



dhcs | ACT

department of disability,
housing & community services

**A BETTER SYSTEM FOR CHILDREN
WITHOUT PARENTS TO
CARE FOR THEM**

**Discussion Paper on the
*Adoption Act 1993***

MAY 2006



The Department of Disability, Housing and Community Services invites comment on this discussion paper:

The closing date for comment is Friday 23 June 2006.

Copies of the document are available on

- Department of Disability, Housing and Community Services Website: www.dhcs.act.gov.au
- By phoning: (02) 6207 1335
- By emailing: adoptions@act.gov.au

Please send comments to:

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Please Note: A summary of the issues for discussion contained in this paper has been attached at the end. We are happy to accept comments written in the spaces provided under each issue.

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Introduction

This paper has been prepared by the Department of Disability, Housing and Community Services to invite comment about proposed changes to ACT adoption legislation – the *Adoption Act 1993* (the Act).

Adoption is the best means of ensuring a permanent home and family for children who have no parents or relatives able to care for them. An adoption order makes a child a legal member of a family and confers on adoptive parents all the responsibilities of any parent in our society.

When enacted, the Act was viewed as progressive legislation which included provisions such as the Aboriginal and Torres Strait Islander placement principle; access to origins information; more open adoption; and, acknowledgement of the overarching principle of the “best interests” of the child. For the most part, the legislation has ensured “best practice” in conducting adoption arrangements in the Territory.

However, in light of several major initiatives over the last ten years, including the *Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption* (the Hague Convention) and the enacting of the *Human Rights Act 2004*, there is a need to review the Act in terms of contemporary relevance and accountability requirements. It is also essential that the Act is consistent with the *Children and Young People Act 1999* (also under review at this time) and that it incorporates the principles of the United Nations *Convention on the Rights of the Child* (UNCROC).

Areas for Review

Specific areas of the Act that may need to be reviewed include the following.

1. Preamble/Objects and Principles

Decisions made under the Act include who may be adopted; who may adopt children; the assessment of prospective adoptive parents, review processes, the discharge of adoption orders, inter-country adoption, adoption consent requirements and the effect of adoption orders. The Act states that the “best interests” of the child are paramount in making decisions under this Act although it is not always clear what constitutes “best interests”. At present, the Act does not set out other operating principles although these may be implicit in some provisions. For example, special provisions relating to the placement of Aboriginal children for adoption, in effect, constitute an Indigenous child placement principle. Principles need to be identified to inform and guide adoption practice now and in the future.

Principles identified by a range of child welfare authorities generally inform adoption practice in Australian states and territories. They are the state or territory adoption legislation; National Minimum Principles in Adoption 1993 (agreed to by the then Social Welfare Ministers committee); and more recently the United Nations *Convention on the Rights of the Child* (UNCROC) and the *Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption* (the Hague Convention).

The paramount principle for conducting adoption arrangements is “the best interests of the child” and a range of factors are considered to determine what is in the best interests of children when decisions are being made.¹ These factors include:

The expressed preference of the child’s birth parents, including:

- The preferred religious upbringing of the child
- Characteristics of prospective adoptive parents and the composition of the adoptive family
- Desire to participate in a voluntary exchange of information or contact

The specific needs of the child, including:

- Emotional, physical, educational, recreational and social needs
- The child’s age, maturity and level of understanding
- Indigenous or cultural background
- Birth circumstances
- Medical needs, including known medical conditions, disabilities, or potential future health conditions or disabilities

The characteristics of the prospective adoptive parents/parent, including:

- The age and gender of the child for which they have been assessed and approved for having the capacity to parent

- Whether they have been approved as having the capacity to parent a child from a different cultural background
- Whether they have been approved as having the capacity to parent siblings
- Their religion
- Their Indigenous or cultural background
- Their willingness to parent a child with known medical conditions, disabilities or potential future health problems
- Their willingness to participate in exchanging information or have contact
- The age of other children in the prospective adoptive family and other relevant considerations.

Most Australian adoption acts already set out some principles however the *NSW Adoption Act 2000* has a comprehensive statement of objects and principles that incorporate the relevant considerations and are included to “give guidance and direction in the administration of the Act”.ⁱⁱ

These objects and principles clauses expand on the following concepts:

- The best interests of the adopted person throughout his/her life;
- Adoption is a service for children rather than for adults seeking to care for a child (no person has an automatic right to adopt a child and adoption is not an arrangement, or direct contact, between a child’s birth parents and other adults seeking to acquire a child);
- Child’s entitlement to be cared for by a suitable family able to meet his or her unique needs;
- Child’s entitlement to know about his/her family background, cultural heritage and the opportunity to maintain or develop cultural identity;
- Indigenous Child Placement Principle;
- Birth Parent’s entitlement to make decisions about their child’s future care;
- Child’s entitlement to be involved in decision making;
- Entitlement of parties to negotiate mutually agreed adoption arrangements;
- Obligation to apply equivalent standards to local and overseas adopted children; and
- Obligation to encourage openness in adoption and to continue to recognise the changes in adoption practice.

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| <p>Issue: Should clear principles be set out in the Act to guide adoption practice?</p> |
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2. Intercountry Adoption Administration

Most adoption orders in the ACT, as well as for the rest of Australia, are now made for children coming from overseas. In the early nineties, overseas placements accounted for 30 % of all adoption orders made in Australiaⁱⁱⁱ. By the beginning of this decade the proportion of adoption orders made in Australia for children brought from overseas has risen to over 60%^{iv}, of the total.

While numbers of overseas adoptions have been increasing, arrangements for them have also become more complex since Australia ratified the Hague Convention. The ACT continues to conduct adoption negotiations with some countries that have not endorsed the Hague Convention, but with whom it has pre existing agreements, as well as with countries that have endorsed the Convention. This means that ACT adoption legislation must now govern these more complex arrangements including making provision for the ACT Government's formal role with commonwealth agencies such as the Attorney-General's Department and the Department of Immigration and Multicultural Affairs in relation to the overseas placements.

2.1 Explanation of obligations under the *Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry adoption* (The Hague Convention)

The Australian Government became a signatory to the Hague Convention on 1 December 1998. The Hague Convention came about largely to prevent child trafficking and ensure that the increasingly common practice of placing children away from their country of origin for the purpose of adoption remained consistent with Article 35 of the UNCROC which deals with child kidnapping and selling.

The Hague Convention establishes a system of reciprocal cooperation between contracting states and provides a common set of fundamental principles to guide intercountry adoption practice between them.

The objectives of the Hague Convention are:

- To establish safeguards to ensure intercountry adoptions take place in the best interests of the child with respect for his/her fundamental rights as recognised in international law;
- To establish a system of cooperation amongst contracting states to ensure those safeguards are respected and thereby prevent the abduction of, sale or trafficking in children; and
- To secure recognition in contracting states of adoptions made in accordance with the convention .

As a result of Australia ratifying the Hague Convention, all Australian states and territories have endorsed the articles of the Hague Convention. Under the agreement, a "Central Authority" is the designated authority in each ratifying

state, responsible for undertaking the adoption process and ensuring that adoptions comply with Convention standards.

The secretary of Commonwealth Attorney-General's Department is the designated principal central authority in Australia for the Hague Convention and each state and territory has a designated State Central Authority. In the ACT, the Chief Executive, Department of Disability, Housing and Community Services is the designated Central Authority and is required to fulfill the functions of a Central Authority in accordance with the Hague Convention.

These functions include:

- undertaking day-to-day casework involved in a particular adoption;
- approving an application for the adoption of a child;
- giving consent to the adoption of a child;
- accrediting a body/bodies to carry out functions under the Hague Convention, where applicable; and
- revoking the accreditation of a body for the purposes of Part Three of the Convention, where applicable.^v

The Commonwealth and states and territories are party to a further agreement named the *Commonwealth/State Agreement for the Implementation of the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* (Commonwealth - State Agreement) which sets out the terms of their relationship in administering their Central Authority duties.

Adoption legislation in most other Australian jurisdictions has now been amended to include reference to obligations under the Hague Convention.

Issue: Should the Act contain an explanation of obligations under the Hague Convention on Intercountry Adoption, including the role of the Central Authority?

2.2 Explanation of Administrative Arrangements with Hague and Non-Hague countries

Not all countries with which the ACT has existing adoption agreements have ratified the Hague Convention. In accordance with the terms of the Commonwealth/State Agreement, the Department of Disability, Housing and Community Services can continue to work with countries that have not ratified the Hague Convention (commonly referred to as "non-Hague countries"), if an agreement already existed at the time of signing, however, agreements must be subject to a review process.

All Australian adoption legislation, besides that of the Northern Territory and the ACT, differentiate administrative processes to be followed with Hague and non-Hague countries.

Issue: Should the Act contain an explanation of different processes to be followed with Hague and non-Hague countries?

2.3 Explanation of Role of Department of Immigration and Multicultural Affairs in Intercountry Adoption

Although adoption is largely covered by state and territory legislation, the Australian Government Department of Immigration and Multicultural Affairs has some legislative functions in regard to intercountry adoption, because of its primary role of regulating migration of people to Australia.

Children who enter Australia for the purpose of adoption are subject to the provisions of the *Immigration (Guardianship of Children) Act 1946*. They are defined as non-citizen children and enter Australia under the guardianship of the Minister for Immigration and Multicultural Affairs. Under this Act the powers and functions of this guardianship are delegated to nominated officers of the welfare authority of the state/territory where the child resides. In the ACT the Chief Executive, Department of Disability, Housing and Community Services is the delegated guardian of the child until adoption is finalised in the ACT Supreme Court. This transfers guardianship to the adoptive parents and results in the child becoming an Australian citizen.

When the present ACT adoption legislation was enacted in 1993 it included a clause to place a child adopted from overseas in the direct guardianship of the Chief Executive (Section 37). At the time, the commonwealth and all states and territories had agreed that children coming to Australia for adoption should enter directly into the guardianship of the state or territory, bypassing Immigration. This provision was due to come into effect when the relevant commonwealth immigration legislation had been amended to allow this change.

The Commonwealth legislation was not amended and the system of the Minister for Immigration delegating guardianship remains, but the clause in the ACT Adoption Act relating to the ACT Chief Executive's guardianship role of overseas children contains no reference to delegation from Immigration. At times, this omission causes confusion. New South Wales, Northern Territory and Queensland legislation now contain some explanation of the role of Immigration in overseas adoption.

Issue: Should the Act contain an explanation of guardianship of non-citizen child functions of the Department of Immigration and Multicultural Affairs?

3. The Adopted Child

The "best interests" principle has to be taken into account in all decisions made under the Act however there are some adopted child's rights that may need to

be specifically supported by legislation. These are rights enshrined in the United Nations Convention on the Rights of the Child including the right to retain name and identity^{vi} and the right to legal representation when decisions are being made about the child's economic, cultural and social well being.^{vii}

3.1 Adopted Child's Right to Retain Given Name

The present ACT legislation allows a child to be given any name on adoption, including retaining an existing first name or surname. The issue of the child's given name is significant for all children requiring adoptive families, but is particularly significant for older children and children adopted from another country. The surname is also particularly important for older children.

"Research does not indicate a definite age at which a child comprehends their name as part of who they are. Children under six months will respond to their name, and original names certainly form a crucial part of the identity of older children who have been known by that name since birth. The child's name is often the only tangible link to their birth family. For children adopted from overseas the name is the only remaining link with their culture and country of origin."^{viii}

Many adoptive parents are sensitive to this issue and do not change the child's first names while others believe that a name change will assist in the child's attachment to their adoptive family.

Some adoptive parents argue that the name has a negative connotation in English or is difficult to pronounce and this will create hardship for the child being accepted in the community. However in contemporary Australian society, people are familiar with a wide variety of names originating from numerous diverse cultures resulting in very little disadvantage for a person with an unusual name.

It is also argued that children are often given their names by an institution or orphanage, not by birth parents, so the names are not significant. However, even if this is the case, the name a child has been addressed by remains an important part of their identity as well as a link to the country of origin. NSW adoption legislation now requires that given name/s be preserved for an adopted child over the age of twelve months. In special circumstances parents can apply to the court for a name change.^{ix}

In the ACT it is proposed that adoptive parents be required to preserve the child's given names with the option to give the child additional first names. In exceptional circumstances adoptive parents may apply for a court order to change the names. Such an application would require a report with a recommendation from the Chief Executive that the change would be in the child's best interest.

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| <p>Issue: Should there be a requirement for the adopted child's first names to remain unchanged with provision to add additional names?</p> |
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3.2 Participation of the Child in Adoption Decisions Concerning Them

As with most Australian legislation relating to the welfare of children, the Act allows for the wishes of the child to be considered in adoption proceedings with due regard to their age and developmental capacity. Both the Hague Convention^x and the UNCROC^{xi} refer to the child's right to express a preference about adoption. Some other jurisdictions in Australia require any child over the age of twelve to give formal consent to their adoption.^{xii}

Present provision in the Act for ascertaining the child's wishes is very general and doesn't provide guidance for a decision maker to ensure the child's wishes are heard, or in which circumstances this is appropriate.

Decisions about the adoption that have a significant impact on a child's life and therefore should not be made without appropriate consultation with the child include:

- The placement of the child for adoption
- The development of any Adoption Plan concerning the child
- An application for an order for the adoption of the child
- Change of the child's name on adoption
- Contact with birth parents or others connected with the child

In addition, to ensure that consultation with the child is effective, ACT Adoption legislation should formally recognise that he or she must have:

- Sufficient intellectual and developmental capacity
- Adequate information in accessible language concerning the decision
- The opportunity to express his or her views freely
- Information about the outcome of the decision and an explanation of reasons for the decision
- Any assistance that is necessary to understand the information and to express views
- The opportunity for counselling

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| <p>Issue: Should the Act clarify when and how a child has the right to be consulted, or in some instances, give formal consent, when decisions are made about their adoption?</p> |
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4. Birth Parents

In the ACT, the Act and *Adoption Regulations 1993* set out whose consents are required for an adoption, and the process for giving consents. This process is designed to ensure consents are given freely and relate to the timing of consent, the form of consent, witnessing consents and withdrawing and dispensing with consents. The Act requires the consenting parent to be in possession of consent documents for 14 days before signing and requires the parent to attest that they have understood the meaning of giving consent for the adoption of their child. The Act does not specifically set out the nature of information to be given to

consenting parents, apart from the consent form itself, nor does it mandate any particular form of counselling.

An adoption order cannot be made if the birth mother signed the consent documents within seven days of giving birth, unless the Chief Executive is satisfied the mother was in fit condition to give the consent. In reality, almost all consents are signed after the seven days have elapsed. The Act also prohibits the court from making an adoption order if it appears that the person was not in a fit condition to give consent or did not understand the meaning of the consent.

In summary, a parent can sign an adoption consent seven days after the child's birth, must have had the consent documents to peruse for at least 14 days and then has 30 days to revoke the consent with an extension of 14 days if required.

However in the ACT, as in the rest of Australia, the number of local adoptions has consistently decreased. There were approximately 100 local adoption orders made each year in the ACT in the early 1970s but only seven in 2004, five of which were adoptions by step parents^{xiii}. Placing a child for adoption is now an unusual decision for an Australian parent to make. As women are able to control their fertility and there is virtually no stigma attached to ex nuptial birth, parents now consenting to adoption arguably constitute a more vulnerable group of people than in past years. The reason these few parents consider relinquishing their children for adoption at all is usually because they have complex problems involving mental illness, family dysfunction, substance abuse and domestic violence not because they are single or considered too young to parent competently^{xiv}.

The present provision in the Act for parents to be informed and counselled about a decision to relinquish for adoption may not be sufficient to ensure a parent makes a decision that is in the best interests of their child. Also UNCROC Articles 14, 18 and 27 make it clear that it is usually in a child's best interest for their parent/s to be involved in decision making about their life and that governments have a responsibility to assist parents to raise their children wherever possible.

4.1 Increasing the Mandatory Period before Consenting to Adoption to allow for Counselling

Any legislative period that specifies how soon after a child's birth a parent may consent to the child's adoption must attempt to balance a number of competing interests and considerations. These are the rights of parents to information and support to enable them to make an informed and voluntary decision, the rights and interests of the child to be cared for by his/her parents and family if possible; and the child's need to be placed with a permanent family as quickly as possible.

Some other jurisdictions have decided that giving parents a longer time to consider a decision to relinquish is in the best interests of all parties. In NSW, this period is 30 days after the birth and 14 days after consent documents have been

received. WA now does not accept adoption consent until 28 days after the birth and at least 28 days after the person giving consent has received relevant information. Both these jurisdictions also provide for counselling during this period. In NSW, it is mandatory to undergo the counseling, while in WA it is mandatory to provide counselling if requested. Tasmania and Victoria have shorter consent periods but still require birth parents to be provided with counselling before formally consenting.

If the consent period were to be extended in the ACT and/or formal counselling mandated, consideration would need to be given to a reasonable time frame, the form of the counselling and who should deliver it.

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| <p>Issue: Should the mandatory period before consenting to adoption be increased in order to provide counselling for birth parents?</p> |
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4.2 Special Conditions for Parents under the age of 18 years Consenting to Adoption

Birth parents under the age of 18 years of age fall into a special category of vulnerable people because of their ages and consequent level of maturity. Until now they have been treated no differently than other parents for the purpose of giving adoption consent.

Some other jurisdictions have included provision in their legislation to recognise the especially vulnerable nature of parents who are still legally children themselves. In NSW consenting parents under the age of eighteen need separate legal advice before giving consent. In WA a parent or guardian of the under age birth parent must provide an affidavit agreeing to the relinquishment of the child – if the parents or other lineal relatives are not available or unable to provide such an affidavit the Director General takes on a guardianship role in relation to the young person and provides an affidavit to the court.

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| <p>Issue: Should parents under the age of 18 years of age have to be given independent legal advice or extra counselling before signing adoption consents?</p> |
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4.3 Wishes of Birth Parents to be Incorporated into an Adoption Plan

Studies^{xv} show a positive link between birth parents having a role in choosing characteristics of adoptive parents for their children and positive outcomes for the adoption. Currently, almost all local adoptions have some degree of openness and there is an expectation there may be contact or information exchange in the future. When a birth parent has contributed to the decision to place their child in the type of family they can relate to, there is a much greater likelihood that information exchange during the adopted person's childhood, and possible later contact, will be more comfortable for all parties.

Most Australian states and territories have made provision for the placement of Indigenous children with adoptive parents of the same racial background and offered local consenting parents of non-Indigenous children the opportunity to express preferences about the characteristics of their child’s adoptive family. At present in the Act these “wishes” are listed as religion, ethnic background, the presence of siblings and whether or not the child is adopted by a couple or single person as well as “any other wishes”. The final placement decision still rests with the Chief Executive and is based on the best interests of the child, but the birth parent’s wishes are always considered and met if possible.

As there are many other factors that contribute to a family environment besides those listed, the proposal is to remove reference to specific “wishes” but retain the ability to express preferences. Before the child is placed, parents would be consulted about the kind of parenting experience they prefer for their child and given the opportunity to view non-identifying profiles of approved adoption applicants. The parents’ wishes regarding information exchange and contact would also be obtained. When a suitable family has been identified, an “Adoption Plan” agreeable to all parties would be formulated and included in the application to the ACT Supreme Court for the formal adoption order. The details of the Adoption Plan could then be reflected in a formal Conditional Adoption Order (Section 7 of this paper discusses conditional orders).

In effect, the opportunity to express these wishes and have them considered for incorporation in an Adoption Plan will be confined to local parents consenting to adoption of their children in the Territory. Parents who relinquish their children in overseas countries for adoption in the ACT do so according to the adoption law of the country where they reside. Under the terms of the Hague Convention all Australian states and territories have agreed to accept the legal relinquishment processes in other signatory countries as lawful and inclusive of certain principles, even though they may not exactly mirror their own procedures. If the child is from a country that has not endorsed the Hague Convention, the ACT, like other Australian jurisdictions will only accept children for adoption where there was an existing bilateral agreement before Australia signed the Hague Convention.

Issue: Should consenting parents be able to express wishes about the attributes of the family who will adopt their child?
Issue: Should these wishes be incorporated into a mutually agreed “Adoption Plan”?

4.4 Definition of Birth Father

In 2004, the Act was amended to remove the reference to the Birth, Equality of Status Act when that Act was repealed. The section in that Act referred to by the Adoption Act defined circumstances where presumptions could be made about fathers whose consents were required to an adoption. The *Parentage Act 2004* similarly defines such circumstances but has not replaced the previous reference. This means that currently two ACT Supreme Court Justices have made comments regarding this omission. Justice Connolly recently made the comment that the

present Act requires consent of the actual father of the child – irrespective of whether that person is known or not and that it has the effect of turning the Chief Executive into an investigator of the paternity of every proposed adopted child.

Chief Justice Higgins also commented that while the situation continues and the Act does not define a “father” for consent purposes there is no basis to exclude unnamed fathers from their right to consent, thereby denying them natural justice. He expressed concern that should the consent be dispensed with in such circumstances, the father may, at some stage in the future, seek to have the adoption order overturned and this would not be in the child’s best interests.

It is vital to protect the rights of known birth fathers and it is acknowledged that in the past adoption was largely “seen as women’s business”^{xvi} with birth fathers not routinely consulted about plans for the child’s care. However under the present legislation when the father is unnamed or unknown, and his consent cannot be dispensed with, the child is severely disadvantaged as an adoption order cannot be made until all necessary consents have been signed or dispensed with.

All other Australian jurisdictions define a birth father for the purpose of consent to adoption.

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| Issue: Should the Act contain a definition of “father” for the purpose of consent to adoption? |
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5. Adoption Applicants

A contemporary Australian text on adoption makes the comment that “From a purely pragmatic point of view it would be irresponsible for agencies to accept as prospective parents individuals or couples who have little hope of placement because of their unwillingness or incapacity to deal with adoption as a dynamic process which may call for a flexible and generous response.”^{xvii}

Modern Australian legislation governing the assessment and approval of adoptive parents needs to take into account the requirement to ensure the best interests of a child are met by adoption, to meet the conditions of international treaties and to encompass the changing nature of adoption as an open, life long process.

While the present Act largely ensures the highest standards are applied to the assessment and approval of adoptive parents in the ACT, one aspect may need review.

5.1 Permanent Residence of Applicants to the ACT Adoption Approved List

The Act requires the Chief Executive to keep a list of people who are “approved” to adopt. The ACT is the only state or territory that does not stipulate that

applicants have to be permanently resident in the jurisdiction.

When adoption applicants are not habitually resident in the ACT the Chief Executive has to rely on unknown agencies and individuals to perform the assessment procedures and does not receive sufficient information about the child to be placed to ensure birth parents' rights have not been violated in the process and the best interests of the child are being met. Also it is almost impossible for ACT services to provide follow up support to families and adopted children who are residing overseas.

China has now ratified the Hague Convention from 1 January 2006 so the situation will not arise again with this country. However, while it remains that there is no residency requirement in the ACT for approval for adoption, there is potential for similar requests to be made by Australians living in other overseas jurisdictions.

Issue: Should persons applying to have their names placed on the Adoption Register have to be "resident or domiciled" in the ACT?

6. Step Parent and Relative Adoption

Australian state and territory adoption legislation has always provided for a step-parent to adopt their spouse's children from another relationship in certain circumstances and thereby become a legal parent along with the spouse. Similarly, there has always been provision for relatives to adopt in some instances. These types of adoptions are different to others as the child concerned is not usually in need of a permanent family relationship that can only be secured by an adoption order, as in "stranger" adoptions.

In the case of step-parent adoption the child is already in the care of one continuing parent who already has full legal rights and responsibilities in relation to the child but who has re-partnered. The child in this instance does not usually need the step-parent to be made a "legal" parent to ensure the protection of a legally recognised guardian.

In the case of relative adoption, the family relationship that already exists can be secured by a lesser order, such as a "guardianship" type order.

The 1997 Review of NSW adoption legislation summed up the situation as follows "Step parent and relative adoptions differ from other types of adoption in that agencies do not select the adoptive parents. Instead the issue is whether the existing care arrangements should be transformed into an adoption." xviii

It has been recognised in the last two decades that the majority of step families and relatives can secure family relationships by the use of Family Court parenting orders, change of name by deed poll and specific provision in wills, rather than the more extreme measure of pursuing a legal adoption that severs all legal ties

with the non continuing parent's family or distorts the child's birth relationship with their family of origin.

Similar to all other Australian state and territory adoption legislation, the Act contains provisions that encourage applicants for step-parent or relative adoption to investigate alternatives that may achieve the same security for the child.

In addition, the Act states that a step-parent adoption order should only be made if the court considers that it would not be preferable to make an order relating to custody or guardianship. Similarly, an order should not be made in favour of a relative unless the court is of the opinion there are circumstances why the relationships within the family of the child should be redefined as such an order would do.

It is considered in the best interests of the child to retain these provisions in ACT adoption legislation however, there may be a need for additional safeguards.

6.1 Step Parent Applicants to Seek the Leave of the Family Court before Proceeding

Making an adoption order extinguishes birth parents' responsibilities under provisions of the *Family Law Act 1975*. However, where the adoption order is made in favour of a step-parent these rights and responsibilities are not automatically extinguished for the purpose of the Family Law Act unless the Family Court has granted leave for the adoption by the step-parent to proceed.

A step-parent adoption order may still be made without seeking leave of the Family Court, however without the leave being granted the non-continuing parent could still initiate proceedings in the Family Court in relation to the child.

At present in the ACT, people seeking a step-parent adoption order do not consistently seek the leave of the Family Court although they are advised to do so if it is known that a Family Court order exists in relation to their step child. Some jurisdictions such as South Australia have included a special provision in their adoption legislation to ensure leave is obtained and will not consider an application for step parent adoption unless "the Family Court of Australia has given that person leave to proceed with the application for adoption under Section 60G of the *Family Law Act 1975*." ^{xix}

This action will have the effect of ensuring the adoption order, if granted, can't be challenged in the Family Court and also ensure applicants are compelled to consider Family Court alternatives before seeking an adoption order.

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| <p>Issue: Should step-parent adoption applicants be required to seek the leave of the Family Court before proceeding?</p> |
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6.2 The Guardianship Role of the Chief Executive in Step-Parent and Relative Adoption

The present legislation states that when all necessary adoption consents have been signed or dispensed with, the child is automatically placed in the guardianship of the Chief Executive. This is vital in the case of a local child made available for adoption - as by consenting to adoption the parent has relinquished all responsibility for care.

Similarly, when children are brought from overseas for adoption in the ACT the Minister for Immigration delegates guardianship to the Chief Executive to ensure the child's needs are met. However in the case of step-parent adoption, the continuing parent consents to the step-parent adopting the child while maintaining their own role as a legal parent. The legislation does not discriminate between these different consents although, in effect, the Chief Executive would never exercise guardianship powers in relation to children who have consents for step-parent adoption. This is not considered necessary or desirable as the child concerned has a continuing legal parent.

In the case of relative adoption the Chief Executive may need to assume guardianship if the child concerned has not already been in the care of the adopting relative.

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| <p>Issue: In the case of step-parent or relative adoption should the Chief Executive be excluded from automatically assuming guardianship after all consents have been signed?</p> |
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7. Post Adoption Support

At present the Act provides for support services to be offered to a family after a child is formally adopted for a period of up to twelve months. The Act states that this support should not include financial support and there is no other provision in the Act allowing financial assistance for a family post adoption.

In effect, as most local adoption orders now have conditions attached (Conditional Orders – sometimes referred to as “open adoption”) with ongoing information exchange and in some cases contact between birth and adoptive families, ACT Adoption services have an informal continuing role in monitoring these arrangements. The Chief Executive's only legislated responsibility in regard to a Conditional Order is to provide a report if one of the parties wishes to change the agreed conditions.

Besides some monitoring of Conditional Order Arrangements the ACT Adoption Unit also provides follow up and counselling services to ACT adoptive families, as requested, at any time after an adoption order has been made.

7.1 Responsibilities of the Chief Executive Post Adoption Order

There may be an argument that the interests of adopted children in the ACT would be better protected if the legislation defined a more formal monitoring and support role for the Chief Executive in regard to Conditional Orders. Some states, such as Western Australia already have quite detailed provisions governing post adoption arrangements for information exchange and contact, while others have considered the matter and opted to remain informal. When the NSW adoption act was reviewed the NSW Law Reform Committee recommended against legislative schemes for agreements for openness in adoption recommending instead that legislation should encourage parties to negotiate voluntary plans for arrangements for exchange of information and contact.^{xx}

As well as a formal role monitoring Conditional Orders there may be a need for adoption services to offer more formal ongoing counselling and support while the adopted child and their parents remain in the ACT.

Consideration could be given to providing for financial assistance in cases where financial hardship prevents a family from adopting a child in need of the legal permanency an adoptive home provides. It is envisaged this type of assistance would be appropriately offered in instances such as that of a financially disadvantaged foster family, who have cared for the child for a number of years, applying to adopt that child or where a child with exceptional needs is adopted. The *ACT Children and Young People Act 1999* already has provision for continuing financial support for children in some kinds of non adoptive permanent placements.

All other state and territories' adoption legislation allows for ongoing financial support to families post adoption in special circumstances.

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| <p>Issue: Should a provision be added for the ACT Chief Executive to have some continuing counselling/supporting role, including financial support in special circumstances, after an adoption order is made?</p> |
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7.2 Restricting Identifying Publicity about an Adoption for a Period of Time post the Adoption Order

At present the Act prohibits the publication of details of parties where the adoption matter is before the court – that is adoption proceedings cannot be reported upon with identifying details in the media nor can the names of parties appear in court lists. This section of the Act has also usually been interpreted to prohibit the publication of names of parties to an adoption in public interest articles in magazines, newspapers television, and in public notices, until after a final adoption order has been made.

These restrictions apply to adoption legislation in all Australian states and territories and were included to protect the privacy of parties in a time when adoption was governed by secrecy.

There are some questions in the community as to whether there is a need for such restrictions now that adoption is generally a more open process. Adoptive family support groups often wish to publish details about families who have returned from overseas with a child for adoption and believe this practice encourages support and cohesiveness in the adoptive community. Also on occasion the Australian media is interested in the arrival of children from overseas for adoption and may wish to publish accounts of their experiences.

However it may be in the best interests of children, especially older children who have arrived from overseas for adoption, to have a period of time to settle into the new family environment without any media involvement.

It is now documented that the process of adoption placement, especially between countries, is extremely stressful for children.^{xxi} This may be exacerbated by age and adverse background experiences and the early months of the placement are crucial to the establishment of long term bonding and mutual trust in the family.

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| Issue: Should identifying publicity be restricted for a certain time after adoption placements and/or adoption orders are made? |
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8. Access to Information and Contact

The absolute right of adopted people to access identifying information about their adoption after turning 18 years is now provided in all Australian state and territory adoption legislation except for the Northern Territory where a veto may be placed on the release of information.

The ACT *Adoption Act 1993* also allows access to information by birth parents, adoptive parents and some types of birth relatives, as well as the adopted person, after the adopted person has turned eighteen. This is the widest eligibility categories of any Australian state or territory. In the Act, these categories of eligible applicants are termed "associated persons". In addition, there are very few restrictions on the type of information that can be supplied to "associated persons". Access is allowed to most information available to the Chief Executive about a particular adoption, placing restrictions only on information stating that the adopted person was born as the result of rape or incest.

Initial misgivings expressed by some other jurisdictions that information in the ACT would be too readily available to too many people have proved to be unfounded and the supply of adoption information has proceeded largely without controversy. In the 12 years since the legislation was enacted there has been a steady rate of applications numbering over 40 per year with no letters of

complaint to the Minister or Ombudsman about the access to information provisions since 1997. This suggests that the provisions are widely accepted in the ACT community.

The Act also includes provision for parties to adoptions who do not want to be contacted after another party has received identifying information to place a “veto” on contact. Contacting against a veto is an offence under the Act although there have been no convictions to date. The ability to veto contact was considered important to protect the privacy of those who were involved in an adoption process in an era when it was believed the adoption would remain secret indefinitely and future contact would be impossible. The veto provision does not apply if there has already been contact.

Since 1993, most adoption orders made in the ACT have some degree of openness with ongoing information or, in some cases, regular contact. Local adoptive parents and birth parents are now well aware that future contact between an adopted person and their family of origin is a strong possibility while many families who have adopted from overseas are now exploring future avenues of contact and reunion for their children. For these reasons, states such as NSW, Queensland and South Australia have no veto provisions applying to current adoptions but have retained them for earlier adoptions.

The administrative unit that provides most post adoption information services is termed in the Act the “Adoption Information Service”. The unit provides information, registers vetoes and assists with reunion, as well as providing informal counselling.

8.1 Access to Information for Birth Relatives Born after the Adoption

Even though the Act allows access to information to birth relatives, as well as a number of other “associated persons” (see above) – it specifies that information is available to those birth relatives who were relatives “before the child was adopted”. This can be interpreted to exclude birth siblings born after their sibling was adopted from accessing information, although it is more probable that it was meant to define birth relatives as those “who would have been legal relatives if the adoption had not taken place”.

This definition needs to be clarified in the Act, as this group are one of the most likely to benefit from access to this information.

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| <p>Issue: Should definition of birth relative be changed to make clear this includes birth relatives of the adopted person who were born after the adoption took place?</p> |
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8.2 Information on Rape and Incest

At present, the Act prohibits the supply of information regarding rape or incest to an applicant. Such information, while possibly distressing, is important for an adopted person to understand the circumstances of their birth and in the case of incest may be vital medical information.

The negative effect of secrecy, especially for the adopted person, is now well documented in recent adoption literature.^{xxii} Practitioners providing reunion services to adults affected by adoption also report the importance for the adoptee of having comprehensive and accurate information to the outcome of a reunion.^{xxiii}

In the ACT, people requesting information about an adoption are always offered assistance and counselling – although this is voluntary – so that difficult information can be presented in a sensitive manner. If the subjects of rape and incest are still thought to be highly sensitive there is an option to allow the release of this information only with mandatory counselling.

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| <p>Issue: Should information about rape and incest, that is now prohibited, be allowed?</p> |
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8.3 Removal of Veto Provision regarding Contact

Since 1993, there have been under 100 contact vetoes placed. Also the rate of placing vetoes has lessened over time with approximately one a year recorded in the last five years. Against the background of an almost complete acceptance of openness in adoption in the ACT, this seems to indicate that consideration could now be given to removing the veto provision for all future adoptions. This is currently the case in New South Wales, Queensland, South Australia and Western Australia.

There may be concern that the privacy of parties would be compromised by such a change, however the proposal is for the contact veto to be removed only for adoption orders made after the legislation is amended and parties entering into these future adoption arrangements would be made fully aware that a legally binding veto on contact would not be possible. The ability to veto and offence for contacting against a veto would remain for any adoptions before the legislation is amended.

Consideration should also be given to adding provision for parties to future adoptions to register an “objection” if they don’t wish to have contact. Contacting against an “objection” would not be an offence, but counselling (mandatory or voluntary) could be provided about the likely harmful emotional consequences of going against this wish.

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| <p>Issue: Should the provision to place a Contact Veto be removed for future adoptions?</p> |
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Issue: Should there be a provision to register an objection to contact?
Issue: Should counselling be provided to parties seeking contact where an objection to contact has been made?

8.4 Change Title of Adoption Information Service

The unit that administers the access to origins provisions of the Act (Part 5) is entitled the Adoption Information Service. This may be misleading and not truly reflect the work of the unit. A possible title is the Family Information Service.

In addition, consideration may be given to expanding the work of the unit to include supplying personal information to people who were not legally adopted but placed in other government out of home care such as foster care or residential care.

Issue: Should the name of the Adoption Information Service be changed to "Family Information Service"?

8.5 Preservation of Adoption Records

The Act contains detailed provisions relating to the retention and storage of adoption records. In effect, specific provision is no longer needed. The *Territory Records Act 2002* is now sufficient to perform this task as it governs the storage, retention and disposal schedules for all records held by ACT Government agencies.

Issue: Should adoption legislation no longer have special provisions relating to the preservation of records?

9. Procedures for the Review of Decisions

The Chief Executive has the power to make a number of appealable decisions under the Act including refusal to include persons on the register for placement of a child for adoption; denying access to certain information; refusing to grant approval of a private adoption agency; refusing to authorise certain payments and refusing to approve certain communications and advertising. Similarly, the Registrar-General has the power to refuse a search of the birth register or to refuse to supply the requested information. When the Chief Executive or the Registrar-General makes such a decision, he or she is obliged to inform the people affected, known as "relevant persons", in writing.

A "relevant person" who then wishes to have the decision reviewed must go to the Administrative Appeals Tribunal, except for a decision to refuse to include the name of a person on the adoption register. In this case, the Act allows an internal appeal to the Chief Executive who must request that the Minister

convene a committee to review the decision and make a recommendation to the Chief Executive to either confirm or vary the decision.

The Chief Executive is then obliged to reconsider the decision and inform the applicants in writing of the outcome. However, if no action has been taken fourteen days after the initial request for review, the “chief executive shall be taken to have reconsidered and confirmed that decision on the expiration of that period”.^{xxiv} A period of fourteen days has not proved to be enough time to convene a committee, make a recommendation, reconsider the decision and inform the applicants, so that in practice, this provision is an ineffective review mechanism.

There may be a need to review all appeal provisions contained in the Act as they may no longer be framed in a manner that satisfies the requirement for transparency and accessibility in contemporary legislation.

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| Issue: Should there be a review of appeal mechanisms in the Act? |
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10. Consolidation of Adoption Legislation with the *Children and Young People Act 1999*

ACT adoption legislation and child protection legislation, the *Children and Young People Act 1999*, have many common factors and operate on similar principles, in particular that the best interests of the child should be the paramount consideration when decisions are made. Both acts also incorporate the “Indigenous placement principle”^{xxv} and the principle that children and young people should be consulted about decisions that affect them. Both acts share a common purpose of providing a means for children to live in a stable permanent nurturing family environment. This purpose is based on well supported research.^{xxvi}

In addition, there are provisions in each act where the other is silent even though these provisions address a common purpose. Consolidation and simplification of the two sets of legislation under one act, operating under shared principles and objectives could result in enhanced practice, efficiencies and ease of understanding of the legislation.

As with ACT adoption legislation, the *Children and Young People Act 1999*, also concerns itself in part with the welfare of children and young people who are permanently placed through legal intervention with a family other than their birth one. Many children continue in the care of a foster family on a long-term basis and in effect attach to this family as in a legal adoption situation. The legislation recognises this by containing provision for an Enduring Parental Responsibility order to enable a child to remain in the care of this family until they achieve independence.

In the last twenty years most Australian jurisdictions have expanded the scope of adoption legislation beyond childhood needs to recognise the adopted person

and their birth family's, now well documented,^{xxvii} lifelong concern with having information about and/or connection to each other. For persons affected by adoption these needs are legislated for in the Adoption Information Service. There is no parallel Family Information Service available for persons after a child leaves foster care.

The recent House of Representative Inquiry Into Adoption of Children from Overseas recently commented on the fact there is a group of children in Australia in long-term foster care whose need for a stable, nurturing home until adulthood may be better served by formal adoption as is more likely to be the practice in other western countries. "Australia lags other countries in relation to adoptions of children in care. In 2000, then estimated rate of adoptions of children in care for Australia was 1%, compared with 4% in the United Kingdom and 6-7% in the United States." ^{xxviii}

Other benefits of merging the legislation may include enhanced capacity to meet the emotional needs of children and young people in care; increased flexibility in regard to placement options and more efficient use of resources.

No other Australian state or territory has, as yet, merged adoption law with child protection law, however, there appears to be sufficient common purpose in ACT child protection and adoption legislation to give the issue some consideration.

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| <p>Issue: Should consideration be given to the consolidation of <i>Adoption Act 1993</i> with the <i>Children and Young People Act 1999</i>?</p> |
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Summary of Issues

1. Preamble/Objects and Principles

Should clear principles be set out in the Act to guide adoption practice?

2. Inter-Country Adoption Administration

2.1 Should the Act contain an explanation of obligations under the Hague Convention on Inter-country Adoption, including the role of the central authority?

2.2 Should the Act contain an explanation of different processes to be followed with Hague and non-Hague countries?

2.3 Should the Act contain an explanation of guardianship of non-citizen child functions of the Department of Immigration and Multicultural Affairs?

3. Adopted Child

3.1 Should there be a requirement for the adopted child's first names to remain unchanged with provision to add additional names?

3.2 Should the Act clarify when and how a child has the right to be consulted, or in some instances, give formal consent, when decisions are made about their adoption?

4. Birth Parents

4.1 Should the mandatory period before consenting to adoption be increased in order to provide counselling for birth parents?

4.2 Should parents under the age of 18 years of age have to be given independent legal advice or extra counselling before signing adoption consents?

4.3 Should consenting parents be able to express wishes about the attributes of the family who will adopt their child?

Should these wishes be incorporated into a mutually agreed "Adoption Plan"?

4.4 Should the Act contain a definition of "father" for the purpose of consent to adoption?

5. Adoption Applicants

- 5.1 Should persons applying to have their names placed on the Adoption Register have to be "resident or domiciled" in the ACT?

6. Step Parent and Relative Adoption

- 6.1 Should step-parent adoption applicants be required to seek the leave of the Family Court before proceeding?
- 6.2 In the case of step-parent or relative adoption should the Chief Executive be excluded from automatically assuming guardianship after all consents have been signed?

7. Post Adoption Support

- 7.1 Should a provision be added for the ACT Chief Executive to have some continuing counselling/supporting role, including financial support in special circumstances, after an adoption order is made?
- 7.2 Should identifying publicity be restricted for a certain time after adoption placements and/or adoption orders are made?

8. Access to Information and Contact

- 8.1 Should definition of birth relative be changed to make clear this includes birth relatives of the adopted person who were born after the adoption took place?
- 8.2 Should information about rape and incest, that is now prohibited, be allowed?
- 8.3 Should the provision to place a Contact Veto be removed for future adoptions?

Should there be a provision to register an objection to contact?

Should counselling be provided to parties seeking contact where an objection to contact has been made?

- 8.4 Should the name of the Adoption Information Service be changed to "Family Information Service"?
- 8.5 Should adoption legislation no longer have special provisions relating to the preservation of records?

9. Procedures for Review of Decisions

Should there be a review of appeal mechanisms in the Act?

10. Consolidation of Adoption Legislation with the *Children and Young People Act 1999*

Should consideration be given to the consolidation of ACT Adoption legislation with the Children and Young People Act 1999?

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Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption (The Hague Convention):
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- ii *NSW Adoption Act 2000*. Chapter 2
- iii Australian Institute of Health and Welfare *Adoption Australia '93-'94*
- iv Australian Institute of Health and Welfare *Adoption Australia '03-'04*
- v *Queensland Adoption Legislation Review*, 2002.
- vi UNCROC Article 8
- vii UNCROC Article 4
- viii *Queensland Adoption Legislation Review*, 2002.
- ix *NSW Adoption Act 2000* Section 101(5)
- x *The Hague Convention* Article 4(d)
- xi UNCROC Article 12(1)
- xii NSW; Queensland; South Australia; Western Australia
- xiii Australian Institute Health Welfare *Adoptions Australia 2003-04*
- xiv Marshall, A and McDonald, M *The Many Sided Triangle – Adoption in Australia*, Melbourne, 2001, pp. 74,75
- xv Cushman, L, Kalmuss, D and Namerow, P. B. *Openness in Adoption: Experiences and Social Psychological Outcomes among Birth Mothers*, Marriage and Family Review, 23, 1997
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- xxiv *ACT Adoption Act 1993* Section 110(3)(b)
- xxv The principle that Indigenous children who need out-of-home care be placed with Indigenous families in consultation with relevant community groups.
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- xxvii Marshall, A and McDonald, M *The Many Sided Triangle – Adoption in Australia*, 2001
- xxviii Report on Inquiry into Adoption of children from Overseas Appendix A – *Local adoption and child protection*, Section 1.6