

## VICTORIAN LAW REFORM COMMISSION: REVIEW OF THE ADOPTION ACT 1984

### COMMENTS ON VLRC CONSULTATION PAPER

My interest in commenting on the VLRC review of the Adoption Act is based on my work in the following areas:

\* Member, Victoria's **Adoption Legislation Review Committee** 1978-83 whose report led to the introduction of the **Adoption Act** 1984 and the **Children (Guardianship and Custody) Act** 1984. Following the ALRC Report, I was also consulted by the Minister with respect to the drafting of the new Victorian legislation. I was also appointed a Member of the 1986 Adoption Legislation Review Committee of the ACT;

\* Deputy Chair, Victoria's **Child Welfare Practice and Legislation Review** 1982-85 (the "Carney Committee") whose report led to major changes to Victoria's child protection and juvenile justice systems, and the specialist Children's Court - and which, inter alia, addressed the interface of permanent care and adoption;

\* Senior Executive of the former **Department of Community Services Victoria** charged with implementing reforms recommended in the Carney Report, with responsibility 1986-1989 for the drafting of the **Children and Young Persons Act** 1989 - which provided, inter alia, for the introduction of "permanent care orders" as an alternative to adoption for the long-term/permanent care of children and young people whose own parents were unable or unwilling to care for them, or who were in long term out-of-home care (foster care or residential care);

\* Member of the **Family Law Council**, and Chairperson of its "Status of Children in Step-families Sub-Committee", whose 1986 Report "**Cinderella Revisited – Rights and Responsibilities in Step-families**" recommended that guardianship/custody orders be used with respect to children in step-families in preference to adoption orders - and led to amendments to the Family Law Act to this effect; and member of the FLC Sub-Committee chaired by Justice Asche and author of its report "**Creating Children - towards a National Approach to Reproductive Technology**";

\* Research Fellow, **Australian Institute of Family Studies**, and author of Policy Background Paper "**Children in Step-families: their Legal and Family Status**", 1984;

\* Member of the **Suitability Panel** - established under Victoria's *Children, Youth and Families Act* 2005 - since it was set up in 2007 to deal with complaints of physical or sexual abuse of children or young people in out-of-home care under Victoria's child protection system. Many of these children and young people have been in out-of-home care for several/many years, often in multiple placements, where consideration is being given by DHHS to alternative long-term/permanent care placement where a decision has been made that they are unable to return to the care of their parent/s.

## INTRODUCTORY COMMENTS

**Objective:** It is submitted that the primary objective of all services which comprise Victoria's child welfare system - *adoption, child protection, and out-of-home care* forming the key components - is to ensure that the child's best interests must always be the paramount consideration when it is decided that the child's own family is unable or willing to care for them and a "new" permanent family needs to be found for them.

Whilst the primary focus of the VLRC Review is on the *Adoption Act*, as outlined in the Consultation Paper, I note that the Terms of Reference emphasise the importance of reviewing the Act to ensure not only that:

- the *Adoption Act* meets the needs of the children and families it affects; and
- the best interests of the child are paramount

but that

- the Act is consistent with contemporary law in relation to family and Community; &
- the Act operates harmoniously with other relevant areas of law that have developed since the introduction of the *Adoption Act 1984*

which suggests, inter alia, the importance of consistency with the *Children, Youth and Families Act 2005* and the *Family Law Act 1975*.

**Context:** It is important also to establish the context within which Victoria's child welfare system operates with respect to children for whom a new permanent family needs to be found - that is, where:

(1) a birth parent has signed a consent for adoption of their child by a "new" permanent family - in 2014/2015, 24 orders were made (20 being made in respect of infants) for local adoption by the County Court under the *Adoption Act* (Consultation Paper 3.32); or

(2) a decision has been made by Victoria's child protection service to seek and place a child in the care of a "new" permanent family – in 2014/2015, 274 permanent care orders were made by the Children's Court under the *Children, Youth and Families Act* (Consultation Paper 3.32).

Given the policy considerations and current resource constraints facing community and children's services, it seems difficult to justify the continued operation of two separate "child welfare" systems which have the same objective but:

\* vastly different client populations - 24 child placements (adoption) in 2014/2015 compared to 274 (permanent care);

\* two different pieces of legislation – *Adoption Act 1984* and *CYFA 2005*

\* two different courts with different expertise - a "generalist" County Court and a "specialist" Children's Court; and

\* several different professional agencies/workforces with significantly different professional expertise and experience (it is noted here that 4 agencies provide an adoption service in Victoria, 3 of these being non-government agencies).

In the light of these considerations, it is submitted that in reporting to the government with respect to this review, the VLRC recommend that it is in the best interests of Victoria's

children and families - for the individual children who need a new permanent family, for the families involved, and for the child welfare and community service system providing support for these children and their families - that these services be integrated into one specialist "permanent care" service which makes recommendations to a court with specialist expertise, namely the Children's Court.

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In commenting on the VLRC Review of Victoria's *Adoption Act* 1984, I have drawn on my experience (as outlined above) in addressing key issues of public policy in the context of reviewing four key areas of legislation, practice and services - child welfare, child protection, adoption, family law - which all have, as their objective, the best interests and rights of children being the paramount consideration.

In so doing, however, my comments are not limited to the distinctions, constraints or boundaries imposed by historical developments in the law, policy, practice and service development. Rather they *focus on meeting the needs of those children whose family is no longer able or willing to care for them, and for whom a new "permanent" family needs to be found and supported.*

I note, in this respect, that the Terms of Reference of the Commission ask it to review the Adoption Act to ensure that:

- \* the best interests of the child are paramount;
  - \* it is consistent with contemporary law in relation to family and community;
  - \* it operates harmoniously with other relevant areas of law that have developed since the introduction of the Adoption Act
- but preclude the Commission from considering submissions about the CYFA (4.53).

However, the context within which the Review is taking place - and its focus on the best interests of the child - raises questions about narrowly restricting the Commission's review, namely that in:

**\* 2014-2015, only 24 children were the subject of adoptions orders** in Victoria, of which only 20 were infant adoptions. While adoption numbers peaked in 1971-1972, with 1768 children adopted in Victoria, adoption numbers in Victoria have remained consistently low over recent years, as indicated in the 2014-2015 numbers - and are unlikely to increase unless mandated by legislative changes.

**\* 2014-2015, 277 children were subject to permanent care orders** - and, based on current indicators, these numbers are likely to increase (unless mandated otherwise by legislative changes).

This context indicates the major public policy challenge facing the Victorian community in providing an optimal legislative, practice and service framework for meeting the needs of the children for a whom a permanent "alternative" family is needed. It is difficult to justify maintaining the continuing operation of two distinct and separate "child welfare" systems, legislative frameworks and court systems to meet the needs of some 300 children – namely one service system for some 20-30 children and another service system for around 280

children (2014-2015 figures) along with the thousands of children subject to protection orders and supervision.

The figures suggest that if the Victorian community is to properly give effect to the contemporary "needs" and "best interests" of the child being paramount in relation to family and community - and with respect to the law and practice that applies - then any Review needs to address this broader context. It is therefore in this context that my comments are addressed - albeit they may therefore be of limited value in the context of the Commissions's Review of the Adoption Act and Terms of Reference.

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## **COMMENTS in response to QUESTIONS posed in the Consultation Paper**

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Given the time constraints facing the Commission (and my limited capacity to respond in more detail), I am responding below to some of the specific questions posed by the Consultation Paper – which could be expanded further in discussion/meeting should the Commission feel this would be of assistance.

### **Question 1 - should the Adoption Act use consistent terminology with respect to the best interests of the child**

It is submitted that the Adoption Act should use consistent terminology, and that this should be consistent with the terminology used in the *Children, Youth and Families Act (CYFA)* - namely that "*the best interests of the child must always be paramount*".

Such terminology is also broadly consistent with that of Victoria's *Assisted Reproductive Treatment Act 2008*: namely that "*the welfare and interests of persons born or to be born as a result of treatment procedures are paramount*" (section 5).

### **Question 2 - should the Adoption Act provide guidance about how to determine what is in a child's best interests ?**

It is submitted that guidance or criteria should be provided: and that principles similar to those set out in section 10 of the CYFA would be appropriate, given the common primary objective of both acts (as referred to above). These principles are listed in a way that gives guidance to decision-makers as to the weight that should be given to relevant matters. Considerable attention was given to the development of such "best interests" principles in the drafting of the then *Children and Young Persons Act 1989*, and they appear to have stood the test of time in the intervening years, including 2005 the amendments.

### **Question 3 - should there be requirements as to age differences between the adopted child and other children in the family ?**

The Consultation Paper draws attention to the provisions of Queensland's *Adoption Act* which seeks to ensure that the parents' focus is primarily on the best interests of the child by trying to ensure that there are age gaps between the child placed for adoption and any other

children. The Queensland legislation outlines certain measures that should be taken in this respect - and these measures are supported as being important in ensuring that, at the time of placement, the child is given the best possible opportunity to establish optimal relationships, and thrive, in the new family. Such measures were discussed and supported in the deliberations of the Adoption Legislation Review Committee.

**Question 4 - should the Act include a principle requiring the placement of siblings for adoption in the same family ?**

It is highly desirable that such a principle be supported by the inclusion of a requirement in legislation to the effect that (as with Queensland adoption law) the department/adoption agency, when making arrangements for the placement of a child, have regard to the consideration that it would be ordinarily be in the child's best interests to be placed with the same family as any sibling of the child who is also to be adopted or has previously been adopted. A child being removed from the care of their birth family faces very significant disruption in their family relationships, so any continuity that can be maintained - such as their relationships with siblings - is highly desirable.

**Questions 5 and 6 - should there be a greater obligation to identify and contact the father of the child to obtain his consent; or are there situations where no such attempts should be made ?**

Prior to the 1984 Adoption Act, steps to identify and obtain the adoption consent of fathers were frequently actively discouraged. The result of this was that when an adopted person later obtained a copy of their original birth certificate, the place where their father's name should have been was simply a blank space. This also meant that the adopted person was unable to identify their father unless they were also able to seek out, and make contact with, their birth mother - and ask if she would agree to telling them the name of their father - which some birth mothers were not willing to do.

In this context, it is noted that Article 7 of the United Nations *Convention on the Rights of the Child* states 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"*.

It is also relevant to acknowledge not only the past experience and distress of adopted persons who have sought but failed to ascertain the name and identity of their birth father - but the increasing body of evidence showing that persons born from donor insemination seek to obtain the name of, and seek contact with, their donor "father". In this latter regard, Victoria has been a world leader in enacting legislation to enable persons born from donor insemination to access identifying information where records have been kept and are available.

It is submitted that the provisions of the Queensland legislation, as referred to in the Consultation Paper (paras 5.76-5.78) which requires the department/adoption agency to take reasonable steps to establish the identity and location of the father, and advise him of his rights - should be incorporated into Victoria's legislation. Amendments should also include

provisions covering situations where it may not be appropriate to contact the father - such as in cases of incest, rape or if there would be an unacceptable risk of harm to the child or mother.

### **Question 7 - should changes be made to the current consent provisions ?**

The Consultation Paper accurately refers, in para 2.60, to practices under the 1960s adoption laws - where consent to adoption was often given under duress, without proper information about the mother's rights, or signed before or within a certain period after the birth - which allowed illegal forced adoptions to take place. The Adoption Legislation Review Committee was well aware of these breaches of the law, and took great care to recommend a range of measures in the 1984 Adoption Act to ensure that the mother's rights were protected and that consents were validly given. To this end, the current protections in the Act should be maintained.

### **Question 9 - are the grounds for dispensing with consent appropriate ?**

It is interesting to note that the circumstances specified in the *Adoption Act* under which a parent's consent can be dispensed with – as outlined in para 5.98 - bear a remarkable similarity to many of the grounds in the *CYFA* for finding that a child is in need of protection and should be removed from the care of their parent and an alternative family found.

This would seem to suggest that consideration should be given to the broader question of the circumstances that the court should consider when deciding that the rights of a parent to continue to care for their child should be abrogated and an alternative family found.

Given the parallels in this regard between the *Adoption Act* and the *CYFA*, there would be benefit in examining the provisions of the respective acts with respect to the abrogation of a parent's right to continue to care for their child, and to the removal of their child from their care - including the nature of the information or evidence required to satisfy the court.

### **Questions 10-12 - meeting the best interests of the child by enabling contact with family members and exchanging information ?**

Since the introduction of the *Adoption Act* in 1984 and the *Children and Young Persons Act* in 1989, indeed well prior to these two pieces of legislation, research has amply demonstrated the importance to a child - and particularly to the development of their sense of self identity - of having information about and contact with their parents, siblings, grandparents and extended family members. In other words, the importance to a child of continuing contact with important kith and kin. In this context, it is important to note that 50% of out-of-home placements in child protection are now with extended family following the removal of a child from the care of a parent/s. It is also important to take into account the fact that, for older children, there are often "significant others" in their life with whom the child may have established close and important relationships which are particularly important to the child (such as a teacher, youth leader, or neighbour).

It is therefore important that the court be able, where appropriate, to put conditions on an adoption order which facilitates and optimises the contact that a child can have with a parent, sibling, relative or other significant person - including where the consent of a parent has been dispensed with or there is disagreement about the exchange of information or the level of contact.

However, it is important to recognise that this contact is the right of the child and in their best interests. It is also important to recognise that in reaching agreement about the level or frequency of contact or exchange of information, imposing rigid "formulas", "rules" or restrictions (such as 4 times pa) can damage the potential for the various adults in the child's life to develop flexible arrangements which will best meet the child's needs. Often once such restrictions or formulas are imposed, adults can develop a negative response to what they perceive as the rules being "broken" if a change or greater flexibility is sought. As occurs following a marriage breakdown, the best arrangements for a child are generally those which are "organic" and have a degree of flexibility, but to which all parties are committed - and which actively seek to involve the child in determining the nature and frequency of such contact and information, and with whom. In other words, flexibility - not rigidity - is generally in the best interests of the child.

**Question 13 - what if any requirements should be stipulated in legislation with respect to the age at which children can consent to an adoption ?**

In preparing their report, the Adoption Legislation Review Committee considered the provisions of the existing adoption legislation requiring the consent of a child aged 12 to their adoption (along with a similar provision in the Family Law Act which mandated age 14 for a child). For the reasons adequately summarised in paras 5.112-5.113, the reference to age 12 was removed - and replaced by a provision that any wishes expressed by the child be considered, and given such weight as the court considers appropriate, taking into account their age, maturity and understanding (which also recognised that sometimes a younger child is mature enough to express their wishes).

**Questions 14-16 - separate legal representation for a child, including acting on instructions or acting in the best interests of the child ?**

It is submitted that the provisions for legal representation in the CYFA - namely providing for both direct representation and the best interests models - would also be appropriate for the *Adoption Act*, and recognises that the Victorian legal community, in particular Victoria Legal Aid, have developed very substantial experience and expertise in appropriately representing children in a broad range of matters in the Children's Court. It is difficult to argue that different provisions should apply as between the adoption and child protection jurisdictions given the similarities between the matters considered, and the outcomes sought.

### **Questions 17-22 - relating to the best interests principle and Aboriginal and Torres Strait Islander children ?**

These questions are of great importance, and ones in which I have a significant interest having been involved in ensuring that Victoria incorporated the Aboriginal Child Placement Principle into both the *Adoption Act* 1984 (the first in Australia if I'm correct) and the *CYPA* 1989.

However, the Aboriginal Child Care Agency is best placed to address these questions.

### **Question 26 - should parenting orders under the Family Law Act continue to be the preferred option for step-parents and relatives caring for a child ?**

Having been a member of both the Family Law Council and its Children in Step-Families Sub-Committee which produced the 1986 FLC *Report "Cinderella Re-visited - Rights and Responsibilities in Step-families"*, and of the Adoption Legislation Review Committee, I remain convinced of the continuing merits of arguments against both step-parent adoptions and relative adoptions - and that parenting orders under the Family Law Act should remain the preferred option.

### **Questions 33-38 - regarding access to adoption information**

Given the lack of time to prepare a more considered response on this important question, I refer to my response above to questions 10-12.

However, I would make the general observation that Victoria having been the first Australian state to enable adopted adults to obtain a copy of their original birth certificate at age 18, as well as enabling access to information by birth parents and adoptive parents and others - reforms which have been added to by later amendments - has a record to be proud of with respect to accessing information and enabling contact by all parties to the adoption process.

Despite some doubts expressed at the time the *Adoption Act* was debated and enacted in 1984, the rights obtained have been exercised responsibly and the abuses that were foreshadowed did not arise. The attempt to impose "contact statements" in 2013 (removed in 2015) to limit the rights of birth parents demonstrated that attempts to limit such rights were mistaken.

### **Questions 44-48 - modernisation and operation of the Adoption Act**

I return here to my Introductory Comments regarding the primary objective and context of Victoria's child welfare system and its key services - adoption, child protection, out-of-home care.

Tricia Harper

26 September 2016