

Adoption Act 1988 (SA) Review



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A report of The Independent Review of the South Australian Adoption Act 1988 undertaken during 2015, containing recommendations in a number of critical areas relating to the protection of the relationship rights of children and the preservation of the commitment to open adoption established in 1988.

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Finally, I hope I have wisely and well represented the views of the many people who spoke with me. Where there is oversight or misrepresentation of another's views it remains my responsibility.

DEDICATION

I dedicate this report to the many people who have undergone adoption in the pre-1988 era when closed adoption practice reinforced secrecy, denial and distortion in the person's life story. Many who have been hurt by the decisions made by adults came and spoke of the negative impact on their identity that stays with them into adulthood. They spoke of pain and confusion throughout childhood, of unsettled, non-belonging, of not understanding how they found themselves in this family. They spoke of the inadequacy of their adoptive parents to support and guide them, since they were often misled by social workers and others. They spoke of how their adult relationships are affected, of how hard it is to connect and build lasting bonds in their lives and how becoming a parent was both life-giving and deeply unsettling. They spoke of needing to know that foundational story, of putting the pieces together and discovery of their roots.

I also dedicate this to all those who found themselves in terrifying conditions in their adoptive families...dealing with abuse and neglect, and life-long trauma. They are so courageous while striving to overcome pain and to put all the pieces together.

And to those of you who respond with anger, I acknowledge the depth of the pain and the desire for an act on your part that gives you the power to put it all right. May yours be a journey into peace.

I dedicate this too, to all those who have sought to build a better life for children separated from their parents. Those who stepped out of the lives of their children, believing, hoping, that things might be better for them in another family. So often, not convinced and feeling pressured to give up because no other options were in place. To those honorable people who stepped forward to receive a child and to build a life with them. To those parents who have opened themselves to new, adult relationships with their children separated from them during childhood, and the adoptive families who have celebrated these moments. To those who worked in human services and facilitated this process, and to those who were honest enough to see that it was not going to bring the desired outcome...that attaching a child to another family and pretending that it was like this all along was going to make it work out. To those who fought to make adoption open and to those who took that step in 1988. To all who have gone through open adoptions since the late 1980s and remained committed to keeping both families present in the child's world.

To those who have found that adoption was just right for them, bringing them the love, attachment, belonging and firm identity that is the aspiration of all who care about the children they raise, may you offer solidarity with those who struggle. Theirs is a painful journey which needs legislative and practice change, but especially needs understanding from those who have been there.

To all these people, I dedicate this report in the hope that in my deliberations you hear your voice and in my recommendations you see your hopes. To those who are disappointed with my conclusions, I say I heard, I weighed and in the end I decided on dilemmas that will remain unresolved while we have practices that make secrets out of the origins of a child.

1.0 EXECUTIVE SUMMARY AND RECOMMENDATIONS

In December 2014 the then Minister for Education and Child Development, Hon Jennifer Rankine MP, invited South Australians to participate in a consultation about the *Adoption Act 1988* (SA). This report takes into consideration the contributions of over 500 respondents who addressed six key issues (see Terms of Reference Section 1.1 below).

The report offers a number of recommendations for changes to the Adoption Act and to consequential policies and practices.

1.1 TERMS OF REFERENCE

This review will inquire into the need and or desirability for changes to the South Australian *Adoption Act 1988* and the *Adoption Regulations 2004* and then provide a report to the Minister. In doing so The Review will ensure that the rights and best interests of the child remain paramount. The Review should consider the impact in South Australia of the broad changes in the field of adoption in the years since the last review of the Act (1994).

The Review should include:

1. consideration of the current COAG agenda for the reform of Australia's inter-country adoption program
2. recent inquiries, current research, activities and attitudes in Australia in relation to past adoption practices
3. the interface between adoption and children in the child protection system requiring permanent care
4. any other relevant matters, including concerns the Department for Education and Child Development has in the administration of the Act and Regulations.

The Review should also take into account any significant and relevant local, national or international documents or instruments, such as the draft Australian National Principles in Adoption and The Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption.

The views of the South Australian community should be taken into account and societal and technological developments, such as social media and the Internet should also be considered.

Specific issues that The Review should explore are:

1. adoption information vetoes
2. adoption of a person over the age of 18 years
3. retention of the child's birth name
4. same-sex couples adoption
5. single person adoption
6. discharge of adoption orders in certain circumstances.

1.2 APPROACH: PROBLEMATISATION, AN INTERPRETIVE FRAMEWORK AND A KNOWLEDGE REVIEW

The enquiry approach used throughout this review is built on Carol Bacchi's 'What is the problem represented to be?' or WPR model (2009). The WPR model moves us, at least at this stage in policy analysis, to problem questioning, rather than problem solving. As an initial step I apply this approach to looking into adoption in Australia and I ask some probing questions about assumptions underlying adoption. This allows me to set up an interpretative framework which I apply (systematically) to the evidence which has been gathered and assessed using the Social Care Institute for Excellence Framework for building a knowledge review (see 1.2.3 below).

1.2.1 PROBLEMATISATION

Here I use the term 'problematization' to describe an analytical approach that takes us into a critical assessment of assumptions and presuppositions within a policy arena. Bacchi describes it in brief as:

(Problematization) refers to how something is put forward as a problem. Since policy proposals specify what needs to change, they are forms of problematization, containing implicit representations of the character and causes of 'problems' (Bacchi C. , 2009, p. 277)

My use of this method becomes explicit in Part 2 as I explore the relationship rights of children. This discussion takes the most 'academic' form of all parts of The Review report. The following sections are kept deliberately minimalist in order to be more accessible, especially for those people who are primarily concerned about the findings and recommendations of The Review.

1.2.1 AN INTERPRETATIVE FRAMEWORK: ADVANCING THE RELATIONSHIP RIGHTS OF THE CHILD

I will spell this out further in the conclusions to Part 2. It is based on the statement of J. Dwyer, with which I agree:

I proceed on the assumption, that the most appropriate way for us adults to reason about children's lives, prior to exercising the awesome power we have over them, is first to figure out what basic rights children ideally should possess...and then we should think about which legal rules those rights would dictate if certain assumptions are made about what children's interests are or about what counts as evidence of interests. (Dwyer, 2006, p. 10)

The framework establishes a priority focus on the rights, best interests, needs and welfare of the child as a foundation and a 'plumb-line' against which the evidence is measured and recommendations formulated and lined up. In this way, the priority focus on children becomes a golden thread throughout this document and should be evident in any subsequent changes in legislation and policy. Dwyer acknowledges that practical impediments can impair the implementation of such a demanding standard (Dwyer, 2006, p. 9). He also points out that, 'many people are all too willing to find that any practical obstacle or conceptual difficulty is sufficient for abandoning focus on the child.' (Dwyer, 2006, p. 9). I agree and would take it further. Every one of the issues under review presents painful moral and ethical dilemmas in the every day. These relate to the difficulties presented by the long-tail of past, closed adoption practices. They are present in consideration of the needs of children with a desperate need for safety and a long term set of needs around stability, belonging and identity. I endeavour to make my thinking in these matters entirely transparent.

My questions are:

1. Is adoption the preferred solution to this [specified] problem?
2. When we effect an adoption what do we do that is irreparable?
3. In short, what is adoption and why would we do it?
4. How do we use adoption as a last resort to advance the rights, best interests, needs and welfare of the child?
5. Finally, assuming adoption will continue, what are the optimal legal and implementational conditions for adoption in South Australia in the 21st century?

1.2.2 A RIGOROUS KNOWLEDGE REVIEW

Within the WPR methodology, which starts at asking the question ‘what is the problem?’, this document also employs the research briefing approach developed and modified by the Social Care Institute of Excellence in the UK (SCIE, 2000, 2003, 2009). This approach accepts that research in areas such as human services is often scattered and of mixed quality. This is a field in which ‘the gold standard’ cannot apply as the research relies on trying to make sense of real world situations, not carefully designed experimental findings.

The SCIE model also argues:

*A knowledge review is a **critical** account of research reports published on a topic. This means that key concepts and issues are subject to critical analysis, showing for example their origins, debates about definition, and about the relevant statistics, and demonstrating the application of SCIE’s value base. (SCIE, 2009, 2)*

The interpretive framework, developed through WPR approach to problematisation makes this critical approach explicit. The SCIE has designed a rigorous and accountable approach that draws together a systematic search of the peer reviewed and other relevant literature, and applying a series of quality tests, namely:

- **Transparency** - are the reasons for it clear?
- **Accuracy** - is it honestly based on relevant evidence?
- **Purposivity** - is the method used suitable for the aims of the work?
- **Utility** - does it provide answers to the questions it set?
- **Propriety** - is it legal and ethical?
- **Accessibility** - can you understand it?
- **Specificity** - does it meet the quality standards already used for this type of knowledge? (SCIE, 2003)

Throughout The Review, I have carried out a detailed search in the areas relating to the eight specific issues raised by the Minister (see 1.3 Conclusions, below). These are:

- adoption information vetoes
- adoption of a person over the age of 18 years
- retention of the child’s birth name
- same-sex couples adoption
- single person adoption
- discharge of adoption orders in certain circumstances.

Additionally, I have explored a further two issues as requested by the Minister, namely adoption of children in care and intercountry adoption.

I have made careful selections by using this TAPUPAS tool to determine quality. Search terms are too numerous and diverse to summarise here, but they relate broadly to the eight key issues. The knowledge review will be published separately.

Therefore, the approach to this review incorporates these sources of inquiry and knowledge. I aim to give respect to the input of many people through the public consultations as well as drawing on published literature and the advice of experts. The Review draws on:

1. Applied political and moral philosophical literature, especially related to gaining a deeper understanding of concepts such as the rights, interests and welfare of the child.
2. Detailed knowledge review: what is the evidence base for supporting, reforming adoption?
3. Public consultations, submissions and meetings, asking: what can we learn from people connected, in many ways, to adoption?
4. Targeted consultations asking: is adoption the preferred solution to this problem?
5. Analysis of vetoes: what can we learn about those who want to preserve anonymity in adoption?
6. What is current practice, how might it be improved?

1.2.3 DATA ANALYSIS AND STORAGE

As this was a consultation and not a research project, it was not required to undergo ethics review under the *National Statement on Ethical Conduct in Human Research* (NHMRC, 2007). However, in recognition of the highly sensitive nature of the conversations with many individuals, all consultations with individuals affected by current and past adoption practices were carried out confidentially, with each person signing a confidentiality statement which gave limited permissions to use material in the public report. These are kept, with the record of interview by the Department for Education and Child Development. These data will not be used in any ensuing publication. They exist now purely for archival reasons and are permanent records under General Disposal Schedule 15 (GDS 15) pursuant to the *State Records Act 1997*. The records of interviews and written submissions were thoroughly analysed at Flinders University using NVivo. The NVivo files are stored on a password protected file at Flinders University in the School of Social and Policy Studies. They will not be analysed further unless required for a purpose directly related to this Review. They will be returned to the Department for Education and Child Development. All other materials related to literature searches are kept in files held within the Department of Education and Child Protection and at Flinders University in the School of Social and Policy Studies.

1.3 OUTLINE, PROPOSITIONS AND CONCLUSIONS

This report of the Independent review of the *Adoption Act 1988 (SA)* builds on several inputs (see 1.2 above) to consider a set of issues raised within the Terms of Reference.

1.3.1 OUTLINE

The report opens with an overview of adoptions in Australia, including: definitions, current statistics and trends, historical changes and, jurisdictional differences. It follows with a discussion on the relationships rights of children (Part 2), which in turn yields an interpretive framework which is applied in Part 3 to the eight key issues of policy in The Review. The section also presents the recommendations in detail. Part 4 presents a detailed table about proposed changes to the *Adoption Act 1988 (SA)* and the *Adoption Regulations 2004 (SA)*. Appendix 4 provides a brief profile of the Independent Reviewer and Appendix 6 provides a copy of The Review Discussion Paper.

This report approaches the Adoption Act as having two functions: 1) restorative and 2) constructive, in terms of the provisions that address the legacy of past adoptions and setting up adoption arrangements for the 21st Century.

1.3.2 PROPOSITIONS

The latest statistics show a steady decline in adoption in Australia over the last 30 years. Based on what I have learned throughout the review via consultations and the current literature, I state clearly here that I think this is a good trend. Perhaps it signals that governments have acted properly in the face of inquiries and research that show the damaging effects of adoption, often for all parties. It also suggests that there are other options available that address children's relationship rights and need for permanency and security.

As I heard from people affected, from those with aspirations to adopt, or with problems in legal parenting arrangements that they hoped adoption would solve, from the many who responded to the public discussion paper and from a detailed behind-the-scenes research program, including targeted consultations with experts in the field, it became clear that to answer the questions posed in the Terms of Reference I needed to reflect at more depth on these five questions:

1. Is adoption the preferred solution to this [specified] problem?
2. When we effect an adoption what do we do that is irreparable?
3. In short, what is adoption and why would we do it?
4. How do we use adoption as a last resort to advance the rights, best interests, needs and welfare of the child?
5. Finally, assuming adoption will continue, what are the optimal legal and implementational conditions for adoption in South Australia in the 21st century?

Therefore, following the overview of adoption, I enter a discussion which uses the work of James Dwyer (Professor of Law at William and Mary Law School in Virginia, USA), other interlocutors and a sound evidence base to explore the relationship rights of children and their pre-eminence over the rights of parents. Starting with O'Hallaran's 2006 declaration that 'adoption is the most radical way to deal with legal parenting issues', I explore this rights framework which links into best interests, needs and welfare. I conclude with several propositions that ground my responses to and recommendations about the eight policy areas spelt out in the Terms of Reference.

My propositions are that:

1. Adoption is indeed a radical act, as at its base, it changes a birth certificate to create a new story of the origins of the child. It therefore hardwires a fiction into a process which, on its face, exists for the welfare of the child. This act of 'creating fiction' is irreparable and causes many flow-on problems for adopted persons.
2. Despite some compelling legal arguments suggesting that adoption be ceased altogether, I can see, for philosophical reasons, which give second consideration to the proprietary rights of parents, and for reasons arising from considering the profound understanding of the situation of the child, that it may be desirable to use adoption, under optimal conditions, to meet the child's needs for attachment, security, safety and belonging and to assist in secure identity formation over the lifespan of the adopted person.
3. Adoption, as it is currently practiced (and yes, that includes open adoption) should only be seen as a last resort in resolving issues about life-long family bonds, identity formation and legal parenting. It should be grounded in the paramountcy principle enshrined in the United Nations Convention on the Rights of the Child 1990 (UNCRC).
4. This last resort should only be taken when other options have been explored and exhausted. Acceptable options exist in related legislation: The *Children's Protection Act 1993 (SA)*, *Family Relationships Act 1975 (SA)* and the *Family Law Act 1975 (C'th)*.
5. Adoption does not exist primarily for family formation, so the selection of adoptive parents cannot be based on the desire of some people to have children. It must be based on a profound understanding of the rights, needs, best interests and welfare of the child or children. This understanding will change adoption practice by the State.
6. Adoption must remain open (as it is currently understood), with guaranteed social support for all parties involved and always negotiated in the best interests of the child or children.
7. The presumption of open adoption must also be reflected on the birth record, which must name all parties, while making it clear that the adoptive parents have full legal responsibility for the child.
8. Adoption, as an intervention by the state to establish legal parenting of a child based on a profound understanding of his/her relationship rights, best interests, needs and welfare, can be dissolved by the state in the best interests of the adopted person.
9. Adoption cannot solve legal parenting arrangements arising from the use of donor gametes or surrogacy. Adoption is about a child who already exists and who needs a family.
10. Seen thus, adoption is a child protection response. But this statement must be understood in the context of the *National Framework for Protecting Australia's Children 2009-2020* (the National Framework)¹, not simply aligned with the statutory role in child protection undertaken by the State of South Australia. Some implementational responses will sit in Tier 2 of the National Framework, while others, especially related to adoption of children in long term fostering will sit within Tier 3.

¹The National Framework endorsed by the Council of Australian Governments in April 2009, is an ambitious, long-term approach to ensuring the safety and wellbeing of Australia's children and aims to deliver a substantial and sustained reduction in levels of child abuse and neglect over time. It outlines six supporting outcomes and provides details about how each of these outcomes will be achieved. The six supporting outcomes are:

- children live in safe and supportive families and communities
- children and families access adequate support to promote safety and intervene early
- risk factors for child abuse and neglect are addressed children who have been abused or neglected receive the support and care they need for their safety and wellbeing
- Indigenous children are supported and safe in their families and communities
- child sexual abuse and exploitation is prevented and survivors receive adequate support.

<https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>

1.3.3 CONCLUSIONS AND RECOMMENDATIONS IN BRIEF

The following sections apply these understandings and related evidence to address the six key plus two additional issues that arose during The Review, concluding with recommendations that, in sum, are:

1. Adoption Information vetoes.

In order to entrench further the presumption of open adoption, these information vetoes should be phased out over the next five years. Intensive supports should be offered to those who fear they will be adversely affected by this decision. I do not recommend the introduction of contact vetoes which are found in some other jurisdictions. Should a person not wish to have contact with another person and they are not able to negotiate non-contact, provisions exist in other South Australian laws such as Intervention Orders under the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*. This Act may require amendment to make this clear.

2. Adoption of a person over the age of 18 years.

This should be re-instated in the Adoption Act. It is most likely to be used by young people who have been in a stable, long term fostering arrangement solidified by other person guardianship established under the *Children's Protection Act 1993 (SA)*.

3. Retention of the child's birth name.

The child's birth name (usually called first name or names) should always be retained except in special circumstances such as where the Court is convinced that the child's name may be offensive in English or where the child may have the same name as a child already in the family and there is no other means of satisfactorily resolving this. The child's surname becomes the surname chosen by their adoptive parent(s).

4. Same-sex couples and adoption.

As adoption is driven by consideration of the relationship rights, best interests, needs and welfare of the child and not by the desires or set characteristics of potential adoptive parents, same-sex couples should not be precluded from being adoptive parents.

5. Single person adoption.

The same considerations as same-sex couples apply here. Therefore a single person could be considered a suitable adoptive parent under the right conditions.

6. Discharge of adoption orders in certain circumstances.

Discharge of adoption orders should be re-instated in the *Adoption Act 1988 (SA)* with provisions that mirror arrangements within the Tasmanian legislation and related case management processes. As a matter of principle all parents and adoptive parents should have their right to be heard in any proceedings acknowledged but are not required to give consent.

7. Dispensation of parental consents (children in care)

Over the period of The Review, the issue of so-called ‘adoption from care’ received attention in the media and from lobbyists, especially following the release of the Coroner’s Report in the matter of Chloe Valentine (April, 2015). I explored this issue and, following the paramountcy principle, have concluded that adoption is not always the preferred solution to the issue of the needs of children in the care system for safety, for stability and belonging and for long-term identity formation. These needs can be met within current provisions of the *Children’s Protection Act 1993* (SA). Any consideration of whether adoption is the best option, should be dealt with in the same ways mentioned here, including the consideration that, as the rights, best interests, welfare and needs of the child are paramount, the proprietary rights of the parents come second. It should not be seen as a panacea to deal with practical issues within the statutory child protection system or to reduce costs in protecting vulnerable children. The current *Adoption Act 1988* (SA) makes it possible to dispense with the consent of parents if certain conditions exist. I make some minor recommendations to establish more clarity but do not propose any loss of powers in this part of the Act. As a matter of principle, under these particular conditions, all parents should have their right to be heard in any proceedings acknowledged but are not required to give consent.

This of course, does not relate to those circumstances where all parties agree that the adoption of a child by a kinship or foster carer offers the best protection of the child’s rights, best interests, welfare and needs. In these instances dispensation of parental consent is not required as consent is given.

8. Intercountry adoptions

This was also widely canvassed in the media during the time of The Review and many people raised it with me, including people who are on waiting lists for a child from overseas. My further enquiries into the published literature made it clear that many assertions are not grounded in fact, especially that there are millions of orphans all over the world needing placement in countries such as Australia. Sound evidence suggests that it is only a small percentage of children in residential or institutional care throughout the world who do not have parents or extended family. Recognition of this removes the sense of panic and allows all jurisdictions in Australia to continue to develop sound practices based on the principles spelt out here and a sound evidence base. If adoption remains a last resort option, questions of Aid come to the fore. I support continued involvement from the states in this process and strongly advise caution around processes that expedite overseas adoption.

In addition to addressing these specific issues I also make recommendations about four areas:

9. Overarching considerations, Section 7: The General Principle:

That the paramountcy principle be retained and incorporated into an expanded section to include a full set of principles and objectives that refer also to the child’s rights, best interests and needs, similar to other socially determining legislation, such as the *Disability Services Act 1993* (SA) in order to guide crucial decision-making by those developing policy and implementing the Act. This could also incorporate the Aboriginal and Torres Strait Islander Placement Principles that display ongoing efficacy in guiding decision-making for Indigenous children and their families. With attention to the UNCRC and the research evidence, it is clear that the preservation of culture and community

connections is important for all children. That is why elevating these principles to this position in the Act will contribute to ensuring these aspects of the child's identity are explored in making any decisions regarding adoption. It should also provide a protection for those who are affected by the legislation in their dealings with the relevant government authority.

10. Implementation Issues

Implementation Issue #1: A new practice framework

That, in order to:

- ensure model coherency in adoption practice (that the right things are being done by the right people, for the right reasons with the right people at the right time), and
- change current practices that convey to the wider community that adoption is an option for family formation (and to continue to dispel what seems to be a widely held understanding that adoption remains closed),...

...a new practice framework be developed that focuses effort in developing the profound understanding of the situation of the child, and locates suitable families through a more community-focused approach while continuing the roles of developing or working with pre and post adoption support services. Refocusing the processes for setting up an adoption register away from a focus on adoptive parents to the needs of the particular child, recognising that adoption of new-born infants is likely to reduce even further over time and that should a child need to be adopted from care, this is likely to be a known adoption. (See Section 9.0 below)

Implementation Issue #2: The need for provision of resources in pre and post adoption support

That in committing to building optimal practice for adoption and continuing to address the long tail of past adoption practices, professionally mature resources are made available for sound case work related to pre and post adoption support; the change to a no-veto system; adult adoption and discharge of adoption orders.

Implementation Issue #3: A note about birth certificates

That, should adoption proceed the birth certificate must reflect the 'truest possible' account of the biological parentage of the child. The birth certificate came up frequently in the public consultations and while I recognise that at times the paternity of a child might be unknown or undeclared or that a gamete donor is not considered a parent under the *Family Relationships Act 1975 (SA)* and related legislation dealing with reproductive technology, the birth certificate cannot deliberately or coincidentally obscure a known history.

In conclusion, The Review has applied a rigorous approach to analysing and interpreting the issues presented within the Terms of Reference. It concludes with recommendations that will ensure it constructs the optimal conditions for adoption in South Australia in the 21st century. It also continues the process of opening adoption while recognising the restorative obligations imposed by past unjust practices in adoption.

PART 1: WHAT IS HAPPENING WITH ADOPTION IN AUSTRALIA?

2.0 BACKGROUND TO THE REVIEW

In December, 2014 the then Minister for Education and Child Development, Hon Jennifer Rankine, MP invited South Australians to participate in a consultation about the *Adoption Act 1988 (SA)*. The resultant project was set up with these benefits in scope:

It is expected that The Review will achieve amendments to the Adoption Act and Regulations as well as in relation to Families SA policies and practices that will provide smoother administration of the Adoption Act, enhance the delivery of adoption services and will address public concerns about provisions affecting the delivery of certain adoption services.
(Project Brief, DECD July 2014)

The Review ran from November 2014, with public consultations based on a Public Discussion paper (released December 2014) open from January through to the end June 2015 with the report due for completion by the end of September 2015. An extension was granted by the Minister of the original consultation closing date of 31 March due to the high level of interest from the public.

This report takes into consideration the contributions of over 500 respondents who addressed six key issues (see Terms of Reference below) as well as:

1. Philosophical literature, especially related to gaining a deeper understanding of concepts such as the rights, interests and welfare of the child
2. Detailed knowledge review, what is the evidence base for supporting, reforming adoption?
3. Public consultations...submissions and meetings, asking: 'what can we learn from people connected, in many ways, to adoption?'
4. Targeted consultations asking: 'is Adoption the preferred solution to this problem?'
5. Analysis of vetoes: 'what can we learn about those who want to preserve anonymity in adoption?'
6. What is current practice, how might it be improved?

The report offers a number of recommendations for changes to the *Adoption Act 1988 (SA)* and to consequential policies and practices.

2.1 TERMS OF REFERENCE

This is an extract from the formal Terms of Reference:

This Review will inquire into the need and or desirability for changes to the South Australian *Adoption Act 1988* and the *Adoption Regulations 2004* and then provide a report to the Minister. In doing so The Review will ensure that the rights and best interests of the child remain paramount. The Review should consider the impact in South Australia of the broad changes in the field of adoption in the years since the last review of the Act (1994).

The Review should include:

- consideration of the current COAG agenda for the reform of Australia's inter-country adoption program
- recent inquiries, current research, activities and attitudes in Australia in relation to past adoption practices
- the interface between adoption and children in the child protection system requiring permanent care
- any other relevant matters, including concerns the Department for Education and Child Development has in the administration of the Act and Regulations.

The Review should also take into account any significant and relevant local, national or international documents or instruments, such as the draft Australian National Principles in Adoption and The Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption.

The views of the South Australian community should be taken into account and societal and technological developments, such as social media and the Internet should also be considered.

Specific issues that The Review should explore are:

1. adoption information vetoes
2. adoption of a person over the age of 18 years
3. retention of the child's birth name
4. same-sex couples adoption
5. single person adoption
6. discharge of adoption orders in certain circumstances.

3.0 AN OVERVIEW OF ADOPTION

3.1 DEFINITION OF ADOPTION

Adoption is a process through which those who adopt a child become the child's legal parents and the child ceases to be the legal child of his or her biological parents (Higgins, 2010). O'Hallaran (2006) argues that adoption is considered as the "most radical of all family law orders" (p. 37)

For the purposes of this report, I accept the following definition which is also used in the report of the Senate Committee into the Commonwealth Contribution to Former Forced Adoption Policies and Practices:

Adoption is a legal process by which a person becomes in law, a child of the adopting parents and ceases to be a child of the birth parents. All the legal consequences of parenthood are transferred from birth parents to the adoptive parents. The adopted child obtains a new birth certificate showing the adopters as the parents, and acquires rights of support and rights of inheritance from the adopting parents. The adopting parents acquire rights to guardianship and custody of the child. Normally the child takes the adopters' surname. The birth parents cease to have any legal obligations towards the child and lose their rights to custody and guardianship. Inheritance rights between the child and the birth parents also disappear (p. 1). (Definition of adoption used in report by Kenny, at al (2012))

This is an expanded definition from the current *Adoption Act 1988* (SA) section 9(1) which states simply that: *where an adoption order is made, the adopted child becomes in contemplation of law the child of the adoptive parents and ceases to be the child of any previous birth or adoptive parents.* While I do not recommend any change to Section 9, for the purposes of this review the fuller explanation is required.

3.2 DIFFERENT TYPES OF ADOPTION

The legislative provisions for adoption in each State and Territory across Australia are diverse, which, among other matters, has had an impact on adoption rates (see section below concerning known child adoptions). Despite this, and according to the AIHW (2014), adoption numbers remain low in Australia. As well as recognising the differences in legislation and policy across the jurisdictions, it is important to further define the differing types of adoption:

3.2.1 OPEN AND CLOSED ADOPTION

The essential distinction between open and closed adoption is whether or not the parties have access to identifying information about each other. In a closed adoption the information cannot be accessed by the parties and no contact between them occurs. In an open adoption the identifying information can be accessed by all the parties and this may lead to a range of levels of contact between them. The processes that have surrounded the practices of closed and open adoption directly relate to how children and their families are seen in our society as well as to notions of identity and belonging.

In Australia in the so called "pre-reform era" (before the 1980s) adoptions were closed and it was intended that the identities of the parties were to be kept secret forever. In South Australia before

the advent of open adoption legislation in the form of the *Adoption Act 1988 (SA)*, adoption records were sealed and could only be opened at the order of the Supreme Court.

The 2012 report of the Senate Committee Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices, described the closed adoption era in terms of the “clean break” theory:

The clean break theory was a prominent child welfare theory at the time. It held that it was better both for the mother and soon-to-be adopted child if they were separated as early and as completely as possible. That is, both mother and child would fare better economically and socially if the child was adopted at birth, and no further contact occurred. This is sometimes referred to as 'closed adoption'.²

The current South Australian Adoption Act came into effect on 17 August 1989. Its introduction repealed the previous Act that provided for closed adoptions, and because of this it was referred to as the “Open Adoption Act” since for the first time in South Australia, legal provisions were made for parties to an adoption to access identifying information about each other. It provided this for all adoptions that occurred from August 1989 onwards once the adopted person turned 18 years of age (while retaining the secrecy arrangements for previous adoptions by establishing the opt in adoption information veto system). Some provisions were made for the release in certain circumstances of identifying information before the adopted person turned 18 years of age³.

The Senate report discusses the development of open adoption legislation in Australia and states that the

...trend towards open adoption in Australia was sparked by a series of three conferences in the late 1970s and early 1980s. At these conferences, several papers were delivered emphasizing the harmful consequences of secrecy, which had been the hallmark of 'uniform' legislation passed in every Australian state in the 1960s⁴.

This trend occurred in the context of the rise of social justice movements, particularly as regards children’s and women’s rights. For example, the United Nations Convention on the Rights of the Child was promulgated in this period. As well as this, the development of social welfare and social work strongly influenced these changes and helped to bring about an end to the era of secrecy in adoption.

Since the late 1980s, practices in open adoption in the Department for Education and Child Development are to the point where almost all adoptions are open to one degree or another. This may even involve overseas adoption where if known, the identity of the child’s parents may be provided to the adopting parents by some overseas authorities.

² The Senate Community Affairs References Committee, Commonwealth Contribution to Former Forced Adoption Policies and Practices, Commonwealth of Australia 2012, p151.

³ Section 27A South Australian Adoption Act, *Information may be provided earlier, in the Chief Executive's discretion*

⁴ The Senate Community Affairs References Committee, Commonwealth Contribution to Former Forced Adoption Policies and Practices, Commonwealth of Australia 2012, p184.

Where a local born infant is relinquished and adopted by people on the South Australian prospective adoptive parent register, they and the child's parents and or other of the child's relatives will meet at the time the Department makes arrangements for the placement of the child. The parties may choose to fully disclose their identities to one another. This is counselled and mediated by the social workers in the Department, who must commit the open arrangements to paper under the provisions of section 26A of the Adoption Act ("Arrangements between parties to adoption"). These arrangements are generally submitted to the Court at the time of the application for an adoption order for the child. In some cases, the two families have come to mediate their own arrangements and have contact based on decisions between themselves.

Where children who are adopted by their long term carers (for example children under the Guardianship of the Minister for Education and Child Development), pre-existing relationships may already exist between the carers and the child's parents and other relatives. These are already open arrangements and they may continue after the adoption order is granted and supported by a written arrangement according to section 26A of the Act.

In some rare cases it may be necessary for an adoption to be closed, for example where there may be physical danger to one of the parties to the adoption if identifying information is disclosed.

While open adoption may raise a number of issues and problems for birth and adoptive families and the adopted people themselves (for example differences in opinion about frequency of contact and what is seen as being in the best interests of the child), the experiences of the closed adoptions of the past, as detailed in the recent inquiries and studies in Australia about the forced adoption era, make it clear that the "clean break" theory and closed arrangements bring profound lifelong problems for many of the people concerned.

3.2.2 LOCAL ADOPTION

The term 'Local Adoption' refers to the adoption of a child born in or permanently residing in Australia prior to the adoption and *without* contact with or prior relationship with the adoptive parent (AIHW, 2014). The following information is drawn from the latest figures available through the Australian Institute of Health and Welfare Annual report.

About the child:

Local adoptions comprised 15% (46) of the total number of Australian child adoptions (203) finalised in Australia in 2013-14.

The children adopted were generally younger than those adopted from other countries. All of the children were under the age of 5, and approximately half (48%) were under the age of 12 months.

About the parents:

- The average age of the mothers was 24 years at the time of the child's birth, with ages ranging between 15 to 44.
- 70% of children in local adoptions had mothers who were younger than 30 years of age.
- Almost all (93%) were not in a registered marriage.

- Approximately three quarters (76%) of all local adoptions finalised in 2013-14 were done so with only the mother's consent. For the remainder, both parents provided consent for the adoption⁵.
- The majority of local adoptions (89%) were considered to be 'open' adoptions.

3.2.3 'KNOWN' CHILD ADOPTION

'Known child adoption' is the term used by the AIHW (2014) to refer to the adoption of a child born or permanently residing in Australia prior to their adoption and *with* a pre-existing relationship with the adoptive parent/s. This category includes adoptions by step-parents, other relatives and carers.

The AIHW (2014) reports that the number of children adopted remained similar to the previous year, however the category of known child adoptions represented a larger proportion of all adoptions (50% in 2013-14 compared with 45% in 2012-13).

It states that:

- The majority of known child adoptions finalised in 2013-14 were by a carer, such as a foster parent. Carer adoptions comprised 57% of known child adoptions, with the majority of these (84 of the 89) occurring in New South Wales. This is indicative of that state's policies, which increasingly promote adoption to achieve stability for children under the long-term care of state child protective services, when reunification is not considered appropriate (p. 26).
- Known Australian child adoptions were generally older than children in local or inter-country adoptions. Over half (53%) of children adopted by carers known to them were aged 10 years and over, including 12% who were aged over the age of 18 years (this applies only in those jurisdiction where an adult can be adopted). Only a small proportion (9%) was under the age of 5 years. Furthermore, children adopted by step-parents were generally older than those adopted by other adoptive parents most likely because formation of a step-family can take some time. Of the known children who were adopted by their step parent, 70% were aged 10 years and over.

3.2.4 INTERCOUNTRY ADOPTION

Intercountry adoptions involve children from other countries other than Australia who are legally placed for adoption. The children have generally not had previous contact with the adoptive parent(s) (AIHW, 2014). These adoptions are managed at both the Commonwealth and State levels. Australia ratified The Hague Convention on Protection of Children and Co-Operation in respect of Inter-country Adoption ('the Hague Convention') in 1998. This sets out the 'international procedures, standards and co-operative mechanisms between government authorities involved in safeguarding the interests of children who are subject to intercountry adoption.' (O'Neill, et al, 2014). For intercountry adoption, countries are assigned as either 'Hague countries' (i.e. those who have ratified the Convention), or 'non-Hague countries' (not ratified the Convention). The Hague

⁵ It should be noted that section 15 (7) of the *Adoption Act 1988 SA* provides a reasonable opportunity for a putative father to establish paternity for the sake of consent to adoption, provided that the paternity does not arise from unlawful sexual intercourse with the mother. This provision is important in ensuring that in practice, due regard is given to engaging the father of the child in any adoption proposal.

Convention attempts to protect children and their families from illegal processes, ill organized adoptions and prevention of abduction, sale or trafficking of children.

As the Australian Central Authority under The Hague Convention, the Commonwealth Attorney-General's Department is primarily responsible for the establishment and management of the intercountry adoption program within Australia. Relatedly, legislation at State and Territory level outlines the assessment, approval and supervision processes for both local and intercountry prospective adoptive parents. The following statistics outline intercountry adoptions finalised in 2013-2014:

- Of the 114 finalised intercountry adoptions in Australia, 89% were from Asia, 5% from South/Central America, and 3% from Africa.
- The child's country of origin is consistent with regions in which Australia has an established adoption program.
- The most common countries were Taiwan (36%), Philippines (16%) and South Korea (11%).

Another group of intercountry adoptions (expatriate adoptions) are not counted in official figures. These are adoptions of children in overseas countries by Australian citizens who resided out of Australia for more than 12 months before the overseas adoption order was granted. In order to obtain a visa for the child, the adopting parent must provide evidence that residing overseas was not a mechanism for bypassing Australian adoption laws.

3.2.5 ADOPTION OF CHILDREN WHO ARE ABORIGINAL OR TORRES STRAIT ISLANDER

The Aboriginal and Torres Strait Islander Child Placement Principle outlines culturally appropriate preferences to achieve the stability and security of Aboriginal children. All State and Territory child welfare systems have adopted the Placement Principle which states the preferences for the placement of Aboriginal children: within the child's extended family; within the child's Indigenous community or with other Indigenous Australians. In 2013-14, 7 Aboriginal children were involved in finalised adoptions. All of the children were adopted by carers known to them.

3.3 ADOPTION IN AUSTRALIA

3.3.1 STATISTICS IN BRIEF

There were 317 adoptions finalised in 2013-14. Of those, 114 (36%) were inter-country adoptions and 203 (64%) were Australian child adoptions. Of the 203 Australian child adoptions, 46 (22%) were local adoptions and 157(77%) were known child adoptions:

- adoption by step-parent – 64
- adoption by relative – 2
- adoption by carers – 89
- other – 2.

The AIHW report (2014) notes that:

...with known child adoptions making up a high portion of all finalised adoptions in 2013-2014, and the tendency for known child adoptees to be older, less than half (142 or 45%) of all children who were the subject of a finalised adoption were aged under 5. Only 38(12%) were infants under 12 months. (p. 13)

3.3.2 TRENDS IN ADOPTION IN AUSTRALIA

The AIHW (2014) analyses the trends in adoption in Australia from 1989-90, showing that over the last 25 years the number of finalised adoptions has substantially decreased. In 1989-90, (the year following the passage of the *Adoption Act 1988 (SA)*), 1,294 adoptions were finalised whereas 317 were finalised in 2013-14. This was strongly evident from 1989-90 to 2003-04 as numbers dramatically declined from 874 to 132 (85% drop). With a slight increase in numbers since 2003-04, the 203 finalised adoptions of Australian children in 2013-14 still represents a 77% decline over a 25 year period. Finalised adoptions involving children from overseas have also steadily declined since 2004-05, particularly in response to China changing its application criteria at that time. In 2004-05, 434 children from overseas were adopted; however by 2013-14 114 children were adopted from overseas representing the lowest annual number in 25 years – a 73% decline since 1989-90.

These trends in the number of finalised adoptions can be attributed to legislative and policy changes across all related jurisdictions, including those overseas. Australian legislative changes have encouraged the use of alternative orders to address stability and security for children. For example, in Victoria the use of permanent care orders often replaces the need for adoption. In 2013-14, a total of 302 permanent care orders were finalised in Victoria. Since 1992, the Children’s Court of Victoria has granted a total of 3,686 permanent care orders (AIHW, 2014). This contrasts with NSW where more adoptions from care have been made in recent years.

In intercountry adoption, the trend is related to changes in policy and practice in the overseas countries, many of which have introduced more robust child welfare policies that result in children being retained by their families or adopted by families in their own countries.

4.0 PAST ADOPTION PRACTICES IN AUSTRALIA

4.1 SOCIAL CHANGE SINCE THE 1970s

Internationally and across Australia adoption practices have evolved, largely reflecting changing societal attitudes and values in relation to ex-nuptial pregnancies, abortion and single motherhood (Kenny, et al, 2012). Until the 1970s, intolerance of illegitimate children led to women relinquishing their babies under pressure of social attitudes which stigmatised unwed (single) mothers as undeserving of the right to motherhood or to social supports to raise their child (O’Neill, 2014). Throughout this period, adoption in Australia was:

characterised by the total severance of ties, legal and otherwise between the adopted child and the birth parents; the establishment of a legal relationship between the adoptive parents and adopted child as though the child were born to the adoptive family; and the maintenance of ‘closed’ adoption bound by confidentiality and secrecy (O’Neill, et al, 2014, p. 27).

Viewed thus, adoption became the legal and social solution for both the problem of illegitimacy and couples who were unable to have their own children, and as O’Neill, et al (2014) eloquently state, ‘the coercive moral overtones of adoption processes during this era remained unchallenged until the late 1970s’ (p. 27). At that time single mothers commonly had their infants adopted. At its peak, there were almost 10,000 babies adopted, however, since then the numbers of finalised adoption

have dropped substantially. The AIHW (2014) identified that there were 46 finalised local adoptions in Australia.

In short we can see that this significant decline in local adoption coincides with a number of economic, social and legal changes including:

- a growing social acceptance of children raised by single mothers
- established financial support benefits for sole parents
- increasing availability and effectiveness of contraception and abortion
- women's increased access to the workforce.

4.2 IMPACTS ON ALL PARTIES

4.2.1 INQUIRIES

Inquiries into past adoption practices have given voice to and highlighted the traumatic experiences of women who were coerced into relinquishing their children. Kenny, et al (2010) state:

Until a range of social, legal and economic changes in the 1970's, unwed (single) women who were pregnant were encouraged – or forced – to “give up” their babies for adoption. The shame and silence that surrounded pregnancy out of wedlock meant that these women were seen as “unfit” mothers. The practices at the time, called ‘closed adoption’, were seen as the solution (p. xi).

Several recent inquiries have focused on the past practices of adoption in Australia. These include the 2012 Senate Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices, conducted by the Community Affairs References Committee.

Several states have issued apologies to those affected adversely by past adoption practices and in March 2013 the Commonwealth, made an historic apology for past practices, with the then Prime Minister, Julia Gillard declaring, ‘We deplore the shameful practices that denied you, the mothers, your fundamental rights and responsibilities to love and care for your children.’

Notably, in South Australia, in giving the South Australian adoption apology on 18 July 2012, the Premier, Hon Jay Weatherill MP recognised that we must ensure that such practices are not repeated and that we should be vigilant about this:

We also express our determination to ensure that such things never happen again. Our present laws and practices are far removed from those which give rise to this apology. Even so, we remain open to continuing suggestions for ways in which things can be further improved⁶.

Among the states, Tasmania and New South Wales had previously conducted parliamentary inquiries into past adoption practices. The Tasmanian inquiry was conducted by the Joint Select Committee and completed in 1999. It examined the period from 1958-1988. The New South Wales inquiry was undertaken by the Legislative Council's Standing Committee and the report was completed in December 2000. Each inquiry recognises that past adoption practices have “caused considerable

⁶ The Hon. J.W. Weatherill, Premier, 18 July 2012, Hansard, South Australian House of Assembly.

pain and suffering, particularly for parents who were pressured into surrendering children for adoption” (The Senate, 2012, p. 13). These inquiries stressed three points: first, a need for specialised support for people who were affected by past-adoption practices and secondly, significant changes need to be made so that access to information and records can be improved. Thirdly, the future must be informed by knowledge and narratives about past practices.

This independent review of the *Adoption Act 1988* (SA) has sought detailed input about past practices through careful reading of the inquiry reports, an extensive literature survey, consultations with those affected by adoption (confidential interviews) and targeted consultations with adoption experts.

4.2.2 RESEARCH LITERATURE

While the 2010 literature review about past adoption practices in Australia by the Australian Institute of Family Studies found a wealth of information in the form of historical records, case studies, inquiries, published and unpublished documents, the authors concluded that, “there appears to be little empirical research. To have an evidence base on which to build a policy response, research is needed that is representative, and systematically analyses and draws out common themes, or makes relevant comparisons with other groups”(p. 3).

Despite the limitations in research literature the study was able to identify a number of key themes including that:

- Past adoption practices were identified as a societal response to issues such as birth outside of marriage, infertility and poverty.
- Anecdotal information suggests that adoption practices lacked consistency:
...the role of choice and coercion, secrecy and silence, blame and responsibility, the views of broader society, and the degree to which it is seen as a “success” or not” have lasting impacts on all individuals concerned.
- Adoption has wide ranging and ongoing impacts on the lives of many people beyond the parents and adopted person.
- Past adoption practices should be viewed through a trauma lens as this allows an understanding of the past adoption practices.
- Persons affected by past adoption practices have a need for information, counselling and support.

A study commissioned by the Community and Disability Services Ministers’ Conference (CDSMC) and the Department of Families, Housing Community Services and Indigenous Affairs (FaHCSIA) was conducted by Pauline Kenny and colleagues (2012). The aim of the study, which used a mixed methods approach involving 1,528 respondents, was to generate knowledge about the extent and effects of past adoption practices, and provide an evidence base to inform government decision making in the development of services and support.

The study argued for “Ensuring that lessons from past adoption practices are learned from and translated where appropriate into current child welfare policies, and that adoption-specific services are created or enhanced to respond to the consequences of past practices” (p. xviii).

It was inclusive of diverse views and opinions yet persistent themes emerged, including that:

- Past adoption practices need to be acknowledged and recognised.
- The wider community needs to be aware of past adoption practices and the ensuing impact for all parties.
- Training and development for professionals is essential so that they are able to respond to the needs of people who have been affected by past adoption practices.
- Current search and contact systems require review and amendment, including the development of a national database that allows for access to information.
- Improved access to and financial assistance for services are required to meet the health needs of people who have been affected by past adoption practices.

The Market in Babies: Stories of Australian Adoption, (Quartly, Swain and Cuthbert, 2013) gives an historical examination of the changing landscape of adoption, which is inclusive of “the voices of people separated by adoption, and of those who have chosen to adopt” (p. 2). They state:

It is a story that goes beyond the understanding of particular actors, to look at the forces that have moved them. We find that a market in children has long existed in Australia, shaped by supply and demand: the demand of those seeking to adopt, and the supply of babies available for adoption. Our story turns on the changing interaction of these forces, and the efforts of social workers and politicians to control the market. (p. 2)

The authors argue that when families are unable or unwilling to care for their children, those children still have a right to safety, stability and security. They propose that the “Victorian system of permanent care seems to offer stability without loss of personal identity and contact with family, making it a viable alternative to adoption” (p. 143). This system is similar to the underused South Australian Other Person Guardianship Order available through the *Children’s Protection Act 1993*. (More of this later).

This survey of the findings of inquiries and studies about past adoptions, suggests that the time is right to reconsider the operations of the *Adoption Act 1988* (SA). The following provides a brief summary of changes to the Act and Regulations since 1988, when it was the first in Australia to establish open adoptions.

5.0 CHANGES TO SOUTH AUSTRALIAN ADOPTION LAW SINCE 1989

The *Adoption Act 1988* (SA) came into force in South Australia in August 1989 – a landmark piece of legislation in that it introduced ‘open adoption’ provisions for the first time. This meant that parties to a past adoption could gain access to the adoption files – with some conditions and restrictions – so that the identities of the parties were no longer secret, as had been the case under the previous Act.

The change in law also meant that parties to future adoptions could not restrict the release of information about themselves once the child turned 18 years of age, thus rendering adoptions completed after the proclaiming of the Act ‘open adoptions’.

Another significant reform was that the definition of marriage in the Act was changed to include defacto relationships, thus enabling established couples who were not legally married the right to apply to adopt a child.

Of particular import was the introduction of a definition of Aboriginality and the inclusion of the Aboriginal Child Placement Principle. In introducing these provisions, the Act recognised the importance of Aboriginal children growing up in their own communities with an awareness of their identity and culture.

After five years of operation, the Act was reviewed in 1994 and as a result, amendments were enacted in 1997. The changes mostly covered provisions relating to past adoption matters, but also included the abolition of the provision for the adoption of people over the age of 18 years.

Other changes ensured compliance with The Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption, and the removal of the provision for the Adoption Panel, replacing it with a new clause, providing for a greater flexibility in the way in which the Minister sought community consultation.

While this last provision has underpinned the regular community and intergovernmental consultations carried out through the Department for Education and Child Development, there have been no further reviews of the Act and no other substantial changes since 1997. Minor technical changes were enacted in 2006 (definition of guardian) and 2010 (insertion of 'Chief Executive' into the interpretations section) and an amendment was made in 2013 to the media provisions in section 31.

The Adoption Regulations were altered in 2004, with some changes to the provisions governing the placement of a child with prospective adoptive parents. Since then, a small number of amendments have been made, most notably the removal in 2005 of the age criteria to adopt a child, and changes to residency requirements for prospective adoptive parents. Other technical changes related to the conditions under which the Chief Executive may place a child for adoption with prospective adoptive parents.

This legislation has operated in a dramatically changing context. Changes include the decrease in the numbers of South Australian children needing adoptive families, increased international scrutiny of intercountry adoption, and most particularly changes in society's attitudes to adoption, especially about how past adoption practices continue to impact on people's lives.

6.0 CONCLUSIONS TO PART 1

Part One has provided a concise background to The Review and provided the Terms of Reference.

A brief presentation of the current statistics shows small numbers of children are adopted in Australia, with the majority being 'known adoptions'. A recent small increase is attributed to changed policy in NSW which seeks to expedite adoption from care in order improve the chances for stability in the child's life.

This survey also shows an ongoing trend from the mid 1970s for declining numbers of adoptions, with most states having access to provisions in child protection legislation that allow for long term, stable care and transfer of guardianship powers without using adoption powers. This change is attributed largely to wider social changes as the stigma around birth outside marriage dissipates, birth control and abortion are more obtainable, more resources are made available for sole parent families and family structures become more diverse.

Against this backdrop of social change, past adoption practices have been researched and the subject of public and parliamentary inquiries. Several states and the Federal government have offered public apologies to those affected by these practices and have concluded that any future changes in adoption laws and practices must be made with high consciousness of the negative impact of closed adoption.

It is therefore important that any recommendations for change made here do not inadvertently recapitulate practices that hurt all parties. The ongoing process of opening adoption must not be held back.

The following section of The Review report examines assumptions about children and their relationships rights in order to articulate a sound philosophical base upon which to consider the evidence for proposing changes to the *Adoption Act 1988* (SA).

**PART 2: IS ADOPTION THE
PREFERRED SOLUTION TO A
RANGE OF PROBLEMS
RELATED TO LEGAL
PARENTING?**

7.0 THE STARTING POINT: UNDERSTANDING THE RELATIONSHIP RIGHTS OF CHILDREN

7.0.1 WHAT IS THE PROBLEM REPRESENTED TO BE?

Childhood ordinarily entails numerous personal relationships. We do not recognise it but the fact is that the state determines, to a large extent, what those relationships are. In some ways, it does this directly, most crucially by deciding who each newborn child's legal parents will be... the state's decisions as to who will raise and associate with a child are largely determinative of whether the child's life proceeds positively or poorly, and the aggregate result of good or bad state decision-making is a citizenry that is happy and flourishing, mired in dysfunction and conflict, or something in between. (Dwyer, 2006, p. 1)

So begins James Dwyer's extensive study of 2006, *The Relationship Rights of Children* (Cambridge Publishers). Dwyer builds a strong case 'for examining rigorously the appropriateness of current practices, 'because on many occasions in many contexts, the state ... makes decisions about children's relationships that are injurious to the children involved' (Dwyer, 2006, p. 1). For Dwyer the automatic assumption of legal parenting by a biological parent (overwhelmingly the woman who bore and birthed the child, setting aside situations of surrogacy or donor gametes), will occur in the best interests of the child. He asserts however, that 'many of the decisions the state now makes about children's relational lives it routinely makes on the basis of ulterior reasons unconnected with the desirability of protecting children – namely the supposed entitlement of biological parents, liberal social aims and a desire to punish certain adults for conduct of which it disapproves.' (Dwyer, 2006, pp. 136-137). He is aware, along with historians, scholars, researchers and policy makers, the frontline social workers in child protection services and the now adult children who have lived through certain interventions, that when 'everything turns on the *possessory* rights of biological parents' some child may suffer, even after child protection authorities have intervened. (Dwyer, 2006, p. 59)⁷

This review of the South Australian *Adoption Act 1988* assumes the necessity for a rigorous examination of South Australian adoption law and (in a more limited fashion) related practices. While I do not start with the assumption that current practices are necessarily injurious to children, with damage carrying into adult life and negatively affecting long term flourishing, I do adopt the vigorous skepticism required of any policy reviewer. Writing in 2007, Carol Bacchi advanced an explanation of a problem representation approach to policy analysis that, in subsequent work, has become known simply as WPR. She says:

A "what's the problem represented to be?" approach to policy analysis produces a methodology to identify the problem representations implicit in policies and policy proposals, and to reflect on their ethical implications...a problem representation approach is an analytic method for scrutinizing the deep-seated assumptions and preconceptions that underpin particular policy directions. The intent is to point out "on what kinds of assumptions, what

⁷ J. Dwyer in 'The Relationship Rights of Children' (2006) makes reference to this automatic conferral of legal parent status as reflecting an assumption that a biological mother is likely to be a good caretaker of a child as possibly reflecting an assumption of *adult entitlement to a child*. This view he labels the 'propriety view of biological offspring' p27

kinds of familiar, unchallenged, unconsidered modes of thought the practices that we accept rest” (Foucault 1981 in Pálsson and Rabinow 2006, 91). (2009, pp. 16,17)

The WPR approach provides an entry point into scrutinising assumptions about certain sets of infants and children and the role of the state in determining and altering legal parenting arrangements. This approach can be used multiple times as the policy analyst ‘sweeps’ over the key documents and evidence asking a series of questions. The initial sweep here relates to establishing the general principles that guide my deliberations and should inform decisions relating to the adoption of children.

So, while I accept that, at various points, largely related to the vulnerability of infants and children (to neglect and or abuse), the state does need to make decisions about the intimate relationships of children, including legal parenting and family involvement and place of residence, the question for us here is ‘on what substantive basis such decisions must be made?’

7.1 A PARAMOUNT ATTENTION TO THE WELFARE OF THE CHILD...

Dwyer states that adoption laws provide a very good example of how the state might intervene, beyond the universal assumption that legal parenthood is conferred on the basis of biological connection. Adoption challenges the proprietary view of biological parents, either because the mother chooses to relinquish the child from her possession and legal responsibility to parent or because other factors intervene and the relationship is severed. Adoption is particularly compelling because it relates to state determinations of intimate relationships, which are necessarily viewed in a wider, more encompassing frame than other arenas of childhood, such as education. Here consideration of the relevant sections the UNCRC is helpful in clarifying the notion of paramouncy over primacy.

(UNCRC) Article 21

States Parties which recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

Article 21 of the UNCRC relates to the issue of adoption and establishes “paramouncy of all children’s best interests in all adoption arrangements and details minimum requirements for adoption procedures” (p. 293). Hodgkin and Newell (2002) argue that the UNCRC remains neutral about the appeal of adoption however it is a legal arrangement that must be considered for the care of children particularly in circumstances where biological parents or extended family members are unwilling or unable to care for them. It is one of the possible options available to ensure that children receive the care to attend to their needs, interests and well-being. “It is clear that children’s psychological need for permanency and individual attachments can be met without the formality of adoption; where adoption is used, it should be properly regulated by the State to safeguard children’s rights” (Hodgkin and Newell, 2002, p. 294). In adoption, Article 21 specifies that the best interests of the child must be the ‘the paramount consideration’ whereas in Article 3, the best

interests of the child is 'a primary' consideration. The paramountcy principle in Article 21 "establishes that no other interests whether economic, political, state security or those of the adopters should take precedence over, or be considered equal to, the child's" (Hodgkin and Newell, 2002, p. 295). Archard (2003) elaborates on the distinction. A consideration that is to be paramount 'outranks and trumps' all other considerations and, in the context of adoption it means that the child's welfare and best interests are **the most important consideration** and must determine the outcome. This differs significantly from the concept of 'a primary' consideration that is specified in Article 3. A consideration that is 'primary' is a leading consideration and ranked first in a list of other considerations. 'But although no considerations outrank a primary consideration there may be other considerations of equal, first rank. Furthermore a leading consideration does not trump even if it outranks all other considerations' (Archard, 2003, p.39) and therefore does not determine the outcome.

The paramountcy principle is critical in decision making processes about adoption and must be clearly stated in law, thus ensuring consistency with the Convention. Furthermore, in countries where adoption is allowed, legislation must be enacted and competent authorities are obligated to ensure "vetting the viability of placement in terms of the best interests of the child" (Hodgkin & Newell, 2002, p. 295). The current Act states the paramountcy principle.

Within the UNCRC 1990 while the best interests of children are the paramount consideration there is a presumption that children's best interests are served by the following:

- Living with their biological parents where possible, however adoption can only occur if parents are unwilling or unable to discharge their parental responsibility
- Each potential adoption requires proper investigation and assessment with full reports "by independent professionals to the authorities considering the adoption application" (p. 296)
- Children's rights must not be violated
- The child's views must be inclusive of the process where possible which is in the spirit of the Convention, and
- Adopted children have the right to know that they are adopted and to know the identity of their biological parents.

7.1.1 THINKING ABOUT RELATIONSHIP RIGHTS

At first sweep of analysis of these issues are philosophical in nature...what are the rights of children and onward into their adult life? What can parents and adoptive parents claim within the process? My starting point accords with Article 3 (1) of the UNCRC (1990), that: *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.* The *Adoption Act 1988 (SA)*, which was enacted prior to the ratification of the CRC in 1990, requires **paramount attention to the welfare of the child** (Section 7). Consistent with contemporary discourse regarding the rights, interests and welfare of children, I base my enquiries on the interest-protecting rights of children (and, relatedly, the 'now-grown up children' who were subject to state interventions to determine legal parenting during their childhood). Interest protecting rights are those that are often made by adults on behalf of children, determined in their best interests (as distinct from the interests of other parties, such as parents or state welfare systems).

Articles 7, 8, and 9 of The CRC address the rights of children to have a registered name, to protection of their identity and to their best interests to be protected when the state intervenes to separate a child from their parents. These are of particular relevance for any legislation relating to adoption. At some points (relating to: the name of the child; consulting the child about decisions made by adults; vetoes; and discharge of adoption orders) I am also concerned with choice-protecting rights of children (and, relatedly, adults subject to state interventions to determine legal parenting during their childhood). Choice-protecting rights are aimed at ensuring that wherever possible the child who is the subject of a decision is given an opportunity to express their view about it. This is consistent with Article 12 of the CRC 1990 that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Along with Dwyer, I can see that once we apply these tests of attributing rights to children (especially those related to ensuring best interests' protection, and welfare and choice protection) we will see a net diminution of state power, not an increase. Dwyer notes that this happens particularly in relation to adoption (Dwyer, 2006, p. 137). He also addresses the possibility that this might lead to more individualized decision-making while considering that statutes can establish 'a strong presumption in favour of certain outcomes in certain types of cases, based on particularly readily demonstrable facts.' (Dwyer, 2006, p. 138) I take this to imply legislators must take into account established evidence regarding the impact of decisions in these arenas and that in legal proceedings designated decision-makers must pay close attention to the circumstances of the lives of children. Flowing from these assumptions are other sets of understandings which I will broadly categorise as welfare-rights, applying Dwyer's model:

Children's relative incompetence certainly does not make them incapable of having well-being, of possessing many welfare interests, and does not diminish the importance of their intimate relationships to their fundamental well-being. (Dwyer, 2006, p. 126)

I therefore attempt, throughout this review to have a mind to the available evidence that may inform deliberations about best interests and welfare, in order to give material weight to rights determinations. As well as canvassing the existing evidence base in relation to children, parenting, family life and adoption, as means to address the Terms of Reference of the present review, I have examined the evidence to undergird the related state obligations to give expression to CRC 1990 Article 18 (2):

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

7.1.2 THINKING ABOUT WELFARE

It became clear, from public and targeted consultations and other data collection processes deployed during this review, that many people were offering philosophical (even ‘common sense’) understandings of these issues. Most of these were implicit, but many contributors also stated their philosophical perspectives with clarity and emphasis. The term ‘welfare’ did not figure highly in the contributions. Most spoke of rights and interests. While all contributors agreed that the rights and/or best interests of the child need to be paramount it did not take long for distinct understandings to emerge. I take this to reflect what Dwyer describes as:

*the assumption that ‘children are equal persons, in the limited sense that they are entitled to as much moral respect from state decision-makers as adults receive...that the equal moral respect owed to children gives rise to a presumption that children possess the same basic moral rights that adults do, even if...those rights must be embodied in legal rights that differ in **content and method of implementation** from the legal rights that apply in interactions between competent adults. (Dwyer, 2006, p. 124) (My emphasis)*

The *Adoption Act 1988* (SA) Section 7 also refers to ‘welfare’ in general terms which we can assume are reflected throughout the provisions of The Act: the **content** of the ensuing legal rights and their **method of implementation**. In this way, the term ‘paramount attention to welfare’ takes specificity depending on the issues being addressed. The systematic knowledge review carried out for this review, highlights key issues in the welfare of children (and on through the life-span), stressing the importance of an early-in-life secure attachment and belonging, the importance of stability in key relationships and the importance of attachment to and involvement in culture and community. It also explores the significance of identity, especially as the child matures through the teenage years and into adulthood. The knowledge review reinforces the impressionistic evidence gathered from the public consultations that adoption can set up a tension between belonging and identity formation, not because there is a focus on gathering family around a vulnerable child, but because of the radical nature of adoption which obscures and disrupts the full life story of the person.

It is crucial as the Act is implemented to keep a joint and coherent focus on **rights, best interests and the needs and welfare of the child**. Any proposals to change the content of the legislation must also be judged by this yardstick.

7.2 ...TRUMPS A DESIRE FOR FAMILY FORMATION.

We cannot talk of children and adoption without having a clear view about families...their characteristics that distinguish them from other forms of social grouping and contract. Perhaps the best starting point lies within the UNCRC (1990.) The Preamble puts it thus:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community. Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding

Let us consider what adoption attempts to do...to alter legal parenting arrangements in a way that extinguishes existing arrangements and replaces it with new parenting arrangements. It is, in South Australia at least, reflected in a changed birth certificate, on the grounds that the child (or children in the case of siblings), requires the state to intervene to ensure their right to develop in a family exhibiting the hallmarks so eloquently put by the CRC 1990. Adoption undoes one arrangement and substitutes it permanently with another. And this is done, most often, based on an argument that a child needs a family...the rights, interests and welfare of the child are linked to removal from perceived inadequate or unwilling parenting into adequate parenting. In pragmatic terms, it requires a direction from the Court to the Registrar of Birth, Deaths and Marriages to alter the birth certificate of the child. In South Australia, the people now listed as parents on a post adoption birth certificate are not identified as adoptive parents, so, to an adopted person, the birth certificate reads as though the adoptive parents are their (birth) parents. I devote a further section 9.1 below to discussion of birth certificates, but for now, we can see that this process establishes a fiction.

Dwyer draws on detailed literature, to remind us that intimate association, such as family provides: 'enjoying the society of other persons, giving and receiving caring and commitment, enjoying closeness and forming one's identity.' (Dwyer, 2006, p. 103) He goes on to explain that the state is unable to provide 'loving concern, values and identity.'(p. 105). It is these issues that need to be at the forefront of considerations about best interests, needs and welfare, especially in light of the evidence that adoption is disruptive of strong identity formation, even while it might meet needs for loving concern and belonging.

7.3 THE TENSIONS IN THE CURRENT *ADOPTION ACT 1988* (SA)

The *Adoption Act 1988* (SA) sits within an almost century long history of the state intervening to find families for certain children (the first Adoption Act was passed in 1925 and makes reference to 'deserted children' and establishes that: *after adoption the child "shall for all purposes...be deemed in law to be the child born in lawful wedlock of the adopting parents...and thereby terminate all the rights and legal responsibilities" of the natural parents (Section 12)*). Therefore the Act has to address the impact of past adoptions...there are many South Australian citizens who were adopted, whose child was adopted or became adoptive parents before the period of open adoption came into effect in 1989. The average age of an adopted person in South Australia is in the early 40s due to the large number of adoptions in the 1970s, which was the peak period in Australia. Over the intervening period we have learned about the negative effects of closed adoptions, so, the current Adoption Act needs to contain **restorative components in its content and implementation**. Under the present review this relates to discussion about vetoes, birth certificates and discharge of adoption orders.

Given that the *Adoption Act 1988* (SA) must also establish the optimal conditions for adoption in the current era and to ensure that past injustices are not carelessly recapitulated, it needs to contain **constructive components in its content and implementation**. Under the present review these relate to questions of who can adopt; adult adoption; dispensation of parental consents and retention of birth name.

The other tension that always exists in adoption laws is between what is just like those who are not adopted and what is different. The earliest laws in this area aimed to make it adoption 'as if' the child were born to a 'lawfully wed couple' and therefore that nothing differed, unless this had

occurred as a result of fraud or duress. Over time, as more research is released and public inquiries have focussed on adoption experiences, the differences are more understood. Those differences have most often been seen negatively, requiring correction. In the present Review, I strive to settle on suggestions that do not undermine the 'forever-ness' of adoption while recognising that the state has intervened in a particular way to shape the intimate relationships of a child and that such an intervention requires a high standard of accountability which is higher than a straightforward test of fraud or duress. This also relates to the fact that the era of open adoption has ushered in a dramatic shift in thinking about the same/difference dilemma because it recognises that a child has birth parents and adoptive parents and is located (in different ways at different times) across at least two families.

In trying to hold these tensions in place, without allowing the restorative (or corrective) provisions to unduly distort the overall intention of the *Adoption Act (1988)* which is to preserve a paramount focus on the welfare of the child in establishing optimal conditions, I have developed these propositions to guide my thinking. My propositions are that:

1. Adoption is indeed a radical act, as at its base, it changes a birth certificate to create a new story of the origins of the child. It therefore hardwires a fiction into a process which, on its face, exists for the welfare of the child. This act of 'creating fiction' is irreparable and causes many flow-on problems for adopted persons.
2. Despite some compelling legal arguments suggesting that adoption be ceased altogether, I can see, for philosophical reasons which give second consideration to the proprietary rights of parents, and for reasons arising from considering the profound understanding of the situation of the child, that it may be desirable to use adoption, under optimal conditions, to meet the child's needs for attachment, security, safety and belonging and to assist in secure identity formation over the lifespan of the adopted person.
3. Adoption, as it is currently practiced (and yes, that includes open adoption) should only be seen as a last resort in resolving issues about life-long family bonds, identity formation and legal parenting. It should be grounded in the paramountcy principle enshrined in the UNCRC 1990.
4. This last resort should only be taken when other options have been explored and exhausted. Acceptable options exist in related legislation: The *Children's Protection Act 1993 (SA)*, *Family Relationships Act 1975 (SA)* and the *Family Law Act 1975 (C'th)*.
5. Adoption does not exist primarily for family formation, so the selection of adoptive parents cannot be based on the desire of some people to have children. It must be based on a profound understanding of the rights, needs, best interests and welfare of the child or children. This understanding will change adoption practice by the State.
6. Adoptions must remain open (as it is currently understood), with guaranteed social support for all parties involved and always negotiated in the best interests of the child or children.
7. The presumption of open adoption must also be reflected on the birth record, which must name all parties, while making it clear that the adoptive parents have full legal responsibility for the child.

8. Adoption, as an intervention by the state to establish legal parenting of a child based on a profound understanding of his/her relationship rights, best interests, needs and welfare, can be dissolved by the state in the best interests of the adopted person.
9. Adoption cannot solve legal parenting arrangements arising from the use of donor gametes or surrogacy. Adoption is about a child who already exists who needs a family.
10. Seen thus, adoption is a child protection response. But this statement must be understood in the context of the *National Framework for Protecting Australia's Children 2009-2020* (the National Framework)⁸, not simply aligned with the statutory role in child protection undertaken by the State of South Australia. Some implementational responses will sit in Tier 2 of the Child Protection Framework, while others, especially related to adoption of children in long term fostering will sit within Tier 3. (See footnote below for further information about this framework.)

7.4 AN INTERPRETIVE FRAMEWORK: RESTORATIVE AND CONSTRUCTIVE

This leads to the development of a succinct interpretative framework in which these questions must be applied to all the evidence and resulting recommendations:

1. Is this a constructive recommendation that meets the requirements for optimal conditions for adoption in the 21st century?
2. Does this recommendation ensure that adoption remains an open process?
3. Does this recommendation enhance the application of the paramountcy principle when effectuating the relationship rights of the child?
4. Does this recommendation increase the chances of the best interests of the child being acted upon and not usurped by the interests of adults?
5. Does this recommendation enhance the possibility that the welfare of the child will be protected?
6. Is this a restorative recommendation which will contribute to rebalancing unjust past practice (as established by the various inquiries and related research)?
7. Given the last resort approach, is it necessary to deal with this issue in the *Adoption Act 1988* (SA) or is better addressed in other legislation?

⁸ The National Framework endorsed by the Council of Australian Governments in April 2009, is an ambitious, long-term approach to ensuring the safety and wellbeing of Australia's children and aims to deliver a substantial and sustained reduction in levels of child abuse and neglect over time. It outlines six supporting outcomes and provides details about how each of these outcomes will be achieved. The six supporting outcomes are:

- children live in safe and supportive families and communities
 - children and families access adequate support to promote safety and intervene early
 - risk factors for child abuse and neglect are addressed children who have been abused or neglected receive the support and care they need for their safety and wellbeing
 - Indigenous children are supported and safe in their families and communities
 - child sexual abuse and exploitation is prevented and survivors receive adequate support.
- <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>

RECOMMENDATION # 1:

That, consistent with the spirit of the United Nations Convention on the Rights of the Child 1990, *the Adoption Act 1988 (SA)* be amended to incorporate the paramountcy principle in a wider statement of Principles and Objectives (similar to the model used in the *Disability Services Act 1992 (SA)* and *Disability Services Act 1986 (C'th)*)

8.0 CONCLUSIONS TO PART 2

This review is therefore carried out with a skeptical rigour first informed by an intention to effectuate the relevant articles of the UNCRC 1990 with particular attention to interests-protecting and choice-protecting rights in relation to intimate relationships in the lives of children considered vulnerable. The WPR approach enables us to see how common sense views can quickly predominate in public discussions of such issues such that the voices of those seeking to form families are most likely to catch the attention of media. We must be able to 'hear past' these voices, to attend to those who are so directly affected by adoption. I do not want to diminish the intensity of these desires, nor to make them appear perverse or ill-intentioned. In short, adoption practice activates the role of the state in promoting the paramount best interests of the child as it interfaces with the interests of persons seeking to form families with children. Clearly, there is no 'right of persons to form a family with children' that the state must uphold or promote.

While I recognise that those who contribute to the public consultations on this issue about adverse adoptions experiences do not speak for the experiences of all, I do acknowledge that there is widespread agreement that adoption can lead to damage to both belonging and identity formation for the developing child and young adult.

Second, The Review has sought to gather, examine and weigh various sources of evidence to inform these deliberations and to ensure that recommendations for legislative change and related service provision are soundly based and coherent. A rigorous knowledge review structure has been applied to ensure that the various sources of evidence and opinion are weighed appropriately.

I have generated a set of seven questions, The Interpretative Framework (section 9.0, below), to guide my deliberations and set recommendations. From there flow a number of pertinent questions which are the subject of The Review of the *Adoption Act 1988 (SA)*. They are addressed in the following sections of this report.

PART 3: WHAT SHOULD
CHANGE IN THE *ADOPTION*
ACT 1988 (SA)?

9.0 THE KEY ISSUES EXPLORED

This part of The Review Report deals with the specific issues raised in the Discussion Paper. Each issue is introduced using excerpts from the Discussion Paper before proceeding with a concise discussion of the perspectives that arose during the review (all sections: including philosophical overview, evidence gathered through the SCIE knowledge review process and public and targeted consultations.) To preserve clarity and brevity, I do not extensively reference these sections. The knowledge review will be published separately. My conclusions and recommendations are made by weighing these views and evidence against the interpretative framework, namely:

1. Is this a constructive recommendation that meets the requirements for optimal conditions for adoption in the 21st century?
2. Does this recommendation ensure that adoption remains an open process?
3. Does this recommendation enhance the application of the paramountcy principle when effectuating the relationship rights of the child?
4. Does this recommendation increase the chances of the best interests of the child being acted upon and not usurped by the interests of adults?
5. Does this recommendation enhance the possibility that the welfare of the child will be protected?
6. Is this a restorative recommendation which will contribute to rebalancing unjust past practice (as established by the various inquiries and related research)?
7. Given the last resort approach, is it necessary to deal with this issue in the *Adoption Act 1988* (SA) or is better addressed in other legislation?

9.1 WHO CAN ADOPT?

This section addresses the issues raised by same-sex couples and single persons seeking to be considered as adoptive parents. I present my investigations and findings in one section as the issues are largely the same for both groups of potential adoptive parents. I also address another question that arose during the consultations and relates to another group of potential adoptive parents i.e. those who become parents through surrogacy arrangements and/or through the donation of gametes. This addresses the **constructive** task of the legislation. It must answer these questions:

- Is this a constructive recommendation that meets the requirements for optimal conditions for adoption in the 21st century?
- Does this recommendation ensure that adoption remains an open process?
- Does this recommendation enhance the application of the paramountcy principle when effectuating the relationship rights of the child?
- Does this recommendation increase the chances of the best interests of the child being acted upon and not usurped by the interests of adults?
- Does this recommendation enhance the possibility that the welfare of the child will be protected?

9.1.1 THE ISSUES OUTLINED

Same-sex couples

The interpretations section (section 4) of the *Adoption Act 1988* (SA) defines the terms used in the legislation. This includes “marriage relationship” as meaning “the relationship between two persons cohabiting as husband and wife or de facto husband and wife”. South Australian law interprets this to mean the relationship between a man and a woman. Section 12 of the Act sets out the criteria affecting prospective adoptive parents as to who may be granted an adoption order for a child. This section refers to “marriage relationship” as the key criteria for the granting of an adoption order to two persons. The effect of these two sections of the Act is that same-sex couples are unable in any circumstances to apply to adopt a child in South Australia.

In some other Australian jurisdictions, same-sex couples are able to apply to adopt a child. This relates to circumstances in which couples may apply to adopt a child who is unrelated to them, or in which a person adopts their same-sex partner’s child. Whether or not same-sex couples may adopt a child from overseas is dependent on both the adoption application criteria in the couple’s home state or territory legislation as well as whether or not overseas countries that have adoption programs with Australia allow same-sex adoption. Australia has no control over the adoption application criteria of overseas countries. In order for same-sex couples to be able to adopt a child in South Australia, the definition of “marriage relationship” would need to be changed.

Single people

Single men and women can apply to adopt a child in South Australia. However, the *Adoption Regulations 2004* restrict the placement of children with single persons to “special circumstances” and the Act specifies that a single person will only be granted an adoption order if there are special circumstances justifying the making of the order. “Special circumstances” relates to the needs and background of the child to be adopted, which almost always can be met by the couples who are on the register of prospective adoptive parents. “Special circumstances” does not necessarily relate to children with special health or developmental needs, but can relate to the child’s cultural background, language of origin, or family background.

Single people may apply to adopt a child born overseas. While Australia has adoption programs with several overseas countries, only a few will accept applications from single persons, and some of those will not accept applications from single men. Very often these applications will be in relation to children with special needs.

In order for single men and women to be treated equally with couples, both the Act and Regulations would need to be amended to remove the “special circumstances” requirement.

Parents through surrogacy arrangements

This issue arose as some respondents to the consultation sought to investigate the suitability of adoption to resolve legal parenting complexities. In these cases there is no reason to suggest that the child is vulnerable and in need of state intervention in order to establish a stable nurturing, enduring family environment. So, their welfare is not in question. It is clear however, that legal parenting arrangements are complicated, especially where commercial surrogacy has happened in a second country that registers the surrogate as the mother of the child (consistent with established international practice regarding the presumption of legal parenting by a birth mother).

9.1.2 THE ISSUES EXPLORED

This issue attracted the most number of responses in the public consultation phase, with several same-sex couples and single persons seeking interviews, and about 200 written submissions and responses to the discussion paper. These were overwhelmingly in favour of a change to the law to allow same-sex couples and single people to adopt. There was also a significant sub-set of responses which presented the contrary position. I held interviews with several individuals and organisations presenting the case for no change in the legislation. The quantity of responses is not the relevant issue here, except that this reflected a highly visible media and social media campaign, revealing strong feelings about this issue within the LGBTI community. What is important is the range of themes and arguments presented by both sides of the debate.

On the one side, protagonists presented evidence and opinion regarding changing family structures in Australian society, growing recognition of the full humanity and rights of people in same-sex couples and momentum for marriage equality. This is one of those issues that Dwyer (2006, p. 6.) warns us to take care about...that we do not displace a focus on the child in an attempt to repair other social inequalities, in this case a history of discrimination in the law against same-sex couples, and to a certain extent, single persons, especially in relation to parenting. While I personally support full equality in these areas, I set this aside as my paramount consideration.

With this in mind, I set out to weigh the evidence for the impact on children being raised in a same-sex couple or single person household. Once again, on the best available evidence, I can see that, given certain other conditions that apply across all households, (roughly, that they display a set of protective factors that favour child development, such as an enduring positive parent bond, a persistent child-focus, informal social support networks, stability of housing and adult relationships, non-violence, a level of material comfort, a capacity to settle differences equably and that certain other factors are not present such as instability, substance abuse, violence and poverty, abuse and neglect of children) children can be expected to thrive in households headed by a same-sex couple or a single person.

The research evidence presented in defense of this argument and located through the knowledge review process suggests that children raised in same-sex couple households fare overall just as well as children who grow up in different-sex couple households. While the knowledge review process highlighted the difficulties of arriving at 'gold standard' conclusions here, based on the best available evidence I tend to agree. I also consider that the same applies for single person headed households where variables are also not controlled.

Arguments against a change in the law recognised the changing nature of the family in Australia, but also sought to highlight evidence and opinion that stable different-sex, married couples provide the best environment for the nurture of children. It is possible to read the literature, especially from the United States, in this way, but the research questions were often set up to bring about an outcome that supports this pre-supposition. This is certainly not the case for all studies that support this conclusion, but it is impossible to effectively account for the fact that, especially within conservative communities, the marriage convention of a man and a woman carries benefits not available to other, traditionally more marginalised groups.

At the practice level, any assessment to determine the suitability of these adults to adopt must be as rigorous as assessment relating to opposite-sex couples. It must focus on all the protective factors listed above as well as other psychological testing etc. I stress that the assessment must pay special attention to the informal social support networks of the single potential adoptive parent and explore the extent of their community embeddedness. This final point was reinforced by respondents who had either fostered or adopted as a single person, or a single adoptive parent following separation and divorce. We know, from the literature, that these families can (not all do) experience isolation and parental stress.

In short, why would we exclude these potential adoptive parents from consideration when we can rely on strong, detailed assessment taken over time to determine the needs of the child and the strengths and protective factors within these families? I believe that this understanding gives us the best possible capacity to remain focused on the relationship rights, best interests, needs and welfare of the child. The primary focus must be on the child and where appropriate, include an enquiry about whether the child has strong existing bonds to a same-sex couple or single person, known to them through fostering, an Other Person Guardianship Order (OPG) or extended family and kin.

9.1.3 CONCLUSIONS

Same sex couples and single persons

I therefore conclude, that, in order to contribute to building the optimal conditions for adoption, and on the best available evidence, there should be no further distinction made within the *Adoption Act 1988* (SA) regarding the marital status of potential adoptive parents. It is important to preserve a time period that couples have co-resided in order to be able to carry out a proper assessment related to the above-mentioned protective factors investigation.

In reaching this point, I need to stress another couple of points. I do not wish to see a change in the law here as a way of adding social pressure for children to become available through adoption in order to satisfy family formation desires for same-sex couples or single person households. I stress that adoption must remain a child protection process undertaken for the paramount purpose of protecting the rights, best interests, welfare and needs of a child. I repeat that adoption must continue as an open process, contrary to the view I heard expressed quite often that appeared to reflect a 1950s notion that adoption solves issues related to reproductive restriction or incapacity and that the child's earlier history is obscured or denied.

Second, some religious groups have sought an exemption for their adoption agencies should the bar on same-sex couples and single persons be lifted. While these agencies do not currently operate in South Australia I have checked this across the jurisdictions. I conclude that, in the interests of uniformity of practice across all adoption agencies as a safeguard for optimal operations of the Act, this exemption should not be granted.

Parents through surrogacy arrangements

Consistent with my enquiry as to whether issues in the lives of children and families might be better addressed through other legislation, I propose that these matters be resolved under the *Family Relationships Act 1975* (SA), in surrogacy related legislation or in the Family Court. The long term welfare of the child concerned is relevant here as I do not want to recapitulate past practices which deliberately used adoption laws to obscure or erase the foundational details of the child's life. We know, from research and the parliamentary inquiries, that this primordial deceit can have lasting negative effects for the adopted person. In my view, the birth record must not be changed in the attempt to clarify legal parenting and guardianship. Should adoption be considered, I stress that it must remain a last resort and only after all other options are explored and exhausted.

RECOMMENDATION #2:

That the relevant provisions in the *Adoption Act 1988* (SA) be changed to remove references to husband and wife and to include references to two persons cohabiting etc.

Further, that the special circumstances provision be removed in order to allow single persons to adopt.

Further, at a practice level, that assessment of suitability to adopt be based on the current model in the UK or similar approaches.

9.2 SHOULD ADOPTION INFORMATION VETOES CONTINUE? SHOULD CONTACT VETOES BE INTRODUCED?

This issue fits with the **restorative** requirements of the *Adoption Act 1988* (SA). It seeks to address the impact of closed adoptions in the present era when open adoption is acknowledged as best practice. It must answer these questions:

- Is this a restorative recommendation which will contribute to rebalancing unjust past practice (as established by the various inquiries and related research)?
- Given the last resort approach, is it necessary to deal with this issue in the *Adoption Act 1988* (SA) or is better addressed in other legislation?

9.2.1 THE ISSUES OUTLINED

In 1988, the Parliament sought to deal with the concerns of those who either wanted to preserve secrecy about 'relinquishing' a child (either voluntarily or with no feasible alternative) or who did not want involvement with their mother and father, by setting up a system of vetoes. Part 2A of the Act provides for access to and restriction of adoption information from adoption files held by the Department for Education and Child Development. In that part of the Act, section 27B provides for adoption information vetoes and sets out who can place a veto, for how long and how the department must manage the veto system.

The Senate Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices (2012) recommended that all adult parties to an adoption should be permitted identifying information, and that all parties should have an ability to regulate contact from another party, with an upper limit on how long restrictions on contact can be in place without renewal.

The veto system does not apply to adoptions completed since August 1989. In current practice in the locally born child adoption program in South Australia, the parties to the adoption usually have contact from the time of the placement of the child in the adoptive family. This may be of varying levels of openness and generally cancels out the element of 'secrecy' that was a prominent feature of local adoptions in the past.

9.2.2 THE ISSUES EXPLORED

Vetoes are a delicate matter, since one party placing a veto (and therefore exercising their right to privacy) prohibits another party from exercising their right to obtain information about themselves (for adopted people), their relinquished children (for birth parents) and their adopted children (for adoptive parents). As well as analysing the public consultation, I conducted an analysis of existing vetoes (confidential, without any identifying information) to determine the profile of those applying the vetoes, whether they placed any message for other parties and any other relevant information. This has proved to be a demanding undertaking, requiring many more hours analysis before a full picture is known. I suggest that it be continued in order to build a better evidence base for designing services for all those in this situation. We do know however, that every year the number of vetoes decline and we can predict that this trend will continue as the population ages and, perhaps, open adoption is more widely understood and accepted. Finally, a survey of other jurisdictions shows that

South Australia is the last state to maintain information vetoes, while the majority of other states provide for contact vetoes.

One contributor to the discussion paper questions summed up the dilemma most eloquently:

Vetoes attempt to bridge the gap which exists in past adoptions between the right for information and the right for privacy. Women who relinquished children in the past were often promised secrecy. Many women did not choose secrecy; it was thrust upon them by social norms and other people's agenda's (sic). However for some, the privacy was vitally important, and continues to be today. With the changing of the legislation in 1988 these mothers were provided with an option to continue to protect their privacy through vetos (sic).

This is important as some women have not ever told significant people in their lives about the child who was adopted. This includes partners and other children born to them. These women may be elderly and depend heavily on their family networks. To have their right to privacy removed brings a social and emotional crisis they are not ready to face, which impacts their readiness for reunion and the outcome of contact by the adopted person.

For an adopted person, having their attempts at contact rejected brings a renewed sense of abandonment, and therefore this situation is not constructive for either party.

A number of these women might refuse contact initially, but when given adequate support and their privacy is respected, they might come to accept reunion contact in months or years to come. (Your Say contributor, May 2015)

This picks up the objections that a small number of contributors raised, while the majority of respondents stressed the need for increased openness and a smaller number called for the abolition of all vetoes with no introduction of contact vetoes. The numerical weight of these contributions is not the important issue here; it is the nature of the arguments that matter. Among respondents there was an overwhelming theme that change in relation to the veto system was required and requested. The above quote concludes on the note that with adequate support in an atmosphere of respect for privacy, parties to a closed adoption might come to accept a changed regime. This gracious point is crucial to any reform in this area. I recognise that this is perhaps the most painful area of reform for anyone who was part of these processes over forty years ago.

This quote provides a thoughtful insight into the need for information:

Obtaining information about family members from whom one has been separated by adoption is one step on the path to the sense of emotional wholeness which can result from addressing the grief associated with adoption separation. Receiving this information can be a significant step on the path to growth and healing. Many people are currently struggling to recover from the trauma of adoption separation, in the absence of this information. In my view, we, as a society, have a responsibility to those people to support and assist them in their quest for wholeness, especially in the light of the State Government Apology for past adoptions, which was made in 2012.

South Australia now has the opportunity to lead the world once again by allowing access to adoption information to all those whose lives have been affected by adoption separation, including descendants, without exception. I believe that we, as a society, represented by our government, have a responsibility to support honesty and healing. The system of adoption vetoes actually supports denial and deceit and does not foster openness and emotional

wellbeing. It is viewed by many members of the adoption community as a significant barrier to healing." (Individual submission, May 2015)

I am also conscious of the need to acknowledge here the fathers of children who were adopted. While not many of them were named in these proceedings a number of them have approached adoption authorities over the years seeking information about the child their partner relinquished or was forced to relinquish. As Identity Rights put it:

The adoptee is entitled to know the names of their mother and father, and to have updated medical information about them...The Department needs to admit, that in the light of new knowledge, it is important for many adoptees to know their origins. (May 2015)

Most support for the abolition of vetoes referred to information vetoes, with many respondents arguing for the usage of contact vetoes which would preserve the right to privacy. One detailed submission explained:

The status quo requires no detailed analysis but the alternative does because of the competing options. The varying regimes providing identifying information, but enabling contact vetoes, are by far the common standard in Australia. They also encapsulate the principle recommended by the Senate Community Affairs Reference Committee in its 2012 report into past adoption policies and practices. One option for South Australia is to simply 'catch up' with the majority of jurisdictions, albeit belatedly. But has South Australia come to the party a little late to simply catch up? (Stephen Gay, May 2015)

I think this raises two questions for The Review: the first, what might be the impact on various parties should information vetoes be removed? And second, is a prohibition on contact best managed within the Adoption Act or within other legislation?

Although most respondents agreed that a change to the veto system was required particularly in the ability to access information, concerns were raised about the impact of removing vetoes all together. This is best summed up thus:

People place vetoes because they feel vulnerable. Taking away the veto provision will make people who already feel vulnerable, more vulnerable. The impact of vetoes can have profound effect on both adopted persons and biological parents. Any changes in the system need to be managed with care. (Cynthia Beare, May 2015)

Ms Beare goes onto say:

It would be extremely irresponsible and unethical to implement changes to the veto provision without a solid commitment by the government to properly resource support services for these people. (Cynthia Beare, May 2015)

I have already stressed above that it is clear that vetoes cannot be removed without proper resourcing of supports for those affected. But does this mean that contact vetoes should be introduced? I spoke with a number of experts in other jurisdictions about this and explored with them the suggestions that came through the consultations:

If vetos are removed, I believe people must be compelled to only do search and contact through an authorised third party. This would mean that the Post Adoption Support Service or Government Adoption Service may make contact on the other person's behalf, but that direct contact is prohibited without the other person's consent. (Sandi Pearson, May 2015)

And a second perspective which came out in a meeting and within private consultations, namely, that the Adoption Act is not the place to criminalise contact and that provisions exist in other legislation to impose restraints on contacts between individuals. Both these approaches were considered viable when explored with experts.

9.2.3 CONCLUSIONS

In relation to information vetoes, I conclude, on the basis of:

- my declared position to give the paramount position to the relationship rights, best interests, needs and welfare of the child (and ongoing into adulthood) and to protect open adoption
- the best available evidence through research and inquiries
- the contributions of respondents in consultation
- analysis of existing vetoes
- a jurisdictional analysis

and upon deliberating about the genuine dilemma regarding the right to knowledge and the previously upheld commitment to privacy, that vetoes impinge the principle of open adoption and can preserve life-long identity impairing impacts for adopted persons.

I therefore propose that information vetoes be lifted with a 5 year phasing out process that is well supported.

Further, *in relation to contact vetoes*, I conclude, on the basis that contact vetoes also potentially distort the principles of open adoption (and recognition that we still have some way to go in order to entrench open adoption) and that other accessible, state based legislation provides for restraining contact between individuals, that contact vetoes should not be introduced into South Australia.

RECOMMENDATION #3:

That information vetoes be phased out over five years from the enactment of amendments to the Act.

Further, that the release of information should be carried out within a properly supported environment and consistent with current best practice.

Further, that contact vetoes not be introduced, as provisions exist in other legislation to constrain unwanted contact, should it become harassment.

Further, that support services should be made available to all people affected by this change in the Act.

9.3 CAN ADULTS BE ADOPTED?

This issue revisits a discussion raised in 1997 when the amendments were made to the *Adoption Act 1988* (SA), when it was determined that, as the Act seeks to address the paramount welfare of the child, it cannot deal with adults in this way. This relates to the **constructive** task of the Act and must address the question of ‘whether amendment would contribute to the optimal conditions for adoption?’

9.3.1 THE ISSUES OUTLINED

Adult adoption is fertile ground for exploring issues of identity, law reform, and the theoretical limits of the 'best interests of the child' paramountcy principle (K. Blore (2010) A gap in the Adoption Act 2009 (QLD): The case for Allowing Adult Adoption p. 62)

Prior to the 1997 amendments to the Act, it was possible for a person between the ages of 18 and 21 years to be adopted, but this was repealed after a review of the Act. Legislative provisions for adult adoptions exist in every Australian jurisdiction except Queensland and the Northern Territory.

Some adults have been raised from infancy or early childhood by people not related to them, such as foster parents or a step parent, and those relationships are equivalent to that of parent and child. Most other Australian states and territories have provisions in their adoption legislation for the adoption of a person over the age of 18 years, in certain circumstances.

If South Australia were to have legislation to enable the adoption of people over the age of 18 years, it may be necessary to amend the Act to include a section called ‘Who may be adopted’, as found in some other Australian adoption acts.

9.3.2 THE ISSUES EXPLORED

While this issue did not attract a lot of specific attention from respondents to the Discussion Paper question, those who did contribute told moving accounts of the desire to make formal the parenting arrangements that have prevailed for many years. This alone does not amount to sufficient argument under my framework which requires us to address adoption as a last resort. Clearly, these families have functioned extremely well and with enduring bonds of affection and obligation.

So why change things now, especially as other legislation can address testamentary arrangements?

I am concerned about those children and young people who are living with very stable fostering arrangements or under OPG Orders under the *Children’s Protection Act 1993* (SA) who might feel that when they reach 18 years old they have no enduring legal relationship with the foster parent and have attenuated or non-existent relationships with their wider family. As one respondent to The Discussion paper put it:

Adoption gives a young adult a sense of belonging to a family formalising their situation. Please change the current act to allow young adults the option to be adopted. (YourSAy submission)

I was also impressed by the thoughtful contribution of one foster parent with OPG who spoke about her view that OPG worked well in her situation and she did not seek to adopt the child in her care, however, she considered that it might be an option for securing a life-long relationship if once the child reached 18 the child could decide to be adopted. This, she explained, could happen with the

input of the child's parents but would not require their consent. It is conceivable that this arrangement could occur with the full understanding and agreement of all parties through provision of the right case support as available to all parties. According to Ms Beare:

If a provision is introduced for adults to be adopted it allows for a permanent legal parent-child bond to be established at an age when children are mature enough to make an informed decision about severing their legal ties with their birth parents. (Cynthia Beare)

And, another comment:

If a child has a long standing relationship with a family, say in a foster arrangement and has been fully accepted into that family, then there should be provision for adoption over the age of 18 years. As a legal adult, that person can make the decision, without consent from biological family, to be adopted. That child would have grown up in a "temporary" placement, albeit possibly for up to 18 years, but it was temporary. To be legally adopted would help that person truly feel like they belong to the family. I think there should at least be the option for these circumstances. (Individual submission, May 2015)

These arguments seem compelling and they do not distort the principle of open adoption while allowing for an understanding that a child's best interests, rights, welfare and needs might extend past the age of 18. I therefore conclude that it should be possible for that small group of young people to proceed with adoption by the foster parents once they have reached 18 years of age. This change will offer an option to the older group as well.

9.3.3 CONCLUSIONS

The Amendments to the *Adoption Act 1988* (SA) should include an opportunity for adults to be adopted. I support the submission of the South Australian Law Society that the existing legal parents have a right to be heard in any legal proceedings relating to this matter, but that their consent is not required.

Although I have not set alignment with other jurisdictions as a key factor in determining my recommendations, this amendment will bring us into line with other states without impairing the overall principles of the Act.

RECOMMENDATION # 4:

That adults can, under certain circumstances, be adopted.

Further, that any adult seeking adoption in this way should convince the Court, via a report from a suitably qualified professional, that they have sought professional guidance about the impact on their extended family relationships, that they are not acting under duress from another person (e.g. a step parent or foster parent) and that they fully understand the full legal implications of their decision, including loss of a claim on the estate of their birth parents.

Where the adult seeking adoption is considered to have impaired capacity to decide in these matters The Court would need to be satisfied, via a report from a suitably qualified professional, that their interests, rights and welfare were duly considered by a disinterested party acting such as a legally appointed guardian who also seeks to determine the wishes of the adult seeking adoption.

9.4 SHOULD A CHILD'S REGISTERED BIRTH NAME BE RETAINED?

Although section 23 of the *Adoption Act 1988* (SA) provides for the adoptive name of a child being declared at the time of their adoption, there are no provisions in the Act for retaining the child's original name as part of their adoptive name. Here I consider the first (and second) or given names, not the surname or family name of the child. I assume that the child will be known by the family name of the adoptive parents.

This addresses the **constructive** task of the Act and must answer the test of 'whether it contributes to optimal conditions for adoption?'

9.4.1 THE ISSUES OUTLINED

Some other Australian jurisdictions have provisions that incorporate principles found in various documents related to child welfare, including Article 8.1 of the CRC 1990. This Article declares that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

Many adoptive parents want to keep the name their adoptive child was given by their birth family or by their overseas guardians. Sometimes, retaining a child's original name can cause a difficulty, especially if a child already in the adoptive family has the same name, or if the name may cause problems to the child due to cultural or language differences.

If South Australia were to have provisions that required adoptive families to retain their adoptive child's original name or names, section 23 of the Act will need to have an extra provision inserted.

9.4.2 THE ISSUES EXPLORED

While it was not widely canvassed in the public consultations, both for and against views were expressed, with respondents seeking balance either one way or the other in favour of the original family or the adoptive family. Most of the respondents were of the opinion that keeping a child's name is respectful of children's rights and inextricably linked to their identity, culture and family history. This issue relates to making decisions that contribute to preserving the identity of a child and, in a time of open adoption, must be considered important when ensuring that enduring links are made to a child's personal story and cultural history. Identity is often not seen as a critical issue when faced with issues around survival and safety. Without initial attention however, it can become an overwhelming struggle for some young people who express uncertainty about who they are and where they belong. Based on what we know about development across the lifespan and especially within the adolescent and early adult years, it appears important to make decisions in infancy and early childhood that will help adopted persons deal with this struggle.

Some quotes:

"I would suggest that a child's family name be retained as a matter of policy and that a name change is only pursued in cases where there is a very good justification. This may be a little difficult within different social groups with different values but allows for the child to retain its own identity through life. In my view this is of particular importance in adult life."
(YourSAy submission)

"Of course children should keep their name. Why on earth would you take away the name of a child who has already lost his or her parents, family and sometimes country, language and culture?"

- *Children respond to their name from a really early age.*
- *When a birth mother has named her child it is a precious gift and one that is symbolic of her connection to the child. This needs to be honoured.*
- *The names given to children in an overseas country are symbolic of their country and culture of origin.*
- *Sometimes adoptive parents want to name the child as a way of claiming the child or making the child the same as a child they would have given birth to. They need to be assisted to understand that the child already has an identity that needs to be respected.*
- *Exceptions can occur if there is a compelling reason for the child to be given a new name" (Cynthia Beare, Written submission)*

And

"AASW supports that it should only be possible to officially, add the surname of the adoptive family to the birth family name of the child. The given names for a child should not be changed unless there are serious issues of security. It is noted that in the United Kingdom a court must approve an application to officially change a name of a child. The AASW supports consideration of this measure in South Australia. The AASW supports an integrated birth and adoption certificate which holds all details in one record." (AASW Written submission, March 2015)

And

"A child should retain its birth name unless it has never been known by that name. In a contested custody case, a Family Court counsellor once told me that a child's name is basic to its identity, and I had to ask him to explain how that works for adoptees! You cannot argue that it is OK to change names without damage for some children but not for others. Your name ties you back into your identity. The only person who should be allowed to change the child's name is the child. The child should not be bound by any adoption order to use a name it does not relate to." (Identity Rights, Written Submission)

9.4.3 CONCLUSIONS

I therefore conclude on the basis of the jurisdictional comparison, knowledge of child development and identity formation and consistent with the need to ensure the *Adoption Act 1988* (SA) provides optimal provisions for adoption, that the Act be amended to ensure that the child's first name is retained unless it is offensive in English or an adoptive sibling has the same name, in which case the family should use a second name or select a name that is of significance in the child's birth family if that can be known.

RECOMMENDATION #5:

That the child's first name should always be retained except in special circumstances such as where the Court is convinced that the child's name may be offensive in English, or where the child may have the same name as a child already in the family.

9.5 CAN AN ADOPTED PERSON SEEK A DISCHARGE OF THEIR ADOPTION ORDER?

The discharge of an adoption order is a very rare occurrence and there have been no instances of it under the current legislation. This addresses the **restorative** task of the legislation. It must answer the question: Is this a restorative recommendation which will contribute to rebalancing unjust past practice (as established by the various inquiries and related research)?

9.5.1 THE ISSUES OUTLINED

The Adoption Act 1988 (SA) only provides for an adoption order to be discharged if the order was obtained by fraud, duress or other improper means. There are no other grounds by which an order may be discharged.

In recent times, the South Australian Government has been contacted by some people who were abused by their adoptive parents. They have argued that they should be able to undo their adoption and have all legal connections with their adoptive family removed. A few of these people have said that they believe that they cannot recover from the trauma the abuse has caused them unless a Court discharges the adoption order. It is understandable that these people would feel this way about their adoption.

Inquiries into past adoption practices in Australia have revealed that adoption practice frequently had scant regard for the rights of birth parents. Many birth parents feel that the adoption proceeded without their informed or considered consent. Some feel that their children were 'stolen' from them.

When an adoption order is granted to the adoptive parents in the Court, it means that the legal relationships put into place as a result are exactly the same as if the child was born into the family. Consideration needs to be given to what it might mean for the legal standing of adoption in general if some adopted people could have their adoptions undone, and also whether the law may help those people who believe they have been wronged, by making special provisions in the Adoption Act to undo an adoption.

9.5.2 THE ISSUES EXPLORED

While I can see the temptation to consider preserving the forever-ness of adoption in the face of quite a radical shift in adoption policy, the loss of this capacity to discharge adoption has the potential to undermine open adoption. The principle of open adoption requires that secrets are not kept, that adoptive parents (at some level) must commit to keeping the other family in sight and that the child is not required to pretend that there is another story. Inherent in this approach is a higher test of accountability than that which currently exists in Section 14 (fraud or duress).

I met a small number of people who desperately seek the right to discharge the adoption order. I do not consider this a representative sample, but almost all cases (both male and female) related to the prolonged sexual and other forms of abuse by an adoptive father. I know that it was an emotionally costly experience for each of those people to meet with me. I was deeply moved by their stories and their journey into seeking wholeness. I was convinced that a change in legislation as regards discharge of adoption orders would contribute to, but by no means resolve all the healing necessary.

I did not meet any adoptive parents or birth parents who sought a discharge of an adoption order, although it is conceivable that these individuals may seek such a change.

9.5.3 CONCLUSIONS

As the research and grey literature is silent on this matter, I carried out a jurisdictional analysis on this issue. My conclusions are also informed by my professional knowledge about the place of formal restorative processes to contribute to healing and growth. I am persuaded by the argument that, for this purpose, where the state has blundered in effecting an adoption that placed a child in grave risk, the state should have the power to undo such arrangements.

Various jurisdictions around Australia have provision for discharge of adoption orders. I was most persuaded by the model operating in Tasmania which seeks the discharge through the Magistrates Court and does not require the person to attend. This is not however a simple paper-lodging exercise. It must be preceded by extensive case management which provides the person with the necessary supports to carry out this decision. Practice evidence from Tasmania suggests that not all the people who seek this remedy actually go through with it, finding that proper and respectful therapeutic support and professional guidance based on a sincere recognition of the harm done to them is sufficient for their healing. Only a small number of people have progressed to discharge, even though the process is not onerous. Over the past 5 years no matters have progressed on behalf of adoptive or birth parents. As the Tasmanian legislation foregrounds the interests and welfare of the adopted person, it is assumed that they are more likely to initiate discharge proceedings. In cases where the adoptive relationship has broken down adoptive parents have recourse to other legislation to address testamentary and related issues.

I prefer this model over the more formal approaches taken in other jurisdictions that would have a person needing to convince a higher court of the extent of the harm done to them and the necessity for this change to promote their healing. This approach seems unnecessarily intrusive and could be re-traumatising for a vulnerable person.

RECOMMENDATION #6: that the *Adoption Act 1988* (SA) be amended to allow for discharge of adoption orders, following the model currently operating in the *Adoption Act 1988* (Tas). This legislation does not expressly rule out discharge by other parties to adoption but it foregrounds the interests and welfare of the adopted person.

Further, that the new practice framework to be developed must include clear guidelines for case management with a person seeking discharge of their adoption.

Further, that professional resources be made available for this work.

9.6 WHAT ABOUT 'ADOPTION FROM CARE'?

This issue gained momentum during the life of The Review as the release in April 2015 of Coroner John's report in the matter of Chloe Valentine, focused closer media and public attention on the miserable conditions of her young life and her death at the hands of her mother and her mother's domestic partner. This brought the issue to public attention although it has been widely canvassed in the literature and in other jurisdictions, both nationally and internationally. The issue of adoption from care, particularly whether it is preferable to other options for long term care raises questions about the **constructive** task of the Act. It must answer these questions:

- Is this a constructive recommendation that meets the requirements for optimal conditions for adoption in the 21st century?
- Does this recommendation ensure that adoption remains an open process?
- Does this recommendation enhance the application of the paramountcy principle when effectuating the relationship rights of the child?
- Does this recommendation increase the chances of the best interests of the child being acted upon and not usurped by the interests of adults?
- Does this recommendation enhance the possibility that the welfare of the child will be protected?

9.6.1 THE ISSUES OUTLINED

It is clear, upon reading the Coroner's report, that not only was Chloe Valentine subjected to prolonged maternal neglect, overlooked, not nurtured and exposed to squalor and itinerant housing, she was brought into a dangerous environment of domestic violence, with all the hallmarks of enforced disconnection from family and friends, isolation, imprisonment and torture that characterise domestic violence and highly intentional child abuse. Within months of her mother re-partnering when Chloe was four years old, this toxic combination resulted in her death as the drug affected adults in whose care she was living, forced her into dangerous acts and neglected her dire medical needs arising from her injuries. Chloe Valentine, aged 4 years, died in 2012 from injuries she suffered while her mother and her mother's boyfriend made backyard videos, took drugs and failed to get urgent medical attention.

The Coroner's report also highlighted serious oversight in the response of the child protection system to the numerous notifications regarding neglect and abuse of Chloe. This is, in part, attributed to the assessment that Families SA, the statutory authority charged with child protection, privileged the parental rights of Chloe's mother over Chloe's right to protection and safety, best interests, and welfare by maintaining, with a low level of intervention, Chloe's placement with her young mother. It is not my role to determine whether the Coroner's assessment at this point is accurate. It is however pertinent to this review to ask whether current child welfare practice might, as a matter of course, resolve many child protection cases in favour of family preservation over other considerations. Dwyer, quoted above, (2006, p. 9) points out that often practical matters (such as who is available to take this child right now) can provide an excuse for protecting the parental prerogative rather than the child's rights, best interests, welfare and needs.

While the immediate focus has been on the Valentine case, a wider debate exists across the western world regarding the place of adoption in a system of care for vulnerable children and whether it is a preferred option for long term care. The attached literature review looks at the available studies to determine whether or not there is sufficient evidence to entrench this practice further in the South Australian child protection system. While this is first of all a policy determination, the specific question for this review, is what place does dispensation of parental consent have in cases in which a child needs to be protected from parents who display a persistent reluctance or incapacity to meet even the basics for a child? This is the controversial question.

This sets aside another option which involves the parent or parents of a child providing consent for a known adoption by a kinship or foster carer or step-parent. This is non-controversial. A known adoption under these circumstances can proceed under the present Act and I see no reason to change that provision, even though it is not currently widely used. Of course, any such adoption would occur under the paramountcy principle and be consistent with the approach of open adoption.

9.6.2 THE ISSUES EXPLORED

This section employs responses from the public consultative phases of the Review linked with issues arising from the literature review (Appendix 5 below). The topic of adoption of children in care was not a topic specified for YourSAy respondents however, 50 participants expressed opinions on this issue, perhaps reflecting its currency within the media. This topic generated diverse opinions ranging from 'adoption should be considered as a viable option for all children in care' to the other extreme that 'adoption should be abolished'. What is evident however is that it is highly controversial and complex.

Rights issues

Returning to the framework established above, it becomes clear that if we shift the proprietary claims of parents, based on a presumption of legal parenting residing with birth parents, to secondary consideration, the possibility of the state acting without parental consent in the best interests of the child must be considered. The current Adoption Act provides for dispensation of parental consents under certain conditions that the Court must be convinced are met.

I was struck by the number of practitioners in the field who were not aware that these provisions exist in the Adoption Act and confidently asserted that adoption from care is impossible under the Act. This reflects the long-term operation of a policy that suggests that adoption from care may not be the preferred solution to the problem of children in unsafe or unstable living arrangements.

Rights

A dominant theme that emerged from the comments was that the rights of the child must be paramount. The respondents were of the opinion that that currently child protection practices favour the rights of the parents, leaving children in situations of increasing adversity and risk of harm; placing the rights of the child as a priority may result in early decision making and improved safety and stability. This view is summed up well here:

"I feel that it is time that the rights of the child was put before the rights of the parents. In recent times we have seen children who are in unstable and unsafe situations who have been

continually returned to parents who have created this environment often with tragic results ...children have rights and these rights include being safe."(YourSAy respondent)

Needs and Best Interests

The needs and best interests of the child/ren must be prioritised. This was a major theme expressed by participants in the review process:

"Children and young people require a stable environment in order to form positive attachments and trusting relationships with the significant people in their lives. This includes developing a sense of belonging within the family environment and the school environment. It is the development of this secure base that enables the child to develop cognitively and emotionally. CREATE advocates for measures facilitating stability of placements in out-of-home care and permanence in the relationships experienced by children and young people who are not able to live with their birth parents. If adoption is chosen as the most appropriate course of action in an individual case, CREATE supports the view that the decision must be based on what would be in the best interests of the child or young person and with the views of the child or young person taken into account. CREATE also believes there are other placement types that can and do deliver stability to young people during their time in out-of-home care...Overall children and young people have told CREATE they want to feel wanted, cared for and loved. CREATE believes it should not matter in what family environment this occurs, whether it is a same-sex couple, single parent or a heterosexual couple. As long as it is safe, appropriate for the child or young person and the child or young person wants to be a part of it. "(CREATE, Written submission)

And

"Children entering care through the child protection system need security and stability whilst also maintaining their links to their family and culture of origin. We know children in the alternative care system can experience far too many disruptions and instability as a result of decisions regarding their care and protection and available options for medium and long term care. Substantial work needs to be done to improve the current alternative care system to strengthen stability for children so that they can grow and develop in safe, secure, stable and loving families. Multiple placements compound problems for children already dealing with separation from their families and a background of abuse or neglect. The capacity of children to form healthy attachments is compromised by each successive placement breakdown. Stability, love and care is especially important to promote a child's healthy development and ameliorate the impact of their experience of abuse, neglect and placement breakdown. The importance of adequate support services is critical to promote sound identity formation for the child and mitigating these negative impacts of disruption and dislocation that can significantly impact their healthy development and later life outcomes. Research into world's best practice models and a thorough examination of current research is needed to inform planning for an improved alternative care system for children in South Australia" (Relationships Australia SA, Written submission)

Child protection

There is a clear view that adoption should be an option for children in care based on the notion that adoption is perceived to be the *only* placement option that provides for stability and security for children. The need for stability and security was a dominant theme:

"Given almost 300 children a year are being taken into State care in some manner or form there has to be a significant shift in where the legislative priority lies, it must empower and resource the States to work collectively, it must seek to protect the long-term interests of the child at the expense of biological parental rights, it must move towards a system which does not take several years or more to find a stable and loving home for these children."(YourSAy respondent)

"There are always shades of grey and this issue is not always black and white. However if I could have a stable up bringing with loving, secure and happy environment instead of being raised in fear, violence, neglect and abuse it will always be with the family that provides that loving environment. The choices the natural parents make are often selfish and the existence of an off spring doesn't registered for them whatever the circumstances maybe. I recommend we have a place for mothers to place their children not in a drain or buried at a beach but a proper facility whereby the child has a chance of life not death."(YourSAy respondent)

Complexity

"Perhaps adoption does have a place in the child protection system, albeit on an individualised basis. There is little evidence yet in existence that adoption of children from out-of-home care provides better outcomes, however what evidence there is does not indicate worse outcomes during childhood itself and does suggest greater emotional stability for children. Early research findings suggest that adoption brings a whole new set of issues for children to grapple with in addition to dealing with past abuse. Additionally, much is now known about the lifelong effects of adoption and the ongoing support needs of adults who were adopted as children" (Written submission Stephen Gay)

And

"This does not mean that adoption should not be an option, but only that it need not be the preferred option. The decisions should be individualised. Additionally, there should be minimum periods of fostering a child before adoption orders can be sought or granted, to ensure that the child and family are familiar with each other and established relationships are able to be assessed as part of the application process." (Guardian for Children and Young People, Written submission)

And, alternatively

"Adoption is totally unnecessary; we have permanent care. Under permanent care we have the problem of resourcing. Anything without consent repeats the past and breaches Human Rights laws. Adoption transfers the state's costs to the adoptive parents. It gives them sole power over birth family connections. These are problems in the context of diminishing services." (Patricia Fronek, Consultation)

There were also views that adoption for children in care provided the best permanency option:

"The felt security of adoption is reflected in the greater stability of adoptive placements, and the demonstrated improvements that adopted children make in development, school performance and wellbeing. Failing to pursue this option will result in children missing out on opportunities for stable, nurturing care and for prospective adoptive parents to provide a family and home." (Pat Rayment and Claire Simmons, Written Submission)

And

"Adoption is the best response":

- *Child protection systems lead children to be damaged.*
- *Therefore earlier and more decisive actions need to be taken to remove the child and to recognise that some families can't be fixed.*
- *Adoption is the best permanency option.*
- *These ideas were taken up most notably in the NSW adoption reform program which led to new permanency planning requirements.*
- *If reunion cannot be successful then dispense with the parents' consent and have the child adopted." (Jeremy Sammut, Consultation)*

Others urge caution and considered deliberation:

Adoption is not the answer to the problem, it is an option. Adoption of children from care limits the children's access to supportive services, which they need.... Ms Simmons and staff are extremely cautious about the adoption of children in care and state that adoption should not be confused with permanency. They see adoption as one possible outcome for children in a range of care options that should be created. They recommend that carers should be selected to enable the best outcomes for children. OPG is a good option for many children in care and children's voices should be enabled to be heard through case management mechanisms. There should be a mechanism in the Adoption Act to ensure children's contact with siblings. (Ms Pam Simmons, notes of interview)

Alternatives to adoption

Many of the respondents, through written submissions and interviews advocated for alternative responses to adoption that facilitate security and stability for children. For example,

"All options to increase stability for children in care need to be considered. A range of alternatives need to be available, including reunification, Other Person Guardianship and open adoption arrangements." (Relationships Australia SA, Written submission)

And

"It is the AASW position that the reality of adoption as it is currently constituted neither fits with the notion of family in our current era, nor the current evidence base of the needs of children and their families, even when it is 'open'. Other ways of securing a nurturing and secure family environment and a sense of belonging – particularly via 'Other Person Guardianship' - can offer an arrangement with greater potential benefits and less potential harms to the child and the biological family." (AASW SA, Written submission)

I have also produced a standalone literature review dealing with this issue, looking at other jurisdictions, national and international, as well as at studies that explore the outcomes for children

adopted from care and studies that compare adoption with other 'permanency options'. An early version of this literature review is attached as Appendix 5.

The quality of these studies varies greatly and when attempting a knowledge synthesis it is very difficult to account for differences in policy and indeed in family and welfare culture across the countries examined. Both the US and the UK have much higher rates of adoption from care, especially with grandparents and other family members. They also show higher rates of adoption of infants determined to be at risk e.g. the younger siblings of children already in care born to parents who show no improvement in their capacity to safely and effectively parent. This is likely to reflect long term differences in the ways that the child protection systems have developed in these countries, with processes that favour early removal and rapid placement into permanent care. The US system also encapsulates private adoption agencies, canvassing certain women to release their child for adoption (before birth) in order to avoid child protection proceedings. This would not be countenanced in Australia where consent to adoption before birth is considered a part of past practices in which women felt compelled to consent to the adoption of their child. Furthermore, the open adoption approach in Australia would not concede to severed contact (even information) from the child's family.

Taking all this and other factors into account, the studies suggest, unsurprisingly, that children fare better when they do not have prolonged exposure to highly inadequate parenting, poor living conditions, sustained neglect and abuse. They also fare better when their living arrangements are safe, stable and maintained over their childhood. Whether or not adoption adds that bit more that really helps a child settle and belong is not entirely clear. Early action is important; especially to reduce the impact of poor attachment, and cumulative harms and trauma along with birth related developmental issues.

These are not the seemingly uncomplicated children who were sought after in the years of high local adoption with closed files. They come with developmental issues and often complex family relationships. They often have siblings who are an important part of their sense of belonging. Past practices which broke up sibling links, particularly but not exclusively, within Aboriginal and Torres Strait Islander families, contributed damage to the identity formation of people across their life span, as well as to communities.

Foster carers are often reluctant to push for adoption when it would mean they no longer have access to the support from the child protection authority and related services. Others seek adoption as a way of consolidating the child's place within their family. The hopes and experiences of foster parents require further research in order to distil family formation goals from a paramount focus on the child (these two factors can operate together, but must do so hierarchically with the focus on the relationship rights, best interests, needs and welfare of the child being paramount).

This also requires a practice framework within child protection that guides professionals in their conversations with foster parents and allows for members of the family of origin to deal with loss and grief issues as well as the issues that precipitated involvement in the child protection. Timely attention to these issues could contribute to more positive outcomes for the child and less contested decision-making.

9.6.3 CONCLUSIONS

While I make some suggestions about improving clarity and simplicity in these provisions in Section 18 of the Act, I affirm that this is a last resort option.

Last resort

Perhaps this is a good place to spell out exactly what ‘last resort’ might mean. It means that all other options must be explored and exhausted. It means that immediate safety must not take such a compelling focus that consideration of longer term needs around belonging and identity formation are compromised.

When I explored the question: ‘Is adoption the preferred solution to the problem of children in long term foster care?’ the answer from foster parents, social workers and adoption experts was: the existing arrangements in the *Children’s Protection Act 1993 (SA)* relating to Other Person Guardianship (OPG) are adequate to secure security and stability without undermining long-term identity formation. Following the last resort maxim, the Court would need to be satisfied that such an order was not an option for this child. If this were the case, it is highly unlikely that foster parent adoption would be suitable either.

Assessment

Any decision to proceed with adoption from care needs to be made with intensive assessment, a commitment to explore and exhaust other options without allowing drift to occur in the child’s life, and providing an opportunity for key family members, including the father if he is known, to have input into the decision. All this must occur within a commitment to preserve the safety of the child.

This approach to planning for long term stable care and belonging for a child requires an approach to case recording, data keeping and sharing and internal communication within the child protection authority (Families SA) that is an expectation of professional practice, and facilitated within the department. An integrated case management approach that has highly trained social workers involved with the child and his/her world (including school) the child’s family, foster carers and other child and family support services could produce a comprehensive plan to which all parties agree. This builds on the notion of surrounding the parent, child and foster carer with rich pre and post placement resources that enhance every opportunity for a placement to survive and thrive.

Deliberations

All deliberations must be documented on the case record and made available, when appropriate if and as required and with intensive professional support to the young person, as they enter that overwhelming period of ‘making sense of who I am’. These must focus around the paramountcy principle and demonstrate the application of last resort considerations.

Without such a significant case involvement the court could not be satisfied that dispensation of parental consents in order to facilitate adoption was being carried with conviction about a paramountcy principle and only as a last resort.

Other Person Guardianship

At this point, the SA Government has not made extensive use of the Other Person Guardianship provisions in the *Children’s Protection Act 1993 (SA)*. The allocation of additional resources to this element in the repertoire of options to secure a positive present and future for a vulnerable child is a

welcome step. It is vital that a comprehensive, independent evaluation of this part of the program take place, with an intensive period of base-lining the situation of the child and monitoring over a period of 10-20 years.

What's next?

This is a clear example of an issue in which the answer to the question: 'Is adoption the preferred solution to the problem of needing long term care options for a proportion of children in care (see targeted consultations with experts)?' is a qualified, no. The current *Adoption Act 1988* (SA) does not form a barrier to this option being exercised as it allows, under certain conditions, for parental consents to be dispensed with. Whether adoption can satisfy both the long-term security and belonging needs for a child while protecting relationship rights and identity formation across the age span better than other permanent care arrangements remains an open question. This is sharpest when we look at the needs of Aboriginal and Torres Strait Islander children, so ensuring that the redeveloped General Principle embraces the Placement Principles remains a core protection for this group of children.

RECOMMENDATION #6:

That the *Adoption Act 1988* (SA) section 18(c) be amended to establish a clear link to the definitions of "abandoned, deserted or persistently neglected or ill-treated" with relevant provisions in the Children's Protection Act.

Further, remove section 18(d), as it is redundant and covered adequately within the other subsections within Section 18.

9.7 WHAT ROLE SHOULD THE STATE PLAY IN INTERCOUNTRY ADOPTION?

The issue of intercountry adoption has received considerable media and political attention during the life of this review. Former Prime Minister Hon Tony Abbott MHR, committed federal government resources to developing a model of service provision to assist prospective adoptive parents with accessing children. During that time Australia signed one intercountry agreement (South Africa) and has explored the possibility of new and enhanced agreements with other countries, and has also amended some Commonwealth legislation.

This addresses the **constructive** task of the Act. Is this a constructive recommendation that meets the requirements for optimal conditions for adoption in the 21st century?

- Does this recommendation ensure that adoption remains an open process?
- Does this recommendation enhance the application of the paramountcy principle when effectuating the relationship rights of the child?
- Does this recommendation increase the chances of the best interests of the child being acted upon and not usurped by the interests of adults?
- Does this recommendation enhance the possibility that the welfare of the child will be protected?

9.7.1 THE ISSUE OUTLINED

This issue was not specifically addressed within the discussion paper distributed to the wider community for comment. However, some respondents commented about the retention of the child's name which is a critical issue for a child adopted from overseas. I did not carry out a detailed knowledge review to gain insight from the research literature. I did not target my consultations with experts about this. I do not consider children born through commercial surrogacy part of this cohort of children. Given this, I address issues about the state-based administration of intercountry adoptions and the links to the SA legislation.

9.7.2 THE ISSUES EXPLORED

Intercountry adoption agreements

Here we are talking about children whose families are unwilling or unable to support them because of poverty or cultural mores. I cannot canvas all the issues here about how and why children are placed in 'orphanages' in certain countries. Based on my reading in this area, I will say that there are legitimate concerns about practices in other countries that impinge on the Hague Convention and could be called a form of child trafficking. The care with which these intercountry agreements to release children for adoption in Australia are negotiated cannot be exaggerated. I do not suggest that all intercountry adoption related to Australia has this character, simply that investigation of the source and situation of the children is vital and cannot be hurried up.

Pre-adoption support

There are many prospective adoptive parents on the adoption register in this state. They experience a range of reactions to the processes of assessment and waiting that are painful and prolonged. Without care these people can become desperate and their reactions begin to undermine their relationships with the adoptions staff within Families SA. This relationship management is difficult and frustrating as people may end up waiting for many years. This underlines the necessity for pre-adoption support which could be articulated through a new practice framework. It also clearly has resource implications.

Post-adoption support

I also heard from parents who had adopted a child from institutional care in another country. They spoke of babies who didn't cry or couldn't settle; who were hyper-vigilant and wary of attachment. They spoke of very turbulent and painful years during the child's adolescence and young adulthood as they struggled with identity. They spoke of feeling alone in these struggles without professional support to explain the impact of institutional harm, attachment disorders and cumulative harm and post-traumatic stress responses. They requested that when these children are brought to Australia the whole family needs ongoing relevant support in order to help the child settle and heal and grow. This echoed the stories of those who were caring for children as foster parents or local adoptive parents when the child had experienced damaging early neglect and abuse.

This is one of those issues which highlight the tension between the rights and needs of children and their families as spelt out in the UNCRC and the Hague Convention, indicating a slow and careful process that does not lead the child into further jeopardy clashing with the legitimate needs of prospective adoptive parents to not spend years without action on a waiting list. The paramountcy principle must be applied here, along with a clear commitment to work closely with families as they wait or decide to withdraw from the process.

9.7.3 CONCLUSIONS

What does this mean for the Adoption Act 1988 (SA)?

The Act and amendments proposed here aim to produce the optimal conditions for adoption (while also dealing with issues emerging from past adoption practice) based on a commitment to open adoption and to the paramountcy principle. I have also made some suggestions about the model of service that is required when a state government department administers this Act (more about this in the following section).

Given the risks to children from unsafe practices that source children who would not normally be considered eligible for adoption, the human services program design principle of developing a redundancy of safeguards applies here. This means that we cannot rely on simple, one-off checks to establish the legitimate status of the child. Multiple layers of checks are necessary as events over the last 20 years demonstrate that child smugglers will seek to corrupt intercountry adoption processes.

This means that the care the states bring to this process is vital in defending the rights of children in other countries. I therefore conclude that preservation of the state government in these processes is vital and that as part of the ongoing deliberations within COAG and across the governments, the states be clear about their role in protecting vulnerable children at home and abroad. Once again, family formation is a secondary but still significant consideration.

RECOMMENDATION #7: that the states continue to play a foundational role in intercountry adoptions, especially in assessment of prospective adoptive parents and their families, and, further, that resources be made available to support prospective adoptive parents and to provide post-adoption support especially to assist families to support the child's development.

9.8 IMPLEMENTING THE *ADOPTION ACT 1988 (SA)*

Throughout this report I have mentioned the consequential practice issues that emerge when developing legislation and policy that can have such a profound and enduring impact in the lives of the people concerned.

The next part of this report provides a provision by provision review of The Act and its Regulations, incorporating the main recommendations of The Review and proposals to clarify terminology to enhance the day to day administration of the Act and to ensure it is linked effectively to other relevant legislation.

This section covers other practice issues which I think can be covered in two main ways.

9.8.1 A PRACTICE FRAMEWORK

First, the section of Families SA charged with the bulk of the adoption work should document fully a practice framework (some call it 'program logic') which starts with the Principles and Objectives of the Act, its links to the UNCRC and the Hague Convention that is explicit about the rights it is aimed at protecting. Here I suggest five central features.

1. The new practice framework should be guided by a commitment to ensure model coherency in adoption practice (that the right things are being done by the right people, for the right reasons with the right people at the right time).

2. The new practice framework should demonstrate how it focuses effort in developing the profound understanding of the situation of the child, and locates suitable families through a more community-focused approach as well as developing or working with pre and post adoption support services. Throughout this report, I have referred to assessment, case management and pre and post adoption support. This new practice framework needs to be developed with all stakeholders and be informed by the models operating in Citizen Advocacy in the disability sector in which the matching processes prioritise profound knowledge of the person as the guide to matching. This removes volunteers from the picture and lends a sharper focus to the matching agencies' relationships with the wider community. I am not advocating a market-driven model that advertises children.
3. The new practice framework should include change strategies to address current practices that convey to the wider community that adoption is an option for family formation (and to continue to dispel what seems to be a widely held understanding that adoption remains closed). Refocusing the processes for setting up an adoption register away from a focus on adoptive parents to the needs of the particular child, recognising that adoption of new-born infants is likely to reduce even further over time and that should a child need to be adopted from care, this is likely to be a known adoption.
4. The new practice framework should also include monitoring, research and data arrangements in order to continue refining practice on the basis of evidence and to be more accountable to those affected by adoption.
5. The new practice framework needs to include a rigorous set of procedures regarding case recording, as these files tell a foundational story in the lives of several people. When the person seeks access to their documents this must happen with professional support, consistent with the guidelines in the practice framework.

I further suggest that an external person work with departmental officers to develop this new practice framework and the monitoring and research aspects. I stress the fact that even though few adoptions occur each year, the work of pre and post adoption support remains significant and will increase if vetoes are phased out and if adoption is explored more as an option for children in care. The government has an ongoing obligation to care for all parties affected by adoption either through service provision in the relevant department or by funding a non-government provider.

9.8.2 BIRTH CERTIFICATES

Throughout The Review birth certificates were often discussed. I came to see that they have different purposes for different people.

For the person whose birth is registered the birth certificate is a foundational document that establishes their biological and familial beginnings. Where the person has been adopted this foundational story is disrupted and I could see that this causes pain for some people. For those with whom I discussed it, the birth certificate tells an official fiction. It contributes to a distortion that is felt within the identity of many.

For those concerned with establishing legal parenting, especially in a climate where they might meet discrimination (especially for same-sex couple parents), the birth certificate needs to tell the truth of

the child's current family relationships. The foundational...who am I?...story can be told in other ways with photos and stories. Whether the birth certificate is required in all places where the child goes or is required in fewer instances such as passport applications, it is clear that it has a level of currency in establishing legal parenting.

Once again, I have deliberated on this by applying my interpretive framework. It is important to stress that in an era of open adoption there can be no shame or stigma attached to being adopted. Perpetuating a secret via the birth certificate as it currently stands conveys a message that adoption remains something that must be concealed.

The full story can be told in a way that does not continue any confusion for the adopted person but makes it clear who are the legal parents.

I therefore suggest that, should adoption proceed, the birth certificate must reflect the 'truest possible' account of the biological parentage of the child. While I recognise that at times the paternity of a child might be unknown or undeclared or that a gamete donor is not considered a parent under the *Family Relationships Act 1975 (SA)* and related legislation dealing with reproductive technology, the birth certificate should not deliberately or coincidentally obscure a known history.

10.0 CONCLUSIONS TO PART 3

This part of The Review report has examined the 8 key areas raised within the Terms of reference and made further recommendations for legislative and practice change. Some of these recommendations will cause anguish for members of the public and I express my sorrow that they will be distressed. I strongly encourage the government to make available, over a period of years, highly professional supports and services that will assist these people to move through the transitions that flow logically and necessarily from the work of opening adoption and freeing many women and their relinquished children from the burden of shame so often associated with adoption.

Some of the recommendations are straight forward and will provoke no discussion. I predict however, that the public debates regarding adoption from care and intercountry adoption will continue. This is healthy. But it is important that the contributions are informed by well understood and analysed evidence and clear principles. Detailed knowledge reviews, consistent with the SCIE Knowledge Review format will be published separately as a contribution to these debates. I expect that they will be available before the end of 2015. A draft is included with this document.

The following part takes the *Adoption Act 1988 (SA)* and its associated Regulations, 2004 provision by provision and makes recommendations for non-substantive changes to the Act.

**PART 4: THE *ADOPTION ACT*
1988 & REGULATIONS WHAT
NEEDS TO BE DONE WHERE?**

11.0 ENABLING SMOOTHER ADMINISTRATION OF THE ACT AND REGULATIONS

The Terms of Reference specified that the Review should also explore any other relevant matters, including concerns the Department for Education and Child Development has in the administration of the Act and Regulations.

I conducted consultations with Departmental adoption service provision staff and asked them about any concerns they had in ensuring the smooth administration of the Act. Staff raised a number of matters with me that did not necessarily go to the key areas of the Review. Generally, their concerns arose out of day to day practice, where the Act or Regulations may be less than clear or may not fully take account of some issues, or where there appear to be inconsistencies or anomalies.

The following tables detail these concerns and provide suggested remedies.

11.1 ADOPTION ACT 1988 AND REGULATIONS 2004 (SA), PROVISION BY PROVISION...

The following section contains proposals sets out details of proposed amendments that include the recommendations against the 8 key areas addressed within the Terms of Reference and proposals that will enhance the administration of the Act. These were made in consultation with departmental officers who currently administer the Act and some of the submissions which addressed issues outside the discussion paper. It should be noted that the ultimate form of any changes to the Act and/or regulations will be determined by legislative drafters/Parliamentary Counsel.

11.1.1 ADOPTION ACT 1988 (SA)

Section	Provision	Change? Yes/No	Recommendation	Comments
New	Principles and Objects	Yes	That a new section on Principles and Objects of the Act be inserted	This would articulate matters such as identity, belonging, best interests, rights etc. and be tied to the UNCRC
New	Adult Adoption	Yes	Provide for adults to be adopted in certain circumstances, in particular that the applicant acted in a parent role for a substantial part of the proposed adoptee's life (e.g. step child; foster child).	Another provision may be required that addresses the eventuality of the adult proposed adoptee and the proposed adopter/s living in different jurisdictions. This is a high eventuality because once a child leaves home, mobility in adulthood may mean living in a different jurisdiction from the prospective parents or vice versa.
General	Terminology	Yes, make consistent	Some inconsistencies exist in terminology across the legislation exist. Example: "Fit and proper persons to adopt" (regulation 42 in several sub-regs – criteria for adoptions) and "suitability to adopt" (section 22).	DECD understands that "Fit and proper person" has a legal interpretation. "Suitability" may have a different meaning and there should be consistency in the term used e.g. in the criteria for assessing persons to adopt. DECD understands there is an attempt to harmonise this terminology across all Australian adoption laws.

Section	Provision	Change? Yes/No	Recommendation	Comments
New	Notification of death of a party to an adoption – not legislated for	Yes	No provisions exist for ensuring that if the Dept is notified of the death of a party to an adoption, that the other parties should be notified.	This is mandated for in the WA legislation, such that the Registrar of Births, Deaths and Marriages must notify the WA Dept responsible for adoptions that an adoptee has died. The Dept must then notify the birth parent. Some other provisions also apply in this regard (e.g. re siblings being notified). WA Department has a practice model in place for this.
1	Short Title	No		
4	Interpretation	Yes (same-sex) (definition of relative) (news media)	<ol style="list-style-type: none"> 1. Definitions may need to be amended to give effect to adoption by same-sex couples. 2. That the definition of “relative” be amended to include a broader number of relatives; 3. Section 4(4) “publication in the news media...” Upgrade this text to take account of social media and other changes in communication technology. 	<ol style="list-style-type: none"> 2. Definition of “relative” is different in <i>Family and Community Services Act 1972 (SA)</i>, <i>Children’s Protection Act 1993 (SA)</i>, <i>Family Law Act 1975 (C’wth)</i>. 3. Compare with provisions in other legislation that refers to media/social media.
7	General principle	Yes (welfare, rights,	<ol style="list-style-type: none"> 1. Include after “In all proceedings under this Act, the welfare” insert “rights 	

Section	Provision	Change? Yes/No	Recommendation	Comments
		interests) (identity belonging, culture; Aboriginal)	and interests”. 2. Include text that highlights the importance of identity and belonging. 3. Include text that relates to Aboriginal children.	
7A	Minister to ensure consultation undertaken on operation of Act	No		
8	General power of the Court	No		
8A	Court must consider opinion of child	No		
9	Effect of adoption order	Yes (identity belonging, culture; Aboriginal)	Section 9(1) may benefit from additional text that highlights identity and cultural issues for Aboriginal children.	
10	No adoption order in certain circumstances	Yes (welfare, rights, interests)	Section 10(1) to be amended to include the words “rights, interests and wellbeing” of the child (as proposed for section 7).	Section 10(2) refers to section 60G of the Family Law Act. This requires some research to establish if this provision has kept pace with the Family Law Act amendments. Amendments to this section of the Adoption Act may provide a mechanism that eliminates surrogacy matters from the Adoption Act.
11	Adoption of Aboriginal child	No		Issue of identity, culture and belonging has been emphasised through one consultation.
12	Criteria affecting prospective adoptive parents	Yes		Criteria to include arrangements for same sex couples.
14	Discharge of adoption orders on ground of	Yes	Include provision that enables	The recommendation is to follow the

Section	Provision	Change? Yes/No	Recommendation	Comments
	fraud		discharge in certain circumstances	Tasmanian case managed model.
15	Consent of parent or guardian	Yes	Consent of parents under age of 18 years.	This section makes no provision about the age of the parent consenting to the adoption of their child. This is of significant concern when the parent is a child themselves, even sometimes not being of an age to legally consent to some other matters less profound. It is believed that this issue has never been examined in terms of the legislation. It has posed some considerable practice and policy dilemmas.
16	Consent of child	No		
17	Consent given under law of another jurisdiction	No		
18	Court may dispense with consents	Yes (adoption from care)	<ol style="list-style-type: none"> 1. Include text in 18(c) that ties the requirement to the definitions of “abandoned, deserted or persistently neglected or ill-treated” to provisions in the Children’s Protection Act. 2. Remove section 18(d) as it is redundant. 	Dispensation provisions are linked to adoptions from care.
19	Order of Court dispensing with or recognising consent	No		
20	Recognition of adoption under Australian law	No		

Section	Provision	Change? Yes/No	Recommendation	Comments
21	Recognition of adoption under foreign law	No		Note that a national working group has been established to examine the issue of expatriate adoptions.
22	Court to consider report on suitability of adoptive parents	No		
23	Name of child	Yes	Amend section 23 (1) to provide that the child's given first name/names be retained unless court satisfied there are reasons to change the name.	Relates to best interest of the child.
24	Proceedings to be private etc	No		
25	Guardianship of child awaiting adoption	No		
26	Financial support in special cases	No		
26A	Arrangements between parties to adoption	No		
27	Right to obtain information once adopted person turns 18	Yes (also BDM Act)	<ol style="list-style-type: none"> 1. Authorisation for original Birth Certificate of an adopted person for relative of birth parent as per Section 27. (Amendment would be required to BDM Act and a protocol in the BDM Registry, as Adoption Act has provisions for this). 2. Addressing access to files on children adopted from overseas. 	<ol style="list-style-type: none"> 1. At present legislation allows Births, Deaths and Marriages to issue an original birth certificate to the Adopted Person (providing the applicant has an Authorisation Form issued by the Department for Education and Child Development); a Descendant of an Adopted Person and a Birth Mother or Birth Father (providing they are named on the original Birth Certificate). Can the Authorisation Form be extended to include birth relatives of the (named) birth parents being able to obtain the original Birth Certificate (such as siblings)?

Section	Provision	Change? Yes/No	Recommendation	Comments
			3. Address the issue of adopted persons being able to access the adoption information of a deceased birth parent who is also an adopted person.	2. The Hague Convention on intercountry adoption provides for access of this information by parents without restriction, but the Act places a restriction. Some reconciliation of this should be provided for operational purposes.
27A	Information may be provided earlier, in the Chief Executive's discretion	No		
27B	Limitation of right to obtain information where adoption occurred before commencement of Act	Yes (vetoes)	Abolish veto system. No contact veto system	Transitional arrangements will be required e.g. 5 years sunset provision for all vetoes currently in place at the commencement of the amendment.
27C	Interviews	No		
27D	Minister's power to authorise disclosure	Unsure Requires further analysis	The provision reads: Despite anything contained in this Part, the Minister may authorise disclosure of any information if the disclosure is necessary in the interests of the welfare of an adopted person. In line with recommendations in the paramount principle, this could also include the words interests and rights.	Include interests and rights?
27E	Requirement for consent is waived on death	No		
28	Certain agreements illegal	No		
29	Negotiations for adoption	No		

Section	Provision	Change? Yes/No	Recommendation	Comments
30	Enticing child away	No		
31	Publication of names etc of persons involved in proceedings	No		
32	Publication of certain material related to adoption	Yes (update)	The term <i>news media</i> may require expansion or additional terms in the light of advances in technology.	The qualifying term “news media” could be removed and the definition of “publish” be aligned with the Evidence Act.
33	False or misleading statements	No		
34	Impersonation	No		
35	Presenting forged consent	No		
36	Confidentiality	No		
37	Offences	No		
38	Age	No		
39	Intervention in proceedings	No		
40	Costs	No		
41	Registration	Yes (birth certificates)	Amend Sect 41 to remove provision to cancel the original birth certificate.	Concerns about the truth in birth certificates and the function of the birth certificate relate to this provision. This section provides for the production of a birth certificate after the granting of an adoption order.
42	Regulations	Possibly	See comment above about “fit and proper persons” r42(2)(h).	
Penalties		Yes	Need updating	Currency of penalty levels in the legislation will be considered during the drafting of amendments.

11.1.2 ADOPTION REGULATIONS 2004

Regulation	Provision	Change? Yes/No	Recommendation	Comments
1	Short title	No		Regulations due to be re-made in 2016 and the year (2004) will change.
3	Interpretation	No		
4	Counselling	No		
5	Witnessing	No		
6	Prospective Adoptive Parents Register	No		
7	Expressions of interest and applications for registration	No		
8	Minimum requirements for applicants for registration	Yes (single people)	<p>Change:</p> <ol style="list-style-type: none"> 8(1)(d): Minimum requirements for applicants for registration – requires that in the case of a joint application one of the applicants must be an Australian citizen. Regulation 8(1) and section 8(2): Residency provisions generally. 8(2)(b) include “criminal neglect” in the list of offences that would disqualify a person from applying. 	<ol style="list-style-type: none"> Is there tension between section 8 of the Act (General Power of the Court) and regulation 8 regarding citizenship particularly in relation to local born children? I.e. Why must long term permanent residents take out Australian citizenship in order for the person to adopt? Any amendments should address potential unwanted changes to a locally born child’s citizenship status. All the provisions (Act and Regulations) regarding residency and domicile need checking to ensure consistency as there are some inconsistencies: the regulations require a person to be resident and domiciled to apply for registration; the Act requires a person to be resident OR domiciled for the making of an order.

Regulation	Provision	Change? Yes/No	Recommendation	Comments
9	Assessment report	No		
10	Registration	No		
11	Transfer of registration from another State	No		
12	Conversion of registration into joint registration	No		
13	Duration and renewal of registration	No		
14	Cancellation of registration	Yes (death of applicant)	<ol style="list-style-type: none"> 1. This needs to spell out the situation where one of the applicants of a couple passes away, in stages 3, 4 and 5. 2. Suggest amending 14(2)(f) to include neglect as per comments on Sect 8. 	<ol style="list-style-type: none"> 1. The Department has needed to respond to such a situation
15	Additional requirements relating to applications	No		
16	Application for review and constitution of adoption board	Unsure	Transferred to the South Australian Civil and Administrative Tribunal	Advice will be sought during drafting regarding how this is best legislatively achieved.
17	Proceedings	See 16		
18	Adoption board's powers	See 16		
19	Order in which registered persons selected to be applicants for adoption orders	Unsure	<p>Amendments required:</p> <ol style="list-style-type: none"> 1. 19(3)(3)(a) prescribes the order in which the Department sends files overseas but this is 	Text should be simplified.

Regulation	Provision	Change? Yes/No	Recommendation	Comments
			<p>problematic. It works operationally for local adoption but not intercountry adoption where other selection mechanisms are used under arrangements with overseas countries.</p> <p>2. 19(3) (d) pertains to single persons. This will require amendment to remove special circumstances but enhance assessment where a person is single.</p>	
20	Court to notify Registrar of Births, Deaths and Marriages of adoption order etc	No		
21	Information to be disclosed in extract from register of births	Yes (BDM provision)		This may require amendments in the light of the recommendation about truth in birth certificates.
22	Forms	No		
23	Fees	Yes (past adoption)	<p>1. Abolition of fee for adoption information.</p> <p>2. Possible new category for additional fees for intercountry adoption.</p>	<p>1. Senate inquiry recommended adoption information should be freely available to those parties who have rights to it (see below).</p> <p>2. Department has waived fees due to previous instruction from Minister Rankine (as an interim measure awaiting review of the Act).</p>

Regulation	Provision	Change? Yes/No	Recommendation	Comments
24	Offence to make false or misleading statement	No		
25	Evidentiary	No		
Schedule	<ol style="list-style-type: none"> Fee (13) for receipt of adoption information. Fees for intercountry adoption. 	Yes	<ol style="list-style-type: none"> Abolish the fee. Introduce new fees. 	<ol style="list-style-type: none"> Access to some records of government related to family history is subject to charge but usually provision is made for fee relief. Given the history of state involvement in past closed adoption practices, free access to information would better support open adoption. May require a fee to reflect the number of progress reports/ the length of time the file remains active after adoption (Adoptions from China now have a 5 years post placement requirement with 6 reports).
Penalties	Various	Yes	Need updating	Advice regarding the appropriate level of such penalties will be sought during the drafting of amendments to the Adoption Regulations.

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APPENDIX #2 SPECIALIST CONSULTATIONS

1. Associate Professor Barbara Baird, School of Social and Policy Studies, Women's Studies, Flinders University, South Australia.
2. Ms Judy Balmforth, Tasmania.
3. Professor Denise Cuthbert, Dean School of Graduate Research, RMIT, Victoria, Australia.
4. Dr Patricia Fronek, Senior Lecturer in the School of Human Services and Social Work, Gold Coast Campus, Griffith University, Australia.
5. Dr Mary Hood, President, South Australian Branch, Australian Association of Social Workers, with Ms Jennie Charlton and Ms Anne Nicolaou.
6. Dr Trevor Jordan, President, Jigsaw Queensland, Brisbane, Australia.
7. Dr Catherine Kevin, Convenor of Research Higher Degrees, School of History and International Relations, History, Flinders University, South Australia.
8. Ms Annette Lever and Ms Aimee Travers, Office of Parliamentary Counsel, Attorney-General's Department, South Australia.
9. Mr Garry Matschoss, Manager and Ms Lizzie Crisp, Supervisor, Other Person Guardianship Team, Families SA, Department for Education and Child Development, South Australia.
10. Professor The Honourable Nahum Mushin, Adjunct Professor of Law, Monash University, Victoria, Australia; Chairperson of the Australian Government's Past Forced Adoptions Implementation Working Group.
11. Mr Rocky Perrotta, President, Law society of South Australia, with Ms Jennifer Olsson and Mr Stuart Barr.
12. Ms Helen Paues and Ms Tracy Berry, Registry of Births, Deaths and Marriages, Adelaide, South Australia.
13. Associate Professor Damien Riggs, Social Work and Social Planning, Flinders University, South Australia.
14. Dr Jeremy Sammut, Research Fellow at the Centre for Independent Studies, Sydney, Australia.
15. Professor Julie Selwyn, Child and Family Social Work; Director The Hadley Centre for Adoption and Foster Care Studies, Bristol University, United Kingdom.
16. Ms Pam Simmons, Guardian for Children and Young People, South Australia and with several staff members.
17. Staff Members, Placement Services (Adoptions), Families SA, Department for Education and Child Development, South Australia.
18. Mr Tim Vaastra, Manager and Ms Elizabeth Hallam, Adoptions Coordinator, Adoptions and Permanency Services, Department of Health and Human Services, Tasmania, Australia.
19. Ms Sharon Williams, Aboriginal Family Support Services (with Ms Tracey Ritchie), Adelaide, South Australia.
20. Professor John Williams, Dean of Law, the University of Adelaide and Director, South Australian Law Reform Institute, South Australia with Researcher, Ms Sarah Moulds.

APPENDIX #3 SUBMISSIONS, INTERVIEWS AND OTHER CONSULTATIONS

BREAK DOWN OF ACTIVITIES:

- 58 people were interviewed (some together) via their requests to orally submit to the Review. This included 3 South Australian parliamentarians.
- 421 electronic submissions were received.
- 75 written submissions and formal letters were received.
- A large number of references, articles and reports were received from people interested in the Review.
- 20 specialist consultations (as solicited by the Review) were completed.
- Consultations were also held with:
 - Minister for Education and Child Development, Hon Jennifer Rankin MP (early in the Review).
 - Minister for Education and Child Development, Hon Susan Close MP.
 - Minister for Child Protection Reform, Hon John Rau MP.
 - Hon Margaret Nyland AM, Royal Commissioner of the Child Protection Systems Royal Commission.
 - Chief Executive, Department for Education and Child Development, Mr Tony Harrison.
 - Deputy Chief Executive, Child Safety, Department for Education and Child Development, Mr Etienne Scheepers.
 - Dr Dana Christensen, developer of the Solution Based Casework Practice model, and Professor Emeritus in the Kent School of Social Work at the University of Louisville.
- A community petition containing approximately 15,000 signatures asking that same-sex couples be eligible to adopt was accepted by Minister Close at a reception in Parliament House on 6 May. This petition was not able to be formally accepted as a proper petition as its form did not meet the rules laid down by parliament (it is an online Change.Org submission).
- A small project was conducted on the vetoes currently in place. This was done in order to identify the demographics of existing adoption information veto holders (information held by DECD only and was conducted through a confidential process).
- Extensive research was conducted in terms of literature, interstate and overseas legislation and other matters.

WRITTEN SUBMISSIONS

1. Women's Forum
2. Confidential
3. Stephen Gay
4. Confidential
5. Sandi Petersen
6. South Australian Association of Infant Mental Health
7. Relationships Australia, South Australia
8. Confidential

9. Commissioner, Victims Rights
10. Kinship Care Team, Southern Team, Families SA
11. Identity Rites
12. Confidential
13. Confidential
14. Evelyn Robinson
15. Connecting Foster Carers SA
16. Child and Family Welfare Association SA
17. Barnardos Australia
18. Adoption SA
19. Australian Association of Social Work, SA Branch
20. Australian Christian Lobby
21. Aboriginal Legal Rights Movement
22. Office of the Guardian and Young People, South Australia
23. Australian Adoptee Rights Action Group
24. Greek Orthodox Archdiocese
25. Justice Net
26. Knowmore Legal
27. Law Society South Australia
28. The Curry Club
29. Alex Greewich MP, NSW
30. Jigsaw Queensland, Inc
31. Relationships Australia, Wattle Place, NSW
32. World Families Australia, Inc
33. Wilberforce Foundation
34. Dr Alexa Martin-Storey
35. Confidential
36. Confidential
37. Births, Deaths and Marriages
38. Confidential
39. Confidential
40. Confidential
41. Confidential
42. Ms Cynthia Beare
43. Mr Damien Riggs

44. Confidential
45. Confidential
46. Michelle Rowland, MP, NSW
47. Confidential
48. Confidential
49. Rachael Sanderson, MP, SA
50. Mr Raffaele Piccolo
51. Confidential
52. Confidential
53. Vickie Chapman, MP
54. Gay and Lesbian Rights Lobby
55. Office for the Commission of Equal Opportunity
56. Castan Centre for Human Rights Law, Monash University
57. Change.org petition
58. Clover Moore, Mayor, Sydney
59. Confidential
60. Confidential
61. Confidential
62. Department of Communities and Social Inclusion, SA
63. The Honourable Greg Donnelly, MLC
64. Confidential
65. Confidential
66. FamilyVoice Australia
67. Confidential
68. Confidential
69. Confidential
70. National LGBTI Health Alliance, NSW
71. National Centre on Adoption and Permanency
72. New Family Social, UK
73. Confidential
74. Confidential
75. CREATE.

APPENDIX #4 PROFILE OF INDEPENDENT REVIEWER

I am the Head of Social Work at Flinders University where I teach social work practice and ethics. I also am the Chair of the University's Social and Behavioural Research Ethics Committee. My research is in disability politics and policy and I am a Chief Investigator in the Evaluation of the NDIS. I have over 30 years' experience of working for social justice and advising governments on social policy. I have previously been Chair of the South Australian Minister's Disability Advisory Council and the South Australian Social Inclusion Board. I am currently a member of the South Australian Ethics Health Advisory Council and the South Australian Premier's Council for Women. I speak and write regularly on contemporary issues and ethical dilemmas faced by the workers of complex health and human services.

APPENDIX #5: ADOPTION AND LONG TERM FOSTER CARE: HOW DO THEY COMPARE?

The purpose of this paper is to examine the literature that compares long term foster care and adoptive placements for children in state care. **Please note that this is the early version of a document that will be published separately as a monograph and will address a wider range of issues.**

OVERVIEW: CHANGING TRENDS IN ADOPTION POLICIES, NATIONALLY AND INTERNATIONALLY

The social and political context of the adoption of children has changed over the last thirty years. From the 1970s trends have swung away from certain adoption arrangements and towards others. First, the number of 'illegitimate' children considered available for adoption declined from the early 1970s due to changing attitudes towards single mothers and the provision of income support and readily available contraception. Secondly, increasing concern about the poor quality of care offered to children and young people in residential and long term foster care contributed to the promotion of adoption as the preferred option for long-term care (Kelly & Das, 2012; Selwyn, Sturgess, Quinton, & Baxter, 2006). This has been the case in the UK and US for some years (Quinton and Selwyn, 2009; McRoy, 2005; Quinton and Selwyn, 2005) and emerging in Australia (Sammut, 2014; Tregeagle, et al, 2014). O'Hallaran (2006) states that:

Adoption is the most radical of all family laws orders. No order so fundamentally changes the legal status of its subject on a lifetime basis. Its effect is to re-write the relationships between three sets of legal interests with implications for the wider family circles of those involved, the consequences of which will be felt by subsequent generations. Many different societies and the same society at different times, led by changing motivations of adopters have shaped adoptions to fit the needs of its particular cultural context. (p. 37)

Across the same period, the ramifications of past adoption practices have dominated discourse in this field contributing to a related hesitancy in engaging in a practice that has proven to have been detrimental for many children, in the short and long term (Kenny, et al, 2012; Tregeagle, et al, 2015). In many jurisdictions the practice of "closed" adoptions has been replaced by "open" adoptions to reduce the detrimental impacts of the past.

More recently, many governments, including Australia's have been faced with the increasing number of children being admitted into alternative care due to biological families unable or unwilling to meet their needs, interests and wellbeing. Quinton and Selwyn (2009) argue that "The belief is that adoption will increase the possibility of a stable family life for the children, and maximise the change of their developmental recovery" (p. 1119) compared to long term foster care arrangements. An adoption order confirms permanency through legality where parental responsibilities are transferred to the adoptive parents and removal of the child/ren cannot occur unless the adoptive parents are found to be neglectful or abusive (Triseliotis, 2002). Adoption therefore has been heralded as one of the most radical solutions to an increasingly challenging issue in the child welfare sector (Simmonds, 2009).

FRAMING THE ISSUES UNDER CONSIDERATION

Several key themes appear to support the policy shift to adoption as a solution to the unmet needs of an increasing number of children in out of home care. It is difficult to challenge the notion that children who have been permanently removed from their birth parents due to issues of abuse and neglect have a right to a family who can offer them stability, stability a sense of belonging (Tregeagle and Voigt, 2014). Children in care face devastating problems as a result of abuse and neglect. They are then placed in out of home care placements that are too frequently characterised by instability, compounding adversity and disadvantage (Tregeagle and Voigt, 2014; Sammut, 2014). Adoption, therefore, is perceived as a strategy or organisational response to providing permanency for children in care (The Care Inquiry, 2013).

Child protection workers strive to preserve families however some authors argue that the ongoing commitment and dedication to preserving families is considered to be imprudent. It is alleged that the pendulum has swung too far towards the practice of preserving families and focusing on the rights of parents at the expense of intervention that promotes and is responsive to decision making that is in the best interests of the child (Sammut, 2014). This was a dominant theme in the recent coronial inquest of Chloe Lee Valentine. An alternative approach to breaking the cycle of intergenerational abuse and neglect is to intervene decisively in families where parental capacity is severely inadequate, remove children from unsafe homes and apply for termination of parental rights freeing children for adoption (Sammut, 2014). Tregeagle and Voigt (2014) concur with this view. They argue that many children who come into care come from families where “poverty and intransigent social problems are fundamental characteristics” (p. 10) and that family preservation services are not equipped to deal with such complexity and chronicity. These arguments are advanced to not only promote adoption from acre but to see it as the preferred solution.

The need to find permanency for children through the practice of adoption must not conceal the fact that adoption is highly controversial from an ethical and human rights perspective. First, of all there is an assumption that placing children in adoptive families is the safest option and will guarantee permanency however this is not always the case. Secondly, this information suggests that adoption is an approach that will be suitable for all children rather than facilitating the best option in their best interests. This point is reinforced by a concluding statement in The Care Inquiry (2012) that

...‘permanence’ for children means ‘security, stability, love and a strong sense of identity and belonging’. This is not connected to legal status and one route to permanence is not necessarily better than any other: each option is the right one for some children and young people. Adoption, although right for some children, will only ever provide permanence for a small number of children in care... (p. 7)

Thirdly, the discourse highlights that children must be saved from their abusive and hopeless parents thereby revealing an (often unstated) philosophy based on a lack of hope and inhumane practice. For some children entry into care can be avoided or is on a temporary basis. Farmer (2009) emphasises the need for “authoritative but empathic relationship-based practice and monitoring” (pp. 95-96) and the ability for social workers to be able to competently and confidently make sound judgements about what is in the best interests of the child and what constitutes good enough parenting.

This review builds on existing studies that provide information on outcomes for children who were either adopted from out of home care (Rushton, 2004; Rushton & Dance, 2006; Thomas, 2013) or who remained in foster care (Barber & Delfabbro, 2004; Sinclair, Baker, Lee, & Gibbs, 2007; Sinclair, Wilson, & Gibbs, 2005). As Triseliotis (2002) highlights one of the key questions in considering which arrangements are in the best interests of children who cannot remain in their biological families that provide outcomes where the children's wellbeing and development are optimised. Foster care arrangements are intended to be long term and "permanent" until the child reaches adulthood or beyond and they have secure base in their life. However, a significant limitation in this arrangement is that parental responsibility is often held either by the state authority or the birth parent. Adoption however is a permanent arrangement through its legality where parental responsibilities and obligations are transferred to the adoptive parent potentially facilitating a sense of security and stability. Triseliotis (2002) examined the literature and contrasted six variables associated (stability, adjustment, sense of security, personal and social functioning, the subjects' retrospective perceptions, and substitute parents' perceptions) with outcomes of adoption and long-term fostering. Allowing for the methodological difficulties and the fact that younger children tend to be the group placed in adoptive arrangements, the examination of the literature led him to conclude that "the main defining difference between these two forms of substitute parenting appears to be the higher levels of emotional security, sense of belonging and general well-being expressed by those growing up as adopted compared with those fostered long term" (p.23). Foster care, however, as a placement option continues to have relevance for children who cannot reside safely with their biological parents.

As identified by Triseliotis (2002) there are many methodological issues in a comparative analysis of outcomes for children who have been adopted or remained in long-term foster care. The author identified that there were a dearth of studies, particularly longitudinal studies. Triseliotis (2002) also argued that children who have been adopted have been targeted by researchers by variety of disciplines because there is greater stability associated with discipline thus providing a

POLICY CONTEXT: NATIONAL AND INTERNATIONAL TRENDS

Although adoption of children from out of care has become a well-established practice in the UK, US and Canada, it is not a practice embraced by most European countries – the use of long-term foster care and residential care are the preferred options. "Dispensing with the consent of parents and severing the legal tie to their birth parents through adoption is seen as an infringement of human rights in many countries of Europe and therefore not an option available" (Simmonds, 2009, p. 222). Permanency planning is not a standard practice in Scandinavian countries. There is legislative provision for adoption without parental consent in Denmark and Norway however it is rarely used. Parental consent is necessary for adoption to occur in Sweden (Vinnerljung & Hjern, 2011). Variations in child protection systems have been explored by Gilbert, et al, (2011). They found that some European countries are informed by a family service approach where there appears to be a high rate of voluntary arrangements with parents in placing children in out of home care. Anglo-American systems however are informed by a child protection orientation where the majority of children placed in out of home care were compelled through coercive powers of the state, usually through orders made by the court.

SEARCH STRATEGY

A search of the Cochrane Database of Systematic Review revealed no studies or systematic reviews that were relevant for this topic by June 2015. A search of the following databases was also undertaken: Medline, CINAHL, PsychArticles, Sociological Abstracts, Social Sciences Abstracts, Proquest search, Science Direct Search and Wiley Online Search. Search terms used were "adoption" and "long term foster care" and "longitudinal studies" or "adoption studies" or "long term foster care studies" or "out of home care" and "outcomes". The search strategy resulted innumber of studies of whichwere included. A furtherstudies were identified from the reference lists of other studies or articles discussing the topic. Which resulted in a total ofstudies reviewed. A small number of qualitative studies were reviewed as they specifically included the analyses of outcomes for children who were in adoptive or long term foster care (See Appendix one for summaries of articles).

The literature review predominantly focuses on articles where there is a comparison of outcomes for children who were either in adoptive or long-term foster care placements. Publications that are simply literature reviews were excluded from the study however they were valuable in identifying some of the studies included in this paper.

STUDIES IN SCOPE

Four studies are examined here including three longitudinal studies and one cohort study. These studies have been published during the last ten years and therefore up-to-date with the latest developments and policy shifts in relation to adoption and foster care placements. They are presented in relation to the country where the study was carried out. This section is then followed by a summary of the key issues arising from these studies.

UNITED STATES

Studies in United States published by Lloyd & Barth (2011) and Barth & Lloyd (2010) examine developmental outcomes after five years for children in foster care who returned home, remained in foster care or adopted. The study is predominantly quantitative in nature utilising measures to ascertain demographic information, maltreatment type, placement type, poverty and standardised and recognised instruments to measure developmental domains including adaptive behaviour; cognitive; language; problematic behaviour, social competence and academic achievement. This study drew a sample from a larger federally funded study, the National Survey of Child and Adolescent Well-being (NSCAW) which intended to explain the pathways for children through child welfare services. The sample from which Lloyd & Barth's study drew included 5501 children entered child welfare services between October 1999 and December 2000. A final sample of 353 children were chosen. The children had to be thirteen months at the time of baseline sampling and placed into foster care at entry into the NSCAW. The age range was based on previous studies where it was determined that children between the ages of zero to eighteen months are representative of a common development group. Statistical regression modelling was utilised to analyse the data.

There were four full waves of data collection completed at baseline, and approximately eighteen months, thirty-six months and sixty-six months post baseline. An additional reduced wave of data collection was undertaken mainly over the telephone from caregivers at twelve months post-

baseline. Legal substantiation of maltreatment was not an inclusion criterion however almost all the children in the sample group had experienced at least one allegation of maltreatment. In some of the children's circumstances, removal from their biological family had occurred as a result of positive drug tests at the time of birth, but in the main, most of the children removed "based on more overt actions occurring post-partum" (p. 1385).

Type of placement and background of the children were examined. The following groups were identified: in-home group consisted of sixty-three children who were re-unified with their families; foster care group consisted of ninety-nine children and the adopted group was made up of one hundred and ninety-children. Statistical measures indicated that there were no significant differences by race, gender, age at time of measurement or maltreatment experiences. However it was found that about baseline measurement, fewer (79% vs 49% and 50%) children who were placed in adoptive placements were found to be at high developmental risk. Some significant results found however the children in the adopted group had been in their final placement longer than children who had been re-unified and that children placed in adoptive families and were in foster care were more likely to have experienced poverty at base-line than children who had been reunified.

The paper presents findings from all the measurements leading the authors to conclude that "No significant differences emerge except that adopted infants were more likely to be rated as high risk...compared to peers still in foster care or reunified...they were also less likely to come from poor homes compared to their peers in foster care. So despite being higher risk...the adopted group still managed to have the highest developmental achievement overall at outcome" (p. 1388).

This concluding comment must be viewed in the context of some of the significant limitations of the study.

1. The data in relation to placement changes for children in foster care has been omitted from the data sets and, as it becomes evident in some of the other studies, children who experience unstable care careers suffer poor developmental outcomes (Selwyn, Sturgess, Quinton, & Baxter, 2006; Biehal, Ellison, Baker, & Sinclair, 2010).
2. The sample is large by adopted study standards and the problem is further exacerbated by a complex design and weighting system.
3. The NSCAW did not collate data about the homes of origin of the children and finally, "a potential confounding issues is that there are differences between the three groups at baseline and these differences, rather than any intervening phenomenon, is the actual cause of differences seen at outcome" (p. 1388).
4. Another important factor that needs to be considered is that the USA has the most aggressive policy internationally in relation to adoption and is a poor comparator for Australian polices.

UNITED KINGDOM

Two well-known studies have emerged from the United Kingdom. The first study by Selwyn, Sturgess, Quinton and Baxter (2006) reports the findings from the longitudinal study "Costs and outcomes of non-infant adoptions". Findings from the study are also reported in publications by Selwyn & Quinton (2004) and Quinton and Selwyn (2009). The second and more recent longitudinal

study is “Belonging and permanence: Outcomes in long-term foster care and adoption” published by Biehal, Ellison, Baker & Sinclair (2010). There are many similarities in their findings will be examined in more detail.

The study by Selwyn, et al (2006) examined the costs and outcomes of children who had different care careers. The study embraced an opportunity to follow a group of 130 children for whom adoption was decided to be in their best interests however not all children were adopted. The study followed the care careers of 130 children who were approved for adoption in the early 1990’s and they were aged between the ages of 3-11. There were two stages to the data collection process: firstly, historical information about the children and families was sourced from case files, and secondly the children were traced after 6-11 years and outcome measures were obtained from carers who were interviewed (Quinton & Selwyn, 2009).

Although adoption was determined to be in the best interests of the 130 children (73 boys and 57 girls), only 104 children were matched with an adoptive family and 96 (74%) children moved in with their adoptive families. At follow up (6-11 years later) it was found that 80 children were still in their adoptive placement. 62% of children for whom adoption were recommended were “successfully” placed with adoptive families. Quinton & Selwyn (2009) highlight that the last figure was not necessarily a measure of success of adoption but “only a reflection of the outcome of the recommendation” (p.1121). In all, 26% of the children were placed in long-term foster care and 12% experienced highly unstable care careers involving multiple placements. Therefore Selwyn, et al (2006) identified three distinct groups in their study: those who were “adopted”; those who were “permanently placed” in long term foster care, and those children who experienced “unstable care careers”.

The study found that the 130 children who entered care and were then approved for adoption, experienced significant adversity and disadvantage within the context of their biological families. Some of the information about families and the children was as follows: birth parents experienced a multiplicity of problems including domestic violence, mental health issues, alcohol abuse and criminal behaviour; 63% of biological mothers had resided in care during their childhood; 79% of children has been referred to social services before they were 12 months old; 99% of the children were harmed and 68% experienced more than one type of abuse; boys were more likely to have been rejected by their families; over 60% of the children had been cared by others, most of the children lived in contexts of poverty. Over two thirds of the family received some form of intervention before the children entered care however the intervention did not lead to sustained changes or were not did match the complex nature of the family circumstances. Delays in entering care were identified for approximately 68% of the children and most of the delays (53%) were attributable to social work inaction and staff shortages and 38% due to delays in legal processes. The mean age of entering care was 3 yrs and as they entered care, 85% had recorded health problems with emotional and behaviour issues becoming increasingly apparent as they commenced school.

The study provides some valuable insights in to the lives and outcomes of children who were adopted, permanent placed in foster care and who experienced unstable care careers. All the insights cannot be replicated in this paper however some of the key findings will be examined. Selwyn, et al (2006) found some statistically significant inconsistencies across the three outcome

groups which were reflective of the children's characteristics and experiences of adversity and their high level needs that were evident when the approval for adoption was made. When the children entered the care system differences already existed between the three groups which had an impact on their care careers. The emotional and behaviour difficulties were a legacy that they brought with them into their placements "with no differences between the two types of placement on the great majority of psychosocial outcomes" (Quinton & Selwyn, 2009, p. 1124). A finding that was consistent with other studies was that children in the adopted group were much younger at time of placement with the mean age of 2.6 years. The authors found that the likelihood of being adopted reduced with the age of entry into care and the length of time between entering care and the best interests decision being made. Therefore the odds of adoption drop for every additional year of age on entry into care. Delays in decision making prior to entry into care have a substantial impact to placement outcomes.

Practice decisions and legal uncertainties clearly have a marked influence on a child's age at entry into care and on delay in addressing their needs both before and after entering the care system. Our research underlines the importance of current policy efforts to achieve early and rigorous risk assessment and swifter decision making for children. (p. 242)

Children who experienced learning difficulties and chronic ill health or were from culturally diverse backgrounds were more likely to be in the permanently placed group. Children in the unstable career group were differentiated across a number of attributes including: that their mothers were more likely to have experienced mental health issues; the children had been exposed to more kinds of abuse and the abuse was more sadistic in nature, and therefore more likely to experience greater emotional and behavioural difficulties when they entered care, and children with unstable careers had been involved in more attempts at reunifications, increased placement disruptions, more difficulties in attachments and social relationships and displays of sexual behaviour. The study reported that children in the unstable career group were "damaged young people" and that social workers felt pessimistic about their prospects in adulthood.

Outcomes for the three groups were compared. The authors measured outcomes in relation to peer relationships, emotional problems, conduct problems, overactivity/restlessness, self-esteem and attachment. It was found that the lives of the adopted children were more stable and suffered less disruptions, however only a quarter of the children were free from difficulties that impacted on their lives. The strongest predictors of difficulties were the extent of conduct issues and over activity at the time of the approval for adoption. Problems at placement were the strongest predictors of problems at follow up "but the adopted children showed better attachments than fostered children, even when attachment problems prior to placement were taken into account" (p. 266). There was significant disparity in the quality of relationships. Most of the adopted children (73%) described feeling close to their adoptive parents and 11% of children reported that they were able to confide in them. In contrast, 50% of the children who were in long-term foster care described as feeling close to their carers however none of them felt that they were able to confide in them about personal information. Foster carers believed that the children were not as closely attached to them because the carers had less parental responsibility and placements lacked a sense of security particularly in relation to the policy directive that when children turned 16 years of age it was

expected that they move into independent living. Lack of ongoing security and stability for children in long term foster care contribute to poor educational outcomes and unemployment.

Adoptive parents and foster carers identified a number of key factors that contributed to the stability of placements. These included: the child's wish for the placement to succeed; positive relationship between the child and the carer's birth children; accurate assessment of the child's abilities and developmental needs enhanced carer's understanding and engagement with the child; child's conduct problems and difficult behaviours were seen to place the most stress on placements particularly in situations where there was no progress and, quality support and understanding from social workers also seen to be crucial to placement stability.

A study by Biehal, et al (2010) was also conducted in the United Kingdom. There were some similarities with Selwyn, et al's (2006) study however the mixed method design was more extensive and inclusive of children's voices. The study had five components: interviews were conducted with staff and carers; administrative data was examined on 374 children; a postal survey was conducted with carers and social workers of 196 children (the survey sample); analysis of historical data of sub-sample of 90 children, and interviews with 37 children and their carers.

As with Selwyn, et al's (2006) pathway careers were identified for two sample groups. 374 children, who made up a census sample, were tracked seven years after they entered the first foster placement – 45% had left the care system either through adoption (36%), reunification (5%) or residence orders (5%) and 32% were still in their index long-term foster placement. Of the 374 children, 23% had left their initial foster placement and experienced unstable care careers. Four groups of children were identified: children adopted by strangers; children adopted by foster carers; "stable foster care" were children who continued to reside in their index foster care placement, and "unstable care" group who had left their index foster placement and experienced placement stability.

The data provided by carers and social workers for the sample of 196 children was more in-depth particularly in relation to their characteristics and care histories. Care pathways resembled the pattern for the larger sample group: 39% were adopted (57% adopted by strangers and 40% by carers); 32% remained in stable long-term foster care and 19% experienced placement instability. Children who were adopted by strangers were much younger (mean age 1.5 years) than children who were adopted by carers (mean age 3.1yrs) and unstable care group (5.3 yrs). The study found certain characteristics that were predictive of an adoptive placements. Children were more likely to be adopted if they entered care at a younger age and were less likely to have ongoing contact with their biological families. Biehal, et al, (2010) also identified that service system factors promoted adoptive placements. Decisions about adoption are also influenced by local policies, resources and practice cultures within social work teams.

Most of the children in the sample experienced emotional and behavioural difficulties and there were no significant differences between children who were adopted and children who were in long-term foster care which is consistent with the findings of Selwyn, et al (2006). Over time there was little change in the scores relating to emotional and behavioural difficulties and may largely be attributed to adversity experienced by the children prior to their placement which is also consistent with finding from the study by Selwyn, et al (2006). The authors articulate "this is a disturbing

finding, as it suggests that even high-quality parenting may not lead to significant improvements in emotional and behavioural difficulties” (pp. 259-260). There was also little difference in educational outcomes for children who were adopted and children who were in long-term foster placements although children in long-term foster placements were more likely to have behavioural challenges at school and more likely to truant. The strongest predictor of educational outcomes was having high scores for emotional and behavioural difficulties rather than type of placement. Children who experienced unstable care careers were, unsurprisingly doing significantly worse on measures of emotional and behavioural outcomes and educational outcomes.

A unique characteristic of the study conducted by Biehal, et al (2010) was that 29 children were interviewed with their adoptive parents or foster carers. Although a small sample, the information provides some much needed insight and voice from children who have been adopted or placed in long-term foster care however the children who participated were self-selected. All the children had been in their placement for more than six years and the authors focused on their sense of belonging. Most of the children felt that they identified with their carers and felt emotionally secure in their placements however their birth families were always psychologically present. While most of the children had no direct contact with their birth parents, they felt a sense of curiosity about them.

Within the small sample, the authors identified three distinct groups. For those children who were adopted or in long-term foster care since a very young age felt a strong sense of belonging with their carers. There was a group of children who lived in foster care but had contact with their birth parents. “These children appeared able to reconcile the fact that they, in different senses, belonged to both a birth family and a substitute family” (p. 262) and were able to manage both attachments. For the third group, the children were in stable foster care however experienced feelings of ambivalence, hurt and anger towards their birth families. They had intermittent contact with their birth families however this did not interfere with a strong sense of belonging and loyalty towards their foster families, although their loyalty not always apparent to their foster carers. Most of the children hoped that they would remain with their adoptive or foster carers in the long term however some were uncertain as to what would happen to them in the future.

Factors that contributed to long term placement stability were identified. The risk of placement stability is higher in foster care than in adoptive placements. As identified by Selwyn, et al (2006), children who were adopted at a younger age experienced more stable placements because they had reduced exposure to adversity. There is strong correlation between the age at entry into placement and the severity of emotional and behaviour difficulties and the risk of disruption. There is some suggestion that the younger age at time of placement may contribute to greater stability. There is also some suggestion that the severity of children’s emotional and behaviour difficulties also contribute to placement stability. Behavioural and emotional difficulties exhibited by some children may contribute to rejection by carers which may be counteracted by increased level of resources being targeted to placements under pressure.

A concluding comment by the authors:

Clearly, there is a fine line to tread between offering high-quality support to keep children in their families and not exposing them to serious adversity for periods so lengthy as to substantially increase the risk of serious emotional or physical harm which clearly has long-

term consequences for them. This study has shown, however, that even if permanent adoptive or foster homes were found in which children experience loving and stable care many children...are likely to need substantial support if they are to have a chance of realising their full potential. This is what children and their substitute families want. It should also be what local authorities endeavour to provide. (Biehal, et al, 2010, p. 272)

SWEDEN

A Swedish cohort study conducted by Vinnerljung and Hjern (2011) compared outcomes in relation to education and welfare dependency among children who resided in adoption and long-term foster care. The study was quantitative in nature and utilised existing data collected by Swedish authorities where each individual is allocated a ten digit pin. The sample group (n=3951) consisted of all Swedish born children who were born between 1972-1981 and who entered out of home care before the age of seven and were followed up to the age of 24-35 years. A minority of the sample group were adopted before the age of 7 (n=899) and the other children grew up in long-term foster care (n=3062). The authors compared results to a population group born between 1972-1981 (n=900418) who were not adopted nor were in any out of home care. The mean age of children when adopted were six months of age whereas children placed in long term foster care were on average twenty-nine months. Children who were placed in long term foster care were more likely to have experienced adversity due to (70%) mothers who misused substances or suffered from psychiatric illness compared to 36% of children who were in adoptive placements.

Outcome measure collected in relation to educational performance (primary school, college degrees) and welfare dependency. Global scores from conscription were collected as military conscription is mandatory for Swedish residents. The study did not have access to information in relation to behavioural or emotional problems at time of placement. The authors argue that this measure would not have been predictive of outcomes considering that most of the children were in their placement prior to the age of three. This is in contrast to the studies by Selwyn, et al (2006) and Biehal, et al (2010) who argue that emotional and behaviour difficulties may be predictive of placement stability and outcomes for children.

Indication of negative outcomes were more prevalent in the long term foster care group whereas outcomes for adopted persons were found to be in between the persons who were in long term foster care and the larger population group. The authors found that adopted persons had more favourable educational outcomes, cognitive test scores for boys at military conscription and less reliance on public welfare at age twenty five compared to people who had lived in long term foster care. Foster children did not perform to their cognitive potential compared to adopted persons which may be suggestive that they did not receive the necessary educational support. From a life course perspective, differences between the groups increased particularly in relation to educational achievements at age 25. The trend of negative educational outcomes for children whilst in foster care continue and are further enhanced after they leave care. In addition, "prevalence of and risks for welfare dependency were substantially higher among long foster care alumni than among adopted peers"(Vinnerljung & Hjern, 2010, p. 2008).

ALTERNATIVES TO ADOPTION

Many jurisdictions use third party orders as an alternative to adoption (AIHW, 2014). In the UK there has been an increasing utilisation of Special Guardianship orders as a way of providing stability, security and permanence for children in long term foster care. The Care Inquiry (2013) identified that during 2010 to 2012 the use of special guardianship orders had almost doubled. According to research conducted by Wade, et al (2010) it was found that special guardianship orders were mostly used by relatives, grandparents in particular. They argued that the order was seldom used by non-kin foster carers because of the concern that shifting to special guardianship order would result in a loss of financial and social work support. Tregeagle and Voigt (2014) critique the use of third party orders as an alternative to adoption. They purport that third-party orders fall short of adoption in granting children permanency, normality and a sense of belonging for several reasons. Firstly, third party orders fail to provide legal security and can be challenged by birth parents at any time. Secondly, when young people reach the age of eighteen their position is ambiguous because legally they become adults however they may continue to require financial and emotional support. In many jurisdictions, funding is terminated by State authorities and young people become homeless. Thirdly, third party orders attract stigma more so than adoption.

Wade, et al (2010) examined the implementation of Special Guardianship Orders in eight authorities in the United Kingdom. They argue that, like adoption, special guardianship is a powerful legal order; "It invests in carers a high degree of parental responsibility, restricts that available to birth parents, lasts until the child is 18, and cannot be challenged without leave of the court. It therefore carries more power than that awarded to local authorities through care orders" (p. 199). The study found that there was a substantial amount of willingness towards the implementation of special guardianship orders amongst social work professionals and carers. It was felt that the characteristics and strengths of the special guardianship order, it could provide children and families with permanency. Carers also welcomed the special guardianship although there was some anxiety particularly in relation to the availability of financial support and services.

CONCLUSIONS

It is difficult to account for differences in policy and indeed in family and welfare culture across the countries examined. Both the US and the UK have much higher rates of adoption from care, especially with grandparents and other family members. They also show higher rates of adoption of infants determined to be at risk e.g. the younger siblings of children already in care born to parents who show no improvement in their capacity to safely and effectively parent. This is likely to reflect long term differences in the ways that the child protection systems have developed in these countries, with processes that favour early removal and rapid placement in permanent care. The US system also encapsulates private adoption agencies, canvassing certain women to release their child for adoption (before birth) in order to avoid child protection proceedings. This would not be countenanced in Australia where consent to adoption before birth is considered a part of past practices in which women felt compelled to consent to the adoption of their child. Furthermore, the open adoption approach in Australia would not concede to severed contact (even information) from the child's family.

Taking all this and other factors into account, the studies suggest, unsurprisingly, that children fare better when they do not have prolonged exposure to highly inadequate parenting, poor living conditions, sustained neglect and abuse. They also fare better when their living arrangements are safe, stable and maintained over their childhood. Whether or not adoption adds that bit more that really helps a child settle and belong is not entirely clear. Early action is important; especially to reduce the impact of poor attachment, and cumulative harms and trauma along with birth related developmental issues.

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APPENDIX #6: THE DISCUSSION PAPER

Discussion Paper: *Review of the South Adoption Act 1988*, Department for Education and Child Development, Adelaide South Australia, January 2015.

This discussion paper provides the terms of reference for the review and was published on the South Australian Government Website *YourSay*.

Review of the South Australian
*Adoption Act 1988 and Adoption
Regulations 2004*



**Government
of South Australia**

Department for Education
and Child Development

From the Minister



I am very pleased to invite comment on the review of the *Adoption Act 1988* and the *Adoption Regulations 2004*.

I trust that this discussion paper will assist people who wish to make comment as they consider how the legislation works in relation to the best interests of children and those who are affected by it.

I am mindful that the key principle that must underpin this Review is the one that is enshrined in section 7(a) of the Adoption Act, which states:

In all proceedings under this Act, the welfare of the child to whom the proceedings relate must be regarded as the paramount consideration.

The main focus of adoption practice is to find a family for a child who does not have the benefits and protection of the family into which they were born. While the needs and wishes of those seeking to adopt children are also important and must be taken into account in developing adoption legislation, policies and practices, the best interests of and the long-term consequences for children placed by the State must be the main consideration.

I am particularly pleased that Associate Professor Lorna Hallahan of Flinders University will lead this review. Associate Professor Hallahan has a Doctorate in Social Work and has worked in a range of settings, including disability advocacy and the management of a loss and grief service. She is a well known and a significant contributor to the development and analysis of disability policy. She is currently conducting research through the National Institute of Labour Studies at Flinders University and she presents regularly on issues related to ethical issues for workers in complex human services. Associate Professor Hallahan will bring her strong value base about social justice and children's rights to her consideration of how best the adoption legislation can serve the people of South Australia.

I particularly asked Associate Professor Hallahan to consider the following specific issues:

- Adoption information vetoes
- Adoption of a person over the age of 18 years
- Retention of the child's birth name
- Same-sex couples and adoption
- Single person adoption
- Discharge of adoption orders in certain circumstances.

On 18 July 2012, the South Australian Government was the first Australian jurisdiction to issue a Parliamentary apology following the tabling five months earlier of the report of the Senate Inquiry into Commonwealth Contribution to Former Forced Adoption Policies and Practices.

In delivering the South Australian apology, the Premier, the Hon Jay Weatherill, noted the significance of the report of the Senate Inquiry in describing the profound impact of past adoption practices on the thousands of people affected. It is important that this review of the Adoption Act takes into account the recommendations of the Senate Inquiry, in particular the recommendations touching on access to past adoption information.

Significant reforms are occurring within our child protection system as the Department for Education and Child Development progresses new approaches and partnerships directed at keeping South Australia's children safe. Some of the children who enter the care of the department can never be safely returned to their families. Therefore, consideration must be given to permanent arrangements for their care.

This review will consider the relationship between the Adoption Act and the *Children's Protection Act 1993* in relation to the arrangements available for such children, keeping in mind the importance of children's ongoing connections with their own families.

Inter-country adoption is currently being considered by the Council of Australian Governments (COAG). It will be important that this review takes into account any changes announced by the Australian Government and how these changes may affect the South Australian legal arrangements for inter-country adoption.

This discussion paper provides the terms of reference for the review, details about the broader context in which the Adoption Act and Regulations sit, and some key ideas that may assist in the preparation of a submission or comment.

I encourage all those interested in this review to engage in the consultation process. I invite you to have your say so that all views and perspectives may be taken into account. I look forward to the tabling of the report.

Hon Jennifer Rankine MP
Minister for Education and Child Development

How to make a submission and closing date

You may provide comment or make a submission to this Review of the South Australian Adoption Act in written or verbal form.

You may lodge your written comment on YourSAY (provide link) or provide a submission by forwarding it to the following address:

Associate Professor Lorna Hallahan
C/- Adoption Act Review Secretariat
The Department for Education and Child Development
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Or you may email it to the Secretariat at: DECDFamiliesAdoptionReview@sa.gov.au

The **closing date** for lodging a comment or submission to the review is 30 March 2015.

The *Adoption Act 1988* and the Adoption Regulations 2004 are available on the South Australian Legislation website at <http://www.legislation.sa.gov.au/index.aspx> or you can request copies by phoning 8226 6840.

Changes to South Australian adoption law since 1989

The *Adoption Act 1988* came into force in South Australia in August 1989 – a landmark piece of legislation in that it introduced ‘open adoption’ provisions for the first time. This meant that parties to a past adoption could gain access to the adoption files – with some conditions and restrictions – so that the identities of the parties were no longer secret, as had been the case under the previous Act.

The change in law also meant that parties to future adoptions could not restrict the release of information about themselves once the child turned 18 years of age, thus rendering adoptions completed after the proclaiming of the Act ‘open adoptions’.

Another significant reform was that the definition of marriage in the Act was changed to include defacto relationships, thus enabling established couples who were not legally married the right to apply to adopt a child.

Of particular import was the introduction of a definition of Aboriginality and the inclusion of the Aboriginal Child Placement Principle. In introducing these provisions, the Act recognised the importance of Aboriginal children growing up in their own communities with an awareness of their identity and culture.

After five years of operation, the Act was reviewed in 1994 and as a result, amendments were enacted in 1997. The changes mostly covered provisions relating to past adoption matters, but also including the abolition of the provision for the adoption of people over the age of 18 years.

Other changes ensured compliance with The Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, and the removal of the provision for the Adoption Panel, replacing it with a new clause, providing for a greater flexibility in the way in community consultation.

While this last provision has underpinned the regular community and intergovernmental consultations carried out through the Department for Education and Child Development, there have been no further reviews of the Act and no other substantial changes since 1997. Minor technical changes were enacted in 2006 (definition of guardian) and 2010 (insertion of ‘Chief Executive’ into the interpretations section) and an amendment was made in 2013 to the media provisions in section 31.

The Adoption Regulations were altered in 2004, with some changes to the provisions governing the placement of a child with prospective adoptive parents. Since then, a small number of amendments have been made, most notably the removal in 2005 of the age criteria to adopt a child, and changes to residency requirements for prospective adoptive parents. Other technical changes related to the conditions under which the Chief Executive may place a child for adoption with prospective adoptive parents.

This legislation has operated in a dramatically changing South Australian context. Changes include the decrease in the numbers of South Australian children needing adoptive families, increased international scrutiny of inter-country adoption, and most particularly changes in society's attitudes to adoption, especially about how past adoption practices continue to impact on people's lives.

Terms of reference

This review will inquire into the need and or desirability for changes to the South Australian *Adoption Act 1988* and the *Adoption Regulations 2004* and then provide a report to the Minister. In doing so the review will ensure that the rights and best interests of the child remain paramount.

The review should consider the impact in South Australia of the broad changes in the field of adoption in the years since the last review of the Act (1994).

The review should include:

- consideration of the current COAG agenda for the reform of Australia's inter-country adoption program
- recent inquiries, current research, activities and attitudes in Australia in relation to past adoption practices
- the interface between adoption and children in the child protection system requiring permanent care
- any other relevant matters, including concerns the Department for Education and Child Development has in the administration of the Act and Regulations.

The review should also take into account any significant and relevant local, national or international documents or instruments, such as the draft Australian National Principles in Adoption and The Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption.

The views of the South Australian community should be taken into account and societal and technological developments, such as social media and the Internet should also be considered.

Specific issues that the review should explore are:

- adoption information vetoes
- adoption of a person over the age of 18 years
- retention of the child's birth name
- same-sex couples adoption
- single person adoption
- discharge of adoption orders in certain circumstances.

Adoption information vetoes

This part of the *Adoption Act 1988* only affects adoptions that were completed in South Australia before 17 August 1989, which was the date that the current Act came into force.

Part 2A of the Act provides for access to and restriction of adoption information from adoption files held by the Department for Education and Child Development.

In that part of the Act, section 27B provides for adoption information vetoes and sets out who can place a veto, for how long and how the department must manage the veto system.

The Senate Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices (2012) recommended that all adult parties to an adoption should be permitted identifying information, and that all parties should have an ability to regulate contact from another party, with an upper limit on how long restrictions on contact can be in place without renewal.

Any amendments to the provisions to this section of the Act would need to take into consideration the fact that some people express distress at having to continually renew their adoption information veto (preferring that the legislation enabled them to apply lifetime vetoes), while others want the veto system to be abolished.

In addition, consideration should be given to whether or not adoption contact vetoes should be introduced and if so, with what conditions.

Adoption information vetoes

Relevant law

27B—Limitation of right to obtain information where adoption occurred before commencement of Act

- (1) *A person adopted before the commencement of this Act may lodge with the Chief Executive a direction that information in the Chief Executive's possession that would enable the person to be traced not be disclosed.*
- (2) *A birth parent of a person adopted prior to the commencement of this Act may lodge with the Chief Executive a direction that information in the Chief Executive's possession that would enable the birth parent to be traced not be disclosed.*
- (3) *An adoptive parent of a person adopted prior to the commencement of this Act may lodge with the Chief Executive a direction that information in the Chief Executive's possession that would enable the adoptive parent to be traced not be disclosed.*
- (4) *Subject to subsection (5), where a direction has been lodged under this section, the Chief Executive must not disclose information in contravention of the direction.*
- (5) *Where—*
 - (a) *a direction has been lodged by an adoptive parent; but*
 - (b) *a direction has not been lodged by the adopted person,*

the adoptive parent's direction does not operate to prevent the disclosure of information that is relevant to the welfare or whereabouts of the adopted person.

- (6) *A person lodging a direction under this section may provide the Chief Executive with written reasons for the direction and, if so provided, the reasons must be released by the Chief Executive if a request for information about the person is subsequently made under this Part.*
- (7) *A direction under this section—*
- (a) may, if the adopted person or adoptive or birth parent is mentally incapacitated within the meaning of the Guardianship and Administration Act 1993, be given on behalf of that person or parent by his or her guardian appointed under that Act; and*
 - (b) has effect for a period of five years, unless revoked earlier; and*
 - (c) may, on the expiration of a period for which it has effect, be renewed; and*
 - (d) must be lodged, renewed or revoked in a manner approved by the Chief Executive (but the Chief Executive cannot require that a renewal be lodged in person).*
- (8) *The Chief Executive will, if necessary, send a person who has lodged a direction under this section a renewal notice approximately 6 months, 3 months and 2 weeks before the date on which the direction will expire, unless the person has requested in writing that no such notices be sent.*
- (9) *Subject to any written directions of the person to the contrary, a renewal notice will be sent to a person at his or her address last known to the Chief Executive.*

27C—Interviews

The Chief Executive may, before providing information to a person or accepting a direction from a person under this Part, invite the person to participate in an interview with a person authorised by the Chief Executive.

27D—Minister's power to authorise disclosure

Despite anything contained in this Part, the Minister may authorise disclosure of any information if the disclosure is necessary in the interests of the welfare of an adopted person.

Background information

An adoption information veto is a restriction placed by one of the parties to an adoption prohibiting the release of identifying information about that person, if the other parties to the adoption apply for that information.

This means, for example, that if an adopted person places a veto and the birth parent applies to obtain information from the relevant adoption file, then even though information will be released about the circumstances of the adoption, the government cannot release the adopted person's name or anything to identify them.

The adoption information veto provisions only apply to adoptions completed prior to the date the current Act came into force (17 August 1989). Adopted persons, their birth parents and their adoptive parents may place a veto. However, the veto of an adoptive parent cannot prevent the release of the identity of their adoptive child to the birth parent.

The South Australian veto system also allows for a message to be left by the veto placer to explain the reasons for the veto being in place. This message must be released to the other party if they apply for adoption information.

A veto is in effect for five years, although the person may revoke it before then. It may be renewed every five years if the person wishes to do so. Section 27B requires the Department for Education and Child Development to remind the person when the veto is about to expire. Fewer and fewer people renew their vetoes every five years.

While some people are distressed at having to continually renew their veto, preferring that the legislation enabled them to have lifetime vetoes, others want the veto system to be abolished.

Therefore, vetoes are a delicate matter, since one party placing a veto (and therefore exercising their right to privacy) prohibits another party from exercising their right to obtain information about themselves (for adopted people), their relinquished children (for birth parents) and their adopted children (for adoptive parents).

In most other Australian States and Territories, a contact veto system exists. This means that parties to an adoption cannot prevent the release of identifying information to the other parties if they apply for it, but they can prevent the other parties from contacting them. For example, a birth parent cannot prevent their relinquished child from finding out their identity, but they can prevent contact from them.

The Senate Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices (2012) examined all the veto systems in Australia and heard many submissions on the effects on peoples' lives of the various types of vetoes in existence. The inquiry's report recommended that new principles should govern post-adoption information and contact for pre-reform era adoptions (meaning in South Australia those adoptions completed prior to 1989), and that these principles include that:

- all adult parties to an adoption be permitted identifying information
- all parties have an ability to regulate contact, but that there be an upper limit on how long restrictions on contact can be in place without renewal.

Aside from the Northern Territory, which at 30 June 2014 had two vetoes in place, South Australia is the only state that has an adoption information veto system. At 30 June 2014, 391 vetoes were in place in South Australia.

The veto system does not apply to adoptions completed since August 1989. In current practice in the locally born child adoption program in South Australia, the parties to the adoption usually have contact from the time of the placement of the child in their adoptive family. This may be of varying levels of openness and generally cancels out the element of 'secrecy' that was a prominent feature of local adoptions in the past. It was this change in practice and attitude that brought about the introduction of the veto system.

In adoption today, children and their adoptive and birth families have greater access to information than before; they can receive information directly from one another, and contact arrangements are often in place to the child's 18th birthday and beyond.

Adoption of a person over the age of 18 years

The *Adoption Act 1988* currently has no provisions for the adoption of a person over the age of 18 years.

Prior to the 1997 amendments to the Act, it was possible for a person between the age of 18 and 21 years to be adopted, but this was repealed after a review of the Act.

Some adults have been raised from infancy or early childhood by people not related to them, such as foster parents or a step parent, and those relationships are equivalent to that of parent and child.

Most other Australian states and territories have provisions in their adoption legislation for the adoption of a person over the age of 18 years, in certain circumstances.

If South Australia were to have legislation to enable the adoption of people over the age of 18 years, it may be necessary to amend the Act to include a section called 'Who may be adopted', as found in some other Australian adoption acts.

Adoption of a person over the age of 18 years

Relevant law

The purpose of the Adoption Act 1988 is "An Act to provide for the adoption of children; and for other purposes."

4—Interpretation

(1) In this Act, unless the contrary intention appears—

child means a person who has not attained the age of 18 years.

There are no provisions in the Act that relate to the adoption of a person over the age of 18 years.

Background information

Amendments to the South Australian Adoption Act were made in 1997 after a review of the legislation that reported in 1994. The Review Committee affirmed the principle that "adoption is primarily a process of securing families for children who need a permanent and legal family"¹.

The committee considered that a number of other alternatives were available for adults who wished to be legally adopted, and it was recommended that the provision for a person to be adopted over the age of 18 years be repealed. Parliament agreed and the existing section 13, which enabled the adoption of people between the ages of 18 and 21 years, was removed from the Act (there was no provision for adoption for people older than 21 years).

¹ *Review Committee on the Adoption Act – Report and Recommendations*, Adelaide, September 1995, page 24

Most Australian states and territories have provisions in their legislation for the adoption of a person over the age of 18 years. In all cases, the intent of the legislation appears to be that the applicants for the adoption order should be people who have had a longstanding parent-child type relationship with the person to be adopted.

In South Australia, the former section 13 that was repealed in 1997 did not provide for the consent of the parents of the person to be adopted. In practice this meant that some parents did not even know that their son or daughter had been adopted and that their relationship with their child had been legally severed.

The Department for Education and Child Development receives occasional enquiries from people seeking an adoption of an adult where that person has been in the particular family's care for most of their lives (usually foster care or step parent arrangements). Some of these family situations may well have been seen by the Adoptions Court to warrant the granting of an adoption order, had the Act provided for adult adoption.

Retention of the child's birth name

Although section 23 of the *Adoption Act 1988* provides for the adoptive name of a child being declared at the time of their adoption, there are no provisions in the Act for retaining the child's original name as part of their adoptive name.

Some other Australian jurisdictions have provisions that incorporate principles found in various documents related to child welfare, including Article 8.1 of the United Nations Convention on the Rights of the Child. This Article declares that "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

Many adoptive parents want to keep the name their adoptive child was given by their birth family or by their guardians overseas. Sometimes, retaining a child's original name can cause a difficulty, especially if a child already in the adoptive family has the same name, or if the name may cause problems to the child due to cultural or language differences.

If South Australia were to have provisions that required adoptive families to retain their adoptive child's original name or names, section 23 of the Act will need to have an extra provision inserted.

Retention of the child's birth name

Relevant law

23—Name of child

- (1) Where the Court makes an order for the adoption of a child it may by the same or a subsequent order declare the name by which the child is to be known.*
- (2) Before making an order changing the name of a child, the Court should take into account any wishes expressed by the child on the subject.*
- (3) The Court will not change the name of a child who is over the age of 12 years unless—*
 - (a) the child consents to the change; or*
 - (b) the child is intellectually incapable of consenting.*
- (4) An order under this section does not prevent a subsequent change of name in accordance with the law of the State.*

Background information

At the time of the making of an adoption order in the Youth Court of South Australia, the child's legal (adoptive) name is also declared. This usually means that the child's original name is changed; the child is often given a different first name from the one given by his or her birth parents, and in almost all cases, the child's family name is changed to that of the adoptive parents.

Section 23(3) of the Act provides for this to happen. It also provides that before a child's name is legally changed through the making of an adoption order, the Court should take into account any wishes expressed by the child on the subject.

Some other Australian adoption legislation has specifically intended that effort must be made to retain the adopted child's original first name. For example, the Western Australian legislation includes the principle that "the adoptee's first name before the making of an adoption order should be included in the name by which the adoptee is to be known."²

Section 215 of the Queensland Act states that the court must not make an order that changes the child's existing given name unless satisfied it would harm the child's wellbeing or best interests to keep the existing given name.³

The New South Wales Adoption Act in section 8 sets out the principles that are to be applied by persons making decisions about the adoption of a child. In relation to the Court changing a child's original name, section 8 states:

The child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved.

This principle is repeated in the section of the Act that provides for the naming of an adopted child at the time of the making of the adoption order. Subsection 5 of this provision states that the Court "must not approve a change in the given name or names of a child who is more than one year old, or a non-citizen child, unless the Court is satisfied that the name change is in the best interests of the child."⁴

The Adoption Act for the Australian Capital Territory requires (in section 45(4)) that before the Court considers an application by the intending adoptive parents to change a child's or young person's given name, the director-general (equivalent of the Chief Executive of the Department for Education and Child Development) must provide the court with a written report about:

- (a) the proposed name change; and*
- (b) any exceptional circumstances; and*
- (c) the best interests of the child or young person.*

This section of the Act (45(5)) goes on to state:

- (5) In considering an application to change the given name of the adopted child or young person, the court—*
 - (a) must consider the report provided under subsection (4); and*
 - (b) must retain the child's or young person's given name unless there are exceptional circumstances for changing the name; and*

² Western Australia, *Adoption Act 1994*, section 7(2)(aa)

³ Queensland *Adoption Act 2009*, section 215(5)

⁴ New South Wales *Adoption Act 2000*, section 101(5)

(c) may give the child or young person additional given names.

The South Australian Adoption Act does not take into account the principles expressed in the various interstate Acts that concern themselves with preserving the child's original name in order to help the child retain links with their birth family, culture, identity, language and religion.

Same-sex couples and adoption

The interpretations section of the *Adoption Act 1988* defines the terms used in the legislation. This includes “marriage relationship” as meaning “the relationship between two persons cohabiting as “husband and wife or de facto husband and wife”. South Australian law interprets this to mean the relationship between a man and a woman.

Section 12 of the Act sets out the criteria affecting prospective adoptive parents as to who may be granted an adoption order for a child. This section refers to “marriage relationship” as the key criteria for the granting of an adoption order to two persons.

The effect of these two sections of the Act is that same-sex couples are unable in any circumstances to apply to adopt a child in South Australia.

In some other Australian jurisdictions, same-sex couples are able to apply to adopt a child. This relates to circumstances in which couples may apply to adopt a child who is unrelated to them, or in which a person adopts their same-sex partner’s child.

Whether or not same sex couples may adopt a child from overseas is dependent on both the adoption application criteria in the couple’s home state or territory legislation as well as whether or not overseas countries that have adoption programs with Australia allow same-sex adoption. Australia has no control over the adoption application criteria of overseas countries.

In order for same-sex couples to be able to adopt a child in South Australia, the definition of “marriage relationship” would need to be changed.

Same-sex couples and adoption

Relevant law

4—Interpretation

(1) In this Act, unless the contrary intention appears—

marriage relationship means the relationship between two persons cohabiting as husband and wife or de facto husband and wife.

12—Criteria affecting prospective adoptive parents

(1) Subject to this section, an adoption order will not be made except in favour of two persons who have been cohabiting together in a marriage relationship for a continuous period of at least five years.

(2) An adoption order may be made in favour of two persons who have been cohabiting together in a marriage relationship for a continuous period of less than five years if the Court is satisfied that there are special circumstances justifying the making of the order.

(3) An adoption order may be made in favour of one person where—

- (a) that person has cohabited with a birth or adoptive parent of the child in a marriage relationship for a continuous period of at least five years; or*
- (b) the Court is satisfied that there are special circumstances justifying the making of the order.*

- (4) Where two persons are cohabiting in a marriage relationship, an adoption order will not be made except in favour of both or in the circumstances described in subsection (3)(a).*
- (5) An adoption order will not be made in favour of a person who is lawfully married but not cohabiting with his or her spouse unless the Court is satisfied, after interviewing the spouse of the person in private, that the spouse consents to the adoption.*

Background information

The previous Review of the Adoption Act (1994) examined whether or not the definition of “marriage relationship” should be expanded to include same-sex couples. In its report, the Review Committee stated that “the committee questioned the readiness of the community to accept alternative relationships and families. The committee considered that if the best interests of the child are paramount, it is not appropriate for adoption legislation to be pioneering but rather to embody the principle of placing the child in a socially acceptable family situation.”

The committee went on to say that “any consideration to changing the definition of ‘marriage relationship’ needs to be mindful of overseas requirements so as to avoid situations where people are approved under South Australian legislation but ineligible elsewhere.”⁵

It is clear that in the intervening 20 years, attitudes have significantly shifted in relation to the status of same-sex couples in our society. This is reflected in the changes to a number of Adoption Acts in the other Australian states and territories. Same-sex couples can apply to adopt a child in Western Australia, Tasmania, the Australian Capital Territory and New South Wales. Same-sex couples cannot apply in Queensland or the Northern Territory.

The South Australian Parliament’s Social Development Committee’s report on its inquiry into same-sex parenting was tabled in Parliament on 17 May 2011.

Recommendation 4 of the report deals with adoption and it recommends that the Minister for Families and Communities (now Education and Child Development) introduce legislation to amend the Adoption Act to extend the eligibility for adoption to same-sex couples and to ensure that same-sex couples are subject to the same stringent eligibility criteria that apply to opposite sex couples. This recommendation was not acted on by the Government.

Few locally born children are relinquished for adoption in South Australia each year; in 2013-14 only one locally born child was adopted. In each case of a local adoption, the birth parents are able to state their preferences as to which family on the department’s prospective adoptive parents’ register may adopt their child, based on the child’s needs and background.

⁵ *Review Committee on the Adoption Act – Report and Recommendations*, Adelaide, September 1995, page 6

With such small numbers of adoptions, there has not been a need for an increase in prospective adoptive families with whom to place children for many decades and prospective adoptive families currently wait several years for the placement of a child.

Many children in South Australia live in families where the parents are a same-sex couple. These are often situations where one of the parents is the birth (and legal) parent of the child and the other is the partner of the parent. Many partners seek to have full parental rights as a mother or father and only an adoption order can provide this legal status.

The 2011 Census counted 6 300 children living in same-sex couple families in Australia, up from 3 400 in 2001. This number is made up of children who may have been born into a previous opposite-sex relationship of one of the partners, or conceived with the help of reproductive technology, adopted, or fostered in a same-sex relationship.⁶

The ability of a same sex couple to adopt a child from overseas would depend on two levels of eligibility criteria: in the first instance the couple would be required to meet the application criteria of the South Australian legislation; and in the second instance, they would have to meet the eligibility of the relevant overseas country.

Australia has inter-country adoption programs with several countries and only one, South Africa, will accept applications from same-sex couples. This is a new program and no children have yet been placed with Australian families. It is expected that once the program is fully operational, only a handful of children will be adopted each year by Australia families.⁷

⁶ Australian Bureau of Census and Statistics website, *4102.0 - Australian Social Trends*, July 2013:
<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013#endnote3>

⁷ Only approximately 200 South African children are adopted internationally per year

Single persons and adoption

Single men and women can apply to adopt a child in South Australia. However, the Adoption Regulations 2004 restrict the placement of children with single persons to “special circumstances” and the Act specifies that a single person will only be granted an adoption order if there are special circumstances justifying the making of the order.

“Special circumstances” relates to the needs and background of the child to be adopted, which almost always can be met by the couples who are on the register of prospective adoptive parents. “Special circumstances” does not necessarily relate to children with special health or developmental needs, but can relate to the child’s cultural background, language of origin, or family background.

Single people may apply to adopt a child born overseas. While Australia has adoption programs with several overseas countries, only a few will accept applications from single persons, and some of those will not accept applications from single men. Very often these applications will be in relation to children with special needs.⁸

In order for single men and women to be treated equally with couples in the adoption of a child, both the Act and Regulations would need to be amended to remove the “special circumstances” requirement.

Single persons and adoption

Adoption Act 1988

12—Criteria affecting prospective adoptive parents

(3) An adoption order may be made in favour of one person where—

- (a) that person has cohabited with a birth or adoptive parent of the child in a marriage relationship for a continuous period of at least five years; or
- (b) the Court is satisfied that there are special circumstances justifying the making of the order.

Adoption Regulations 2004

19—Order in which registered persons selected to be applicants for adoption orders

(3) A person who—

- (a) is not resident and domiciled in this State; or
 - (c) is not cohabiting with another in a marriage relationship; or
 - (d) is cohabiting with another in a marriage relationship but has been so cohabiting for a continuous period of less than 3 years; or
 - (e) has a child residing with him or her and the child has so resided for a period less than the immediately preceding 12 months; or
 - (f) will or is likely to have any other child residing with him or her in the period of 2 years following selection as an applicant for an adoption order under this regulation,
- is excluded from selection as an applicant for an order for adoption of a particular child in accordance with the order prescribed by subregulation (1) unless the Chief Executive is satisfied that there are special circumstances that would justify the making of an adoption order in favour of the person.

⁸ See the website of the Australian Attorney-General at the page for “Country Programs”:
<http://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/CountryPrograms/Pages/default.aspx>

Background information

Single persons may only be granted an adoption order for a child if the Court is satisfied that there are special circumstances justifying the making of the order. The term “special circumstances” relates to the needs and circumstances of the child to be adopted and whether or not prospective adoptive parents are able to respond to those needs and the circumstances.

For example, an older child born overseas may be assessed as needing an adoptive family that has particular knowledge about the child’s country of birth and certain prospective adoptive parents may have lived in that country, speak the child’s language and have been assessed as having exceptional parenting skills. It could be that the best prospective adoptive family for this child is a single person.

An example in the locally born child program could be a situation where a child has special medical needs and the only prospective adoptive parent on the register is a single person who has specialised knowledge or skills in this area.

In most cases, birth parents who relinquish their children for adoption do so because they are unable to parent their child themselves. In general, practice has shown that these parents tend to seek to have their son or daughter placed in a two-parent family.

The same attitude also applies to the birth parents and guardians of children adopted from overseas; this is reflected in the application criteria of most overseas countries with which Australia has adoption programs, which often require that applicants are a married couple.⁹

Placing a child into an adoptive family where there is only one parent raises the issue of how that parent will manage without the support of a partner in the home, and how the child will manage with only one parent to relate to. This matter is not related to whether or not a single person has the right to be treated equally with a couple who seek to adopt, but rather, what is in the best interests of a child who needs an adoptive family.

Single people can apply to adopt a child in all the other Australian states and territories except Queensland. There would be variations in each jurisdiction depending on whether or not the regulations in the jurisdictions have an effect on the eligibility criteria for single people.

⁹ See the website of the Australian Attorney-General at the page for “Country Programs”:
<http://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/CountryPrograms/Pages/default.aspx>

Discharge of adoption orders in certain circumstances

The discharge of an adoption order is a very rare occurrence and there have been no instances of it under the current legislation.

The Adoption Act only provides for an adoption order to be discharged if the order was obtained by fraud, duress or other improper means. There are no other grounds by which an order may be discharged.

In recent times, the South Australian Government has been contacted by some people who were abused by their adoptive parents. They have argued that they should be able to undo their adoption and have all legal connections with their adoptive family removed. A few of these people have said that they believe that they cannot recover from the trauma the abuse has caused them unless a Court discharges the adoption order. It is understandable that these people would feel this way about their adoption.

Inquiries into past adoption practices in Australia have revealed that adoption practice frequently had scant regard for the rights of birth parents. Many birth parents feel that the adoption proceeded without their informed or considered consent. Some feel that their children were 'stolen' from them.

When an adoption order is granted to the adoptive parents in the Court, it means that the legal relationships put into place as a result are exactly the same as if the child was born into the family. Consideration needs to be given to what it might mean for the legal standing of adoption in general if some adopted people could have their adoptions undone, and also whether the law help those people who believe they have been wronged, by making special provisions in the Adoption Act to undo an adoption.

Discharge of adoption orders in certain circumstances

Relevant law

14—Discharge of adoption orders on ground of fraud

- (1) The Court may discharge an adoption order if it appears that the order was obtained by fraud, duress or other improper means.*
- (2) The Court may, on discharging an adoption order, make any consequential orders that may be necessary or desirable in the circumstances of the case.*

Background information

Adoption is a permanent arrangement for a child and this is the intention of the Court when an adoption order is granted. The order makes the legal arrangements in the adoptive family exactly the same as those for children who were born into the families that reared them.

The Adoption Act before 1988 did provide for the Court to discharge an adoption order on grounds similar to the current section 14, but also on the grounds “that there is some other exceptional reason why, subject to the welfare and interests of the child, the adoption order should be discharged”. When the old Act was repealed and replaced by the current Act, the “exceptional circumstances” ground was not included in the new legislation.

At the time the current Act was reviewed in 1994, section 14 was considered by the Review Committee, but only as written and the committee did not consider the matter of “exceptional circumstances” or consider broadening the section in any way.

However, part of the committee’s statement about the provisions for the discharge of an adoption order is of interest. In its report, the committee said:

“The committee believes that there should be no greater ability for adopted people to ‘divorce’ their adoptive parents than there is for children who lived with their birth parents to ‘divorce’ them.

There have been a small number of enquiries about the discharge of adoption orders and most appear to have come from people adopted by a step parent. The committee did not support the introduction of legislation that makes discharge of adoption orders possible on grounds other than those already stated in the Act.”

The committee did not consider the matter of discharge on the grounds of abuse or in relation to aiding healing of people who may have suffered injury in their adoptive family.

The other Australian states and territories, other than the Northern Territory, have provisions in place for the discharge of an adoption order on grounds other than fraud or duress. For example New South Wales provides for “some other exceptional reason why the adoption order should be discharged.”¹⁰

Over recent years, the Department for Education and Child Development has received several enquiries a year from people who ask about dissolving their adoption. The majority of these are from people who were adopted by their step father, with one or two being from people who were adopted as an infant. The department has rarely heard from birth parents who want to undo their child’s adoption and remake their legal relationship with their child.

The people adopted by their step father tend to be concerned about the negative family dynamics in the marriage of their mother to their step father (eg, domestic violence). They have alleged abuse by their step father, and they often wish to reinstate their legal relationship with their birth father. The enquiries from people adopted as infants tend to be from people who allege abuse and neglect by their adoptive parents.

Various circumstances can arise later in an adoption, which indicate that the adoption was unsafe in some way other than in relation to fraud, duress or other improper means. This may relate to domestic adoptions and inter-country adoptions. It is conceivable that some of these circumstances may not satisfy the requirements of section 14.

Therefore, the inclusion of grounds of “exceptional circumstances” could enable the Court to weigh the relevant evidence in these terms.

¹⁰ New South Wales *Adoption Act 2000*, section 93(4)

Given that the issue of forced past adoptions has now been recognised as significant in the lives of many Australians, it may be that some circumstances in relation to this era of adoption would fit into the category of “exceptional circumstances” rather than “fraud, duress or other improper means”.

In considering this difficult subject, it should be noted that grievances, no matter how genuine and how severe the relevant circumstances, occur in families whether or not they are adoptive families. Brutal child abuse in non-adoptive families is dealt with on a regular basis by the Youth Court. While the law provides for prosecution of such abuse, it does not provide for the children in these cases to legally sever their relationship with their parents, as observed by the Adoption Act Review Committee in 1994 (cited above).

Unless it can be demonstrated that the arrangements for the adoption were unsafe, then the discharge of an adoption order on the grounds of family dysfunction, however severe, could be seen to undermine the purpose of adoption, which is to form a family like any other, for the best interests of a child who cannot remain in their original family. The intent of the law is to equate, in legal terms, adoptive families with families into which the children are born. Otherwise there could be two ‘categories’ of legal families and this would appear to be an equity issue.

Other concerns are summarised below:

- If the adoption order was discharged, what might be the status of the adopted person’s legal parentage and how would the Court address this?
- If the adopted person is legally severed from their adoptive parents, who would then become their parents?
- How would the birth parents be involved in this? What would be the remedy if the birth parent was opposed to becoming again the legal parent of their child?
- What if the birth parents were deceased? How might the discharge of an order affect inheritance rights of the adopted person?
- If an inter-country adoption is undone, how does the adopted person’s citizenship and residency stand as a result? Who would become the child’s parent? Does the child resume citizenship of the overseas country?

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