ADOPTION LAW AND PRACTICE IN AUSTRALIA

Safeguarding Children from Exploitation

Adoption remains a controversial practice. Those who favour adoption see it as a humanitarian act, both towards the individual children and, in the case of intercountry adoption, their country of origin. Those who oppose it see it as a form of exploitation, in particular, where Australians unable to adopt locally seek to satisfy their own needs by adopting a child from a developing country.

In Australia, the last quarter of the 20th century witnessed both a significant decline in the adoption of locally born children and an increase in the adoption of children born outside Australia. This period also coincided with Australia embracing adoption law reform including the becoming a signatory to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption of 1993.

While the number of adoptions by Australians is now in decline once more, Australian law remains committed to safeguarding the welfare of all adopted children.

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I. Introduction

1 Adoption, both intra-country and intercountry, remains controversial. The low numbers of Australian-born infants available for adoption by persons other than relatives, and the increased success rate and affordability of assisted conception and fertility procedures, have posed considerable challenges for the law and practice of adoption in Australia in the last four decades.

2 As the pool of available Australian babies has dwindled, would-be adopters have turned to other options including intercountry adoption. Those who favour adoption see it as a humanitarian act, both towards the individual children and, in the case of intercountry adoption, their country of origin. Those who oppose it see it as a form of exploitation; in particular, intercountry adoption where wealthy couples from developed countries, unable to adopt locally, seek to satisfy their own needs by adopting a child from a developing country. Regardless, this process has necessitated appropriate measures being developed and implemented in order to safeguard adopted children from potential exploitation.

3 The law's response to this development has seen an increasing regulation and control of both intra-country and intercountry adoptions. Important in this regard has been the United Nations Convention on the Rights of the Child[1] (1989) ("CRC"), as well as the development of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption[2] ("Hague Adoption Convention"). In addition, significant developments have occurred in relation to the perceived rights and needs of the parties to adoption, especially regarding access to information and ongoing contact.

4 The law of adoption, both in Australia and internationally, is in a constant state of review and transition, brought about by ever-changing social and economic conditions. There continues to be much debate about whether adoption should continue at all. If adoption does continue into the future, it is essential that the best interests of the child are paramount at all times and that children are free from exploitation.

II. Background

5 The central principle in adoption is that a complete substitution notionally takes place of the adoptive parents for the birth parents,

1 (20 November 1989) 1577 UNTS 3.
2 Concluded 29 May 1993.

referred to as the "substitution principle". The original family relationship is extinguished almost, but not quite, as if it had never existed.

A. Early laws

6 While adoption practices can be traced back to early civilisation, particularly during the Roman Empire, adoption legislation in the common law world can be traced to the US state of Massachusetts in 1851.[3] The first Asia/Pacific jurisdiction to enact adoption laws was the then British colony of New Zealand in 1881. The Australian colonies and states all enacted legislation between 1896 and 1935.[4] The UK did not enact adoption legislation until 1926. In all these early laws, the substitution principle was the central feature.

B. Contemporary adoption policy and reform

7 The notion of complete substitution was, and still is, qualified in respect of personal relationships by the criminal law of incest. If incestuous sexual relations are to be discouraged and punished by the law, then the principle of substitution could not be allowed to operate without some reservation. If it did, then sooner or later, persons who were closely related by blood, such as brother and sister, but who by reason of the adoption of one or both of them would have been regarded, and would have regarded themselves as not so related, might meet without knowing of their relationship, fall in love and innocently commit the crime of incest. This worried the makers and administrators of the law, and some made express provision to deal with this situation.[5] Given the potential to impact upon succession law, the state and territory laws ensure that an adopted child is not deprived of any vested or contingent property right acquired by the child before the making of the adoption order.[6]

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3 For a discussion, see Jamil S Zainaldin, "The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts" (1979) 73 *Northwestern University Law Review* 1038.

4 In date order: Adoption of Children Act 1896 (WA); Adoption of Children Act 1920 (Tas); Child Welfare Act 1923 (NSW); Adoption of Children Act 1925 (SA); Adoption of Children Act 1928 (Vic); Adoption of Children Act 1935 (Qld).

5 The contemporary legal approach is exemplified by s 95 of the Adoption Act 2000 (NSW).

6 Adoption Act 1993 (ACT) s 43; Adoption Act 2000 (NSW) s 97; Adoption of Children Act 1994 (NT) s 45; Adoption Act 2009 (Qld) s 214; Adoption Act 1988 (Tas) s 50; Adoption Act 1984 (Vic) s 53; Adoption Act 1994 (WA) s 75. There appears to be no equivalent provision in the Adoption Act 1988 (SA).

C. Transition to "open" adoption

8 Adoption in Australia is clearly moving away from the "substitution principle" and towards a more open form of permanent parenting, with all jurisdictions encouraging open adoption.[7] In an open adoption, the identities of the adopted person, adoptive parents and the birth parents are known, information may be exchanged, and face-to-face contact may be involved. To date, the concept of open adoption has been most enthusiastically taken up in New South Wales and Western Australia, where systems of "adoption plans", which encourage negotiated contact and exchange of information, have been set up.[8] The concept and increased use of open adoption complements the increasing trend of recent years of carer adoptions as part of the state's response to the needs of children in the child protection sphere.

9 All Australian jurisdictions have taken the path of encouraging and promoting open adoption. It is seen as critical for children to grow up with an understanding of where they come from and, wherever possible, to have a relationship with their birth parents. Families will often enter an "adoption plan" which sets out how exactly birth parents will keep a connection with their child as well as how the child will learn about who they are and there they came from. It would include details about how many times contact will occur and could also cover how the child will remain connected to his birth culture, should that be a relevant consideration.

10 It is difficult to provide specific examples of what this relationship can look like in an open adoption, as the frequency and mode of contact is determined by the circumstances of each case and the relevant court orders made. In some cases, the birth parents will meet with the children four times a year for several hours, where in other circumstances the frequency of contact could be much less. In the case of *Adoption of JLK and CRK*,[9] a somewhat complex contact arrangement was agreed to. The adoption plan permitted two-hour visits, six times a year, for two children (aged eight and six). The complexity arises in that three visits would be only with the birth parents; the other visits could be with other family members (including three other siblings). The adoption plan also included the possibility of overnight visits in the future. In this case, Brereton J of the New South

7 For example, the objects of the New South Wales legislation now include "to encourage openness in adoption": see s 7(g) of the Adoption Act 2000 (NSW).

8 Adoption Act 2000 (NSW) ch 4, Pt 4, ss 46–51; Adoption Act 1994 (WA) s 46. For a discussion, see Neville Turner, "Adoption or Anti-Adoption? Time for a National Review of Australian Law" (1995) 2 *James Cook University Law Review* 43 at 77.

9 [2017] NSWSC 7.

Wales Supreme Court noted that a registered adoption plan is significant in ensuring that adoptive parents sustain birth family contact because it gives the birth parents standing to enforce it, should such action be needed, and this "provides considerable comfort".[10]

11 Brereton J also considered a relatively complex adoption plan in *Adoption of RCC and RZA*.[11] This case concerned twins (aged ten) who had lived with the proposed adoptive parents since they were five. Orders were made to register the adoption plan and for the children to have contact with their birth mother five times a year, and with the birth father twice a year. Somewhat demonstrative of the support for, and reasoning behind, open adoptions, his Honour commented that "[birth] parent contact is an important aspect of satisfying the identity needs of children who do not reside with their birth family, and mitigating the risks of later identity issues".[12]

D. Australian intercountry and intra-country adoption statistics

12 According to the Australian Institute of Health and Welfare ("AIHW"), 278 adoptions were finalised in 2015–2016. This represents the lowest annual number of adoptions on record and a fall of 5% from the 292 adoptions that occurred in the previous year. It also represents a fall of nearly 75% from the number of adoptions that occurred 25 years ago. AIHW said the decline seen over the past decade has been driven primarily by intercountry adoptions, which fell from 421 in 2005–2006 to 82 in 2015–2016. That said, "known" child Australian-born adoptions are increasing, with 151 such adoptions finalised in 2015–2016, the highest number in the last decade, and carer adoptions accounting for approximately 46% of all finalised adoptions in 2015–2016. The reasons for the overall decline are numerous and arguably include increased societal acceptance of single parents, more effective and reliable birth control methods, authorised terminations, the end of forced adoption practices, increased childcare options, changes to family law legislation, and greater financial security for single parents through increased government income support and the establishment of the child support assessment and collection scheme.

13 The main country of origin for Australian intercountry adoptions has changed over time. According to AIHW, between 2006–2007 and 2010–2011, the main country of origin was either China or the Philippines; since then, it has varied between Taiwan and the Philippines. In 2015–2016, the most common countries of origin for

10 *Adoption of JLK and CRK* [2017] NSWSC 7 at [94].
11 [2015] NSWSC 813.
12 *Adoption of RCC and RZA* [2015] NSWSC 813 at [88].

Australian intercountry adoptions were the Philippines, providing 24% of intercountry adoptions, followed by Thailand (22%), Taiwan (20%) and South Korea (17%). However, despite more recent reliance over the last quarter century on intercountry adoption, it is clear that intercountry adoptions by Australians may be in decline or have at least plateaued.

III. Adoption of Australian children

A. Introduction

14 Constitutionally, the adoption of children born or resident in Australia ("Australian children") is an area that falls outside the legislative competence of the Commonwealth and is governed by state and territory legislation. During the early 1960s, the states and territories moved towards uniform adoption legislation. Although the current legislation is not identical, it is substantially similar.[13] One key feature of contemporary Australian adoption law is that the jurisdiction to make adoption orders is entrusted to a court of law.[14]

15 The nexus that brings the parties within the jurisdiction of the order-making authority differs as regards the persons wishing to adopt and the child to be adopted.[15] The former must be either "resident" or "domiciled" within the relevant state or territory. However, the child being adopted need only be "present" in the relevant jurisdiction at the time the application is filed.

16 There is a general requirement that, for the purpose of adoption, the welfare and interests of the child must be regarded as the

13 See Adoption Act 1993 (ACT) and Adoption Regulations 1993 (ACT), Adoption Act 2000 (NSW) and Adoption Regulation 2003 (NSW), Adoption of Children Act 1994 (NT) and Adoption of Children Regulations 1994 (NT), Adoption Act 2009 (Qld) and Adoption Regulation 2009 (Qld), Adoption Act 1988 (SA) and Adoption Regulations 2004 (SA), Adoption Act 1988 (Tas) and Adoption Regulations 2006 (Tas), Adoption Act 1984 (Vic) and Adoption Regulations 2008 (Vic) and Adoption Act 1994 (WA) and Adoption Regulations 1995 (WA).

14 The relevant courts are the Supreme Court (for the Australian Capital Territory), Supreme Court (for New South Wales), Local Court (for the Northern Territory), Children's Court (for Queensland), Youth Court (for South Australia), Magistrate's Court (Children's Division) (for Tasmania), Supreme Court/County Court (for Victoria) and Family Court of Western Australia (for Western Australia).

15 Adoption Act 1993 (ACT) ss 9 and 13; Adoption Act 2000 (NSW) s 23; Adoption of Children Act 1994 (NT) s 6; Adoption Act 2009 (Qld) ss 183 and 189; Adoption Act 1988 (SA) s 8; Adoption Act 1988 (Tas) s 6; Adoption Act 1984 (Vic) s 7; Adoption Act 1994 (WA) s 65.

paramount consideration.[16] This is consistent with Australia's international obligations under the CRC[17] and accords with the "paramountcy principle" under Australian family law.[18]

17 The process for the adoption of Australian children is now firmly under the control of the relevant child and community welfare departments in the states and territories. The Chief Executive, Director-General or Secretary of the relevant government department arranges adoptions and administers the adoption process.[19] In some jurisdictions, there is provision for the approval of private adoption agencies to arrange local or known adoptions.[20] Although historically permitted, it is now an offence for a private person to arrange or to advertise an adoption.[21]

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16 Adoption Act 1993 (ACT) s 5; Adoption Act 2000 (NSW) s 8 (which uses the phrase, "best interests"); Adoption of Children Act 1994 (NT) s 8; Adoption Act 2009 (Qld) s 6 (which uses "wellbeing and best interests"); Adoption Act 1988 (SA) s 7; Adoption Act 1988 (Tas) s 8 (which uses "welfare and interests"); Adoption Act 1984 (Vic) s 9; Adoption Act 1994 (WA) s 3 (which uses "welfare and best interests").

17 See Art 21 of the Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3: "States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration".

18 Family Law Act 1975 (Cth) ss 60CA, 60CC and 65AA.

19 Generally speaking, the power of the relevant departmental executive (or the relevant minister in the Northern Territory) is implied from the powers and functions given to him in the adoption legislation or subsequent subordinate legislation: see s 95 of the Adoption Act 1993 (ACT) and reg 11 of the Adoption Regulations 1993 (ACT). For New South Wales, see s 11 of the Adoption Act 2000 (NSW) and Pt 2 of the Adoption Regulation 2015 (NSW). For the Northern Territory, see ss 4, 9 and 74 of the Adoption of Children Act 1994 (NT) and reg 4 of the Adoption of Children Regulations 1994 (NT). For Queensland, see, *eg*, ss 57, 153 and 320 of the Adoption Act 2009 (Qld) and regs 5 and 7 of the Adoption Regulation 2009 (Qld). For South Australia, see s 28 of the Adoption Act 1988 (SA) and reg 9 of the Adoption Regulations 2004 (SA). For Tasmania, see ss 9 and 110 of the Adoption Act 1988 (Tas) and reg 12 of the Adoption Regulations 2006 (Tas). For Victoria, see ss 20 and 122 of the Adoption Act 1984 (Vic) and reg 35 of the Adoption Regulations 2008 (Vic). For Western Australia, see ss 6 and 8 of the Adoption Act 1994 (WA) and Pt 2 of the Adoption Regulations 1995 (WA).

20 Adoption Act 1993 (ACT) s 95(1); Adoption Regulation 1993 (ACT) Pt 6; Adoption Act 2000 (NSW) s 11(1)(b) and ch 3 (on adoption service providers); Adoption Regulation 2015 (NSW) Pt 2; Adoption Act 1988 (SA) s 29(2)(b); Adoption Act 1988 (Tas) s 11; Adoption Regulations 2006 (Tas) Pt 2; Adoption Act 1984 (Vic) s 122; Adoption Regulations 2008 (Vic) Pt 2; Adoption Act 1994 (WA) ss 8, 9 and 10; Adoption Regulations 1995 (WA) Pt 2. There are no equivalent provisions in the Northern Territory and Queensland. In all jurisdictions, there are currently no approved private adoption agencies that organise intercountry adoptions.

21 Adoption Act 1993 (ACT) ss 94–96; Adoption Act 2000 (NSW) ss 11 and 177–179; Adoption of Children Act 1994 (NT) ss 69–70 and 74; Adoption Act 2009 (Qld)

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B. Who can be adopted?

18 An Australian child may be adopted only if he is under the age of 18 years.[22] However, an Australian "child" 18 or over may be adopted in all jurisdictions (except Queensland and South Australia) provided he has been "brought up, maintained and educated" by the applicant or either of the applicants.[23] While the adoption of stepchildren was relatively commonplace in the past, changes in both society and family law have resulted in a marked decline in the adoption of stepchildren by a step-parent, except in exceptional circumstances. Despite this overall decline, in 2015–2016, step-parent adoptions numbered 27% of the total number of adoptions, representing the largest category of "known" child adoptions (being 76 out of 151 children), with carer adoptions being the second largest category (25% of total adoptions, representing 70 children).[24]

(1) Indigenous children

19 Until relatively recently, no special provision was made in Australian adoption legislation regarding the adoption of Aboriginal or Torres Strait Islander children. The laws simply provided for the adoption of children, irrespective of the child's ethnic or cultural background.[25] The discrimination encountered by Aborigines and Torres Strait Islanders with regard to adoption practices is now well-documented, with a distinct preference having been shown for middle-class white values over a traditional upbringing.[26] These practices stemmed from the "assimilation policy" of successive governments which was specifically aimed at forcing people to relinquish their own

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Pt 14; Adoption Act 1988 (SA) ss 28–29; Adoption Act 1988 (Tas) ss 107–108 and 110; Adoption Act 1984 (Vic) ss 119–120 and 122; Adoption Act 1994 (WA) ss 11, 122 and 123.

22 Adoption Act 1993 (ACT) s 9; Adoption Act 2000 (NSW) s 24(1)(a); Adoption of Children Act 1994 (NT) s 12(1)(a); Adoption Act 2009 (Qld) s 10; Adoption Act 1988 (SA) s 4; Adoption Act 1988 (Tas) s 19(1)(a); Adoption Act 1984 (Vic) s 10(1)(a); Adoption Act 1994 (WA) s 66(1).

23 Adoption Act 1993 (ACT) ss 9 and 10; Adoption Act 2000 (NSW) ss 24(1)(b) and 24(2); Adoption of Children Act 1994 (NT) ss 12(1)(b) and 12(2); Adoption Act 1988 (Tas) s 19(1)(b); Adoption Act 1984 (Vic) s 10(1)(b); Adoption Act 1994 (WA) s 66(2): a person over the age of 18 may be adopted by a person who was a carer or step-parent of that person immediately before they attained 18 years of age.

24 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 13 and Figure 3.1.

25 Peter Boss, *Adoption Australia: A Comparative Study of Australian Adoption Legislation and Policy* (The National Children's Bureau of Australia Inc, 1992) at p 16.

26 Adoption Legislative Review Committee, *A New Approach to Adoption: Final Report* (Adoption Legislative Review Committee, 1991).

culture and be absorbed into a Western culture, with devastating consequences for Aboriginal and Torres Strait Islander communities.[27] The controversial assimilation policy has been replaced by the "child placement principles", which require that Aboriginal and Torres Strait Islander children should, where possible, be adopted by members of their own community. The need for recognition of traditional culture and values has been reinforced by Australia's ratification of the CRC and, in particular, Art 2, which refers to the need for States Parties to "respect and ensure the rights set out in the Convention to each child within the jurisdiction without discrimination of any kind". This provision is aimed at guaranteeing that all children will have the benefit of the rights proclaimed in the Convention irrespective of their own or their parents' race, colour, language, national or ethnic origin or other status.

20 In all jurisdictions (except Tasmania), there are now specific provisions that relate to the cultural identity of the child, and specifically, the adoption of an Aboriginal or Torres Strait Islander child.[28]

21 AIHW reported that in 2015–2016, just three Indigenous children were adopted in Australia.[29] In the last 25 years, 130 Indigenous children were adopted and just over half of these adoptions were by Indigenous Australians.[30] As noted by AIHW, it is difficult to identify current trends in the number of Aboriginal and Torres Strait Islander children adopted in accordance with the placement principles as the number of adoptions remains so small.[31]

(2) Special needs children

22 Special needs children have traditionally been harder to place permanently and all jurisdictions allow for relaxation of the usual eligibility requirements for the adoption of such children.[32] There is some variation between jurisdictions as to what constitutes a "special

27 For a detailed discussion, see Human Rights and Equal Opportunity Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

28 Adoption Act 1993 (ACT) s 6; Adoption Act 2000 (NSW) ss 32–39; Adoption of Children Act 1994 (NT) s 11; Adoption Act 2009 (Qld) s 7; Adoption Act 1988 (SA) s 11; Adoption Act 1984 (Vic) s 50; Adoption Act 1994 (WA) ss 4 and 16A.

29 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 46.

30 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 46.

31 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 46.

32 See, *eg*, s 53 of the Adoption Act 1994 (WA) (a general provision that allows for waiver of requirements in s 52 regarding placement in respect of a child who "cannot otherwise be placed").

needs" child, but each of the states and territories includes children with a physical, intellectual or mental disability. The legislation of a number of jurisdictions contains provisions for financial and other assistance in respect of such children in the pre-adoption and post-adoption stages.[33] Relevant in this regard are those articles of the CRC that relate to the protection of children with special needs.[34]

23 The policy underlying this and other provisions that relax the requirements for adopters of special needs children with the aim of facilitating the adoption of such children has, however, been criticised on the grounds that special needs children require parental guidance from men and women with greater, rather than lesser, capacities.[35]

C. Who can adopt?

24 In addition to those jurisdictional requirements discussed previously, the relevant legislation also spells out some specific criteria that applicants must satisfy. In broad terms, these criteria relate to relationship status (marital or equivalent), age requirements, and general requirements relating to the suitability of the prospective adopters as adoptive parents.

(1) Relationship status

25 The specific requirements of the various Acts with regard to relationship status and related matters vary significantly as between jurisdictions. The minimum required relationship length varies from two to five years.[36] Until the late 1980s, the position in all Australian

33 Adoption Act 2000 (NSW) s 201; Adoption of Children Act 1994 (NT) s 85; Adoption Act 2009 (Qld) s 325 (on assistance to adopters); Adoption Act 1988 (SA) s 26; Adoption Act 1988 (Tas) s 92; Adoption Act 1984 (Vic) s 105; Adoption Act 1994 (WA) s 140 (on the general power of the Director-General to provide financial assistance in relation to an adoption). In the Australian Capital Territory, the provision of "financial support" is provided only if a child has "complex or high needs": see s 108A of the Adoption Act 1994 (WA).

34 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3, Arts 25 and 27.

35 J Neville Turner, "Adoption or Anti-Adoption? Time for a National Review of Australian Law" (1995) 2 JCULR 43 at 49.

36 Adoption Act 1993 (ACT) s 14 (requiring at minimum a three-year marriage or "domestic partnership" of opposite or same sex; for definition of "domestic partnership", see s 169 of the Legislation Act 2001 (ACT); Adoption Act 2000 (NSW) s 28 (requiring at minimum a two-year relationship); Adoption of Children Act 1994 (NT) s 13(1)(a) (requiring at minimum a two-year marriage or "traditional Aboriginal marriage"); Adoption Act 2009 (Qld) s 76 (requiring at minimum a two-year marriage); Adoption Act 1988 (SA) s 12(1) (requiring at minimum a five-year marriage or opposite-sex *de facto* relationship); Adoption Act 1988 (Tas) ss 20(1) and 20(2) (requiring at minimum a three-year marriage or

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jurisdictions was that only married couples could adopt a child. Opposite-sex *de facto* couples became eligible applicants in all jurisdictions in the 1990s and 2000s, and following calls for law reform,[37] same-sex *de facto* couples also became eligible in all jurisdictions by 2016.[38]

26 The adoption legislation in all jurisdictions, with the exception of Queensland, makes provision for a single person to adopt, but there have to be special circumstances to justify adoption in such cases.[39] In most jurisdictions, there is a requirement that, if the person seeking an adoption order made in his name alone is married, the person must be living separately and apart from his spouse,[40] or alternatively, that the spouse has consented to the adoption.[41] Special provision is made in the legislation of most jurisdictions for the recognition of "Aboriginal customary marriages", such that these are now treated as marriages for the purposes of the adoption legislation.[42]

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significant relationship which is the subject of a deed of relationship registered under Part 2 of the Relationships Act 2003"); Adoption Act 1984 (Vic) s 11 (requiring at minimum a two-year marriage, "traditional Aboriginal marriage" or opposite-sex *de facto* relationship); Adoption Act 1994 (WA) s 39 (requiring at minimum a three-year marriage or *de facto* relationship of opposite or same sex).

37 The Victorian Law Reform Commission made a similar recommendation in 2007: see Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption: Final Report* (2007) ch 10 (entitled, "Adoption"), Recommendation 67, and the Adoption Amendment (Adoption by Same Sex Couples) Act 2015 (Vic), passed in late 2015 and came into effect in 2016.

38 See, *eg*, s 20(1) of the Adoption Act 1988 (Tas), which provides that a *de facto* couple, opposite or same sex, who have resided together in a "significant relationship" registered three or more years ago under Pt 2 of the Relationships Act 2003 (Tas), can apply for an adoption order.

39 Adoption Act 1993 (ACT) s 16; Adoption Act 2000 (NSW) s 27; Adoption of Children Act 1994 (NT) s 14(1); Adoption Act 1988 (SA) s 12(3); Adoption Act 1988 (Tas) s 20(4); Adoption Act 1984 (Vic) s 11(3). The Western Australian Act also allows for adoption orders to be made in favour of one person (see s 38(2) of the Adoption Act 1994 (WA)), but the same criteria and assessment of applicants (see ss 39 and 40) apply as for adoption applications made by two persons jointly. There is no equivalent provision in Queensland.

40 Adoption of Children Act 1994 (NT) s 14(2). Section 12(5) of the Adoption Act 1988 (SA) requires that the parties are not cohabiting and that the spouse consents to the adoption. See also s 20(5)(a) of the Adoption Act 1988 (Tas) and s 11(4) of the Adoption Act 1984 (Vic). There is no equivalent provision in Queensland or the Australian Capital Territory.

41 Adoption Act 2000 (NSW) s 27(3). Section 12(5) of the Adoption Act 1988 (SA) requires that the parties are not cohabiting and that the spouse consents to the adoption. See also s 20(5)(b) of the Adoption Act 1988 (Tas) and s 11(4) of the Adoption Act 1984 (Vic). There is no equivalent provision in Queensland or the Australian Capital Territory.

42 According to the New South Wales Dictionary, "married" means "an Aboriginal or Torres Strait Islander man and woman who are living together in a relationship that is recognised as a marriage according to the traditions of an Aboriginal

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(2) Age requirements

27 In some jurisdictions, there are certain minimum age requirements for adoptive parents.[43] The general approach is to specify a minimum age for persons seeking to adopt and then, as an alternative, to specify minimum age differentials between the prospective adoptive parents and the child. The minimum age varies between jurisdictions: in Queensland and Western Australia, it is set at 18,[44] in New South Wales, it is 21[45] and in the Northern Territory, it is 25.[46] The minimum age differentials specified in the legislation also vary between jurisdictions: in New South Wales and Tasmania, both the prospective adoptive parents must be at least 18 years older than the child;[47] and in the Northern Territory, the minimum age differential is 25 years.[48] Although a maximum age differential for adoption (of around 40 years) was historically applied across Australia, only the Northern Territory and Western Australia retain such age restrictions today.[49]

community or Aboriginal or Torres Strait Islander group to which they belong". See also s 13(1)(b) of the Adoption of Children Act 1994 (NT) (requiring a traditional Aboriginal marriage to be "recognised for not less than 2 years"), s 4(3) of the Adoption Act 1988 (SA), s 11(1)(b) of the Adoption Act 1984 (Vic) (requiring a traditional Aboriginal marriage to be "recognized for not less than two years") and s 4(2)(c) of the Adoption Act 1994 (WA). There is no equivalent provision in the Australian Capital Territory, Queensland or Tasmania.

43 There are no age limits specified in the Australian Capital Territory ("ACT"), South Australia, Tasmania or Victoria. In the ACT, there is a general reference in s 39F(1)(c)(A) of the Adoption Act 1993 (ACT) to the age of the applicants as being of relevance in determining whether they are suitable persons to adopt the particular child, but no minimum (or maximum) ages are specified in either the Act or the regulations. In Tasmania, no minimum age is prescribed; however, under s 22 of the Adoption Act 1988 (Tas), the age difference between the applicant/applicants and the child must be at least 18 years "unless the court … considers that there are circumstances relating to the needs of the child which make it desirable to make the adoption order".

44 Adoption Act 2009 (Qld) s 76(1)(a); Adoption Act 1994 (WA) s 39(1)(b).

45 Adoption Act 2000 (NSW) ss 27 (covering "adoption by one person") and 28 (covering "adoption by couple").

46 Adoption of Children Act 1994 (NT) s 16(1)(a).

47 Adoption Act 2000 (NSW) ss 27 (covering "adoption by one person") and 28 (covering "adoption by couple"); Adoption Act 1988 (Tas) s 22.

48 Adoption of Children Act 1994 (NT) s 16(1)(b).

49 Adoption of Children Act 1994 (NT) ss 16(2) and 16(3) (which prescribes a maximum age differential of 40 years, provided the adopted child has not been in the care of the adoptive parent/parents, or 45 years if the child has been in the care of the adoptive parent/parents); Adoption Act 1994 (WA) s 52 (which prescribes maximum age differential ranges between 45 and 55 years depending on the circumstances).

(3) General requirements

28 Evidence of the suitability of the applicants as parents for an adopted child is required to be presented to the court in a report or plan prepared by the relevant government department.[50] The legislation usually spells out the general matters on which the court must be satisfied, from the report and other evidence.[51] In general terms, the requirements are threefold:

> (a) the applicants are of "good repute" and are "fit and proper persons" to fulfil the responsibilities of parents of a child;
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> (b) the applicants are suitable persons to adopt that child, having regard to all relevant matters, including the age, state of health, education (if any), religious upbringing (if relevant), or convictions (if any) of the child and of the applicants, and any wishes that have been expressed by a parent or guardian of the child in an instrument of consent to the adoption of the child with respect to the religious upbringing of the child; and
>
> (c) the child's welfare and best interests will be promoted by the adoption.[52]

29 While these general requirements are common across Australia, local variations do exist.

(4) Assessment process

30 For all adoptions, except intra-family, the prospective adopters ("applicants") need to go through a preparation process prior to being approved as prospective adoptive parents.[53] Applicants must initially

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50 Under the Adoption Act 1994 (WA), provision is made in s 12 for the establishment of an "adoption applications committee", whose function under s 13 is to consider whether applicants for adoption are suitable for adoptive parenthood and to approve or not to approve such persons as prospective adoptive parents.

51 Adoption Act 1993 (ACT) s 39F; Adoption Act 2000 (NSW) s 91; Adoption Act 1994 (WA) s 40. In the other jurisdictions, the Acts are now less specific and the requirements for adoptive parents are set out in the regulations: see s 41 of the Adoption of Children Act 1994 (NT) and Div 5 of the Adoption Act 2009 (Qld) (but note that it is the chief executive of the Department of Child Safety (who makes the order) who must be satisfied on these matters). See also s 22 of the Adoption Act 1988 (SA), s 24 of the Adoption Act 1988 (Tas) and s 15(1) of the Adoption Act 1984 (Vic). Criteria for adoptive parents are also to be found in the relevant practice directions and policy guidelines.

52 Authorities on the interpretation of these general requirements include *Re T and the Director of Youth and Community Services* [1980] 1 NSWLR 392; *Re Lee Yen Chum* (1963) 4 FLR 296; *Re M* [1968] 1 NSWR 770; and *Re E* [1974] 1 NSWLR 739.

53 For details, see, *eg*, Department of Family and Community Services, "Thinking about Adoption" (April 2017) <http://www.community.nsw.gov.au/__data/

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determine the type of adoption they are interested in (such as local or intercountry adoption) and lodge an expression of interest with the relevant government department or adoption service provider (if applicable).

31 All applicants, except intra-family applicants, are required to undertake a training programme that provides information about the needs of adopted children, issues for birth parents, issues relating to infertility and adoptive parenting. Applicants are also required to complete an "application to adopt" that covers information relating to their family, employment, finances and education, as well as autobiographies, referees, and police and medical checks. If the application is satisfactory, then the applicants move into the "assessment phase". Once approved, applicants are placed in a pool of prospective parents, in the case of local adoption; or, in the case of intercountry adoption, they are placed on the waiting list of the relevant country. In the case of the adoption of special needs children, the applicants are usually recruited for one specific child and, as a consequence, they may experience a slightly different training and assessment process.

32 In the case of intra-family adoption, no preparation or assessment of the prospective adoptive parents takes place.

D. Consent to adoption

(1) Parental consent

33 The basic pattern of the legislation in force across Australia is that no adoption order shall be made without the consent of the birth parent/parents or guardian/guardians of the relevant child.[54] There have, however, been significant changes in the last 30 years with regard to exactly whose consent is required. The traditional approach has been to require the consent of both parents only when they were married to each other by the time of the child's birth. This interpretation continued even after the introduction of the state and territory status-of-children legislation, which purported to remove the legal constraints associated

assets/pdf_file/0009/319617/Thinking-about-Adoption-factsheet-April2017.pdf> (accessed 8 May 2017).

54 Adoption Act 1993 (ACT) s 27(2); Adoption Act 2000 (NSW) s 52(a); Adoption of Children Act 1994 (NT) ss 26(a) and 27(1); Adoption Act 2009 (Qld) ss 16 and 17; Adoption Act 1988 (SA) s 15(1); Adoption Act 1988 (Tas) s 29(1)(a); Adoption Act 1984 (Vic) s 33(1); Adoption Act 1994 (WA) s 17(1). The following analysis applies in respect of children under the age of 18 who have not previously been adopted. In circumstances where the child has previously been adopted, the consent of the adoptive parent is required: see, *eg*, s 52(b) of the Adoption Act 2000 (NSW).

with illegitimacy.[55] Most jurisdictions have, in pursuance of the policy of affording equal rights to unmarried parents and under the influence of the general philosophies of the status-of-children legislation, made the consent of the father of an ex-nuptial child a specific prerequisite to adoption (or that he at least be given the opportunity to consent), provided that his paternity is legally recognised or established.[56]

34 Generally speaking, a mother's consent is inoperative if given *before* the birth of the child or within a short period *after* the child's birth. That period varies across Australia from five to 30 days, although in some jurisdictions, the minimum period following birth may be waived if the mother was "in a fit condition to give the consent".[57]

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55 Parentage Act 2004 (ACT); Status of Children Act 1996 (NSW); Status of Children Act 1978 (NT); Status of Children Act 1978 (Qld); Family Relationships Act 1975 (SA); Status of Children Act 1974 (Tas); Status of Children Act 1974 (Vic). Western Australia did not follow the same pattern as the other jurisdictions, but achieved substantially the same effect by making specific amendments to particular statutes to equate the position of ex-nuptial children with that of nuptial children (*ie*, those born in marriage). It is arguable that in light of the status-of-children legislation across Australia (*eg*, Status of Children Act 1978 (Qld)), the term "guardian" includes the birth father of the child.

56 Adoption Act 1993 (ACT) s 27(2); Adoption Act 2000 (NSW) s 56; Adoption of Children Act 1994 (NT) ss 27(1) and 28(1); Adoption Act 2009 (Qld) s 16 and Pt 2, Div 5; Adoption Act 1988 (SA) s 15(7); Adoption Act 1988 (Tas) s 29(3)(a); Adoption Act 1984 (Vic) ss 33(3) and 33(4); Adoption Act 1994 (WA) s 17.

57 The minimum period, under s 34(3) of the Adoption Act 1993 (ACT), is 28 days unless "there are circumstances that justify the instrument being treated as an effective consent". Under s 60 of the Adoption Act 2000 (NSW), it is 30 days *and* "at least 14 days after the person giving the consent is given a copy of the instrument of consent and the mandatory written information". Under s 34(2)(b) of the Adoption of Children Act 1994 (NT), it is one month "unless it is proved that, at the time the instrument was signed, the birth mother was in a fit condition to give the consent". Under s 19 of the Adoption Act 2009 (Qld), it is 30 days or 14 days after the parent is given the documents under s 22, or 14 days after the parent is given the prescribed information under s 23, or 14 days after the day the counsellor swears the statement mentioned in s 175(3)(b). Under ss 15(2) and 15(3) of the Adoption Act 1988 (SA), it is 5–14 days – a court:

> [May] recognise the validity of a consent of a mother given more than 5 but less than 14 days after the birth of the child, if satisfied —
>
> (a) that there were special circumstances justifying the giving of consent less than 14 days after the birth of the child; and
>
> (b) that the mother was able to exercise a rational judgment on the question of consent.

Under s 36(2) of the Adoption Act 1988 (Tas), the minimum period is seven days "unless it is proved that, at the time the instrument was signed, the mother was in a fit condition to give the consent". Under s 42(3) of the Adoption Act 1984 (Vic), it is 14 days "or where the Court has ordered that it is in the best interests of the child that a shorter period be applied, that shorter period". And, under s 18(1) of the Adoption Act 1994 (WA), it is 28 days *and* "at least 28 days after the person whose consent is required receives the information and, if requested, the counselling mentioned in clause 1 of Schedule 1".

35 A birth parent normally receives counselling before signing an adoption consent form. In some jurisdictions counselling is required by law and/or there is a requirement that a person whose consent is required be given information about the effect of adoption prior to signing the instrument of consent.[58]

(2) Child's consent

(a) Child aged 12 or over

36 In all jurisdictions, children who are the subject of the adoption proceedings must be consulted if they are over the age of 12.[59] This requirement arguably provides the child with a voice in adoption proceedings in compliance with Australia's obligations under Art 12 of the CRC, although some may disagree with this age limit.[60] The legislation has generally been framed in terms that the consent of a child over the age of 12 years must be obtained before an adoption order in respect of the child can be made. However, the court has a discretionary power to dispense with that consent and make the order if satisfied that there are special reasons related to the welfare and interests of the child, despite the fact the child has not given his consent, or that his consent has not been sought.[61] Regardless of age, research suggests that children

58 Adoption Act 2000 (NSW) s 63; Adoption of Children Act 1994 (NT) s 30; Adoption Act 1988 (SA); Adoption Regulations 2004 (SA) reg 4; Adoption Act 1988 (Tas) s 31; Adoption Act 1984 (Vic) s 35(1); Adoption Act 1994 (WA) s 18 and Sch 1.

59 Adoption Act 1993 (ACT) s 39F(2) (in which no age minimum is prescribed although the court must "have regard to … the views expressed by the child or young person"); Adoption Act 2000 (NSW) s 55(1); Adoption of Children Act 1994 (NT) ss 10(1) and 10(2); Adoption Act 2009 (Qld) s 179(2); Adoption Act 1988 (SA) ss 16(1) and 18(2) (unless "it appears to the court that the child is intellectually incapable of giving consent"); Adoption Act 1988 (Tas) s 23 (in which no minimum age is prescribed but states, "an order for the adoption of a child shall not be made unless the court is satisfied that, so far as practicable, the wishes and feelings of the child have been ascertained and due consideration given to them, having regard to the age and understanding of the child"); Adoption Act 1984 (Vic) s 14(1)(b) (in which no minimum age is prescribed; the court must consider the "wishes of the child … having regard to the age and understanding of the child"); Adoption Act 1994 (WA) s 17(1)(c)(ii).

60 It is arguable that the age of ten (being the age where a child may be held criminally responsible for his actions in all jurisdictions) may be a more appropriate benchmark. That having been said, in 2007, New South Wales amended its child protection legislation to increase the age from 10 to 12 for which a child in care proceedings can give binding instructions to the court-appointed legal representative: see s 99B of the Children and Young Persons (Care and Protection) Act 1998 (NSW).

61 In New South Wales, where an adoption involves a child over 12 who has been brought up by the applicants for at least two years, the only required consent is that of the child: see s 54(2) of the Adoption Act 2000 (NSW).

want to be involved in the process. That means giving children a chance to have a two-way dialogue with workers in placement organisations to ensure that all children participate in these decision-making processes that impact their lives in such a significant way.[62]

(b) Child's wishes

37 In the Australian Capital Territory, Tasmania and Victoria, the court is required to take into account the wishes of the child, without reference to a minimum age.[63] In New South Wales and the Northern Territory, the requirement to obtain the child's wishes exists in addition to the requirement that the consent of a child over the age of 12 years must be obtained.[64]

38 It is clear in the case law that the views and wishes of the children are sought as part of the process. For example, in *Adoption of RCC and RZA*, the children referred to the prospective adoptive parents as their "forever mummy and daddy"[65] in observations and discussions with the court-appointed expert. It is also interesting to note that the adoption plan in this case was amended during the hearing to provide that after 12 years of age, the children's wishes in relation to contact would be considered in relation to the contact arrangements with their birth mother. This replaced a provision that allowed contact only if the children agree, which is not the usual practice for such plans.

(3) Legal representation

39 A number of jurisdictions provide for legal or separate representation of the relevant child in the adoption proceedings in certain circumstances.[66]

E. Access to adoption information

40 One of the major adoption issues that has arisen in the last 40 years is that of access to information and, in particular, whether adoptees should have access to information disclosing the identity of

62 See further Elizabeth Cox, Lynne Moggach & Tina Smith, "Participation and Decision Making in Older Age Adoption" (2007) 19 *Developing Practice* 16.

63 Adoption Act 1993 (ACT) s 39F(2); Adoption Act 1988 (Tas) s 23; Adoption Act 1984 (Vic) s 14(1)(b).

64 Adoption Act 2000 (NSW) ss 127–129; Adoption of Children Act 1994 (NT) s 10(1).

65 *Adoption of RCC and RZA* [2015] NSWSC 813 at [22]–[23].

66 Adoption Act 1993 (ACT) s 107; Adoption Act 2000 (NSW) s 122(2); Adoption of Children Act 1994 (NT) s 80; Adoption Act 1984 (Vic) s 106; Adoption Act 1994 (WA) s 134.

their birth parents. In the past, it had been assumed that the interests of all parties involved in the adoption process were best served by not permitting access to information disclosing the identity of the child or the birth parents. The uniform adoption legislation introduced in Australia in the 1960s was based upon the "clean break" principle that adoption should normally involve a complete break between a child and his former parents. In furtherance of this principle, the adoption legislation enacted in the various Australian jurisdictions introduced a system of confidential adoption which made it virtually impossible for adoptees to obtain their original birth certificates.

(1) Access to birth information

41 Victoria was the first jurisdiction to reform this area in the late 1980s. The relevant legislation confers on adult adoptees the right to a copy of their original birth certificates, as well as access to information contained in their adoption records.[67] It also confers rights on the birth parents and the adoptive parents to access certain information.[68] The other Australian jurisdictions have subsequently followed the Victorian lead, although there remain some material differences between jurisdictions.

42 As a general proposition, adoptees do not have an *absolute* right to information: while they do have rights, those rights are qualified in a number of important respects, more so in some jurisdictions than in others. One important qualification that applies is the distinction drawn between the rights of adult adoptees and adoptees under 18 years of age.[69] The other major difference between provisions depends on when the adoption order was made; more specifically, whether the adoption order was made before amendments to legislation in the last decade or so which permit information-sharing. In all jurisdictions, an adult adoptee has a virtually unqualified right to gain access to non-identifying information about himself (for example, medical information, information about age of birth parents and place of birth).[70] The jurisdictions vary as to the right of an adult adoptee to have access to identifying information such as original or amended birth

67 Adoption Act 1984 (Vic) ss 92–94 and 96A.
68 Adoption Act 1984 (Vic) ss 95–98.
69 The only exception is Western Australia.
70 Adoption Act 1993 (ACT) s 63; Adoption Act 2000 (NSW) s 134 (dealing with the general right of adoptees to prescribed information); Adoption Act 2009 (Qld) s 256; Adoption Act 1988 (SA) s 27; Adoption Act 1988 (Tas) s 78; Adoption Act 1984 (Vic) s 93(1); Adoption Act 1994 (WA) s 88. This is also the position in the Northern Territory by virtue of the combined effect of ss 61, 62, 64 and 65 in the Adoption of Children Act 1994 (NT).

certificates.[71] By way of example, in the Northern Territory, where an adoption order was made after the commencement of the current legislation in 1994, the birth parents do not have the right to veto the provision of the information.[72] However, in all cases, the Minister for the administration of the relevant Act may refuse to provide information if satisfied there are reasonable grounds for believing the personal safety of another person might be endangered by the provision of the information.[73]

(2) Contact registers and vetoes

43 Various mechanisms now exist to facilitate information exchange between parties to adoption and to safeguard their interests: these include the use of counselling, contact systems, contact vetoes and, in New South Wales, an advance notice system.[74] Generally speaking, all jurisdictions have now established some form of "adoption information service", which is charged with the function of providing advice to persons in respect of the relevant part of the adoption legislation, making arrangements for counselling, receiving applications for information and facilitating the provision of information.[75]

44 In addition, "adoption information" and "reunion information" registers have been established in some jurisdictions allowing parties to adoption to enter relevant information, including their wishes as to information exchange and contact.[76] New South Wales and Victoria were

71 Adoption Act 1993 (ACT) ss 66–68; Adoption Act 2000 (NSW) s 134; Adoption of Children Act 1994 (NT) ss 62, 64 and 65; Adoption Act 2009 (Qld) ss 262–268 and 275; Adoption Act 1988 (SA) s 27; Adoption Act 1988 (Tas) s 82; Adoption Act 1984 (Vic) ss 92–94; Adoption Act 1994 (WA) ss 82 and 85.

72 Adoption of Children Act 1994 (NT) s 64.

73 Adoption of Children Act 1994 (NT) s 62(3).

74 Adoption Act 2000 (NSW) ch 8, Pt 3, ss 144–153. This allows parties to an adoption made before 2010 to lodge an application to be advised if another party to an adoption applies for identifying information. The release of information is then delayed for two months to allow the registered person to prepare for the release of the information.

75 Adoption Act 1993 (ACT) s 77; Adoption Act 1988 (Tas) s 89; Adoption Act 1984 (Vic) s 102; Adoption Act 1994 (WA) s 79. In New South Wales, this is the Department of Family and Community Services Adoption Information Unit. In the Northern Territory, this is the Adoption Unit of the Department of Families and Children's Services, which operates an Adoption Information Service. In Queensland, the Adoption Services Unit can assist persons adopted in that state to access information about their adoption. In South Australia, the Adoption and Family Information Service (of the Department for Families and Communities) is responsible for administering s 27 of the Adoption Act 1988 (SA).

76 Adoption Act 1993 (ACT) ss 78 (on adoption information register) and 80 (on reunion information register); Adoption Act 2000 (NSW) ch 8, Pt 5, in particular, s 166 (on reunion and information register); Adoption Act 1988 (Tas) s 90 (on

(*cont'd on the next page*)

the first jurisdictions to offer this type of service in the early 1980s.[77] In 2016–2017, there were 2,755 applications for access to information lodged across Australia.[78] Since 2001–2002, well over 80% of local adoptions have allowed some type of contact or information exchange.[79]

45 The Australian Capital Territory, New South Wales, Queensland, Tasmania and Western Australia all have some form of contact veto system,[80] and, with the exception of Queensland, have formally set up "contact veto" registers.[81] In New South Wales and Queensland, only adoptees or birth parents can lodge a contact veto.[82] The relevant statutory provisions in the Australian Capital Territory, Tasmania and Western Australia[83] have broader scope, also allowing other relevant parties to the adoption to object to contact.[84] In New South Wales, the contact veto system only has retrospective operation; that is, it applies only to adoptions that were made before the introduction of these reforms.[85] Under all of the relevant statutes, once made, a contact veto lasts indefinitely unless the veto is revoked or the person who lodged the contact veto dies.[86] Many of the statutes have

adoption information registers); Adoption Act 1984 (Vic) s 103 (on adoption information register).

77 In New South Wales, the service was initially introduced by s 73(1)(f1) of the (now repealed) Adoption of Children Act 1965, as amended by the Adoption of Children (Amendment) Act 1980 (NSW). In Victoria, the service was initially introduced by the (now repealed) Adoption of Children (Information) Act 1980 (Vic).

78 Australian Institute of Health and Welfare, *Adoptions Australia 2016–17*, Table S22.

79 Australian Institute of Health and Welfare, *Adoptions Australia 2016–17*, Table S17.

80 Adoption Act 1993 (ACT) ss 70 and 79; Adoption Act 2000 (NSW) ch 8, Pt 4, in particular, s 157 (but note that this only applies to adoptions made before 26 October 1990, being the date of assent of the repealed s 155 of the Adoption Information Act 1990 (NSW)); Adoption Act 2009 (Qld) ss 255–275; Adoption Act 1988 (Tas) s 90; Adoption Act 1994 (WA) Pt 4, Div 4, in particular, ss 99–100.

81 Adoption Act 1993 (ACT) s 70(3) (on "contact veto register"); Adoption Act 2000 (NSW) s 157; Adoption Act 1988 (Tas) ss 90(3)(b)(iii) and 90(3A) (on adoption information register); Adoption Act 1994 (WA) s 99 (on register of contact vetoes).

82 Adoption Act 2000 (NSW) s 154; Adoption Act 2009 (Qld) Pt 11, Div 4 (although this refers to "contact statement", not "contact veto").

83 In Western Australia, as a result of changes made in 2003, no new contact or information vetoes are permitted to be lodged after the "veto cut-off date" (1 June 2003): see s 99(a) of the Adoption Act 1994 (WA), as amended by s 2(1) of the Adoption Amendment Act (No 2) 2003 (WA).

84 Adoption Act 1993 (ACT) s 70; Adoption Act 1988 (Tas) ss 90(3) and 90(3A); Adoption Act 1994 (WA) s 96(1) (now repealed), but see also s 100, which refers to "the person who lodged the statement of wishes".

85 Adoption Act 2000 (NSW) s 155.

86 Adoption Act 1993 (ACT) Pt 5, Div 5.3 (although note ss 70(2) and 71(2) in relation to adoption orders made prior to the Adoption Amendment Act 2009 (No 2) (ACT); Adoption Act 2000 (NSW) s 160; Adoption Act 2009 (Qld) s 273; Adoption Act 1994 (WA) s 100. There is no equivalent provision in Tasmania.

provisions directed at enforcement, for example, requiring undertakings of persons to whom identifying information is to be released that they will not attempt to contact persons who have lodged a contact veto[87] and/or making it an offence to make contact with a person who has lodged a contact veto.[88]

46 While there is no formal contact veto system in Victoria, the adoption information register contains information as to the wishes of persons in relation to obtaining information about, or meeting, or providing information to other relevant parties to the adoption.[89] In the two remaining jurisdictions, the Northern Territory and South Australia, in relation to adoption orders made under the preceding legislation to that currently enacted, adoptees or birth parents continue to have a right of veto in respect of the disclosure of identifying information. Consequently, a contact veto system is strictly speaking unnecessary in the case of adoptions made under the earlier legislation.

IV. Intercountry adoption

A. Introduction

47 Intercountry adoption is the process of an Australian citizen or permanent resident, residing in Australia, adopting a child from another country. This occurs through a formal process facilitated by the relevant authority in the state of that citizen (or permanent resident).

48 As with other types of adoption, intercountry adoption can fulfil a valuable social function, not the least for the children involved. That said, there are unique challenges involved in the intercountry adoption process. Many overseas children in need of an adoptive family have special needs (physical, intellectual or behavioural) and will almost always have language, cultural and other ethnic differences that need to be catered for and nurtured. In fact, older children, sibling groups and

87 Adoption Act 1993 (ACT) s 73 (see also s 72, which requires counselling as a precondition to the release of information where a contact veto has been registered); Adoption Act 2000 (NSW) s 164; Adoption Act 1988 (Tas) ss 82–84; Adoption Act 1994 (WA) s 103.

88 Adoption Act 2000 (NSW) s 188; Adoption Act 1988 (Tas) s 115A. There is no equivalent provision in the Australian Capital Territory, Queensland or Western Australia.

89 Adoption Act 1984 (Vic) s 103(3)(b). A contact veto scheme was introduced in 2013 in Victoria but was repealed in 2015, though any contact statements lodged during that time will remain in force until they expire five years from lodgement.

those with special needs form a growing proportion of intercountry adoptions.[90]

B. Development of Hague Adoption Convention

49 Although intercountry (and intra-country) adoption can be traced back to ancient times, the evidence suggests that intercountry infant adoption for the purpose of building a family was rare.[91] According to John Boswell, abandoned children were often taken for slavery rather than adoption.[92] In more modern times, intercountry adoption became more widespread in the aftermath of World War II, mainly as an *ad hoc* humanitarian response to the plight of orphaned children.[93]

50 In response to concerns about the growing practice of intercountry adoption in the absence of any sufficient international legal agreement or regulation, the Hague Conference on Private International Law ("HCCH") created its first adoption convention in 1965.[94] This first attempt was unsuccessful, however, and attracted only three ratifications. International concerns were subsequently recognised by the United Nations in the International Adoption Declaration in 1986[95] and in Arts 20–21 of the CRC.[96]

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90 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 19, referencing Jean-François Mignot, "Why is Intercountry Adoption Declining Worldwide?" *Population and Societies* (2015) at pp 1–4.

91 John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (University of Chicago Press, 1998) at pp 74 and 115.

92 John Boswell, *The Kindness of Strangers: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (University of Chicago Press, 1998) at pp 62–63.

93 Nigel Cantwell, "Intercountry Adoption" (1998) 4 *Innocenti Digest* 2 <www.unicef-irc.org/publications/pdf/digest4e.pdf> (accessed 6 February 2016); see also Barbara Tizard, "Intercountry Adoption: A Review of Evidence" (1991) 32 *Journal of Child Psychology and Psychiatry* 743.

94 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption (concluded 15 November 1965).

95 General Assembly Resolution 41/85, *Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally*, A/RES/41/85 (3 December 1986).

96 Article 20 stipulates that member states are obliged to provide special protection for a child deprived of the family environment and to ensure that appropriate alternative family care or institutional placement is available in such cases. Efforts to meet this obligation must pay due regard to the child's cultural background. Article 21 stipulates that in countries where adoption is recognised and/or allowed, it shall only be carried out in the best interests of the child, and then only with the authorisation of competent authorities and safeguards for the child.

51 The Hague Adoption Convention was unanimously adopted by all member states present at the Seventeenth Session of the HCCH on 29 May 1993. It is noteworthy that some 60 countries participated in the development of this Convention. Given the need to gain the support of "exporting" countries, and the reality that "importing" countries make up the majority of HCCH membership, special invitations were extended resulting in a deliberating body that represented more countries than had ever previously taken part at a HCCH.[97] Moreover, a large number of the delegates were not lawyers but rather, government officials and social workers involved in child welfare, adoption and fostering.[98] There are currently 98 countries that are contracting states.[99]

52 The international response to removing the dangers of potential exploitation of children has seen the development of both the CRC and the comprehensive Hague Adoption Convention.[100] The full title of the Convention is indicative of the intention of the drafting states in protecting children from potential illicit practices in adoption practices. The key principles set out in "The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice Guide No 1" ("Guide No 1") are central to the prevention of the abduction, sale of, or traffic in children and include the best interests principle, the safeguards principle, and the co-operation principle.

(1) Objectives of Hague Adoption Convention

53 The objectives of the Hague Adoption Convention are to:[101]

> (a) establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his fundamental rights as recognised in international law;

97 Peter Pfund, "Intercountry Adoption: The 1993 Hague Convention – Its Purpose, Implementation and Promise" (1994) 28(1) *Family Law Quarterly* 53 at 55.

98 Peter Pfund, "Intercountry Adoption: The 1993 Hague Convention – Its Purpose, Implementation and Promise" (1994) 28(1) *Family Law Quarterly* 53 at 55 (thus allowing a greater emphasis on setting norms and procedures to protect the rights of children, birth parents and adoptive parents).

99 This was as at 22 October 2017: see "Status Table – 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption" (29 March 2017) <www.hcch.net/index_en.php?act=conventions.status&cid=69> (accessed 22 October 2017).

100 For a discussion, see Celica Bojorge, "Intercountry Adoptions: In the Best Interests of the Child?" (2002) 2(2) QUTLJJ 266.

101 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993) Art 1.

(b) establish a system of co-operation among contracting states to ensure that those safeguards are respected and thereby prevent the abduction, sale of, or traffic in children; and

(c) secure the recognition in contracting states of adoptions made in accordance with the Convention.

54 The Hague Adoption Convention only covers adoptions between convention countries where the relevant Central Authorities have agreed the adoption should proceed in relation to children who are aged less than 18 years and whereby a permanent parent–child relationship is created. As can be seen from the objectives above, the Convention focuses on the need for countries to work together to prevent the abduction, sale or trafficking of children. Another guiding principle in the Convention is that a child should be raised by his birth or extended family whenever possible. It is only when local solutions have been exhausted that intercountry adoption options should be considered – always with the child's best interests kept in mind.

(2) Procedural requirements under Hague Adoption Convention

55 The procedural requirements under the Hague Adoption Convention are as follows:[102]

(a) the prospective adoptive parents must apply to the Central Authority in their own country of habitual residence ("residence Central Authority");

(b) the residence Central Authority must be satisfied the applicants are eligible and suitable to adopt, and it must prepare a background report in relation to the applicants for consideration by the Central Authority of the child's origin ("origin Central Authority");

(c) the origin Central Authority must be satisfied that the relevant child is adoptable and that the proposed adoption is in the child's best interests; in doing so, it must prepare a background report having regard to the child's upbringing and to his ethnic, religious and cultural background; it must then send that report to the residence Central Authority together with proof that the necessary consents have been obtained and the reasons for the determination;

102 See generally regs 6–9 of the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth) and Arts 14–21 of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993).

(d) if the prospective parents agree, the decision to proceed is approved by both Central Authorities and the child is allowed to enter and reside permanently in the country of residence (both Central Authorities are required seek the necessary permissions to allow the child to move between the countries and to ensure that the transfer takes place in secure and appropriate circumstances);

(e) the relevant Central Authorities are required to keep each other informed about the adoption process and the progress of the placement if a probationary period is required; and

(f) if it is found that the adoption is not in the best interests of the child, the residence Central Authority may withdraw the child from the care of the adoptive parents, arrange a new placement of the child in consultation with the origin Central Authority or, as a last resort, return the child.

56 Unless the adoption is manifestly contrary to the public policy of a contracting state, an intercountry adoption that is certified in accordance with the Hague Adoption Convention must be recognised.[103] This recognition includes a further recognition that a legal parent–child relationship now exists and that the adoptive parents have parental responsibility for the child.[104] Moreover, the Convention leaves open the possibility of local law terminating the pre-existing legal birth parent–child relationship (if applicable) to create a full adoption.[105] Notwithstanding, information in relation to a child's origin must be preserved and made available to the child.[106]

C. Intercountry adoption in Australia

57 Australia signed and ratified the Hague Adoption Convention on 25 August 1998 and it came into force on 1 December 1998,

103 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993) Arts 23–25; see also ss 108, 110 and 112 of the Adoption Act 2000 (NSW).

104 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993) Art 26; see also s 109 of the Adoption Act 2000 (NSW).

105 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993) Arts 26–27; see also s 111 of the Adoption Act 2000 (NSW).

106 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993) Art 30; see also s 134(2) of the Adoption Act 2000 (NSW).

implemented by the Family Law Act 1975[107] and regulations.[108] Australia will only facilitate an overseas adoption if the principles and standards of the Convention can be met, notwithstanding whether or not the partner country has signed the Convention. For example, Australia has partner country arrangements with Taiwan and South Korea regardless that they are not party to the Convention; however, it is considered that those countries have the same standards of, or are compliant with, the Convention.[109]

58 Under the Hague Adoption Convention, each convention country is required to establish a central authority that is entrusted with both non-delegable and delegable functions arising from the Convention.[110] The Family Law (Hague Convention on Intercountry Adoption) Regulations 1998[111] provide for the establishment of a Commonwealth Central Authority, in addition to state and territory central authorities.[112] The Australian Commonwealth Attorney-General's Department is the Australian Central Authority under the Convention and is consequently responsible for enabling the performance of Australia's responsibilities under the Hague Adoption Convention in co-operation with overseas central authorities along with central authorities in each state and territory.[113]

59 From 1 January 2017, the responsibility for managing and establishing Australia's intercountry adoption programmes moved from the Attorney-General's Department to another federal department, the Department of Social Services ("DSS"). DSS now provides leadership and co-ordination (with assistance from the Attorney-General's

107 Cth.

108 See s 111C of the Family Law Act 1975 (Cth) and the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth).

109 It is noted that South Korea is in the final stages of ratifying the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993), and Australia has a bilateral arrangement with Taiwan.

110 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993) ch III, Arts 6–13; see also regs 5–11 of the Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth).

111 Cth.

112 Family Law (Hague Convention on Intercountry Adoption) Regulations 1998 (Cth) regs 5–11.

113 The relevant state and territory central authorities are the Australian Capital Territory Community Services Directorate; New South Wales Department of Family and Community Services; Northern Territory Department of Children and Families; Queensland Department of Communities, Child Safety and Disability Services; South Australia Department for Education and Child Development; Tasmania Department of Health and Human Services; Victoria Department of Health and Human Services; and West Australian Department for Child Protection and Family Support.

Department which remains the Central Authority, where needed) for intercountry adoption programmes that include managing and reviewing existing programmes as well as establishing new programmes. The state and territory central authorities are located within state and territory government departments (usually the relevant welfare department) and are responsible for assessing applications, educating, preparing and supporting prospective adoptive parents for intercountry adoptions, and providing post-placement supervision and support for parents and adoptees.

60 From 1999 until about 2011, more intercountry adoptions were finalised in Australia than adoptions of local and known children, reaching a high point of 74% of total adoptions in 2004–2005.[114] However, this has since declined, so that in 2015–2016, only 82 of the 278 finalised adoptions were intercountry adoptions, very similar to 2014–2015 figures, where 83 intercountry adoptions were finalised.[115] Australia currently has active[116] arrangements with 13 partner countries.[117] Of the total adoptions, 52 (or 19%) were Hague adoptions and 30 (or 11%) were non-Hague adoptions. Under the Hague Adoption Convention, Australia is a receiving country only and does not have an outgoing intercountry adoption programme to place Australian children with families seeking to adopt from overseas.

61 This trend is reflected globally, though the reasons for the decline are, not surprisingly, complex and varied. AIHW refers to improvement in economic and social development for traditional countries of origin resulting in fewer children in need of adoption (particularly children with health issues or impairments), more stringent eligibility criteria, and restrictions on application types and numbers, as well as long waiting times, all contributing to the general decline.[118] The general fall in the number of children available for adoption around the world has also led to many countries putting more stringent eligibility requirements and/or quotas in place for the number of children to be adopted by other countries. For example, the Department of Social Development and Welfare in Thailand allocated Australia a quota of 20 adoption applications in 2017. The demand for children to adopt, while no doubt influenced by humanitarian concerns, has also been attributed to the societal changes of the latter part of

114 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 36.
115 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 15.
116 There are programmes with Bolivia, Fiji, India, Lithuania and Ethiopia that are either on hold, inactive or closed.
117 The 13 partner countries are Bulgaria, Chile, China, Colombia, Hong Kong, Latvia, Philippines, Poland, South Africa, South Korea, Sri Lanka, Taiwan and Thailand.
118 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at pp 38–39.

20th century discussed earlier that has seen a substantial reduction in the number of local children being made available for adoption.

62 As referred to earlier, a significant majority, 90% in 2015–2016, of intercountry adoptions in Australia are from Asia (24% from Philippines, 22% from Thailand, 20% from Taiwan (Non-Hague), and 17% from South Korea (Non-Hague)).[119] It is noteworthy that the percentage of adoptions from China has fallen rather dramatically in the last decade, from 31% in 2006 to only 4% in 2016.[120] This split is reflective of the countries that Australia has an adoption programme with.

63 Interestingly, the proportion of children aged less than one year adopted from overseas has substantially declined: from 47% of intercountry adoptions in 2005–2006 to 9% in 2015–2016. In turn, 95% of adoptees were aged under ten and 71% were aged under five.[121] There has been a shift in the ages of children needing adoption away from infants to somewhat older children.

(1) Intercountry adoption process in Australia

64 State and territory central authorities are responsible for processing adoption applications and assessing the eligibility and suitability of people wanting to adopt a child from overseas against criteria outlined in the relevant legislation. They also manage the adoption application process, which can take several years. The median length of time for processing an intercountry adoption in Australia has generally been on the rise in Australia, peaking at over five years in 2014–2015; however, this fell to three years and five months in 2015–2016.[122] However, these figures can be somewhat misleading as the length of time does vary quite considerably depending on the country of origin. For example, the median length of time for an adoption from Thailand was almost seven years whereas for South Korea it was two and half years.[123]

65 In mid-2015, the "Intercountry Adoption Australia" service was launched to provide a guide of sorts for people wanting to adopt from overseas. The service is delivered by DSS and includes a national website

119 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 17.
120 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 34.
121 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 19, and Tables A2 and A9.
122 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 18.
123 Australian Institute of Health and Welfare, *Adoptions Australia 2015–16*, at p 18 and Table 3.3.

and telephone information line to assist Australian families through the intercountry adoption process.[124]

66 The intercountry adoption process is similar to the process for the adoption of Australian children discussed earlier. Applicants undergo similar assessments, including health, age, maturity, and medical and criminal checks, as well as their ability to deal with the specific needs of the adopted child and capacity to provide a stable, secure and loving home environment. Applicants are subject to similar residency and age requirements, and the welfare and the interests of the child are regarded as the paramount consideration at all times. In addition to being found eligible according to the relevant Australian state or territory's requirements for intercountry adoption, the international country can impose additional requirements that need to be met. For example, to adopt from the Philippines, applicants must have been married for three years (or 12 months having been previously in a *de facto* relationship for several years), couples with a history of more than two divorces will not be accepted, nor are *de facto* couples or same-sex couples considered eligible.[125]

(2) Procedural steps

67 Considering the fact that the processes required in each state and territory are similar, but not identical, the following is a general summary of the process for an Australian family considering adopting a child from overseas:[126]

(i) Make an initial enquiry.

(ii) Attend education seminars and make a formal application to the central authority of the relevant state/territory.

(iii) Await the adoption assessment and decision by the relevant state/territory (the approval process may include health, police and referee checks, as well as interviews with an adoption assessor).

(iv) If approved, the application is sent to the relevant country of choice for approval by their authorities.

124 See Intercountry Adoption Australia website at <www.intercountryadoption.gov.au> (accessed 22 October 2017).

125 See the partner country page on the Philippines on the Intercountry Adoption Australia website at <www.intercountryadoption.gov.au/thinking-about-adoption/countries/philippines/> (accessed 22 October 2017).

126 See Intercountry Adoption Australia, "Thinking about Adoption" <www.intercountryadoption.gov.au/thinking-about-adoption> (accessed 22 October 2017).

(v) A placement proposal (matching a child with a family) is issued by the overseas authority.

(vi) Commence the immigration application process in Australia with the Department of Immigration and Border Protection ("DIBP").

(vii) Travel to meet the child in the child's country of birth to accept placement of the child and complete the overseas adoption and immigration formalities or court proceedings.

(viii) After travel and pick-up of the child, the state/territory central authority may visit the family, prepare update reports on the family and ensure all is going well. The reporting requirements vary depending on the legal status of the child and the relevant overseas country requirement.

(ix) Finalise the adoption through the legal process so the adoptive parent/parents become the legal parent/parents of the child.

68 It should not be surprising that the intercountry adoption process can be expensive, often prohibitively so. Though fees vary between authorities (on the Australian side and on the international country side), costs would usually include the application process (up to AU$11,000), airline travel, accommodation overseas when collecting the child, immigration fees, translation costs, preparation of documents, and legal fees.

69 In a similar vein to the information services provided for known country adoptions, the Australian government funds the Intercountry Adoption Tracing and Reunification Service.[127] As the name suggests, this body (delivered by International Social Service Australia ("ISS")) provides a free specialised search and reunion services to intercountry adoptees and adoptive parents. It provides information, support and counselling to those involved in the decision to trace the birth family and throughout the complex reunification process.

(3) Immigration issues

70 Children adopted through the states and territories under the various intercountry adoption arrangements will usually enter Australia under the Child (Class AH) Visa Subclass 102 Adoption. For a child adopted by Australian residents to be eligible for this type of visa, they must meet many requirements, including that the adoption has the approval of a state or territory welfare authority. The child is also

127 See <www.iss.org.au> (accessed 22 October 2017).

required to meet the standard migration requirements, including health criteria. Further information is available on the DIBP website.[128]

71 It is worth noting that DIBP will refuse a child an entry visa unless the adoption arrangement meets migration requirements, even if the adoption has already occurred and is lawful in the international country.

(4) Expatriate adoption

72 The only circumstance where a visa may be granted to a child adopted privately overseas is where at least one of the adoptive parents has been a resident outside Australia for at least 12 months at the time of the visa application. This is otherwise known as an "expatriate adoption". Other criteria that must be met include (but are not limited to):

> (a) compliance with the laws relating to adoption for the country in which the child is usually resident;
>
> (b) the relevant authorities in the international country have approved the child's departure to Australia;
>
> (c) the residence internationally was not contrived to deliberately bypass any requirements concerning the entry of adopted children into Australia; and
>
> (d) the adoptive parents have lawfully acquired full and permanent parental rights by the child's adoption. This means that the adoption order must sever the legal relationship between the child and his biological parents (noting that some countries do not have full and permanent adoption).

73 An intercountry adoption may be finalised using one of a number of processes. A "full adoption" order can be made in the child's country of origin and this may be recognised in Australia. Alternatively, for children whose adoption orders are not finalised in the country of origin, the Immigration (Guardianship of Children) Act 1946[129] provides for guardianship arrangements. Once the child arrives in Australia, the federal Minister for Immigration and Border Protection is generally the legal guardian, although the Minister can delegate his powers and functions to the relevant state or territory Central Authority Minister or department head, thereby allowing the Minister or department head to give consent to the adoption. This arrangement

128 Australian Government Department of Home Affairs, "Adoption of Children from Outside Australia" <www.border.gov.au/Trav/Life/Adoption-of-children> (accessed 22 October 2017).

129 Cth.

remains in place until an adoption order is finalised in the relevant state or territory.

74 Also noteworthy is a relatively recent amendment to the Australian Citizenship Act 2007,[130] which commenced on 25 February 2015, that enables children adopted from countries with which Australia has a bilateral agreement to be granted citizenship as soon as an adoption is finalised and an adoption compliance certificate is issued. For example, this means that children adopted from South Korea and Taiwan can now immediately apply for Australian citizenship once the adoption process in the country of origin is completed.

V. Preventing trafficking of children

75 In keeping with Art 21(d) of the CRC, the Hague Adoption Convention does not overlook the obvious potential for child-trafficking. Indeed, one of the three objects of the Convention is to establish safeguards to prevent the abduction, the sale of, or traffic in children.[131] Furthermore, Art 32 of the Convention stipulates that:

> (1) No one shall derive improper financial or other gain from an activity related to an intercountry adoption.
>
> (2) Only costs and expenses, including reasonable professional fees of person involved in the adoption, may be charged or paid.
>
> (3) The directors, administrators and employees of bodies involved in an adoption shall not receive remuneration which is unreasonably high in relation to services rendered.

76 In October 2016, the Working Group (of which Australia was a member) on preventing and addressing illicit practices in intercountry adoption published its conclusion and recommendation paper.[132] In 2011, Australia led a working group on developing co-operative measures to prevent and address illicit practices in intercountry adoptions.

77 In order to prevent improper financial gain in relation to adoption, intercountry or domestic, it is an offence in New South Wales for a person to make or receive consideration for the making of any

130 Cth.

131 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (concluded 29 May 1993) Art 1(*b*).

132 This paper can be found on the Hague Conference on Private International Law website along with other preparatory and discussion papers at <https://www.hcch.net/en/publications-and-studies/details4/?pid=6309&dtid=62> (accessed 26 October 2017).

arrangements for adoption, other than authorised fees or expenses.[133] This prohibition does not extend to the payment or receipt of reasonable expenses or reasonable remuneration for work done or for the care of the child leading up to the adoption.[134]

VI. Conclusion

78 The adoption of children has been, and continues to be, the subject of much debate within the Australian community and elsewhere, particularly as to whether it should continue at all. The adoption laws and processes are clearly in a period of review and transition, brought about by changed social and economic conditions. Adoption clearly remains relevant in Australian society, not just for the many children who have been adopted, but also for their adoptive and birth parents, siblings and extended families.

79 There are valid concerns about the permanent severing of a legal relationship, not only in relation to a parent, but also as regards a whole family, both past and future. Adopted children talk about "genealogical bewilderment",[135] and speak of having more of a psychological connection to ancestors within their birth families than their adoptive families. There are also significant concerns about the need for permanency for children who cannot remain within their birth families, and the wishes of those children who are not in permanent placements to know they belong in their foster families. Adoption professionals are also aware of the sometimes devastating impact of multiple placements of infants and young children who are not adopted, and how a permanent placement from the earliest possible time can be invaluable for the long-term health of the child.

80 Despite increasing and more effective international regulation, intercountry adoption remains controversial. In committing Australia to the Hague Adoption Convention process, the Australian Federal Government has attempted to balance the views of those who support intercountry adoption for humanitarian reasons, with those who are concerned about the possibilities of exploitation and cultural disconnection for the children who are adopted from abroad. Whether the current balance is correct is a matter of conjecture. Certainly, it is

133 Adoption Act 2000 (NSW) ss 177(1) and 177(2).

134 Adoption Act 2000 (NSW) ss 177(3) and 177(4).

135 "Genealogical bewilderment" is a supposed mental condition resulting from identity problems concerning blood relations of a person. It is usually found in a child who either has surrogate parents or foster parents, or is adopted. For a general discussion, see H J Sants, "Genealogical Bewilderment in Children with Substitute Parents" (1964) 37 Brit J Med Psychol 133.

true to say that placements of children born overseas have accounted for a large number of adoptions in Australia. Given that it is likely that the current federal and state/territory partnership for intercountry adoption law and practice will continue into the years ahead, it is imperative that our governments work together to ensure compliance with the Hague Adoption Convention and to prevent unnecessary duplication and legislative uncertainty. Adoptive parents also need to be aware that failure to comply with the legal framework for intercountry adoption may mean that their adopted children will not be allowed to enter Australia.

81 It is essential, given the significant involvement of so many Australians with adoption, that we – psychologists, social workers, legal practitioners, judges, politicians, health professionals, teachers, students, individuals and family members – continue to ask how we can all best care for children who cannot remain within their birth families.