Torres Strait Islander heritage, for the Aboriginal child care agency to comply with the Aboriginal Child Placement Principle by making enquiries to locate possible family or kinship carers with whom the child could be placed or spend time with to maintain the connection to their identity, culture and community.

Question 18: Should there be a separate rules and guidelines that apply only to the adoption of Aboriginal and Torres Strait Islander children? Is the child placement principles in Adoption Act (s50) appropriate?

Recommendation Eight

The Adoption Act should be amended to include additional rules and guidelines that the Court is required to consider when determining what is in the best interests of a child who identifies as an Aboriginal or Torres Strait Islander.

This is consistent with the approach in both the Family Law Act 1975 (Cth) and the Children Youth and Families Act 2005 (Vic).

The LIV considers that there should be separate rules and guidelines that apply specifically to children who identify as Aboriginal and Torres Strait Islander. This is consistent with the approach in both the FLA and CYFA. In both those jurisdictions, the relevant Court is required to consider additional factors when the child is an Aboriginal and Torres Strait Islander when it determines what is in the best interests of the child who the subject of the application.

Separate rules and guidelines are required to take into account the unique needs of these children arising from the intergenerational trauma caused by the treatment by the government of Aboriginal people in the past, including the forced systematic removal by the State of Aboriginal children from their families and communities and attempts to remove their Aboriginality from their identity and

lives. This is consistent with the recommendations of the "Bringing The Home: Stolen Children report'[5].

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

Recommendation Nine

The Adoption Act should be consistent with, and be able to give proper and meaningful effect to, the Aboriginal Child Placement Principle.

The Adoption Act should be consistent with the Aboriginal Child Placement Principle which promotes a hierarchy of placement options whereby:

1. "Removal of any Aboriginal child must be a last resort
2. If, after consultation with a community controlled Aboriginal welfare organisation, removal of a child from its family is unavoidable then the authorities must have regard to the direction of the Aboriginal welfare organisation
3. If such a removal is necessary, then the child must be placed within the extended family, or if this is not possible, the child may be placed within the Aboriginal community within close proximity to the child's natural family
4. If there is not an Aboriginal placement available, then in consultation with Aboriginal and Islander Child Care Agencies (AICCAs), the child may be placed with a non-Aboriginal family on the assurance that the child's culture, identity and contact with the Aboriginal community are maintained"[6].

[5] https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/bringing-them-home-stolen
[6] www.vacca.org.au

This should be the case for an Aboriginal child even when one parent is not Aboriginal to ensure the child has the opportunity to experience, and benefit from, their Aboriginal heritage as well as the cultural heritage of their non-Aboriginal parent.

Question 20: Should the Adoption Act require that adoption be considered for Aboriginal and Torres Strait Islander children only where there is no other appropriate alternative?

Yes, the LIV considers that the Adoption Act should reflect the Aboriginal Child Placement Principle which requires that adoption be considered for Aboriginal and Torres Strait Islander children only where there is no other appropriate alternative (in other words, it is a last resort).

Question 21: Should there be different principles for the adoption of Aboriginal children as compared to Torres Strait Islander children? For example, should there be a separate child placement principle for Torres Strait Islander children as compared to Aboriginal children as is the case in New South Wales adoption law?

No.

LIV members consider this would be problematic noting that many Aboriginal children in Victoria have family members, and identify as being part of Aboriginal and Torres Strait Islander communities, from around Australia including the Torres Strait. This is an inevitable consequence of the forced removal of Aboriginal children from their parents and communities coupled with the natural increase of movement of modern day Australians between States and Territories.

Ultimately the unique requirements of each individual child, whether they are Aboriginal or Torres Strait Islander or otherwise, can be catered for if the best interests of the child is enshrined in the Act as the paramount consideration.

Question 22: Should parents of Aboriginal and Torres Strait Islander children retain the ability, that parents of other children do not have, to put conditions on their consent to the adoption of their children? If not, what options should there be to protect the connection of Aboriginal and Torres Strait Islander children to country, kin, language and community?

Parents or other family or community members significant to an Aboriginal and Torres Strait Islander children should be provided with the opportunity to present to the Court any conditions they consider should be placed on the adoption of their children as, in most cases, those persons will be best placed to consider how that child is able to enhance and preserve their connection to country, kin, language, family and community even if those family members are unable to care for the children themselves.

Consideration should be given to whether or not an elder (if the child is from an identifiable Aboriginal or Torres Strait Islander community) or person from an Aboriginal child welfare organisation should have to give consent to ensure that the proposed means by which the child is to maintain their connection with their country, kin, language, community is effective.

Without this, there is a risk that any conditions and not appropriately resourced or prioritised and will become tokenistic.

CONTEMPORARY ATTITUDES

Question 23: Is a co-habitation requirement consistent with contemporary family life and the best interests of the child?

Recommendation Ten

There should be a minimum cohabitation requirement to ensure the adopted child is being placed in a stable and permanent home.

This requirement should apply to all couples equally, including married couples and not just be a requirement for de facto couples.

The minimum period should be 2 years.

Section 11(1) of the Adoption Act provides that an adoption order may be made in favour of two persons who are living in a domestic relationship and have been so living for not less than 2 years. There is no such requirement for couple who are married, in a registered domestic relationship or traditional Aboriginal marriage. This creates inconsistency as to the basis of eligibility to adopt.

The Adoption Act defines "domestic relationship" to mean a relationship between 2 persons who are living together as a couple on a genuine domestic basis (irrespective of sex or gender) and who are neither married to each other nor in a registered domestic relationship with each other.

The LIV acknowledges that the requirement for a couple to live together for a period of not less than two years is necessary so as not to discriminate against de facto couples who wish to adopt but who have not formalised their relationship by way of registration or marriage. However if the cohabitation requirement is designed to ensure that couples adopting children have had time to make the personal adjustments that are necessary to bring stability to a relationship, it is submitted the requirement should apply to all couples equally.

Unequivocal wording can be found in the NSW legislation, which stipulates that 'The Court must not make an adoption order in favour of a couple unless the couple have been living together for a continuous period of not less than 2 years immediately before the application for the adoption order'[7] .

Stability is important for the child and a stable relationship of an adopting couple can be evidenced by cohabitation for at least 2 years. There should be a cohabitation requirement for all couples, married or otherwise, of at least 2 years.

Question 24: Single people can adopt a child only if there are "special circumstances in relation to the child" which make the adoption desirable. Should this requirement be amended? If yes, what criteria should apply to adoptions by single people?

Recommendation Eleven

The Adoption Act should be amended to allow single people to adopt a child. The restriction which currently prevents this should be removed.

The requirement that a single person can only adopt a child if there are special circumstances is not only out of date with modern values; it is also inconsistent with the best interests of the child principle.

The relationship history of the single person applicant may be a relevant factor that the Court takes into account when determining what is in the best interests of the child the subject of the application. For example, a single person who is consistently in and out of relationships may not be a suitable adoptive parent for a child who requires stability and who has difficulty adapting to change. The Court when determining the best interests of the child should not have their discretion fettered by a default position that excludes an applicant, except in special circumstances, solely on the basis of that person's current relationship status.

The criteria for single persons to adopt should be the same as for married persons except for the cohabitation requirement.

[7] Section 28 Adoption Act 2000 (NSW)
http://www.austlii.edu.au/au/legis/nsw/consol_act/aa2000107/s28.html

Question 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 LIV considers that the religious body exception is not 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 does not operate harmoniously with the Equal Opportunity Act 2010 (Vic) in this respect.

The LIV has long supported adoption being made available to same sex couples on the basis of equality[8] In relation to faith-based exemptions, in a 2013 submission on amendments to the *Sex Discrimination Act* we stated that the LIV:

> *"continues to have concerns about blanket exceptions for religious bodies and educational institutions that allow them to discriminate in their non-religious day to day activities (as opposed to in the ordination and training of priests and ministers of religion) on particular grounds. The balancing of freedom of religion with other important human rights, such as the right to equality and to be free from discrimination, requires thoughtful consideration.[9]"*

This position is also consistent with the LIV's *Policy Statement on the removal of Discrimination against People on the Basis of Gender Identity or Sexual Orientation*[10] which states that the LIV is 'fundamentally opposed to discrimination and inequality before the law in any circumstances, including discrimination on the basis of gender identity or sexual orientation'.

From 1 September 2015, changes to the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* allowed couples to adopt regardless of their sex or gender identity. The LIV welcomed these changes as long-overdue and much needed

Then LIV President Katie Miller said at the time these changes were introduced:

> "… importantly, the Andrews Government's *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015* does not include any faith-based exemptions".

[8] See for example Submission on the VLRC Consultation Paper entitled: Assisted Reproductive Technology & Adoption - Should the Current Eligibility Criteria in Victoria be Changed?, 1 July 2004 at page 13 available at http://www.liv.asn.au/getattachment/fe89df49-0d4f-4ba1-b76f-fd981af4876b/Assisted-Reproductive-Technology---Adoption.aspx; Submission to Consultation regarding federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity, 6 December 2010 at page 2 available at http://www.liv.asn.au/getattachment/45eac9f5-7163-48fd-9e7d-f5a650fc55dd/Consultation-regarding-federal-protection-from-dis.aspx.

[9] 15 April 2013 page 14-15, available at: http://www.liv.asn.au/getattachment/74a402ec-fd6d-4aa0-902b-71f488662862/Inquiry-into-the-Sex-Discrimination-Amendment-(Sex.aspx

[10] Available at http://www.liv.asn.au/PDF/About/Governance/2007DiscriminationPolicyStatement

"While the religious freedoms of faith-based groups need to be respected, these freedoms also need to be balanced against the rights of same sex couples to be treated equally and the best interests of the child," Ms Miller said.

"Ultimately, it is the courts that make the final adoption order according to the best interests of the child on a case by case basis.

"If faith-based adoption agencies are able to discriminate against same-sex couples this may prevent children from being placed with the most suitable parents."

Question 26: Step-parents and relatives of a child can only adopt a child in their care in limited circumstances. Parenting orders under the Family Law Act are the preferred option in these situations.

Is this appropriate? If not, what changes are needed?

Recommendation Twelve

The Adoption Act should be amended to simplify the process, and lessen the restrictions, for known child adoptions.

The wording used in the NSW Adoption Act is preferred, i.e. the Court is satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the child,s30(1)(d).

Section 11(6) of the Adoption Act provides that the Court must not make an order for the adoption of the child solely by that spouse or domestic partner unless it is satisfied that:

a. the making of an order in relation to the guardianship or custody of the child under the Family Law Act 1975 of the Commonwealth as amended and in force for the time being in relation to the child would not make adequate provision for the welfare and interests of the child; and

b. exceptional circumstances exist which warrant the making of an adoption order; and

c. an order for the adoption of the child would make better provision for the welfare and interests of the child than an order referred to in paragraph (a);

These provisions primarily address adoptions by a spouse or domestic partner of a parent; however similar requirements exist in section 12 for relative adoptions. Considerations behind the inclusion of the requirements are summarised at chapter 18 of the Department of Health and Human Services ("the Department") Adoption and Permanent Care Procedures Manual and include concerns that:

a. Adoption permanently severs the legal relationship between the child and relatives who are significant to the child.

b. Adoption could be used as a means of excluding the child's extended family, who would no longer have a legal relationship with the child.

c. Adoption may inhibit the ability of the family members to clarify their legal relationships and it may also inhibit the ability of the child to clarify his/her biological background.

d. With relation to children adopted by relatives, genealogical confusion could arise as the child's mother may become the legal 'sister' or 'cousin'.

LIV members do not have a position in relation to whether the concerns are appropriate or inappropriate or whether the Adoption Act should prescribe when adoption is preferable to what was previously referred to as custody or guardianship orders.

However, LIV members stress that amendment is required as s11 (a) and (b) arguably set different evidentiary benchmarks. In practice, situations arise where an adoption order would make better provision for a child than a guardianship or custody order, albeit that it cannot necessarily be said that a guardianship or custody order would not make adequate provision for the child.

On the facts of any given case the two sections need not be mutually exclusive. Yet it is difficult to reconcile an order not being made in those circumstances with the principle that the 'welfare and interests of the child are to be paramount'. To that is added the requirement of demonstrating that 'exceptional circumstances' warrant the making of the adoption order.

It is submitted that if the making of the adoption order is in the best interests of the child having regard to all the relevant circumstances, then the order should be made. The position was aptly put in the explanatory memorandum to the Adoption Act, which indicates that 'before making an

adoption order for a spouse the Court is to be satisfied that adoption better serves the welfare and interests of the child than guardianship'.

It is submitted that the only requirement be that Court is satisfied that an order for the adoption of the child would serve the child's interests better than any other action that could be taken by law, including an order for custody or guardianship, or a maintenance of the status quo. The reform proposed by this submission would be assisted by the inclusion in the Act of guiding principles for determining what is in a child's best interests, as recommended above.

If the above approach is not considered appropriate, the LIV submits that if the Adoption Act is to prescribe a consideration of the alternatives as a precursor to adoption, regard should be had to the approach adopted by South Australia. The South Australian approach requires that the Court must be satisfied that the making of the adoption order is clearly preferable in the best interests of the child than alternative orders such as custody, guardianship or parenting orders.

If the requirements of the section are to remain unaltered, there should be guidance as to what may constitute 'exceptional circumstances' in the context of applications for spousal or relative adoptions (i.e. 'known adoptions'). Examples are not provided in the Adoption Act, but guidelines are provided in the Adoption and Permanent Care Procedures Manual, again at chapter 18.

The LIV considers that the considerations as outlined in the manual, in particular at pages 134-135, are appropriate guidelines and reflect many of the circumstances of families who seek legal advice in relation to the making of an application for spousal or relative adoptions.

From the perspective of the legal advisor, the factual matrix surrounding prospective adoption applications can be varied and broad. Adoption enquiries may follow circumstances which are exceptional in nature, such as the death of a biological parent/s, or absenteeism on the part of a parent as a consequence of a history of serious family violence.

LIV members report that it is not unusual however to receive enquiries from clients whose circumstances are very much aligned with the considerations outlined in the Department's manual as being able to satisfy the requirements of s11(6) of the Adoption Act. It is not uncommon for example, for enquiries about known adoptions to arise in circumstances whereby one biological parent has had little or no involvement in the life of the child for an extended period whilst a spouse or domestic partner of the other parent has discharged those responsibilities over many years notwithstanding that they had no legal obligation to do so. Often there are other children of the relationship between the parent and spouse who comprise the remainder of the family constellation, and there is openness and transparency with the child who would be the subject of the adoption application about their biological tapestry.

Those applications readily lend themselves to submissions addressing the requirements of s11(6), particularly having regard to considerations such as investing permanency in a relationship which is in the best interests of the child beyond adulthood, providing the child with adequate legal and emotional security, and providing legal recognition to the parties concept of their family unity. They are largely predicated on the bond between adoptive parent and child and on the basis that a principle purpose of the adoption is the furtherance of that relationship.

Enquiries are also received from couples who have recently re-partnered and are enthusiastic to seek the legal uniformity of their new family, particularly if a biological parent has been wayward for a substantial period of the child or children's life. Often these enquiries are well intentioned and meet the threshold requirements established by section 10A of the Adoption Act. It is not specifically submitted that there ought be reform in this regard but considerations around the tenure of relationships when weighed against the very significant effect of an adoption order is a context in which other States and Territories have legislated for requirements that parties be married or in a relationship for 3 or 5 years prior to being eligible to apply to adopt.

The County Court Guide to Making an Adoption Application also outlines factors to be taken into account when applying for a step parent adoption, namely:

a. The non-custodial parent's consent must be obtained;

b. Adoptions are discouraged if the custodial parent was previously married to or had a lengthy relationship with the other parent of the child;

c. There is a Family Court Order in respect of a child of a marriage. Leave is required from the Family Court (s60G FLA) for the step parent to commence proceedings for the adoption of that child if the non-custodial parent is the subject of a parenting order i.e.: there is contact (access) and/or maintenance orders and the non-custodial parent is complying with the conditions of those orders, then an adoption application may not be appropriate;

d. If the adoption agency that is going to provide a report to the court is not prepared to recommend an adoption order it becomes very difficult for an application to succeed.

The LIV submits that the discouragement of known adoptions on the basis of the form or duration of the relationship between parents may lead to results which are inconsistent with the best interest principle. The proper inquiry should be the nature of the relationship between the child, the other biological parent, and the prospective applicant for an adoption order.

The LIV submits that the inclusion of guidelines would bring greater clarity to the process, ameliorate the pressure on the Department or delegate agencies to assess family circumstances

as appropriate for adoption, serve as a disincentive to adoption being utilised as a vehicle for excluding a parent from the life of the child, and better facilitate the provision of legal advice to prospective applicants as to merits. The guidelines should not be exhaustive. Rather, the question as to whether an adoption order is in the best interests of the child (and whether exceptional circumstances exist) should still be answered having regard to the facts of each case.

It is acknowledged that parenting orders under the FLA are preferred in cases of known child adoptions, and that there is a presumption in the Adoption Act against allowing adoptions by step-parents and relatives.

The legal requirements under the Adoption Act for known child adoptions are however, unduly strict, particularly the requirement to establish that "exceptional circumstances exist which warrant making an adoption order".

LIV members consider the terminology used in the NSW Act is preferred. That is, the Court is satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the child, s30(1)(d).

This terminology also encompasses the reference to the best interests of the child.

Question 32: Is it appropriate that birth parents are able to express wishes about the religion, race and ethnic background of adoptive parents?

Recommendation Thirteen

The Adoption Act should be amended to replace the wording, "race or ethnic background" of adoptive parents with, "…wishes as to cultural heritage, identity or ties" by a birth parent (NSW wording).

The LIV considers that birth parents should be able to express wishes in relation to adoptive parents' religious, race and ethnic background. However, the LIV submits that these wishes should not be determinative of the appropriateness of the adoptive parents.

The LIV considers that the terminology regarding these wishes should be revised. Specifically, the LIV submits that "wishes as to cultural heritage, identity or ties" by a birth parent as in the NSW Adoption Regulations is better terminology than taking into account wishes as to "race or ethnic background" of adoptive parents.

In relation to religion, the NSW regulation takes account of “religious upbringing intentions” of a child in accordance with the wishes of the parent or guardian. If this expression is to be used, wishes as to “non-religious upbringing” should also be considered.

INFORMATION AND IDENTITY

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

Consistent with the concept of open adoptions, the identity of an adopted person on their birth certificate should reflect their natural and adoptive parents. LIV members report that in practice, birth certificates are often a source of confusion for both the adopted person and authorities as, in some cases, the mother stated on the certificate is the birth mother of a child while the father on the same birth certificate is the adoptive father. This can create a legal 'falsehood' as it does not reflect the difference in time between parentage or difference in the legal status of the parents (e.g. it appears as though both people named are the legal parents, when in fact, neither were known to each other and the adoptive father became the parent many years later.

Persons who have been adopted should have the right and ability to apply to have their birth certificate changed to reflect only their adoptive parents if that adopted person wishes to do so after they have turned 18. That birth certificate should still reflect the fact that the parents named on the certificate are adoptive parents and also note the date of the adoption order. This is consistent with the practice adopted by most judges in current adoption proceedings whereby adoptive parents are directed to inform the child, at an appropriate age, that they were adopted. Reflecting who the birth parents and the adoptive parents are on the child's birth certificate and noting when the adoption order was made would assist the adopted child know where they came from while providing evidence of the current legal status of their parentage. LIV members consider it would also assist to reduce the delay and resources currently spent by the adopted party in resolving issues arising from the birth certificate.

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

A different form of birth certificate available to adopted people should have the same legal status as regular birth certificates.

The LIV considers there should not be a different form of birth certificate.

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

A child's name is a key factor in that child's identity. Whether or not it should be changed is a factor to be determined by the Court in each relevant case before it having regard to the facts and unique needs of that child of each specific application. The Adoption Act should not prescribe any default position regarding the name of a child. Rather, the Court should be required to determine the name of the child as part of its determination of what is in that child's best interest.

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

Recommendation Fourteen

The Adoption Act should be amended to ensure that a child's name (given and last name) should only be changed when the Court determines it is in the best interest of that child to do so and makes a positive finding, and gives reasons, for their decision.

LIV members note that in current practice, there is a stark difference between how the County Court and Family Courts decide whether or not a child's name should be changed. Members comment that in the County Court the issue is often treated in adoption applications as though it was an administrative issue and decision often based on the wishes of the applicant adoptive parent for the child to have the same name as the rest of the adoptive family. However, in the Family Court the issue is determined in accordance with the best interests of the child principle which acknowledges that a child's name is key to their identity, sense of self and connection to culture. The Family Court requires significant evidence from the parties as to why the proposed name change is in the child's best interest prior to making an order and, in practice, an order allowing the child's name to be changed is a difficult order to obtain.

Consistent with the best interests of the child principle, a child's name (given and last name) should only be changed when the Court determines it is in the best interests of that child to do so. It is not the right of the natural or adoptive parents but rather the right of the child to their identity.

In some cases, it may be in the child's best interests to change their name (e.g. where their name causes them psychological harm as a reminder of abuse, violence or neglect) while in other cases the child's best interest will be served by retaining their name which is a critical component of their sense of self, identity and where they come from.

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

LIV members consider the Adoption Act should include a section identifying the main object of the Act, similar to how the same is expressed in the FLA, CYFA and Child Support (Assessment) Act 1989 (Cth).

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

The language in the Adoption Act should be amended to better reflect that the child's best interests are paramount and remove terms such as contact, guardianship and custody. These terms are outdated and reminiscent of the traumatic era of forced adoption. The FLA was amended some time ago to reflect this and instead terms including 'spend time with', 'live with' and parental responsibility are used in place of 'contact', 'custody' and 'guardianship'.

Question 48: Should there be increased requirements in the Adoption Act to provide postadoption support? If yes: Who should be responsible for providing this support? What type of post-adoption support should be provided, and in what circumstances? Who should be eligible for it?

There should be increased requirements to provide post-adoption support when the adoption arose from child protection proceedings. The department responsible for the child protection proceedings should also be responsible for funding the support. Imposing a financial obligation on the same would increase the accountability of that department for those decisions.

At a minimum, LIV members consider that the support should be available to the adopted child and their natural parents and be provided by a professional specifically trained and experienced in adoptions. This support should be available if they apply within a certain time period after the adoption; for example, within a 3 year period of the adoption being finalised.

OTHER COMMENTS

Adoption in the Child Protection context

The LIV acknowledges that the terms of reference do not provide for the Commission to consider submissions about the CYFA.

However, in response to the matters in the Consultation Paper, the LIV wishes to note that some of our members are opposed to the approach taken by NSW in relation to the adoption of children from child protection and consider that adoption should be reflected in both the CYFA and the Adoption Act itself as a matter of last resort. LIV members practising in adoption, child protection and family law consider that more resources should be provided to support parents and family members to address the underlying issues which resulted in the intervention by child protection to maximise the prospect of the children being kept within their family unit. This reflects the tendency as reported by LIV members that most children in State care actively seek out their parents and family members after they turn 18 as their desire to know their identity and family is critical to their welfare and sense of self.

Further Information

Please contact Ms Sarah Bright, Senior Policy Lawyer for the Family Law Section, on (03) 9607 9443 or at sbright@liv.asn.au if you have any queries in relation to this submission or would like any further information.