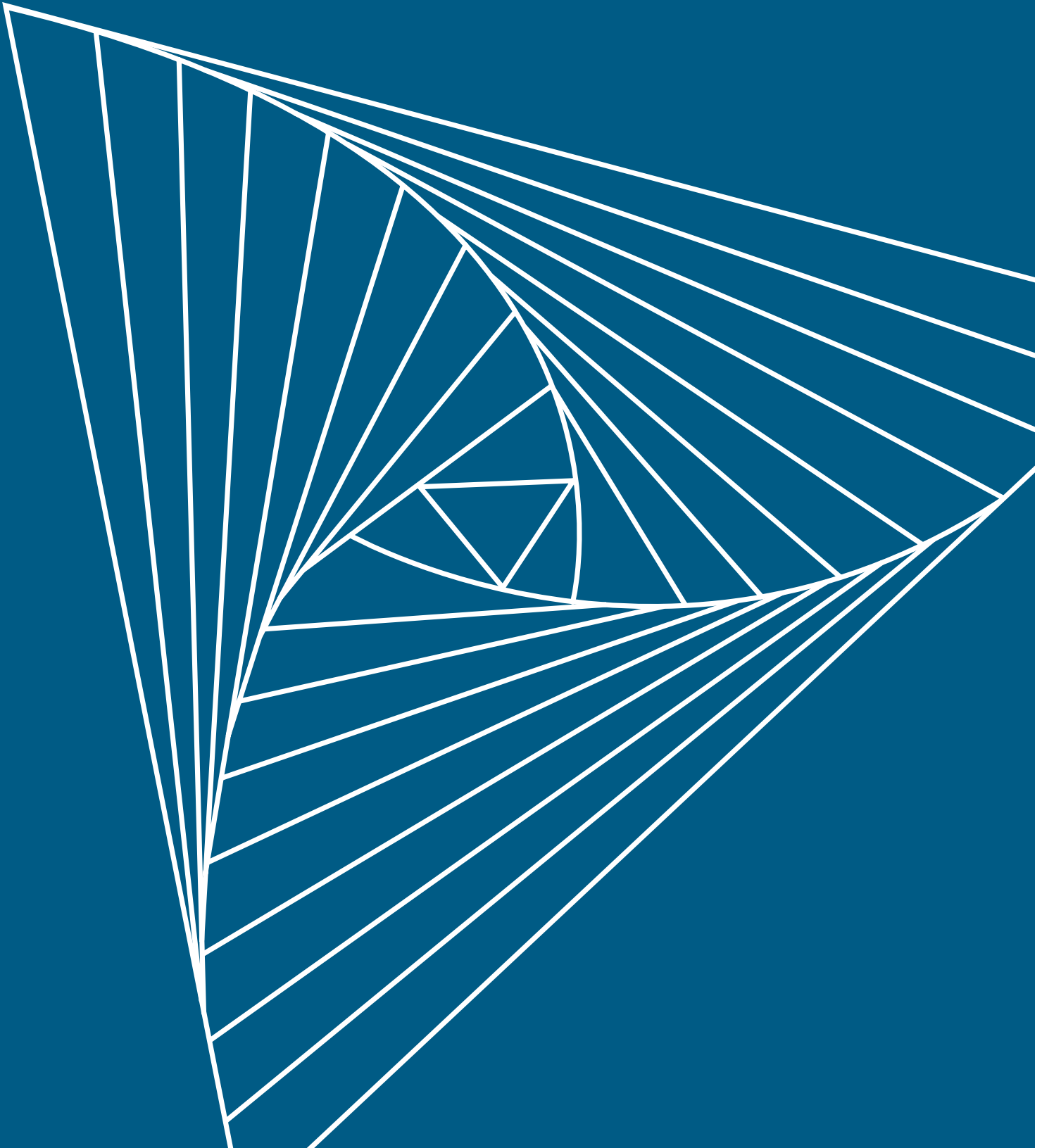




Victorian
Law Reform
Commission

Review of the Adoption Act 1984

CONSULTATION PAPER AUGUST 2016





Published by the Victorian Law Reform Commission

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Preface

The Victorian Government has asked the Victorian Law Reform Commission to review Victoria's adoption laws and make recommendations to ensure they meet the needs of the children and families they affect.

The *Adoption Act 1984* (Vic) is over 30 years old. Since its enactment there have been significant changes in society's values and expectations in relation to families.

Adoption is a word that elicits mixed responses. A significant proportion of the population has experienced or been exposed to issues relating to adoption. Many if not most of these experiences were of closed and possibly 'forced' adoption. Past adoption practices resulted in significant trauma for many people involved. These practices have been the subject of a number of inquiries, which rightly resulted in apologies by the Commonwealth Parliament and all State and Territory Parliaments. Adoption has also been a positive experience for many Victorian children, adult adopted people and their families.


The Adoption Act was the first adoption legislation in Australia to introduce the principles and practice of open adoption. All adoptions carried out in Victoria since 1984 have been under the open adoption system.

Numbers of adoptions are now at an all-time low. From a high in 1971–72 of almost 10,000 adoptions nationally, only 56 local adoptions were finalised in Australia in 2014–15, of which 24 were in Victoria.

There are some in the adoption community who say adoption is never in the best interests of the children adopted. The Commission has not been asked to examine this question. However, the Commission has been asked to make recommendations to ensure the best interests and rights of the child are the foremost consideration in any decision made under the Adoption Act and the *Adoption Regulations 2008* (Vic). This paper seeks the community's views about this question.

The Commission will not consider inter-country adoption programs or commercial surrogacy. These matters are excluded by the terms of reference as they are more appropriately considered at a national level. Adoption by same-sex couples is not a question for this reference. The *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) was passed in December 2015 and will be effective on 1 September 2016 (the forced date). Likewise, contact statements are not considered by the review, as they were removed from the Adoption Act by the *Adoption Amendment Act 2015* (Vic).

The issues involved will attract a range of views. The Commission encourages anyone with an interest in them to make a written submission to the Commission by 16 September 2016. The method of making a submission is stated on page vii of this consultation paper.



The Hon. P. D. Cummins AM
Chair, Victorian Law Reform Commission
August 2016

Call for submissions

The Victorian Law Reform Commission invites your comments on this consultation paper.

What is a submission?

Submissions are your ideas or opinions about the law under review and how to improve it. Submissions can be anything from a personal story about how the law has affected you to a research paper complete with footnotes and bibliography.

We want to hear from anyone who has experience with the law under review. Please note that the Commission does not provide legal advice.

This consultation paper contains a number of questions, listed on page 148, that seek to guide submissions. You do not have to address all of the questions to make a submission.

What is my submission used for?

Submissions help us understand different views and experiences about the law we are researching. We use the information we receive in submissions, and from consultations, along with other research, to write our reports and develop recommendations.

The Commission will not consider submissions on matters which are not within the terms of reference.

How do I make a submission?

You can make a submission in writing, or verbally to one of the Commission staff if you need assistance. There is no required format for submissions. However, we encourage you to answer the questions on page 148.

Submissions can be made by:

Completing the online form at www.lawreform.vic.gov.au

Email: law.reform@lawreform.vic.gov.au

Mail: GPO Box 4637, Melbourne Vic 3001

Fax: (03) 8608 7888

Phone: (03) 8608 7800, 1300 666 557 (TTY) or 1300 666 555 (cost of a local call)

Assistance

Please contact the Commission if you need an interpreter or other assistance to make a submission.

Publication of submissions

The Commission is committed to providing open access to information. We publish submissions on our website to encourage discussion and to keep the community informed about our projects.

We will not place on our website, or make available to the public, submissions that contain offensive or defamatory comments, or which are outside the scope of the reference. Before publication, we may remove identifying information from submissions that discuss specific cases or the personal circumstances and experiences of people other than the author. Personal addresses and contact details are removed from all submissions before they are published. The name of the submitter is published unless we are asked not to publish it.

The views expressed in the submissions are those of the individuals or organisations who submit them. Their publication does not imply any acceptance of, or agreement with, those views by the Commission.

We keep submissions on the website for 12 months following the completion of a reference. A reference is complete on the date the final report is tabled in Parliament. Hard copies of submissions will be archived and sent to the Public Record Office Victoria.

The Commission also accepts submissions made in confidence. Submissions may be confidential because they include personal experiences or other sensitive information. These submissions will not be published on the website or elsewhere. The Commission does not allow external access to confidential submissions. If, however, the Commission receives a request under the *Freedom of Information Act 1982 (Vic)*, the request will be determined in accordance with that Act. The Act has provisions designed to protect personal information and information given in confidence. Further information can be found at www.foi.vic.gov.au.

Submissions which do not have an author's or organisation's name attached will not be published on the Commission's website or made publicly available and will be treated as confidential submissions.

Confidential submissions

When you make a submission, you must decide whether you want your submission to be public or confidential.

Public submissions can be referred to in our reports, uploaded to our website and made available to the public to read in our offices. The names of submitters will be listed in the final report. Private addresses and contact details will be removed from submissions before they are made public, but the name of the submitter is published unless we are asked not to publish it.

Confidential submissions are not made available to the public. Confidential submissions are considered by the Commission but they are not referred to in our final reports as a source of information or opinion other than in exceptional circumstances.

Please let us know your preference when you make your submission. If you do not tell us that you want your submission to be treated as confidential, we will treat it as public.

Anonymous submissions

If you do not put your name or an organisation's name on your submission, it will be difficult for us to make use of the information you have provided. If you have concerns about your identity being made public, please consider making your submission confidential rather than submitting it anonymously.

More information about the submission process and this reference is available on our website: www.lawreform.vic.gov.au.

Submission deadline: 16 September 2016

Terms of reference

[Matter referred to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* by the Victorian Attorney-General, the Hon. Martin Pakula MP on 18 December 2015.]

At the time of its introduction, the *Adoption Act 1984* represented a significant change in Victorian adoption policy.

The government recognises that adoption is complex, and past adoption practices have resulted in significant trauma for people affected by those practices. The government also acknowledges the positive experience of adoption for many Victorian children, adult adopted people and their families.

To ensure that the Adoption Act, now over 30 years old, meets the needs of the children and families it affects, it is time to review the Act to ensure:

- the best interests of the child are paramount
- it is consistent with contemporary law in relation to family and community
- it operates harmoniously with other relevant areas of law that have developed since the introduction of the Adoption Act
- it is structurally sound and in accordance with contemporary drafting practice.

Accordingly, the Victorian Law Reform Commission (the 'Commission') is requested to provide recommendations to government on the modernisation of the *Adoption Act 1984* and the Adoption Regulations 2008.

The Commission should consider and provide recommendations to government on opportunities to amend adoption law to:

- ensure the best interests and rights of the child are the foremost consideration in any decision made under the Adoption Act
- better reflect community attitudes and contemporary law in relation to family, for example, the way a child's identity is reflected on a child's birth certificate, or ensuring requirements in relation to prospective parents' relationship status or living arrangements are consistent with current Victorian law
- uphold principles set out in the *Charter of Human Rights and Responsibilities* and the *United Nations Convention on the Rights of the Child*
- improve the operation of the Adoption Act and Adoption Regulations including, but not limited to:
 1. addressing any gaps in current information provisions
 2. clearly articulating legislative practice and procedural requirements, for example in relation to assessment of adoption applicants
 3. ensuring the Act uses clear, contemporary language.

In making recommendations, the Commission should ensure amendments are capable of harmonious operation with other relevant Victorian and Commonwealth legislation.

The Commission should *not* consider:

- intercountry adoption programs or commercial surrogacy: these matters are more appropriately considered at a national level
- adoption by same-sex couples: the government made an election commitment to legislate to allow same-sex adoption. This commitment has been delivered by the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* and is not within the scope of this review
- contact statements: the government made an election commitment to legislate to remove contact statements. This commitment has been delivered by the *Adoption Amendment Act 2015* and is not within the scope of this Review.

The Commission is asked to report by 28 February 2017.

Glossary

Adoption information register	A register maintained by the Family Information Networks and Discovery (FIND) service within DHHS as part of its role in helping people access information about past adoptions. An adopted person, other parties to an adoption and certain other people can ask the Secretary to enter their name and address on the Register, as well as their wishes in relation to disclosure of information and contact.
Adoption information services	Services within DHHS and approved agencies that handle applications for information by people with rights to adoption information.
Adoption order	An order made by the court which finalises an adoption.
Approved agency	A non-government organisation approved by the Secretary to arrange adoptions under section 22 of the Adoption Act. There are currently four approved agencies: Anglicare/St Lukes Anglicare, CatholicCare, Child & Family Services Ballarat and Connections UnitingCare.
BDM	The Victorian Registry of Births, Deaths and Marriages.
Child	A person under 18 years of age.
Closed adoption	A form of adoption in which no information is shared between adoptive and birth families. Closed adoption is no longer practised in Victoria.
DHHS	The Department of Health and Human Services (Victoria).
Domestic partner	A person in a domestic relationship or registered relationship.
Domestic relationship	A relationship between two people who are not married or in a registered relationship who are living together as a couple on a genuine basis (irrespective of sex or gender).
Forced adoption	The term used to describe an adoption that occurred without effective consent of the child's birth parent or parents due to duress or coercion.

Infant	A child under 12 months of age.
Information provisions	Provisions in Part VI of the Adoption Act which give certain people access to adoption information.
Integrated birth certificate	A birth certificate which records both the birth and adoptive parents of an adopted person.
Inter-country adoption	Adoptions involving children from countries other than Australia who are legally placed for adoption under the <i>Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption</i> or under separate agreements between Australia and other countries.
Known-child adoptions	Adoptions by people who have a pre-existing relationship with the child, such as step-parents or relatives of the child.
Open adoption	A form of adoption that facilitates or allows information sharing or contact between the adoptive and birth parents, and may involve contact between the child and birth parents. The 1984 Act introduced open adoptions.
Principal officer	Officers within approved agencies who have powers and responsibilities under the Adoption Act and Adoption Regulations.
Registered relationship	A domestic relationship registered under the <i>Relationships Act 2008</i> (Vic).
Secretary	The Secretary of the Department of Health and Human Services.
Special needs adoption	The adoption of children who are over the age of 12 months, and/or have complex needs, such as children with a disability or children who have experienced abuse or neglect.
Stolen Generations	A name commonly given to the generations of Aboriginal and Torres Strait Islander children who were removed from their families by compulsion, duress or undue influence.

Introduction

- 2** Referral to the Commission
- 2** Scope of the reference
- 3** Terminology
- 4** Conduct of this reference
- 5** Structure of this paper

1. Introduction

Referral to the Commission

- 1.1 On 18 December 2015, the Attorney-General, the Hon. Martin Pakula MP, asked the Victorian Law Reform Commission, under section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic) to provide recommendations to government on the modernisation of the *Adoption Act 1984* (Vic) and the *Adoption Regulations 2008* (Vic). The terms of reference appear at page ix.

Scope of the reference

- 1.2 At the time of its introduction, the Adoption Act represented a significant change in Victorian adoption policy. The Adoption Act established open adoption, which facilitates information sharing or contact between the adoptive and birth parents. Since the introduction of the Adoption Act, all adoptions in Victoria have been under the open adoption system.
- 1.3 The Commission acknowledges that before the current Act came into effect, closed adoption was practised, in which no information was shared between adoptive and birth families, and birth parents and their children were denied the possibility of contact after relinquishment. These practices often resulted in significant trauma for people affected by them.
- 1.4 While the Commission encourages individuals to participate in our consultations and to make submissions informed by personal experience, the terms of reference ask the Commission to review the operation of the current adoption legislation and regulations.
- 1.5 The terms of reference expressly exclude a number of matters from the review. The Commission is therefore not reviewing:
- *Inter-country adoption programs and commercial surrogacy*—these matters are more appropriately considered at a national level.
 - *Adoption by same-sex couples*—the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic), which amends the Adoption Act to enable the adoption of children by same-sex couples and people who do not identify with a specific sex or gender, will come into effect in September 2016.
 - *Contact statements*—provisions relating to contact statements and the associated offence were removed by the *Adoption Amendment Act 2015* (Vic).
- 1.6 The Commission will not consider submissions on the above three matters.
- 1.7 Further, the terms of reference assume the ongoing existence of adoption in Victoria.

Terminology

- 1.8 Adoption can be difficult to write about due to the trauma suffered by many people affected by past adoption practices in Australia. The Commission acknowledges the need to balance the sensitivities of language and to communicate clearly with a range of audiences, including those directly affected by adoption. The Commission has sought to write without bias, balancing linguistic sensitivities with the need to distinguish between parties to adoption.
- 1.9 The Commission appreciates that there may be some people who will remain dissatisfied with the language used in this paper, but has tried to respect all views and strike a balance between sensitivity to individuals and clarity for a wider readership. Appropriate terminology in the Adoption Act is discussed in Chapter 9.

Parents: birth and adoptive

- 1.10 The Commission acknowledges that mothers who have given up their children, whether voluntarily or forcibly, may disagree with terms such as 'birth mother', 'natural mother', 'biological mother' and 'relinquishing mother'. Often, the simple term 'mother' is preferred.
- 1.11 However, adoptive mothers who have raised these children may object to the use of the term 'mother' in this context. Indeed, the terms 'adoptive mother' and 'adopter' have been rejected by some in favour of the term 'mother'.
- 1.12 Wherever possible in this consultation paper, the Commission has used the terms 'parents', 'mother' and 'father' to refer both to the people to whom a child was born, and the people who have adopted a child, where it is clear from the context which circumstance applies.
- 1.13 Where the context is not clear, the term 'birth mother' has been used to refer to the person to whom the child was born. The term 'adoptive mother' has similarly been used to identify the person who has adopted the child. The same reasoning applies in referring to 'adoptive fathers' and 'adoptive parents'.
- 1.14 References to 'natural parents', 'natural relative' and 'natural child' have been made only where the Adoption Act and the Adoption Regulations use these terms.¹

Adopted child/person

- 1.15 Adopted persons and children may also disagree with the terms 'adopted person', 'adopted child' or 'adoptee', particularly if they were adopted during the period of forced or closed adoption.
- 1.16 Wherever possible, the Commission has used the term 'child' and 'infant' in the context of adoption processes. However, where it is not clear from the context that a child or person was adopted, the Commission has used the term 'adopted child', and when that person is over 18 years of age, 'adopted person'.

Family of origin

- 1.17 When referring to relatives of the birth parents, the term 'family of origin' has been used for clarity. This may include references to the child's grandparents, siblings and other relatives from the child's family of origin.

¹ The terms 'natural parent', 'natural relative' and 'natural child' are discussed in Chapter 8 from page 112. These terms are also discussed in Appendix B on page 157.

Aborigine

- 1.18 The term 'Aborigine' is used in the Adoption Act, defined as 'a person who is descended from an Aborigine or Torres Strait Islander, identifies as an Aborigine or Torres Strait Islander, and is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community'.² The Commission notes that the term 'Aborigine' is often considered inappropriate and may cause offence.³ It also notes that the term 'Aboriginal person' or 'Aborigine' does not include Torres Strait Islander people, although it has been defined to do so in the Adoption Act.⁴ The Commission recognises that Torres Strait Islanders are a separate people in origin, history and way of life. For these reasons, the Commission does not use the term 'Aborigine' in this discussion, substituting 'Aboriginal or Torres Strait Islander person' where possible.

Domestic relationships and registered domestic relationships

- 1.19 This consultation paper uses terminology introduced to the Adoption Act by the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic).
- 1.20 When it comes into effect in September 2016, the amending Act will enable same-sex couples and people who do not identify with a specific sex or gender to adopt. To achieve this, the amending Act introduced non-gendered language and new types of relationship to the Adoption Act. This included adding 'registered domestic relationships' to the types of relationship that may be eligible to adopt a child and replacing the terms 'de facto relationship' and 'de facto spouse' with the terms 'domestic relationship' and 'domestic partner'.

Conduct of this reference

Division

- 1.21 The Chair of the Commission exercised his powers under section 13(1)(b) of the Victorian Law Reform Commission Act to constitute a Division to guide and oversee the conduct of the reference. The Chair of the Commission is the Chair of the Division.

Experts

- 1.22 Experts have assisted the Commission in identifying issues and exploring options for reform, although they are not involved in developing or voting on the Commission's recommendations. The Chair sought the advice of two experts in the field, who were consulted during preparation of the consultation paper to identify and advise on issues raised by the terms of reference. They will be consulted after submissions have been received and contribute further insight and guidance.

Consultation paper and submissions

- 1.23 This consultation paper draws from the preliminary research conducted by Commission staff, along with a small number of confidential, preliminary consultations with key stakeholders who assisted with identifying the issues arising from the terms of reference.
- 1.24 This paper describes the law, provides background information and asks questions about the issues arising from the terms of reference. The questions are listed on pages 148–152.
- 1.25 The Commission is seeking submissions in response to these questions by **16 September 2016**. Information about how to make a submission is set out on page vii.

² *Adoption Act 1984* (Vic) s 4(1).

³ See, eg, Oxfam Australia, *Aboriginal and Torres Strait Islander Cultural Protocols* (1 December 2007) Oxfam Australia <resources.oxfam.org.au>; Reconciliation Queensland, *Appropriate Terminology Use in Reconciliation Groups* (November 2008) Reconciliation Queensland <rq. org.au/wp-content/uploads/2012/01/appropriate_terminology.pdf>.

⁴ See, eg, Oxfam Australia, *Aboriginal and Torres Strait Islander Cultural Protocols* (1 December 2007) Oxfam Australia <resources.oxfam.org.au>; Reconciliation Queensland, *Appropriate Terminology Use in Reconciliation Groups* (November 2008) Reconciliation Queensland <rq. org.au/wp-content/uploads/2012/01/appropriate_terminology.pdf>.

- 1.26 Public consultations will be held during the submission period, to allow members of the community to identify issues and propose reform options.

Structure of this paper

- 1.27 The paper is divided into two parts. Part 1 (Chapters 1–4) provides a historical context for the reference and sets out the current law. It does not pose questions. Part 2 (Chapters 5–9) draws out the issues raised by the terms of reference and provides the questions for the consultation paper. All the questions are listed on pages 148–152.

Part 1

- 1.28 Chapter 1 provides an introduction and overview of the reference.
- 1.29 Chapter 2 sets out the history of adoption law in Victoria and identifies recent relevant reviews and amendments to the law.
- 1.30 Chapter 3 provides an overview of the operation of adoption law and practice in Victoria.
- 1.31 Chapter 4 provides a brief overview of adoption in the child protection system in Victoria and the legal framework for adoption in the child protection context, including the need for consent or dispensation with consent under the Adoption Act.

Part 2

- 1.32 Chapter 5 explores a range of issues relevant to ensuring that the best interests and rights of the child are the foremost consideration in any decision made under the Adoption Act.
- 1.33 Chapter 6 considers the way the Adoption Act provides for the best interests of Aboriginal and Torres Strait Islander children.
- 1.34 Chapter 7 considers the requirements applicants must meet to be able to adopt, the compatibility of these requirements with community attitudes and contemporary law about the family, and whether the requirements are set out clearly.
- 1.35 Chapter 8 considers rights to access adoption information and how they affect people's privacy. It also considers how a birth certificate should reflect an adopted person's identity, and when it is appropriate for an adopted child's name to be changed.
- 1.36 Chapter 9 discusses the operation of the Adoption Act and Regulations, the clear articulation of practice and procedures, terminology which is no longer socially or operationally relevant, and post-adoption support.
- 1.37 Chapter 10 concludes the paper.

History of adoption law in Victoria

- 8** Introduction
- 10** Adoption legislation in Victoria
- 12** Closed and open adoption
- 15** Reports and reviews
- 19** Reviews in other jurisdictions
- 19** Human rights and the rights of the child

2. History of adoption law in Victoria

Introduction

- 2.1 This chapter provides a brief history of adoption law in Victoria and the social context of its development. It describes the law as it was before the *Adoption Act 1984* (Vic), briefly discusses relevant reviews and inquiries, and outlines changes to the Adoption Act since its enactment.
- 2.2 Many Australians have been touched by adoption, particularly during its height in the late 1960s and early 1970s, in the era of closed adoptions, when many experiences were painful. Adoption is no longer a common occurrence: in Australia in 2014–15 there were 56 local adoptions, of which 24 were in Victoria.¹
- 2.3 Adoption is a contentious subject, in Australia and internationally. There are those who strongly oppose adoption for any reason, and those who promote its increase. All argue their position is in the best interests of the child.

The long history of adoption

- 2.4 Adoption, or forms of child placement referred to as adoption, has a long history. Adoption agreements were sealed on tablets by the Mesopotamians more than 2000 years BCE.²
- 2.5 Adoption was common in ancient Greece and ancient Rome, operating essentially to ensure succession in the male line.³ Adoption records in ancient Greece date from the 6th century BCE. Adoption established an heir to the adopter's property. As only men could legally own property, only males could be legally adopted. Adoption was usually accompanied by a public declaration.⁴
- 2.6 Roman adoption records date from the 5th century BCE. As in Greece, adoption was an important means of ensuring inheritance within the male family line, particularly as a will was ineffective if it did not nominate an heir.⁵

1 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 13. The Australian Institute of Health and Welfare report defines 'local adoptions' as 'adoptions of children who were born or permanently residing in Australia before the adoption, are legally able to be placed for adoption, but generally have had no previous contact or relationship with the adoptive parent(s)'. 4.

2 See generally Robert Paulissian, 'Adoption in Ancient Assyria and Babylonia' (1999) 13(2) *Journal of Assyrian Academic Studies*. Adoption of a stranger's male child provided a childless couple with an heir, and a son to support them in their old age and perform the religious rites required upon their death. A craftsman might adopt a male heir for apprenticeship to ensure the continuity of the family business. Adoption of children was also common among the eunuchs of the royal palace and by the women dedicated to religious celibacy, who also looked to ensure support in their old age. A loyal slave might be adopted to maintain the continuity of care and support of the adopter into old age. Children born to a free man and his slave wife were commonly adopted and legitimised by the father to be legally considered as heirs. Females were also adopted (as daughter, daughter-in-law and sister). Typically, natural parents or guardians maintained their interest in the child and retained limited rights of reclaiming him. Inheritance from the adoptive parents and the nature of the rights retained by the natural parents were often addressed in the adoption contract.

3 See generally Hugh Lindsay, *Adoption in the Roman World* (Cambridge University Press, 2009); Hugh Lindsay, 'Adoption and Heirship in Greece and Rome' in Beryl Rawson (ed), *A Companion to Families in the Greek and Roman Worlds* (Blackwell Publishing, 2011) 346.

4 See Hugh Lindsay, *Adoption in the Roman World* (Cambridge University Press, 2009) 37–8.

5 See Hugh Lindsay, 'Adoption and Heirship in Greece and Rome' in Beryl Rawson (ed), *A Companion to Families in the Greek and Roman Worlds* (Blackwell Publishing, 2011) 347, 354.

- 2.7 There was a preference for adoption of close kin.⁶ Most surviving records of adoption, in both Greece and Rome, involve adult adoptees.⁷
- 2.8 Prior to the introduction of adoption legislation in most English-speaking countries in the early 1900s, adoptions were generally open, in that the adoptive family and the family of origin often knew each other before the adoption and sometimes stayed in contact afterwards. Adoption was an informal procedure; parents had no legal rights and a birth parent could at any time reclaim custody of a child they had neither seen nor contributed to the care of for years at a time. The earliest modern adoption laws were enacted in America in the latter half of the 19th century.⁸

Australian adoption legislation

- 2.9 By the middle of the 19th century, growing numbers of orphaned or abandoned Australian children were living in institutions which emphasised discipline, religion and skills for employment.⁹ In time this institutional care came under criticism as a 'barracks system', which created 'well drilled and noiseless machines' who lacked the moral development provided in a family setting and on discharge were unequipped for life.¹⁰ The system of 'boarding out' provided family care: foster parents were paid an allowance to provide family care for the children, under supervision by the state.
- 2.10 Private adoptions had long been practised in Australia alongside state-sponsored child placement. These adoptions have been described as part of a 'market' in children which operated from the middle of the 19th century, when advertisements for children available for adoption appeared in metropolitan newspapers.¹¹
- 2.11 There were calls for regulated adoption to provide better outcomes for the child and reduce the financial burden on the state. Support for regulation of adoption also came from adoptive parents, concerned to prevent the birth parents of an informally adopted or boarded-out child from reclaiming the child. Preventing this risk by severing the legal bond between the child and birth parents was a consistent concern in public debate.
- 2.12 Western Australia was the first Australian jurisdiction to introduce adoption legislation,¹² motivated in large part by fears that the gold rush then underway in that state would result in labour shortages, increasing the value of child labour and leading birth parents to reclaim their children from their long-term foster parents just when they were becoming useful. The *Adoption of Children Act 1896 (WA)* terminated all legal rights and relationship between the child and their birth parent and conferred all legal rights and responsibilities for the child on the adoptive parents. Other jurisdictions introduced adoption legislation over the next few decades.¹³

6 See Athenian case studies in Hugh Lindsay, *Adoption in the Roman World* (Cambridge University Press, 2009) 40–8.

7 Ibid 41.

8 *The Massachusetts Adoption of Children Act 1851*. Under this legislation all legal rights and obligations were transferred by the adoption from the birth parents to the adoptive parents, including most rights of inheritance. It has been suggested that the late development of adoption legislation in Anglo-Saxon codes is an outcome of the early capacity of the Christian Church to own property and become a beneficiary of private estates. The Church hoped to be principal beneficiary of the estate of a man who died without natural heirs and was therefore critical of the practice of adoption: see generally *ibid* 23.

9 See Nell Musgrove and Shurlee Swain, 'The "best interests of the child"', *Historical Perspectives* (2010) 35 *Children Australia* 35.

10 Audrey Marshall and Margaret MacDonald, *The Many-Sided Triangle: Adoption in Australia* (Melbourne University Press, 2001) 23.

11 Marian Quartly and Shurlee Swain, 'The Market in Children—Analysing the Language of Adoption in Australia' (2012) 9(2) *History Australia* 69, 72.

12 *The Adoption of Children Act 1896 (WA)*.

13 *Adoption of Children Act 1920 (Tas)*; *Child Welfare Act 1923 (NSW)*; *Adoption of Children Act 1925 (SA)*; *Adoption of Children Act 1935 (Qld)*; *Adoption of Children Ordinance 1938 (ACT)* and *Adoption of Children Ordinance 1949 (NT)*.

Adoption legislation in Victoria

- 2.13 There were three pieces of adoption legislation in Victoria before the current Adoption Act.

The Adoption Act 1928

- 2.14 The *Adoption Act 1928* (Vic) provided for the transfer of parental rights, duties, obligations and liabilities to adoptive parents. It also provided for the legitimisation of existing informal adoptions, without the consent of the birth parents. Before this time, informal adoptions were not recognised at law. The 1928 Act did not prohibit private adoptions or impose secrecy about parentage.

The Adoption of Children Act 1958

- 2.15 After a series of amending Acts¹⁴ the *Adoption of Children Act 1958* (Vic) consolidated adoption legislation and modernised its drafting. It also extended the rules of succession, which in previous legislation was limited in relation to wider family inheritances, and introduced the requirement that the court appoint a person (a *guardian ad litem*) to safeguard the interests of the child in adoption proceedings before the court.¹⁵

The Adoption of Children Act 1964

- 2.16 The *Adoption of Children Act 1964* (Vic) came into effect on 1 January 1966. The 1964 Act was based on model legislation implemented around Australia. It increased confidentiality and secrecy measures and ushered in the era of closed adoptions.¹⁶ It banned privately arranged adoptions, and made it an offence to advertise a child for adoption or seek adoptive parents. It created private adoption agencies, which were charitable organisations approved by the minister to arrange adoptions. The model legislation and the 1964 Act are discussed further at [2.29].

The Adoption Act 1984

- 2.17 During the 1960s, evidence began to emerge of the damage caused by closed adoptions and the need of adopted people and birth parents to know about and have contact with each other.
- 2.18 In 1978 the Victorian Government commissioned a review of the 1964 Act. There was great public interest in the report, which took four years to prepare, received 880 submissions, ran to more than 300 pages and contained 247 recommendations.¹⁷ There was widespread support for its proposals, most of which were taken up in the Adoption Act.¹⁸
- 2.19 The Adoption Act made significant changes to practice and introduced open adoption. The legislation focused on the needs of adopted children, and enshrined a child's right to access information about his or her family of origin. The Act also limited adoption orders in favour of step-parents. The reasons for limiting adoption by step-parents are discussed in Chapter 7.

14 *Adoption of Children (Amendment) Act 1936* (Vic); *Adoption of Children Act 1942* (Vic); *Adoption of Children (Amendment) Act 1953* (Vic); *Adoption of Children (Amendment) Act 1954* (Vic); *Adoption of Children Act 1955* (Vic).

15 These guardians were departmental officers or possibly a minister of religion: *Adoption of Children Act 1958* (Vic) s 11(4).

16 The operation of information privacy was set out in the *Adoption of Children Regulations 1965* (Vic) pt VI.

17 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983).

18 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4244 (Pauline Toner, Minister for Community Welfare Services).

Amendments to the Adoption Act 1984

- 2.20 The Adoption Act has been amended many times. While the essential framework of the Act has not changed, successive amendments have extended the open adoption scheme and incorporated new developments such as the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*.¹⁹
- 2.21 Over time, these amendments have made the Adoption Act complex and hard to navigate. In addition, the language of the Act is out of date and its structure is not in keeping with modern drafting. The Commission seeks the community's views on terminology in the Adoption Act that may need updating in Chapter 9.
- 2.22 The key amendments to the Adoption Act are listed and their effects summarised below.
- a) The *Adoption (Amendment) Act 1987* (Vic) introduced a range of amendments that extended and modified rights to obtain information and enabled increased access to information held by government bodies.
 - b) Another amending Act (the *Adoption (Amendment) Act 1989* (Vic)) expanded the categories of people who could apply for adoption information and clarified the prohibition against publicity regarding adoptions.
 - c) The *Disability Services and Other Acts (Amendment) Act 1997* (Vic) was an omnibus Act which amended the Adoption Act (along with other legislation) to remove mandatory age restrictions and extend the right to adopt to de facto partnerships.
 - d) The *Adoption (Amendment) Act 2000* (Vic) gave effect to the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*²⁰ and to certain bilateral arrangements for inter-country adoption. It also provided a method for the wishes of a child to be considered in an adoption proceeding.
 - e) The *Adoption Amendment Act 2013* (Vic) removed the requirement to obtain an adult adopted person's consent before giving identifying information about the person to their birth parent. The 2013 Amendment Act introduced 'contact statements', which allowed an adult adopted person to specify their wishes in relation to contact by a birth parent, created an offence for the birth parent to contact the adopted person in breach of their wishes, and imposed a penalty of 60 penalty units (up to \$9100 at the time). Parents, particularly those who had had their children forcibly removed, regarded the contact statements as hurtful and discriminatory. After a public campaign, provisions relating to contact statements and the associated offence were removed by the *Adoption Amendment Act 2015* (Vic). Adult adopted people can no longer make contact statements. However, the adopted person, parents and other parties are able to record their wishes regarding contact on the Adoption Information Register. As all contact is mediated by agencies, efforts are made to ensure an adopted person's wishes are known and honoured.
 - f) A further amending Act was passed in 2015, to enable adoption of children by same-sex couples and people who do not identify with a specific sex or gender. The *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) amends the Adoption Act to remove references to gender in relation to eligibility to adopt, and replaces the terms 'de facto relationship' and 'de facto spouse' with new definitions of 'domestic relationship' and 'domestic partner'.²¹ The latest commencement date for the 2015 Act is 1 September 2016.²²

19 *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, opened for signature 29 May 1993, 1870 UNTS 167 (entered into force 1 May 1995).

20 Ibid.

21 It was also intended to amend the *Equal Opportunity Act 2010* (Vic) to remove the exception to the prohibition to discriminate in relation to religious bodies providing adoption services, but this did not proceed after amendment by the Legislative Council. See generally Josh Gordon, 'Conservatives Force Religious Exemptions Into Same-Sex Adoption Laws' *The Age* (online) 13 November 2015 <<http://www.theage.com.au/victoria/conservatives-force-religious-exemptions-into-samesex-adoption-laws-20151112-gkxz46.html>> and Sarah Farnsworth 'Same-Sex Adoption Laws Pass Victorian Parliament After Government Accepts Religious Exemptions' *ABC News* (online) 9 Dec 2015 <<http://www.abc.net.au/news/2015-12-09/same-sex-adoption-passes-victorian-parliament/7013502>>.

22 *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 2(2).

2.23 The current operation of the Adoption Act is set out in Chapter 3.

Closed and open adoption

2.24 The *Adoption Act 1984* introduced open adoption in Victoria. This section explains open adoption and briefly describes the context in which it developed.

2.25 In the early 20th century, adoption was considered primarily as an alternative to institutional care. After World War II, adoption became much more widely accepted and supported as a social policy, and the number of people wishing to adopt increased dramatically. Social attitudes in favour of adoption meant that by the 1950s there were more couples wishing to adopt a child than mothers wishing to relinquish their child.²³

2.26 Adoption secrecy was introduced gradually. The first Australian legislation contained no provisions relating to closing adoption records.²⁴ However, such laws were introduced in the 1920s by other Australian jurisdictions as they enacted adoption legislation. At that time, secrecy was primarily intended to protect adoptive parents.

2.27 However, after World War II, adoption came to be seen as a solution to the problems of pregnancy out of wedlock, illegitimacy and infertility. Secrecy came to be viewed as protecting all parties to the adoption.²⁵

2.28 National model adoption legislation put in place these protections.

National legislation and adoption secrecy

2.29 A push for greater regulation of adoption practice and nationally consistent legislation led to the enactment of 'model' legislation in 1965 as an ordinance of the Australian Capital Territory.²⁶ By the end of the 1960s its principles had been implemented in adoption legislation in all Australian states and territories.²⁷

2.30 The model legislation introduced secrecy provisions to ensure members of the family of origin and the adoptive family would not discover each other's identities, and that the records of the adoption would be kept confidential.

2.31 The *Adoption of Children Act 1964* (Vic) imported the provisions of the model legislation, imposing secrecy at all stages of the process, including the taking of consent, the placement of the child, the application for an adoption order, the hearing of the application, record keeping and availability of records to the public. A new birth certificate was issued with the adoptive parents' details, and the records of the adoption order and the original birth certificate were kept secret. The birth of a child was re-registered upon adoption. Any person who made a search of the register, or applied for a birth certificate, would receive information as it appeared on the re-registered record. The original birth certificate, with a notation to the effect that an adoption had taken place, was only made available by court approval. The Register of Adopted Children was unavailable for public inspection except with the approval of a court. Offences were established for breach of information privacy provisions.²⁸

23 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 27.

24 *The Adoption of Children Act 1896* (WA) was amended in the 1920s to introduce secrecy: a 1921 amendment closed adoption records, subject to permission of the Master of the Supreme Court; a 1926 amendment prevented an adopted child from obtaining their original birth certificate.

25 See generally New Zealand Law Commission, *Adoption and Its Alternatives: A Different Approach and a New Framework*, Report 65 (2000) 15.

26 *Adoption of Children Ordinance 1965* (ACT) pt III. Before the *Australian Capital Territory (Self-Government) Act 1988* (Cth), many laws were made for the ACT by the Governor-General exercising delegated powers. These laws were known as ordinances.

27 *Adoption of Children Ordinance 1965* (ACT), *Adoption of Children Act 1964* (Vic), *Adoption of Children Act 1964* (Qld), *Adoption of Children Act 1965* (NSW), *Adoption of Children Act 1966–1967* (SA), *Adoption of Children Act 1968* (Tas), *Adoption of Children Ordinance 1968* (NT), and the *Adoption of Children Act Amendment Act 1964* (WA).

28 See Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 172–4.

The clean break

2.32 Adoption processes of the time reflected the ‘clean break theory’, prominent in child welfare in the mid-20th century.²⁹ The theory held that it was in the best interests of both the mother and soon-to-be-adopted child to be separated as early and as completely as possible, with no further risk or possibility of contact.³⁰ Speedy and confidential adoption facilitated early and uninterrupted bonding between an adoptive mother and the child, and allowed all parties to forget about the past and forge a life free from stigma. Hospital staff, adoption staff and family all maintained silence to help the birth mother make a new start in life. Adoption legislation supported this process by altering the child’s birth certificate and maintaining closed records.³¹

Social change

2.33 In the late 1960s adoption rates in Australia were among the highest in the world. In 1971–72, 9798 children were adopted in Australia, including 4539 in NSW and 1768 in Victoria. However, social changes were underway which would ultimately lead to the introduction of open adoption and bring the adoption ‘boom’ to an end. These changes have been extensively documented and include:

- the ready availability of oral contraceptives from about 1971
- increasingly tolerant community attitudes towards ex-nuptial births and single parenthood
- the introduction of government benefits for single parents³²
- access to safe abortion.

2.34 The status of ‘illegitimacy’ was abolished in the early 1970s.³³ With the introduction of child care³⁴ and ‘no-fault’ divorce,³⁵ a better quality of life became possible for unmarried mothers. The outcome was that fewer women chose adoption and the number of infants available for adoption radically reduced. Numbers began to fall, first gradually and then dramatically. By 1975–76 they had halved to 4990, and by 1995–96 there were 668 adoptions in Australia.³⁶ In 2009–10 a total of 412 children were adopted nationally. Of these, 190 children were adopted from Australia and 222 from overseas.³⁷

2.35 At the same time, there was a changing understanding of the consequences of adoption for children and birth parents. Evidence was mounting of the long-lasting damage the ‘clean break’ caused, especially together with social stigma and secrecy. In the 1970s, research began to demonstrate that maintaining secrecy about a child’s origins was in fact contrary to their best interests. Over the next decades, it was established that knowledge of their family of origin was important for adopted children in developing a strong sense of identity.

2.36 The United Nations *Convention on the Rights of the Child* has reinforced the understanding that children have a right to know who their birth parents are.³⁸

29 This theory was in part based on the work of prominent psychologist, psychiatrist and psychoanalyst, John Bowlby. Bowlby’s work on ‘attachment theory’ underpinned policies and attitudes which supported early separation of mothers from their newborns. See Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 25.

30 Ibid 151.

31 Ibid 12.

32 Ibid 103.

33 See, eg, *Status of Children Act 1974* (Vic) s 12 which amended a range of Acts to redefine the status of ‘illegitimate’ to ‘a child whose parents were not married to each other at the time of birth or at or after its conception’.

34 *Child Care Act 1972* (Cth).

35 *Family Law Act 1975* (Cth).

36 See Australian Bureau of Statistics 4102.0 – Australian Social Trends, 1998 <<http://www.abs.gov.au/AUSSTATS/>>.

37 Australian Institute of Health and Welfare, *Adoptions Australia 2009–10*, Child Welfare Series Number 50 (2010) 12. Of the 190 adopted from Australia, 61 were local adoptions and 129 were ‘known-child adoptions’.

38 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

The development of open adoption

- 2.37 When open adoption was first proposed it created both hope and anxiety in the adoption community.
- 2.38 Supporters argued that open adoption would diminish adopted children's sense of grief and rejection, support identity development and promote a secure attachment with their adoptive parents. Ongoing contact and information about their child would also help birth parents cope with their loss.³⁹
- 2.39 Opponents argued that ongoing contact and information would compromise and inhibit the parenting of adoptive parents and impair adopted children's bonding and loyalty to their new family. Far from helping birth parents, it would hinder their acceptance of the finality of the adoption.⁴⁰
- 2.40 In 1984 the Australian Institute of Family Studies published a report on the impacts on women who had given up their children during the period of closed adoption, and the factors which affected their adjustment to relinquishment.⁴¹
- 2.41 Overall, the report found the effects on the mother were negative, with an increasing sense of loss over periods of up to 30 years. These feelings were made worse by the absence of opportunities to talk about the relinquishment and lack of social supports in dealing with it. The report supported increased openness in the adoption process, as mothers expressed the clear view that their sense of loss and problems of adjustment would be eased by knowledge about what had happened to the child they gave up for adoption.⁴²

What is open adoption?

- 2.42 'Closed' adoption is a practice in which no information is shared between adoptive and birth families, and birth parents and their children are denied the possibility of having any contact after relinquishment.
- 2.43 Open adoption facilitates or allows information or contact to be shared between the adoptive and birth parents of an adopted child, before and/or after the placement of the child, and perhaps continuing for the life of the child.⁴³
- 2.44 In practice, open adoption takes many different forms to suit the child's needs and the family context. It may involve:
- meetings between adoptive and birth parents around the time of placement
 - periodic exchange of information through an agency
 - direct contact between parties, which may or may not be ongoing.
- 2.45 The type of contact also varies, possibly involving face-to-face meetings, contact only via telephone calls, annual letters, reports and photos. If parties agree, identifying information may be exchanged and parties may have ongoing contact.⁴⁴

39 See Robyn Ball, *Open Adoption in Victoria, Australia: Adoptive Parents' Reports of Children's Experience of Birth Family Contact in Relation to Child Wellbeing* (Phd Thesis, Victoria University of Technology, 2005) 4–9; Phillipa Castle, 'Collaboration in Open Adoption: The Birth Mothers' Experience' (2012) 6(1) *Australian Journal of Adoption* (archived online) <<http://pandora.nla.gov.au/pan/98265/20130416-0013/www.nla.gov.au/openpublish/index.php/aja/issue/view/220/showToc.html>>

40 Robyn Ball, *Open Adoption in Victoria, Australia: Adoptive Parents' Reports of Children's Experience of Birth Family Contact in Relation to Child Wellbeing* (Phd Thesis, Victoria University of Technology, 2005) 7–8.

41 Robin Winkler and Margaret van Keppel, 'Relinquishing Mothers in Adoption: Their Long-Term Adjustment' (Monograph No 3, Australian Institute of Family Studies, May 1984).

42 *Ibid* 1, 67.

43 Susan Tregagle and Louise Voight, 'Overcoming the Pain of Never Belonging: The Case for Open Adoption for Severely Abused and Neglected Children' (2014) 8(1) *Australian Journal of Adoption* 3.

44 Robyn Ball, *Open Adoption in Victoria, Australia: Adoptive Parents' Reports of Children's Experience of Birth Family Contact in Relation to Child Wellbeing* (Phd Thesis, Victoria University of Technology, 2005) 4.

Open adoption in the *Adoption Act 1984*

- 2.46 The Adoption Act establishes open adoption. Openness is built into the adoption process. The Act allows birth parents to nominate a preferred frequency of contact which, with agreement from the adoptive parents, becomes a condition of the adoption order.⁴⁵ While contact arrangements agreed to in an adoption order are legally enforceable, in practice they rely on the goodwill of the parties involved. If family of origin members do not keep their commitments, there is little that children or adoptive parents can do to enforce them. Likewise, adoptive parents can also 'make it difficult or uncomfortable for families of origin to stay in contact, with the result that contact may cease or greatly diminish over time'.⁴⁶
- 2.47 In practice, a full spectrum of contact situations occurs.⁴⁷

Reports and reviews

- 2.48 This section briefly discusses reports, inquiries and reviews, recently completed or under way, relevant to adoption legislation and policy.

Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families

- 2.49 *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*⁴⁸ (*Bringing Them Home*) provided an opportunity to discover the experiences of people removed from their families. The Inquiry was asked to 'trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies'.⁴⁹
- 2.50 *Bringing Them Home* describes the adoption of Aboriginal children under the *Adoption of Children Act 1928* (Vic) and the *Adoption of Children Act 1964* (Vic). The Inquiry took evidence and testimonies from more than 1000 Indigenous people throughout Australia concerning their experiences of the removal policies. In a wide variety of situations the consent requirement could be waived, or given under duress. Some Indigenous parents found out that they had unknowingly agreed to relinquish children when they believed they were placing them in temporary care. Others simply could not locate children who had been fostered or adopted by the Aborigines Welfare Board.
- 2.51 The Inquiry found that:
- [t]he impacts of the removal policies continue to resound through the generations of Indigenous families. The overwhelming evidence is that the impact does not stop with the children removed. It is inherited by their own children in complex and sometimes heightened ways.⁵⁰
- 2.52 On 17 September 1997, the Premier of Victoria Jeff Kennett issued an apology in the Legislative Assembly to the Aboriginal people for the past policies leading to the removal of Aboriginal children from their families and communities.
- 2.53 These practices still resonate today. The Adoption Act has particular provisions relating to adoption of Aboriginal and Torres Strait Islander children, which are discussed in Chapter 6.

45 *Adoption Act 1984* (Vic) s 59A.

46 Robyn Ball, *Open Adoption in Victoria, Australia: Adoptive Parents' Reports of Children's Experience of Birth Family Contact in Relation to Child Wellbeing* (Phd Thesis, Victoria University of Technology, 2005) 4–9.

47 *Ibid* 4–7.

48 Australian Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

49 *Ibid* Term of reference (a).

50 *Ibid* 222.

Victorian Law Reform Commission Report on Assisted Reproductive Technology & Adoption

- 2.54 In 2002 this Commission was asked to review the *Infertility Treatment Act 1995* (Vic) and the Adoption Act and consider whether eligibility for access to assisted reproduction and adoption should be expanded. The Commission reported in 2007 and made 130 recommendations,⁵¹ resulting in the enactment of the *Assisted Reproductive Treatment Act 2008* (Vic).
- 2.55 A number of recommendations related to adoption. The Commission recommended that the Adoption Act be amended to allow same-sex couples to adopt. This recommendation was implemented in 2015, discussed below in the section ‘Adoption by Same Sex Couples Legislative Review’.
- 2.56 A recommendation to remove a restriction on the ability of single people to adopt was not implemented. The current reference requires the Commission to re-examine this issue, which is discussed in Chapter 7.
- 2.57 Other aspects of the Commission’s 2007 report are also discussed in this paper, in Chapters 7 and 8.

Commonwealth Contribution to Former Forced Adoption Policies and Practices

- 2.58 On 15 November 2010, the Senate referred to the Community Affairs References Committee an inquiry into former forced adoption policies and practices.⁵² The terms of reference asked the Committee to consider:
- a) the role, if any, of the Commonwealth Government, its policies and practices in contributing to forced adoptions
 - b) the potential role of the Commonwealth in developing a national framework to assist states and territories to address the consequences for the mothers, their families and children who were subject to forced adoption policies.⁵³
- 2.59 The Committee found that the Commonwealth’s role was indirect, but significant, in two areas of concern. It had been responsible for national model adoption laws in the 1960s, which imposed secrecy at all stages of the adoption process, ensuring that members of the family of origin and the adoptive family would not discover each other’s identities, and that the records of the adoption would be kept confidential. It had also been responsible for providing a range of social security benefits which affected the options available to parents, particularly single mothers considering whether to keep a new baby or surrender him or her for adoption. The Committee found that because of this involvement, the Commonwealth should play a role in helping the states and territories to address the consequences of past forced adoption practices.⁵⁴
- 2.60 The Committee reported that under adoption laws passed in the 1960s, consent to adoption was illegal if it was given under duress, without proper information about the mother’s rights, or signed before or within a certain period after the birth. These laws were not properly complied with, allowing illegal forced adoptions to take place.⁵⁵

51 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption*, Report (2007).

52 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012).

53 Ibid 1.

54 Ibid 5.

55 Ibid 208.

- 2.61 Forced adoptions were widespread throughout Australia from the 1950s to the early 1970s. An estimated 140,000–150,000 adoptions occurred in Australia between 1951 and 1975. Many of the babies were born to unwed mothers. The social stigma that surrounded pregnancy out of wedlock at that time meant that some viewed these mothers as ‘undeserving’, which justified removing their babies and giving them to married couples.
- 2.62 Many people adopted in this way recounted damaging and painful experiences from their childhood and ongoing struggles with self-identity and with mental and physical health. They also reported difficulties in seeking to meet or build a relationship with their parents and parenting their own children.⁵⁶
- 2.63 The Committee made 20 recommendations. Relevantly for the present inquiry, the Committee recommended that:
- all jurisdictions adopt integrated birth certificates, to be issued to eligible people upon request, and that they be legal proof of identity of equal status to other birth certificates
 - all jurisdictions investigate harmonisation of births, deaths and marriages register access with a single national access point to those registers.⁵⁷
- 2.64 The question of integrated birth certificates is discussed in Chapter 8.

Protecting Victoria’s Vulnerable Children Inquiry

- 2.65 The Protecting Victoria’s Vulnerable Children Inquiry⁵⁸ was asked to investigate the factors that increase the risk of child abuse or neglect, and effective strategies to enhance early identification and intervention. The Inquiry was expressly asked to consider out-of-home care and permanency planning. The Inquiry reported in January 2012.
- 2.66 The Inquiry found that on average it was five years between a child’s first child protection report and a permanent care order.⁵⁹ It made recommendations to improve and simplify case planning and improve collaboration across service agencies. It also recommended that where appropriate, barriers to adoption and permanent care should be identified and removed.⁶⁰
- 2.67 Reforms to Victorian child protection laws which came into effect on 1 March 2016⁶¹ give priority to permanent care for children who are not able to return to their parents or family of origin. Under these changes, a case plan prepared for a child in the protection of the Department of Health and Human Services must include a ‘permanency objective’, for the present and future care and wellbeing of the child. The *Children, Youth and Families Act 2005* (Vic) provides a hierarchy of permanency objectives, which are required to be considered in the following order ‘as determined to be appropriate in the best interests of the child’: family preservation, family reunification, adoption, permanent care and long-term out-of-home care.
- 2.68 The Commission is aware of concerns that the placement of adoption ahead of permanent care and long-term out-of-home care in the permanency objective hierarchy may lead to a renewal of forced removal of children from their parents.
- 2.69 Adoption in the child protection context is discussed in Chapter 4.

56 Ibid 54–67.

57 Ibid 257 (Recommendation 13).

58 Philip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria’s Vulnerable Children Inquiry* (Department of Premier and Cabinet, 2012). The Inquiry was chaired by the Hon. Philip Cummins, who is currently the Chair of the Victorian Law Reform Commission.

59 Philip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria’s Vulnerable Children Inquiry* (Department of Premier and Cabinet, vol 2, 2012) finding 4, 229.

60 Ibid xxxvii.

61 *Children, Youth and Families Act 2005* (Vic) ss 167, 168.

Senate Committee report on out-of-home care

- 2.70 In July 2014, the Senate Community Affairs References Committee was asked to consider why the number of children and young people entering and remaining in statutory out-of-home care around Australia had more than doubled since 2000. The Committee reported in August 2015.⁶²
- 2.71 The Committee observed that adoption was the most contentious of the permanent care options for children in out-of-home care that it examined.⁶³ It acknowledged the strong opposition to adoption in some segments of the community, particularly those affected by past practices of forced adoptions.⁶⁴
- 2.72 The Committee observed that while most jurisdictions emphasise keeping children with families where possible and do not prioritise adoption, several jurisdictions were considering reviewing their approach.⁶⁵ It discussed child protection reforms introduced in New South Wales in 2014 which encourage and support adoption by carers as one of the permanency options for children in out-of-home care.⁶⁶
- 2.73 The Committee concluded that for some children, legally permanent arrangements such as guardianship orders and adoption may provide the safest and most stable long-term placements. Where this occurs, it is important to ensure children remain connected to their families and communities, taking into consideration their cultural background.⁶⁷

Adoption by Same-Sex Couples Legislative Review

- 2.74 This review was conducted in 2015 by Eamonn Moran PSM QC to implement a commitment by the Victorian Government to legalise same-sex adoption.⁶⁸ The purpose of the review was to recommend legislative amendments required to permit adoption of children by same-sex couples and people who do not identify with a specific sex or gender.⁶⁹
- 2.75 The review recommended that the Adoption Act be amended by introducing non-gendered definitions of domestic partner, domestic relationship and registered domestic relationship.
- 2.76 The *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) was passed in December 2015, enabling adoption of children by same-sex couples and people who do not identify with a specific sex or gender. The amendments will come into effect by 1 September 2016.
- 2.77 The government originally intended to amend the *Equal Opportunity Act 2010* (Vic) to remove the exception which would allow religious bodies to refuse to provide adoption services to same-sex couples, but this did not proceed after amendment by the Legislative Council.
- 2.78 The terms of reference exclude same-sex adoption and the matter is not discussed further in this paper.

62 Senate Community Affairs References Committee, Parliament of Australia, *Out-of-Home Care* (2015).

63 Ibid 208.

64 Ibid 281.

65 Ibid 212.

66 Ibid 30–1; *Children and Young Persons (Care and Protection) Act 1998* (NSW).

67 Senate Community Affairs References Committee, Parliament of Australia, *Out-of-home care* (2015) 281.

68 Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples Legislative Review* (2015)

69 As the Moran review observes, 'Although the Government's election commitment states that the Adoption Act is to be reviewed with a view to permit same-sex adoption, the Department of Premier and Cabinet considered that the preferable approach to fulfilling this commitment was to permit all couples to adopt, irrespective of gender or sex, as that would be consistent with the Government's commitment to review all Victorian legislation to remove provisions that discriminate against LGBTI Victorians': Ibid 4.

- 2.79 A number of submissions were made to the review on matters that were not within its terms of reference.⁷⁰ These included:
- removing a limitation on the ability of single people to adopt
 - ‘achieving consistency’ in the eligibility requirements that apply to married and non-married couples
 - including more matters, or removing the existing matters, that birth parents can express wishes about regarding adoptive parents.
- 2.80 As these matters were not within the review’s terms of reference, it did not consider them.
- 2.81 These matters do fall within the Commission’s terms of reference, which ask it to ensure that the Adoption Act is consistent with contemporary attitudes and contemporary law relating to family. They are discussed in Chapter 7.

Reviews of adoption laws in other jurisdictions

New Zealand (2000)

- 2.82 In 2000 the New Zealand Law Commission (NZLC) carried out a review of the *Adoption Act 1955* (NZ). Its report, *Adoption and Its Alternatives: A Different Approach and a New Framework*, found that the New Zealand Adoption Act reflected value judgments inconsistent with current standards. Further, although open adoption was widely practised in New Zealand, it was not recognised in law. The NZLC recommended consolidating New Zealand’s legislation relating to parenting and care of children in a new *Care of Children Act*, with adoption representing the most permanent of the options on the care spectrum. No amendments have arisen from this report.⁷¹

Queensland (2015)

- 2.83 In 2015 the Queensland Department of Communities, Child Safety and Disability Services issued a discussion paper, *Public Consultation for the Review of the Operation of the Adoption Act 2009*.⁷² Submissions closed on 11 March 2016. A final report was released as this consultation paper was sent to print. It will be considered during the Commission’s review.

South Australia (2015)

- 2.84 In early 2015 the report of a review of the *Adoption Act 1988* (SA) was published.⁷³ The review made 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. A government response has yet to be released.
- 2.85 In preparing its report, the Commission will consider these and other relevant reviews of adoption from other jurisdictions.

Human rights and the rights of the child

- 2.86 The terms of reference ask the Commission to provide recommendations on the way Victorian adoption law can uphold principles set out in the *Charter of Human Rights and Responsibilities* and the United Nations *Convention on the Rights of the Child*. The following paragraphs briefly explain how these instruments are relevant to Victorian adoption law.

70 Ibid 39.

71 See generally New Zealand Law Commission, *Adoption and Its Alternatives: A Different Approach and a New Framework*, Report No 65 (2000) 3, 4, 19.

72 Department of Communities, Child Safety and Disability Services, Government of Queensland, *Public Consultation for the Review of the Operation of the Adoption Act 2009*, Discussion paper (2015).

73 Lorna Hallahan, *Adoption Act 1988 (SA) Review (2015)*. Matters raised in this review are discussed in Chapters 7 and 8 of this consultation paper.

United Nations Convention on the Rights of the Child

- 2.87 In November 1989 the United Nations General Assembly adopted the *Convention on the Rights of the Child* (CRC).⁷⁴ The CRC sets out the basic rights of children and the obligations of governments to fulfil those rights.
- 2.88 Australia ratified the CRC in December 1990. This means that Australia has a duty to ensure that all children in Australia enjoy the rights set out in the treaty. While an adopted child is entitled to all the rights in the CRC, articles 3 and 21 of the CRC are particularly relevant to this review.
- 2.89 Article 3 provides a general ‘best interests of the child’ principle which requires that ‘in all actions concerning children ... the best interests of the child shall be a primary consideration’.⁷⁵
- 2.90 Article 21 provides specifically for the best interests of the child in an adoption, stipulating that in an adoption, the best interests of the child are to be the ‘paramount consideration’.⁷⁶
- 2.91 Inter-country adoption is outside the scope of this reference. The way the Adoption Act should approach the best interests of the child is discussed in Chapter 5.

Victorian Charter of Human Rights and Responsibilities

- 2.92 In 2006 the Victorian Parliament passed the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter), derived from the *International Covenant on Civil and Political Rights*. The Charter provides protections in Victoria when people are dealing with state and local government and private entities where they are performing public functions.⁷⁷
- 2.93 The Charter requires public authorities in state and local government to act in ways that are compatible with human rights. It sets out 20 key human rights, of which four may be relevant to the Adoption Act:
- The right to recognition and equality before the law: everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination.⁷⁸
 - The right to privacy and reputation: everyone has the right to keep their lives private. A person’s family, home or personal information cannot be interfered with, unless the law allows it.⁷⁹
 - The right to protection of families and children: families are entitled to protection. Children have the same rights as adults, with added protection according to their best interests.⁸⁰
 - Cultural rights: people can have different family, religious or cultural backgrounds. They can enjoy their culture, declare and practise their religion, and use their languages.⁸¹
- 2.94 The Charter does not create a cause of action or right to go to court, and the courts cannot award damages for a breach of Charter rights. People can make complaints about human rights issues to the Victorian Ombudsman and the Independent Broad-based Anti-corruption Commission where those bodies have jurisdiction.

74 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

75 *Ibid* art 3(1).

76 *Ibid* art 21.

77 See generally Michael Brett Young, *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1289–95 (Rob Hulls, Attorney-General).

78 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

79 *Ibid* s 13.

80 *Ibid* s 17.

81 *Ibid* s 19.

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3. Current law and practice in Victoria

Introduction

- 3.1 This chapter gives a general overview of adoption law and practice in Victoria. It sets the scene for the issues discussed and questions raised in the following chapters.
- 3.2 The chapter only discusses adoption of children born or situated in Victoria through the Victorian legal system. This is the focus of the Commission's inquiry. Overseas or inter-country adoption is excluded from the Commission's review.
- 3.3 The *Adoption Act 1984* (Vic) establishes the legal framework which governs adoption in Victoria. This chapter outlines the main features of that framework, and how the adoption process works in practice. The focus of the Commission's review is possible amendments to adoption law.
- 3.4 Particular aspects of the law and adoption practice are discussed in detail in later chapters. This chapter indicates what those topics are and where they are discussed in the consultation paper.
- 3.5 The chapter begins with a broad overview of Victoria's adoption system.

An overview of adoption

- 3.6 The adoption process is not widely understood. For many people who go through it, the adoption process is not only a highly personal and emotionally challenging experience; it can also be complicated and unclear. It involves a large amount of paperwork, layers of legal requirements and, ultimately, an application to a court. Adoption is fundamentally a legal process, with a significant legal effect: it changes who a child's parents are in law.

Main stages

- 3.7 Broadly speaking, there are three main stages in the adoption process:
 1. A child's parents (or parent) make a decision to have their child adopted (or a court decides that an adoption should proceed without the agreement of the parents or parent).
 2. The child is placed, through a government department or adoption agency, with new parents who have been approved to adopt a child.
 3. A court makes an order which confirms the adoption.

Legal framework

- 3.8 Each of these stages is highly regulated, with its own legal requirements, procedures and forms which must be complied with. These are set out, in some detail but not always clearly, in Victoria's adoption legislation, regulations and court rules:
- the *Adoption Act 1984* (Vic)
 - the *Adoption Regulations 2008* (Vic)
 - the *Supreme Court (Adoption) Rules 2015* (Vic) (the Adoption Rules).
- 3.9 The Adoption Act determines the fundamental requirements, such as those surrounding the parents' decision to have the child adopted and who is allowed to adopt a child. The Adoption Regulations contain procedural details and forms. The Adoption Rules set out the court application process.

The court

- 3.10 The court which makes adoption orders is the County Court of Victoria.¹ The County Court made 55 adoption orders in 2014–15.²

The department and approved agencies

- 3.11 The government department which arranges adoptions is the Department of Health and Human Services (DHHS).³ The Secretary of DHHS (the Secretary) also approves non-government organisations to arrange adoptions. These organisations are called 'approved agencies'. There are four approved agencies.

Secretary and principal officers

- 3.12 The Secretary and the principal officers of approved agencies have powers and responsibilities under the Adoption Act. For example, the Secretary or a principal officer is the legal guardian of a child who is to be adopted,⁴ and they have the power to approve people as 'fit and proper persons' to adopt a child.⁵
- 3.13 When carrying out their responsibilities, the Secretary and principal officers must have regard to the principle that adoption is a service for children.⁶

Adoption teams

- 3.14 In practice, adoptions are carried out by 'adoption and permanent care teams' within DHHS and each approved agency. These are referred to in this chapter as 'adoption teams'.
- 3.15 The adoption teams are involved in all aspects of the adoption process. They assist parents who are considering having their child adopted, assess people who want to adopt a child, facilitate and monitor placements of children with the adoptive parents, and provide reports to the County Court when it is deciding whether to make an adoption order. They also run adoption information services which assist adopted people and family members seeking information about past and current adoptions.

1 The Supreme Court of Victoria also has jurisdiction to make adoption orders under s 6 of the *Adoption Act 1984* (Vic) but in practice adoption matters are heard and determined by the County Court of Victoria.

2 County Court of Victoria, *County Court of Victoria 2014–2015 Annual Report*, 7 <<https://www.countycourt.vic.gov.au/annual-report>>. The annual report does not identify how many adoption orders were for local adoptions and how many for inter-country adoptions. In 2013–14 the Court made 39 adoption orders.

3 DHHS was established on 1 January 2015. The Department of Human Services (DHS) preceded DHHS. Many of the Victorian government documents about adoption referred to in this paper were produced by DHS and are available on its website.

4 *Adoption Act 1984* (Vic) s 46. See [3.70] for more information.

5 *Ibid* s 13. See [3.86]–[3.95] for more information.

6 *Ibid* s 32. See also Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 2.

Adoption Manual and Adoption Standards

- 3.16 Two main policy documents guide the work of adoption teams. These are an *Adoption and Permanent Care Procedures Manual* (2004) and *Standards in Adoption* (1986). The *Adoption Manual* and *Adoption Standards* are publicly available⁷ policy and practice guidelines.⁸ They are part of the decision-making framework.
- 3.17 Adoption teams must carry out their work in accordance with an overarching principle,⁹ discussed in the next section.

The paramount consideration

- 3.18 The overarching principle which governs adoption in Victoria is that the ‘welfare and interests of the child’ are the ‘paramount consideration’.¹⁰ This puts the child’s welfare and interests above the interests of the child’s birth parents, people wanting to adopt and adoptive parents.
- 3.19 This overarching principle is a focus of the Commission’s inquiry. The terms of reference ask the Commission to consider amendments to ‘ensure that the best interests and rights of the child are the foremost consideration in any decision made under the Adoption Act’.

Decisions under the Adoption Act

- 3.20 As described in the following sections, a number of decisions are made under the Adoption Act. These include:
- decisions by the Secretary of DHHS to approve an agency to arrange adoptions¹¹
 - decisions by the Secretary and principal officers to approve people wanting to adopt as ‘fit and proper persons’ to adopt a child¹²
 - decisions by the Victorian Civil and Administrative Tribunal (VCAT) when reviewing decisions of the Secretary or approved agency¹³
 - decisions by the County Court to make an adoption order¹⁴
 - decisions by the County Court to discharge an adoption order.¹⁵
- 3.21 These decision makers must have regard to the overarching principle when making decisions under the Adoption Act. The overarching principle is discussed in detail in Chapter 5.
- 3.22 The following sections explain the legal effect of adoption and how it differs from other types of court orders relating to parental responsibility.

7 They are available on the DHS website at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

8 There have been efforts to achieve national harmonisation of adoption policy and practice. Chapter 2 discusses the development and implementation of model legislation in all Australian states and territories during the 1960s. In 1993, the Community and Disability Services Ministers Conference (CDSMC) ratified the National Principles in Adoption. These were reviewed in 1997 to incorporate Australia’s obligations under the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*. On 23 July 2008, the CDSMC agreed to establish the Enhancing Adoption as a Service for Children Working Group to review the National Principles and agree on a set of principles to guide adoption practice and a more consistent approach across jurisdictions. The Commission understands that a revised draft of the National Principles was circulated out of session to the CDSMC in April 2012 and that all jurisdictions except the Commonwealth provided endorsement through this process. The CDSMC has since been disbanded as part of streamlining the Council of Australian Governments system. It is unclear whether there has been further work on this issue. The 1997 National Principles in Adoption are available on the DHS website at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/national-principles-in-adoption-1997>>. See also Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 1 ‘Introduction’) 15; (Part 2 ‘Infant Adoption’) 6 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

9 *Adoption Act 1984* (Vic) s 9.

10 *Ibid* s 9.

11 *Ibid* s 22.

12 *Ibid* s 13(3). See [3.88].

13 *Ibid* s 129A. See [3.96].

14 *Ibid* s 15. See the section beginning at [3.107].

15 *Ibid* s 19. See [3.116].

The legal effect of adoption

- 3.23 An adoption order ends the legal relationship between a child and the child's parents.¹⁶ The law no longer recognises the birth parents as being the parents of the child. The adoptive parents assume all the parental rights and responsibilities that belonged to the child's birth parents before the adoption order was made. The law views the child as the adoptive parents' child, as if the child had been born to them.¹⁷
- 3.24 This change is reflected in a number of ways. The child's surname generally changes to the adoptive family's surname. The child's given names may also change. A new birth certificate is created which replaces the original birth certificate and indicates that the child was born to the adoptive parents. The child's inheritance rights change.
- 3.25 The change is permanent unless it is revoked by another order of the court, which 'discharges' the adoption (see [3.116]).
- 3.26 The effects of an adoption order differ from other types of orders relating to parental responsibility, as discussed below.

Main differences between adoption and other types of parental responsibility

- 3.27 Adoption is one of a number of ways that parental responsibility is transferred from a child's parents to other people. Two other main ways are:
- permanent care orders under the *Children, Youth and Families Act 2005* (Vic) (the CYF Act)
 - parenting orders under the Commonwealth *Family Law Act 1976* (Cth).
- 3.28 Unlike adoption orders, these orders do not extinguish the legal relationship between a child and the child's parents.

Permanent care orders

- 3.29 In Victoria, a 'person or persons' can be given the permanent care of a child under the CYF Act. These orders are used when a child is in Victoria's child protection system.¹⁸ They are made by the Children's Court of Victoria.¹⁹
- 3.30 Permanent care orders give a person 'parental responsibility' for the child 'to the exclusion of' every other person, including the child's parents.²⁰ Parental responsibility encompasses 'all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children'.²¹
- 3.31 A permanent care order remains in force until the child turns 18 (unless revoked by an order of the Court).²² This means that the child's permanent carer (or carers) has full parental responsibility while the child is under 18, to the exclusion of the child's parents.

16 Ibid s 53(1)(b).

17 Ibid s 53(1)(a).

18 The circumstances when the Children's Court can make a permanent care order are set out in section 319 of the *Children, Youth and Families Act 2005* (Vic).

19 *Children, Youth and Families Act 2005* (Vic) s 3 (definition of 'Court').

20 Ibid s 321(1)(a).

21 Ibid s 3 (definition of 'parental responsibility').

22 Or when the child marries, if that happens first: *Children, Youth and Families Act 2005* (Vic) s 321(1)(c).

- 3.32 More permanent care orders are made in Victoria than adoption orders.²³ In 2014–15, 277 permanent care orders were made, compared with 24 orders for local adoption.²⁴ Parents considering adoption of their child are encouraged to consider permanent care orders as an alternative option.²⁵
- 3.33 Some recent amendments to the CYF Act which affect adoption are explained in Chapter 4.

Parenting orders

- 3.34 The Family Court of Australia and the Federal Circuit Court of Australia make parenting orders under the Family Law Act.²⁶ The Magistrates' Court of Victoria also has power to make parenting orders.²⁷
- 3.35 Parenting orders are generally made in favour of a child's parents when the parents separate. They may also be made in other situations and in favour of other people such as a grandparent, step-parent or 'any other person concerned with the [child's] care, welfare or development'.²⁸
- 3.36 Parenting orders deal with a range of parenting arrangements, such as who the child is to live with and spend time with.²⁹ They may confer, allocate and alter parental responsibility for a child.³⁰ 'Parental responsibility' has a similar meaning here as under the CYF Act. It means 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.³¹ Parenting orders may remain in force until a child turns 18, marries or enters into a de facto relationship.³²
- 3.37 As discussed below at [3.54] and [3.84] and in Chapter 7, parenting orders are generally preferred to adoption when step-parents or relatives of a child want to establish a legal relationship with a child in their care.

Permanent care orders, parenting orders and adoption orders

- 3.38 Permanent care orders and parenting orders are different from adoption orders in the following ways:
- They do not sever a parent and child's legal relationship.
 - They do not alter a child's birth record.
 - They do not affect the child's inheritance rights.
 - They are not permanent, but expire when the child turns 18.
- 3.39 A comparison of adoption orders, permanent care orders and parenting orders is in Appendix A.

23 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 47–8. The numbers have fluctuated but increased since permanent care orders were introduced in 1992. The Children's Court has made 3963 permanent care orders since 1992.

24 Ibid 23, 27, 48. 'Local adoption' here means adoption of children in Victoria 'who were born or permanently residing in Australia before the adoption' and generally 'had no previous contact or relationship with the adoptive parent(s)': Ibid 4.

25 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 104. See also Nicola Ross and Judy Cashmore, 'Adoption Reforms New South Wales Style: A Comparative Look' (2016) 30 *Australian Journal of Family Law* 51, 55–6; Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 1 'Introduction') 12 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

26 *Family Law Act 1975* (Cth) s 65D.

27 Ibid ss 69J, 69N.

28 Ibid ss 64C, 65C.

29 Ibid s 64B.

30 Ibid ss 61D, 64B(2)(c). Parenting orders may deal with the allocation of responsibility for making decisions about major long-term issues relating to a child: s 64B(3).

31 Ibid s 61B. Adoption ends a person's parental responsibility: s 61E. However, a person's parental responsibility does not end if the adoption is by a 'prescribed adopting parent' and the court did not give leave for the adoption proceedings to be commenced under s 60G. A 'prescribed adopting parent' includes a spouse of, or person in a de facto relationship with, a parent of the child: s 4 (definition of 'prescribed adopting parent').

32 Ibid s 65H(2). A parenting order stops being in force when a child is adopted, unless the adoption is by a 'prescribed adopting parent' and the court did not give leave for the adoption proceedings to be commenced under s 60G: s 65J. A 'prescribed adopting parent' includes a spouse of, or person in a de facto relationship with, a parent of the child: s 4 (definition of 'prescribed adopting parent').

- 3.40 The next section discusses the main types of adoption under the Adoption Act that are relevant to the Commission’s review.

Different types of adoption

- 3.41 The different types of adoption relate to who can be adopted in Victoria. The Adoption Act sets out the general types of adoption but, as explained below, some details are not contained in the legislation.

Who can be adopted?

- 3.42 Any child under 18 years of age can be adopted.³³ The Adoption Act refers to children generally, but it contains specific provisions which deal with the adoption of particular groups of children:

- step-children
- children who are related to the people who want to adopt them
- Aboriginal and Torres Strait Islander children
- children who are not Australian citizens.

Adoption of adults

- 3.43 An adult can also be adopted under the Adoption Act. This can happen where:
- the proposed adopter or adopters ‘brought up, maintained and educated’ the person as if they were their parent or parents,³⁴ and
 - ‘special circumstances make [the adoption] desirable’.³⁵
- 3.44 This consultation paper concentrates on adoption of children, but the Commission will consider any issues relating to adult adoption within the terms of reference that are raised in submissions.

Adoption of children

- 3.45 While the Adoption Act refers to adoption of children under 18 years of age,³⁶ in practice most children adopted in Victoria are infants under 12 months of age. These children are adopted through an ‘infant adoption program’.³⁷

Infant adoption

- 3.46 Infant adoption is the main adoption program in Victoria. About 20 infants are placed for adoption each year.³⁸ These children are ‘generally aged between two months and one year’.³⁹
- 3.47 Infant adoption is available to couples who meet the Adoption Act’s eligibility and suitability criteria (explained below). The couples generally have no pre-existing relationship with the child before the child comes into their care (the adoptions are therefore often called ‘stranger adoptions’).
- 3.48 As discussed below (in [3.82]) and in Chapter 7, infant adoption is currently not available to single people.

33 *Adoption Act 1984* (Vic) s 10(1)(a).

34 *Ibid* s 10(1)(b).

35 *Ibid* s 15(2).

36 *Ibid* s 10(1)(a) and s 4 (definition of ‘child’).

37 Department of Human Services, Government of Victoria, *Pathways for Children into Adoption & Permanent Care (A&PC)* (nd) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

38 Department of Human Services, Government of Victoria, *Infant Adoption* (March 2007) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

39 *Ibid*.

Children over 12 months old and children with ‘special needs’

- 3.49 Children older than 12 months of age can also be adopted. This occurs through a ‘special needs’ adoption program.⁴⁰
- 3.50 Special needs adoption is not referred to in the Adoption Act, which makes no distinction between children who are older or younger than 12 months of age.
- 3.51 Other children also come within the special needs adoption program. They are children with complex needs, such as children with a disability and children who come from difficult backgrounds and may have experienced abuse or neglect.⁴¹ Again, the Adoption Act does not specifically refer to children in these circumstances.
- 3.52 Children with special needs are not placed through the infant adoption program but through a ‘permanent care’ program.⁴² Couples and single people can adopt children with special needs.

Particular adoptions

- 3.53 Particular provisions apply to adoption of:
- step-children and children who are related to their proposed adopters
 - Aboriginal and Torres Strait Islander children
 - children who are non-citizens.

Step-children and children related to adopters (‘known-child adoptions’)

- 3.54 Adoption of step-children and children who are related to their adopters are called ‘known-child adoptions’. This is because they are adoptions by people who have an existing relationship with the child.⁴³
- 3.55 The Adoption Act allows known-child adoptions, but only in limited circumstances. They are generally discouraged, because they can alter and distort family relationships.⁴⁴ This is discussed in further detail in Chapter 7.
- 3.56 Known-child adoptions are less common in Victoria than infant adoption.⁴⁵ There were five known-child adoptions in Victoria in 2014–15. This represented 3.3 per cent of total known-child adoptions in Australia.⁴⁶ Adoption by relatives occurs rarely.⁴⁷

Aboriginal and Torres Strait Islander children

- 3.57 Specific principles and requirements apply to the adoption of Aboriginal and Torres Strait Islander children. These are discussed in Chapter 6.

40 The Commission has obtained this information through preliminary consultations with DHHS and some approved agencies.

41 Department of Human Services, Government of Victoria, *Other Forms of Adoption* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/other-forms-of-adoption>>.

42 Ibid; *Pathways for Children into Adoption & Permanent Care (A&PC)* <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>; Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 104.

43 Another difference between step-child adoption and infant adoption is that step-children tend to be older than other adopted children: Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 28.

44 Department of Human Services, Government of Victoria, *Other Forms of Adoption* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/other-forms-of-adoption>>; Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 104.

45 Known-child adoptions were the largest proportion of adoptions nationally in 2015: Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 13–4. This report states that ‘While adoption numbers overall have declined over time, “known child” adoptions by carers are increasing’: vi. This is attributable to the number of adoptions by carers in New South Wales: 13–14.

46 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 27. This report defines ‘known child adoption’ as follows: ‘an adoption of a child/children who were born or permanently residing in Australia before the adoption, who have a pre-existing relationship with the adoptive parent(s) and who are generally not able to be adopted by anyone other than the adoptive parent(s). These types of adoptions are broken down into the following categories, depending on the child’s relationship to the adoptive parent(s): step-parent, relative(s), care and other’: 101.

47 Department of Human Services, Government of Victoria, *Other Forms of Adoption* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/other-forms-of-adoption>>.

- 3.58 Aboriginal and Torres Strait Islander children are rarely adopted, in Victoria and elsewhere in Australia. Only one child who identified as Aboriginal or Torres Strait Islander was adopted in Australia in 2014–15.⁴⁸

Children who are non-citizens

- 3.59 Special requirements also apply to the adoption of children who are ‘non-citizens’ in Victoria. Broadly speaking, these are children who enter Australia, are not Australian citizens and not under the care of a parent or relative over the age of 21 or a person who intends to adopt the child.⁴⁹ The Commonwealth Minister for Immigration and Border Protection is the guardian of these children.⁵⁰
- 3.60 Adoption of non-citizen children requires the minister’s consent.⁵¹ The Adoption Act sets out when this consent can be given⁵² and when the County Court can make adoption orders for non-citizen children.⁵³

The adoption process

- 3.61 This section outlines the main aspects of the adoption process, including:
- when a child can be adopted
 - who is eligible to adopt a child
 - the assessment and approval of people who want to adopt a child
 - the selection of the adoptive parents
 - placement of the child with the adoptive parents
 - finalising the adoption through the County Court.

When can a child be adopted?

- 3.62 A child can only be adopted if:
- the child’s parents give free and informed consent to their child being adopted,⁵⁴ or
 - the County Court decides to dispense with the need for the consent of one or both parents.
- 3.63 Chapter 5 sets out the circumstances in which the Court can make this decision. They include situations where a parent cannot be found ‘after reasonable inquiry’ or where a child has been ‘abandoned’ or ‘persistently neglected or ill-treated’.⁵⁵
- 3.64 The following section focuses on the parents’ decision to have their child adopted.

The parents’ decision to have their child adopted

- 3.65 The consent of the child’s parents is the fundamental legal requirement in the adoption process.
- 3.66 Deciding to have a child adopted is a significant decision, with lifelong consequences for all involved. Strict legal procedures surround the decision, to ensure that the parents’ consent is informed and freely given.⁵⁶ The procedures are discussed in full in Chapter 5.

48 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 46–7.

49 *Immigration (Guardianship of Children) Act 1946* (Cth) s 4AAA. The terms ‘relative’ and ‘intending adoptive parent’ are defined in s 4.

50 *Ibid* s 6. The Minister may delegate powers under s 5.

51 *Adoption Act 1984* (Vic) s 33(6). The Secretary of DHHS or a principal officer of an approved agency may apply to the County Court for an order that the Secretary be the guardian of the child, where the Secretary or an approved agency is ‘authorized to make arrangements with a view to adoption of the child’: *Adoption Act 1984* (Vic) s 47.

52 *Ibid* s 36.

53 *Ibid* s 51.

54 The Adoption Act specifies whose consent is required: s 33. This is discussed in Chapter 5.

55 *Adoption Act 1984* (Vic) s 43.

56 *Ibid* s 42.

- 3.67 A parent or parents considering having their child adopted approach an adoption team.⁵⁷ This may happen during pregnancy or after the child is born.⁵⁸ An approved counsellor provides information and counselling about the effects of adoption and alternative options, such as permanent care orders and parenting orders.⁵⁹
- 3.68 If the parent or parents decide to proceed with adoption, they must give consent in the manner required by the Adoption Act. This includes signing legal forms in the presence of approved witnesses such as court officials.⁶⁰ The witnesses must be satisfied that the parents understand the effect of adoption.⁶¹ (See Chapter 5 for more information.)
- 3.69 Once consent is given, it can be revoked within a period of generally 28 days.⁶² After that, the consent becomes final and cannot be withdrawn.

The effect of consent

Guardianship of the child

- 3.70 When consent is given, the Secretary or principal officer of the approved agency becomes the child's guardian. The Secretary or principal officer has day-to-day responsibility for the child, to the exclusion of all other people including the child's parents.⁶³ The parents may 'visit the child during the period [in] which consent may be revoked'.⁶⁴
- 3.71 The Secretary or principal officer remains the child's guardian until the adoption order is made.⁶⁵ At that point the adoptive parents become the child's parents.⁶⁶

General consent

- 3.72 A parent's consent to their child being adopted is a 'general consent' to the adoption of the child.⁶⁷ This means the parent consents to the child being adopted by any person who is able to adopt a child under the Adoption Act.⁶⁸

Who can adopt?

- 3.73 A person can adopt a child if they are:
- eligible under the Adoption Act, and
 - considered suitable to adopt according to criteria in the Adoption Regulations.

57 Department of Human Services, Government of Victoria, *Information for parents considering adoption of their child* (2008) 8 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. This document states: 'Sometimes adoption agencies are approached by both parents and at other times it is the mother only who attends for counselling': 9. Another DHS document explains: 'Not all birth fathers choose to be involved in planning for their children or desire to become involved in decision making to the same extent as the birth mother': Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 41 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

58 Department of Human Services, Government of Victoria, *Information for parents considering adoption of their child* (2008) 8 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. A parent cannot give valid consent within 14 days after the child's birth, unless the court orders that this period be shortened 'in the best interests of the child': *Adoption Act 1984* (Vic) s 42(2)–(3).

59 *Adoption Act 1984* (Vic) ss 34–35; *Adoption Regulations 2008* (Vic) regs 16–17, sch 6; Department of Human Services, Government of Victoria, *Information for parents considering adoption of their child* (2008) 8 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>; Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 104.

60 *Adoption Act 1984* (Vic) s 35; *Adoption Regulations 2008* (Vic) regs 22–23.

61 *Adoption Regulations 2008* (Vic) reg 23.

62 *Adoption Act 1984* (Vic) s 41. The timeframe for revoking consent can be extended by 14 days.

63 Ibid s 46(1). This does not apply where a step-parent or relative is adopting a child: s 46(3). See also Department of Human Services, Government of Victoria, *Information for Parents Considering Adoption of their Child* (2008) 12–23; *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 6: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

64 Ibid s 48.

65 Or until other circumstances set out in section 46(1)(b)–(f) occur.

66 *Adoption Act 1984* (Vic) s 53. See [3.23].

67 Ibid s 39.

68 This does not apply where the child is being adopted by a relative or step-parent or domestic partner of a parent of the child. In these situations, the consent is to adoption by that particular person: *Adoption Act 1984* (Vic) s 39(2), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 10.

3.74 The Adoption Act defines when a couple or person can adopt a child. It states that the County Court can make an adoption order in favour of either:⁶⁹

- two people jointly
- one person.

3.75 Two people who are not in a relationship cannot adopt a child together.

Adoption by two people (couples)

3.76 Two people can adopt a child jointly if they are a couple in a relationship specified in the Adoption Act:⁷⁰

- marriages⁷¹
- ‘traditional Aboriginal marriages’
- registered domestic relationships
- domestic relationships.

3.77 A traditional Aboriginal marriage is a marriage recognised by the Aboriginal community the couple belong to.⁷² A registered domestic relationship is a relationship registered under the *Relationships Act 2008* (Vic).⁷³ A domestic relationship is a relationship between two people who are not married or in a registered relationship but ‘who are living together as a couple on a genuine basis (irrespective of sex or gender)’.⁷⁴

3.78 Couples in these relationships are eligible to adopt if they have been in their particular relationship, or a combination of the specified relationships, for at least two years.⁷⁵

3.79 Couples in domestic relationships must also show that they live together.⁷⁶ This does not apply to the other types of couple. Chapter 7 discusses this issue further.

Adoption by one person (sole applicants)

3.80 The Adoption Act contemplates three situations where one person may seek to adopt a child:

- the person is not in a relationship (ie is single)⁷⁷
- the person is in a relationship but is applying as a sole applicant rather than jointly with their partner⁷⁸
- the person is technically married or in a registered relationship but separated and living apart from their partner.⁷⁹

3.81 The Adoption Act limits when these people can adopt a child. In each case, the person is only permitted to adopt a child if there are ‘special circumstances in relation to the child’ which make the adoption ‘desirable’.⁸⁰ The Adoption Act does not define ‘special circumstances’.

69 *Adoption Act 1984* (Vic) s 11, as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7.

70 *Adoption Act 1984* (Vic) s 11(1), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7.

71 Nearly 95% of local adoptions in Australia in 2014–15 were by married couples: Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 24.

72 *Adoption Act 1984* (Vic) s 11(1)(b). The language used in this sub-section in full is ‘[relationship] recognized as a traditional marriage by an Aboriginal community or an Aboriginal group to which [the two people] belong’.

73 *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 4(1) (definition of ‘registered domestic relationship’); *Relationships Act 2008* (Vic) s 3 (definition of ‘registered domestic relationship’).

74 *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 4(1) (definition of ‘domestic relationship’).

75 *Adoption Act 1984* (Vic) ss 11(1), 10A(a), 20A, as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) ss 6–7, 9.

76 This is because of the definition of ‘domestic relationship’. See [3.77] and *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 4(1) (definition of ‘domestic relationship’).

77 *Adoption Act 1984* (Vic) s 11(3).

78 *Adoption Act 1984* (Vic) s 11(4), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7(5).

79 *Ibid.*

80 *Ibid* s 11(3).

- 3.82 In practice, ‘infant adoption’ is not available to single people, but single people can adopt children with special needs.⁸¹ This issue is discussed in Chapter 7. There were no adoptions by single people in Australia in 2014–15.⁸²
- 3.83 Generally, where one person in a couple is seeking to adopt, the other partner must agree to the adoption.⁸³

Step-parents and relatives

- 3.84 Step-parents and relatives of a child may only adopt a child if:⁸⁴
- a parenting order under the Family Law Act ‘would not make adequate provision for the welfare and interests of the child’
 - exceptional circumstances exist which warrant making an adoption order
 - an adoption order would make better provision for the welfare and interests of the child than a parenting order.
- 3.85 These ‘known-child adoptions’ are discussed further in Chapter 7.

Suitability

- 3.86 The court can only allow a person to adopt a child if it is satisfied that the person meets the suitability criteria in the Adoption Regulations.⁸⁵ These criteria aim to ensure that adoptive parents are able to raise a child in a stable and positive environment and understand the unique aspects of parenting an adopted child.
- 3.87 The full suitability criteria are set out in Chapter 7. They include factors such as a person’s:
- health
 - age
 - character
 - life experience
 - financial circumstances.⁸⁶

Fit and proper person test

- 3.88 The court must also be satisfied that applicants other than relatives of a child have been approved as ‘fit and proper persons’ to adopt a child.⁸⁷ This approval is given by the Secretary or a principal officer.⁸⁸ They give approval if applicants satisfy the suitability criteria mentioned above.⁸⁹
- 3.89 The adoption teams assess whether applicants satisfy the suitability criteria and provide a report to the court.⁹⁰ This assessment is discussed in Chapter 7. It is one part of the process couples undergo to adopt an infant, as discussed in the following section.

81 Department of Human Services, Government of Victoria, *Infant Adoption* (March 2007) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

82 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 24.

83 *Adoption Act 1984* (Vic) s 11(4), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7(5). See Chapter 7 for more information.

84 *Adoption Act 1984* (Vic) ss 11(5)–(7), 12, as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) ss 7–8.

85 *Adoption Act 1984* (Vic) s 15(1)(a); *Adoption Regulations 2008* (Vic) reg 35.

86 *Adoption Regulations 2008* (Vic) reg 35.

87 *Adoption Act 1984* (Vic) s 15(1)(a).

88 *Ibid* s 13.

89 *Ibid* s 13(3); *Adoption Regulations 2008* (Vic) reg 37.

90 *Supreme Court (Adoption) Rules 2015* (Vic) r 23(1)(c).

Becoming adoptive parents

3.90 Becoming adoptive parents involves a number of steps, set out below.

Information and training

3.91 Before they can apply for approval, couples must:

- attend a two-hour information session
- participate in two days of group training.⁹¹

3.92 Adoption teams run a number of sessions each year. Couples must register with an adoption team and are invited to attend when places become available.

Assessment

3.93 After the information and training stage, couples may apply to an adoption team for approval as ‘fit and proper persons’ to adopt.⁹²

3.94 The formal assessment is thorough and time-consuming. Couples complete a large amount of paperwork, give extensive details about their personal and financial circumstances and are interviewed a number of times.⁹³

Approval

3.95 An ‘applicant assessment committee’ decides whether to approve a couple as suitable.⁹⁴ If approval is given, the couple is added to a statewide register of people approved to adopt.⁹⁵ Approval is valid for two years.⁹⁶

3.96 If approval is not given, the couple can apply to VCAT for a review of the decision.⁹⁷

3.97 The process from the information session through to approval can take from 12 to 18 months or longer.⁹⁸ At the end of the process, there is no guarantee that the couple will adopt a child.

Selection of adoptive parents

3.98 The Adoption Act does not specify how a couple is selected from the register to adopt a child.

3.99 As the child’s legal guardian,⁹⁹ the Secretary or a principal officer makes the decision. While the paramount consideration is the child’s welfare and interests,¹⁰⁰ the Secretary or principal officer must consider the birth parents’ wishes regarding:

- the adoptive parents’ religion, race and ethnic background
- having contact with, or receiving information, about the child.¹⁰¹

91 Department of Human Services, Government of Victoria, *Adoption Information and Training* <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/adoption-information-and-training>>; *Adoption and Permanent Care Procedures Manual* (2004) 42 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

92 *Adoption Act 1984* (Vic) s 13.

93 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 2 ‘Infant Adoption’) 8, 10, 14 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

94 *Ibid* 8; *Adoption and Permanent Care Procedures Manual* (2004) 49, 67–68 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

95 *Adoption Act 1984* (Vic) s 13A.

96 This is a policy and practice matter, not a legal requirement. See Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 69–70 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

97 *Adoption Act 1984* (Vic) s 129A.

98 The Commission obtained this information from attending an information session for couples considering applying for infant adoption.

99 *Adoption Act 1984* (Vic) s 46. See [3.70].

100 *Adoption Act 1984* (Vic) s 9. See [3.18].

101 *Adoption Act 1984* (Vic) s 15(1)(b)–(c); *Adoption Regulations 2008* (Vic) reg 18.

- 3.100 The child's parents (or parent) can have a say in which couple is chosen. If the parents wish to be involved, the adoption team selects a small number of suitable couples, based as much as possible on the parents' wishes. The parents are given de-identified profiles of these couples and are invited to select one to adopt the child.¹⁰²
- 3.101 If the parents prefer not to be involved in the selection process, the Secretary or principal officer makes the decision.¹⁰³
- 3.102 The selection process is considered in more detail in Chapter 7.

Placement of child with adoptive parents

- 3.103 After the long application process, and weeks, months or even years waiting on the adoption register, placement of the child happens in a matter of days once the adoptive couple is chosen.
- 3.104 The Adoption Act is silent about this stage of the adoption process. The child is placed with the adoptive couple for about 12 months before the adoption is finalised through the court. This time enables bonding and attachment to develop between the child and adoptive couple.
- 3.105 During this period the adoption team monitors the placement and gives the couple assistance and support.¹⁰⁴ In some cases there is contact between the child's parents and the adoptive family during this time.
- 3.106 If the placement goes well, the adoption is finalised through the court process.

Finalising the adoption

- 3.107 To finalise the adoption, the adoptive couple applies to the County Court for the adoption order.¹⁰⁵ The adoptive couple is called the 'applicants'.
- 3.108 The Secretary or principal officer provides a report to the Court about the proposed adoption, including the adoptive couple's suitability and any wishes expressed by a child's parent.¹⁰⁶
- 3.109 The child must receive counselling and the child's wishes must be ascertained (depending on the child's age and level of understanding) before the Court decides whether to make an adoption order.¹⁰⁷ This is discussed further in Chapter 5.
- 3.110 A judge decides whether to make the adoption order at a hearing. The hearing is closed to the public.¹⁰⁸ The adoptive couple attends with the child and their lawyer, if they have one. In some circumstances the child may need their own lawyer. These circumstances are discussed in Chapter 5.
- 3.111 The Court makes the adoption order if satisfied of the following matters:
- the child's wishes have been ascertained and given due consideration¹⁰⁹
 - the applicants satisfy the suitability requirements¹¹⁰
 - the applicants have been approved as 'fit and proper people' to adopt (this does not apply to relative adoptions)¹¹¹

102 Department of Human Services, Government of Victoria, *Information for parents considering adoption of their child* (2008) 11, 15 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. See further references in Chapter 7.

103 Ibid.

104 Ibid.

105 *Supreme Court (Adoption) Rules 2015* (Vic) rr 6(2), 9.

106 Ibid r 23.

107 *Adoption Act 1984* (Vic) s 14(1)(a). Counselling must occur at least 28 days before the adoption order is made.

108 Ibid s 107.

109 Ibid s 14(1)(b).

110 Ibid s 15(1)(a).

111 Ibid.

- the Secretary or principal officer has considered:
 - any wishes expressed by a parent about the ‘religion, race or ethnic background’ of the people who adopt the child,¹¹² or about contact with, or receiving information about, the child¹¹³
 - any arrangements agreed between a parent and the applicants about contact with or information about the child¹¹⁴
- the adoption will promote the ‘welfare and interests of the child’.¹¹⁵

The adoption order

3.112 The adoption order cements the adoption. The order states the child’s name, which must be approved by the Court.¹¹⁶ The child’s surname generally changes to the adoptive family’s surname.¹¹⁷ The child’s given names may also change (see Chapter 8). The adoption order may contain conditions allowing the child’s parents or relatives to have contact with, or receive information about, the child¹¹⁸ (see Chapter 5).

Records of the adoption

3.113 The County Court issues a certificate of adoption.¹¹⁹ The Court also sends a record of the adoption order, called a memorandum of adoption, to the Registrar of Births, Deaths and Marriages (BDM).¹²⁰ The Registrar registers the adoption order and records details of the adoption in the BDM register.¹²¹ A new birth certificate is created with this information (see Chapter 8).

After the adoption order

- 3.114 People may require support after an adoption is finalised. Adoptive parents may need assistance with the particular challenges of bringing up an adopted child, including managing contact with the child’s family of origin.¹²² Chapter 9 discusses issues relating to post-adoption support.
- 3.115 After the adoption, people involved in or affected by the adoption may wish to seek information. The Adoption Act gives certain people rights to information about an adoption (see Chapter 8).

Discharge of adoption order

- 3.116 An adoption order can be revoked by making an application to the County Court to have the order discharged. An adopted person or adoptive parent (or other person)¹²³ can apply to the Court in the event that their relationship has broken down irreparably.¹²⁴
- 3.117 An application can be made for other reasons, including that the adoption order was obtained by fraud, duress or improper means, or that special circumstances justify having it discharged.¹²⁵

112 Ibid s 15(1)(b).

113 Ibid s 15(1)(c).

114 Ibid.

115 Ibid s 15(1)(d).

116 Ibid s 56.

117 Department of Human Services, Government of Victoria, *Information for Parents Considering Adoption of their Child* (2008) 16 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

118 Ibid ss 59, 59A.

119 Ibid s 52.

120 Ibid s 70.

121 Ibid. BDM registered 73 adoption orders in 2014–15: Births, Deaths and Marriages Victoria, *Data* (14 April 2016) <<http://www.bdm.vic.gov.au/utility/about+bdm/about+us/data/>>. This figure is not broken down into adoption orders relating to local adoptions and adoption orders relating to inter-country adoptions. BDM registered 109 adoption orders in 2013–14, 55 adoption orders in 2012–13, 73 adoption orders in 2011–12, 89 adoption orders in 2010–11 and 80 adoption orders in 2009–10.

122 Department of Human Services, Government of Victoria, *Information for Parents Considering Adoption of their Child* (2008) 19 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

123 An application can also be made by the Secretary, principal officer of the agency that arranged the adoption or a birth parent: s 19(2)(a).

124 *Adoption Act 1984* (Vic) ss 19(1)(b), (2).

125 Ibid s 19(1)(a).

3.118 The Court can require the Secretary to investigate ‘the circumstances under which the application is made’ and provide a report to the court.¹²⁶ The Court can make a discharge order if, after considering the report, it is satisfied that the adoption order should be discharged and this would promote the ‘welfare and interests of the child’.¹²⁷

Interaction of adoption law with other laws

3.119 Other laws are relevant to adoption in Victoria. These include:

- the CYF Act (discussed at [3.29])
- the Family Law Act (discussed at [3.34])
- the *Charter of Human Rights and Responsibilities 2006 (Vic)*
- the *Births, Deaths and Marriages Act 1996 (Vic)*
- the *Child Wellbeing and Safety Act 2005 (Vic)*
- the *Status of Children Act 1974 (Vic)*.

3.120 The next chapter discusses how the CYF Act intersects with the Adoption Act.

3.121 The relevance of the Family Law Act is discussed further in Chapter 7.

3.122 Relevant rights in the Charter of Human Rights and Responsibilities are mentioned in a number of chapters.

3.123 The Births, Deaths and Marriages Act is relevant to the birth certificates of adopted people, which are discussed in Chapter 8.

Other bodies involved in adoption

3.124 This chapter has referred to agencies involved in adoption that have responsibilities under the Adoption Act:

- DHHS
- approved agencies
- the County Court
- VCAT
- BDM.

3.125 A number of other organisations are involved in adoption in Victoria. They provide post-adoption support, assist people affected by adoption and advocate on their behalf (see Chapter 9). The Commission is aware of these organisations’ strong interest in the Commission’s review. It looks forward to their input during the submission and consultation processes.

Adoption in the child protection context

38 Introduction

38 Changing national policy approach to the use of adoption in the child protection context

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4. Adoption in the child protection context

Introduction

- 4.1 This chapter provides an overview of the legal framework for adoption in the child protection context.
- 4.2 The Commission understands adoption from child protection in Victoria currently occurs very rarely. The chapter outlines recent amendments to the *Children, Youth and Families Act 2005* (Vic) (CYF Act) which came into effect on 1 March 2016. The changes appear to raise the possibility that the use of adoption may increase.
- 4.3 The chapter also explores a policy shift towards increasing the use of adoption in child protection contexts, within Australia and internationally.
- 4.4 The Commission is aware that there is significant interest from the community in the recent changes to the CYF Act. The terms of reference provide for the Commission to review the *Adoption Act 1984* (Vic) and the *Adoption Regulations 2008* (Vic). The CYF Act is outside the scope of the review and the Commission is unable to consider submissions on the provisions of the CYF Act.
- 4.5 Any adoptions, whether from a child protection context or otherwise, must comply with the requirements of the Adoption Act. One of the requirements for the court to make an adoption order is that the parents must have consented to the adoption. In some circumstances the court may dispense with this consent.
- 4.6 The provisions of the Adoption Act that provide for consent and dispensation with consent are considered in Chapter 5. The Commission welcomes community views on these provisions, and encourages community members with an interest in the use of adoption in the child protection context to consider the questions posed in Chapter 5.

Changing national policy approach to the use of adoption in the child protection context

- 4.7 There is an ongoing policy discussion nationally and internationally about how to provide for the best interests of the child. The debate includes the question of how much weight should be placed on family preservation and reunification. There is a broad range of views on how to provide for the best interests of the child.
- 4.8 Some people consider that adoption should only be used to provide permanency for a child if it is not possible for the child to return to their family and no other permanent care options are possible. (The Commission notes that some people consider that adoption should never be used.)

- 4.9 Others believe that it is desirable to increase the use of adoption generally and in particular for children in the child protection system.¹
- 4.10 As discussed below, current policy in New South Wales aims to increase the use of adoption for children in the child protection system.
- 4.11 There have also been major policy shifts on how to provide for the best interests of the child in England and Wales and the United States of America. In those jurisdictions, policy has shifted away from a focus on reunifying children with their birth parents to a focus on reducing delays in putting children in permanent placements, including adoption. This has resulted in the streamlining of processes for adoption of children in out-of-home care.²
- 4.12 Two reports by the Standing Committee on Human and Family Services (Parliament of Australia) in 2005 and 2007 advocated a revision of the approach to adoption in Australia, criticising an ‘anti-adoption’ culture.³ The discussion in these reports captures the arguments underlying the policy shift in New South Wales.

Inquiry into adoption of children from overseas

- 4.13 The 2005 report was *Overseas Adoption in Australia: Report on the Inquiry into Adoption of Children from Overseas*.⁴ The terms of reference focused on ‘how the Australian Government can better assist Australians who are adopting or have adopted children from overseas countries (intercountry placement adoptions)’.⁵ However, the observations in the report went beyond this to encompass local adoptions and adoptions for children in out-of-home care.⁶
- 4.14 The report identified an ‘anti-adoption culture’ in Australia, and observed that:
- The committee is concerned that, due to past practices, adoption generally has become the poor relation of child protection in Australia. In New South Wales and Queensland, adoption is either neglected or some departmental officers are openly hostile to it.⁷
- 4.15 It queried the focus on family preservation or reunification in child protection policy:
- Following the unsympathetic adoption practices between the 1950s and 1970s, the policy focus has been on the birth parents and a belief that children should maintain their biological links above all else. The term ‘in the best interests of the child’ seems to be used as a shield against any criticism of current adoption policy. This has led to tens of thousands of children being placed in foster care and other forms of out-of-home care when adoption could well have been in their best interests.⁸

1 See generally Lorna Hallahan, *Adoption Act 1988 (SA) Review* (2015) 56–63 and 89–100, which reviews the arguments for and against adoption from care. For arguments supporting the use of adoption for children in out-of-home care in the Australian context, see especially Jeremy Sammut, *The Madness of Australian Child Protection: Why Adoption will Rescue Australia's Underclass Children* (Connor Court Publishing, 2015); Susan Tregeagle and Louise Voigt, ‘Overcoming the Pain of “Never Belonging”: The Case for Open Adoption for Severely Abused and Neglected Children’ (2014) 8(1) *Australian Journal of Adoption* (archived online) <<http://pandora.nla.gov.au/pan/98265/20150416-0016/www.nla.gov.au/openpublish/index.php/aja/issue/view/271/showToc.html>>; House of Representatives Standing Committee on Human and Family Services, Parliament of Australia, *The Winnable War on Drugs: The Impact of Illicit Drug Use on Families* (2007) 72–84. For a discussion of the policy shifts in the use of adoption in Australia, see Kate Murphy, Marian Quartly and Denise Cuthbert, ‘In the Best Interests of the Child: Mapping the (Re)Emergence of Pro-Adoption Politics in Contemporary Australia’ (2009) 55(2) *Australian Journal of Politics and History* 201.

2 See generally Kate Murphy, Marian Quartly and Denise Cuthbert, ‘In the Best Interests of the Child: Mapping the (Re)Emergence of Pro-Adoption Politics in Contemporary Australia’ (2009) 55(2) *Australian Journal of Politics and History* 201, 206–7; Kerry O’ Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and Practice* (Springer, 3rd ed, 2015) 207–10, 334–5; Nicole Ross and Judy Cashmore, ‘Adoption Reforms New South Wales Style: A Comparative Look’ (2016) 30 *Australian Journal of Family Law* 51, 57–75.

3 For a detailed discussion see Kate Murphy, Marian Quartly and Denise Cuthbert, ‘In the Best Interests of the Child: Mapping the (Re)Emergence of Pro-Adoption Politics in Contemporary Australia’ (2009) 55(2) *Australian Journal of Politics and History* 201.

4 House of Representatives Standing Committee on Human and Family Services, Parliament of Australia, *Overseas Adoption in Australia: Report on the Inquiry into Adoption of Children from Overseas* (2005).

5 Ibid xiii.

6 Ibid 123–32.

7 Ibid 4.

8 Ibid viii–ix.

- 4.16 The report stated that ‘the past social attitudes and practices that brought it about [‘it’ can be interpreted to mean a preference against adoption in the child protection context] are no more’.⁹ It noted that birth mothers receive counselling before they are permitted to put up their child for adoption; there is now a range of financial benefits to support single mothers; being a single parent of itself is no longer stigmatised; adoption is no longer clouded in secrecy; and that depending on the circumstances, a mother who gives up her child can continue to have contact or re-establish contact in later years.¹⁰

Report on impact of illicit drug use on families

- 4.17 The terms of reference of the 2007 report, *The Winnable War on Drugs: The Impact of Illicit Drug Use on Families*, required the Standing Committee on Human and Family Services to ‘inquire into and report on how the Australian Government can better address the impact of the importation, production, sale, use and prevention of illicit drugs on families’.¹¹ As part of this review the Committee considered the use of adoption from child protection where the child protection notification involved illicit drug use by a parent.¹²
- 4.18 The Committee concluded that current policies are biased against adoption, and lead to too many children being left in at-risk situations because of a shortage of out-of-home placements, or to children being moved from carer to carer.¹³ It criticised ‘attitudes shared by state departments and many magistrates that force children to be with their biological parents as their preferred policy’, suggested that parents seek to have children returned to their care because of financial incentives, and that policy and practice currently operate in the best interests of the parent rather than the child.¹⁴
- 4.19 The Committee recommended that for children aged 0–5 years, adoption be established as the ‘default’ care option where the child protection notification involved illicit drug use by the parent or parents, with the onus on child protection authorities to demonstrate that other care options would result in superior outcomes for the child or children.¹⁵
- 4.20 It considered that ‘this would be a way of giving greater stability and certainty for children in out-of-home care, particularly for younger children’.¹⁶
- 4.21 As a result of the Australian history of forced adoption practices (see Chapter 5) and the Stolen Generations (see Chapter 6), there is ongoing disquiet about the possibility of increased adoption for children in the child protection system. Parliamentary apologies recognised these past failings of policy, legislation and practice. Some people are concerned that there is potential for past mistakes to be repeated.¹⁷

9 Ibid 5.

10 Ibid.

11 House of Representatives Standing Committee on Human and Family Services, Parliament of Australia, *The Winnable War on Drugs: The Impact of Illicit Drug Use on Families* (2007) xvii.

12 Ibid 83–4.

13 Ibid 75–6. But see House of Representatives Standing Committee on Human and Family Services, Parliament of Australia, *Dissenting Report* (2007) 316–17 which did not support the approach to child protection taken in the report.

14 House of Representatives Standing Committee on Human and Family Services, Parliament of Australia, *The Winnable War on Drugs: The Impact of Illicit Drug Use on Families* (2007) xi–xii.

15 Ibid 84.

16 Ibid 83.

17 See, eg, submission to Standing Committee of Legal and Social Issues, Parliament of Victoria, *Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015* by Association of Relinquishing Mothers, Submission No 20, 24 June, 2–3; and by Liberty Victoria, Submission No 27, 30 June, 3.

Adoption in the CYF Act

- 4.22 As outlined in Chapter 3, there are different types of adoption and situations in which adoption may occur. One situation in which adoption may be considered is when a child is unable to live with their family and provision needs to be made for their protection and permanent care.
- 4.23 The CYF Act underpins the Victorian system of statutory child protection.

Permanency objective of adoption in CYF Act

- 4.24 A number of significant amendments were made to the CYF Act in 2014.¹⁸ The changes discussed below came into effect on 1 March 2016.
- 4.25 The amendments were intended to respond to findings in the *Report of the Protecting Victoria's Vulnerable Children Inquiry*, tabled in Parliament in 2012.¹⁹ A major finding was that the average time taken for permanent care orders to be granted was too long, despite these orders being necessary to ensure a child's safety and wellbeing. On average, it took five years between a child's first child protection report and a permanent care order.²⁰
- 4.26 The amendments introduced 'permanency objectives' to case planning, and timeframes for achieving family reunification.²¹ The changes were intended to 'ensure[s] that decisions regarding vulnerable children will be made in a timely way, to avoid children being in care without a timely response and to promote permanency of care arrangements'.²²
- 4.27 The concept of permanency was introduced by the 2014 amendments. Previously, the concept of 'stability' had been used in planning for permanent care for children. All references in the CYF Act to 'stability' were removed. The reason for the conceptual change was explained in the Second Reading Speech in Parliament:
- 'Stability' was often interpreted as addressing immediate issues only. The change to 'permanency' will focus attention on plans for the child's long-term and permanent care arrangements. Case planning, at the point child protection becomes involved, is critical to making timely permanency arrangements for the care of children. The bill requires that a case plan is developed as soon as abuse or neglect is substantiated [...] The bill requires that a clear permanency objective be articulated for the case plan ... and case plans be reviewed annually or when there is a significant change in circumstances.²³
- 4.28 A case plan must include a 'permanency objective'.²⁴ Adoption is one of the options for a permanency objective.
- 4.29 A case plan is prepared for a child by the Secretary of the Department of Health and Human Services (DHHS). It must contain all significant decisions made by the Secretary that relate to the present and future care and wellbeing of the child.²⁵
- 4.30 The CYF Act provides a hierarchy of permanency objectives. It requires that the permanency objectives be considered in that order of preference 'as determined to be appropriate in the best interests of the child'.²⁶
- 4.31 The possible permanency objectives, in the order that the CYF Act requires them to be

18 The amendments were made by the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 (Vic)*. A number of changes were made that do not relate to adoption and are therefore not discussed in this chapter.

19 Philip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (Department of Premier and Cabinet, 2012).

20 Ibid 229.

21 *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014 (Vic)* s 97 repealing ss 167–171 and substituting *Children, Youth and Families Act 2005 (Vic)* ss 167–169.

22 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 2014, 2657–61, 2658 (Mary Wooldridge, Minister for Community Services).

23 Ibid.

24 *Children, Youth and Families Act 2005 (Vic)* ss 166(3), 167.

25 Ibid s 166. Section 168 of the Act provides that: '[t]he Secretary must ensure that a case plan is prepared in respect of a child if a protective intervener is satisfied on reasonable grounds that the child is in need of protection'. A 'protective intervener' is defined in section 181 of the Act as either the Secretary or a police officer.

26 Ibid s 167(1).

considered, are:

1. *family preservation*—the objective of ensuring a child who is in the care of a parent of the child remains in the care of a parent
2. *family reunification*—the objective of ensuring that a child who has been removed from the care of a parent of the child is returned to the care of a parent
3. *adoption*—the objective of placing the child for adoption under the Adoption Act
4. *permanent care*—the objective of arranging a permanent placement of the child with a permanent carer or carers
5. *long-term out-of-home care*—the objective of placing the child in—
 - a stable, long-term care arrangement with a specified carer or carers; or
 - if a stable, long-term care arrangement with a specified carer or carers is not possible, another suitable long-term care arrangement.²⁷

4.32 The placement of adoption ahead of permanent care and long-term out-of-home care in the permanency objective hierarchy is discussed below starting at [4.39].

4.33 The CYF Act introduced timeframes for the family reunification objective of 12 to 24 months.²⁸ The timeframes are cumulative.²⁹

4.34 The CYF Act provides the following guidance for the choice of permanency objective in a child's case plan:

- A permanency objective of family reunification is appropriate if the child has been in out-of-home care for a cumulative period of less than 12 months and the safe reunification of the child with a parent is likely to be achieved.³⁰
- Except in 'exceptional circumstances', the appropriate permanency objective is adoption, permanent care, or long-term out-of-home care if the child has been in out-of-home care for a cumulative period of 24 months.³¹
- If a child has been in out-of-home care for a cumulative period of 12 months, and there is no real likelihood of the safe reunification of the child with a parent in the next 12 months, a permanency objective of adoption, permanent care, or long-term out-of-home care is appropriate.³²

4.35 If the permanency objective in the case plan is adoption, permanent care, or long-term out-of-home care, the CYF Act directs that 'it is to be preferred that a child is placed with a suitable family member or other person of significance to the child'.³³ Placements with another suitable carer or carers should only be made if a placement with a suitable family member or other person of significance is not possible.³⁴

4.36 The preference in the CYF Act for placements with family members, including for adoptions, does not appear to sit comfortably with the Adoption Act, which imposes restrictions on relative adoptions, providing a presumption in favour of orders under the *Family Law Act 1975* (Cth), rather than adoption orders for relatives of a child.³⁵ Relative adoptions are discussed in Chapter 7.

27 Ibid.

28 Ibid ss 167(3)–(5).

29 Ibid ss 167(3)–(5). Sections 287 and 287A of the Act provide the timeframes for a family reunification order and detail on how the court should determine the period of the family reunification order, including how to determine a cumulative period.

30 Ibid s 167(3).

31 Ibid s 167(4)(b).

32 Ibid s 167(4)(a).

33 Ibid s 167(2)(a).

34 Ibid s 167(2)(b).

35 *Adoption Act 1984* (Vic) s 12. The *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 8, which is not yet in force, amends this section but does not change the preference for the use of orders under the *Family Law Act 1975* (Cth) for relatives over adoption orders. The amendments to section 12 relate to the removal of the use of the de facto spouse and de facto relationship terminology and concepts and replacement with domestic partner, domestic relationship and registered domestic relationship.

Legal framework for adoption in child protection context

- 4.37 Generally, any court orders required to implement a permanency objective would be governed by the CYF Act. For example, if the permanency objective is ‘family preservation’, it is likely that the court order sought would be a ‘family preservation order’ made by the Children’s Court in accordance with the requirements in the CYF Act.³⁶
- 4.38 In contrast to the other permanency objectives, if adoption is the permanency objective in a child’s case plan, the legal requirements and processes to be followed would be provided by the Adoption Act and Adoption Regulations. An adoption order would be made by the County Court.³⁷

Concerns about adoption in child protection

- 4.39 Following the 2014 amendments to the CYF Act, a number of individuals and agencies expressed opposition to the placement of adoption third in the ‘permanency objective’ hierarchy, ahead of permanent care and long-term out-of-home care.
- 4.40 A submission by the Law Institute of Victoria to a 2015 Victorian parliamentary committee inquiry typifies the concerns raised:
- The LIV agrees that it is in the best interest of children to provide them with stability by achieving a permanent outcome. However, to rank Adoption over and above Permanent Care or Long-Term Out of Home Care ignores the recommendations of the state and federal forced adoption inquiries and is inconsistent with the principles of the original Act, which focus on protecting the family as the fundamental group unit of society. Adoption should be the last resort.³⁸
- 4.41 The Law Institute advocated for the amendment of the permanency objectives to make adoption last in the permanency objective hierarchy.³⁹
- 4.42 A key concern expressed by agencies and individuals is that the number of adoptions in Victoria from child protection may increase as a result to the changes to the CYF Act.⁴⁰ The placement of adoption above permanent care and long-term out-of-home care in the new permanency objective hierarchy appears to raise this possibility.
- 4.43 The Victorian Government has not made any statements suggesting an intention to increase the use of adoption in the child protection context. In the Second Reading Speech for the 2014 Bill, the then-Minister for Community Services indicated that:
- In line with creating a better fit between case planning and court decisions, a change of case plan objective will usually require a change of protection order. Adoption should be discussed in the small number of situations where it is clear that a parent will never be able to care for their child and is willing to consent to adoption.⁴¹
- 4.44 In its submission to the parliamentary committee, the Law Institute stated that recent correspondence from the minister had advised that the policy of DHHS with respect to adoption would not change as a result of the 2014 Amendment Act.⁴²

36 *Children, Youth and Families Act 2005* (Vic) ss 280–281. See generally, *Children, Youth and Families Act 2005* (Vic) pt 4.9, which provides for protection orders.

37 In practice, applications are made to the County Court. However, section 6(1) of the *Adoption Act 1984* (Vic) provides for application to the Supreme Court or the County Court at the option of the applicant. Section 6(1A) of the Act also enables the County Court to direct that the application be transferred to the Supreme Court.

38 Law Institute of Victoria, Submission No 15, 22 June 2015, to Standing Committee of Legal and Social Issues, Parliament of Victoria, *Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*, 14.

39 *Ibid* 14–15.

40 See, eg, Children’s Court Private Practitioners Association, Submission No 13, 22 June 2015, to Standing Committee of Legal and Social Issues, Parliament of Victoria, *Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*, 25; Law Institute of Victoria, Submission No 15, 22 June 2015, to Standing Committee of Legal and Social Issues, Parliament of Victoria, *Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*, 14.

41 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 August 2014, 2657–61, 2658 (Mary Wooldridge, Minister for Community Services).

42 Law Institute of Victoria, Submission No 15, 22 June 2015, to Standing Committee of Legal and Social Issues, Parliament of Victoria, *Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*, 3.

- 4.45 The Law Institute noted that a future minister could approach the legislation with a different intention.⁴³

Adoption policy in New South Wales

- 4.46 Some agencies and individuals consider that there might be more adoptions of children from the child protection system in Victoria because of its similarities to New South Wales legislation addressing the same issue.

- 4.47 The New South Wales Government has an active policy of increasing the use of adoption. On 16 March 2016 it announced the establishment of an Institute of Open Adoption Studies to support implementation of this policy. Launching the Institute, Premier Mike Baird said:

We are committed to increasing adoption numbers in NSW, and particularly helping more vulnerable children in Out Of Home Care into permanent and loving families. Every child deserves a stable home. Already NSW has the highest numbers of children and young people adopted from care but we can do more, and the Institute will help us with this goal.⁴⁴

- 4.48 The *Children and Young Persons (Care and Protection) Act 1998* (NSW) includes principles which appear to be similar to the new Victorian permanency objective.⁴⁵ They provide that a child or young person who needs permanent placement is to be placed in accordance with the permanent placement principles hierarchy. The permanent placement principles were introduced into the New South Wales Act as part of a suite of amendments made to the child protection legislation in 2014.⁴⁶

- 4.49 In New South Wales, guardianship (the equivalent of the permanent care option in Victoria) is placed ahead of adoption.⁴⁷ However, some other amendments to the New South Wales legislation suggest that adoption, rather than a guardianship order, is the preferred option for authorised carers.

- 4.50 The New South Wales Government has made a number of legislative changes to facilitate the increased use of adoption for children who are in out-of-home care. These changes are not mirrored in the 2014 Victorian amendments, and include:

- a dual authorisation process for authorised carers and prospective adoptive parents⁴⁸
- establishing a framework for simplified procedures to enable the authorised carers of a child who is in out-of-home care to be invited to apply to adopt the child and to be assessed as suitable to adopt the child⁴⁹
- enabling a birth parent who has not consented to the adoption of a child to be given the opportunity to participate in the development of, and agree to, the adoption plan for the child and to the review of such a plan.⁵⁰

43 Ibid. See also Aboriginal Family Violence Prevention and Legal Service Victoria, Submission No 21 to Standing Committee of Legal and Social Issues, Parliament of Victoria, *Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*, 10.

44 New South Wales Government, 'New Institute Puts Focus on Adoption' (Media Release, 16 March 2016) <<https://www.nsw.gov.au/media-releases-premier>>.

45 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 10A.

46 *Child Protection Legislation Amendment Act 2014* (NSW).

47 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 10A(3).

48 Ibid s 137(1)(d), as amended by *Child Protection Legislation Amendment Act 2014* (NSW) sch 1 cl 75.

49 *Adoption Act 2000* (NSW) pt 3A, as amended by *Child Protection Legislation Amendment Act 2014* (NSW) sch 2.1 cl 9.

50 *Adoption Act 2000* (NSW) ss 46(2A)–(2B), as amended by *Child Protection Legislation Amendment Act 2014* (NSW) sch 2.1 cl 10.

4.51 The *Adoption Act 2000* (NSW) provides for a number of situations, all concerning a child living in out-of-home care, where parental consent to an adoption is not required or may be dispensed with by the court. These provisions, which existed prior to the changes made to the New South Wales legislation in 2014 to facilitate carer adoptions, are also not mirrored in the Victorian legislation. They are:

- If the adoptive child is 12 or more years of age and of sufficient maturity to understand the effect of giving consent, he or she may give sole consent to his or her adoption by a proposed adoptive parent or parents, if the child has been cared for by the proposed adoptive parent or parents for at least two years.⁵¹
- If the court is satisfied that it is in the best interests of the child, it may dispense with parental consent if an application has been made to the court for the adoption of the child by one or more persons who are authorised carers for the child where:
 - the child has established a stable relationship with those carers, and
 - the adoption of the child by those carers will promote the child's welfare, and
 - in the case of an Aboriginal child, alternatives to placement for adoption have been considered in accordance with the Act.⁵²

Effect of CYF Act changes

4.52 At this stage it is too early to say whether the amendments to the CYF Act that came into effect on 1 March 2016 will lead to an increase in the use of adoption for children from child protection in Victoria.

4.53 The terms of reference do not provide for the Commission to consider submissions about the CYF Act. All adoptions require that the parents have consented to the adoption or that the court has dispensed with consent. The Commission encourages community members with an interest in adoption, including in the child protection context, to comment on these provisions, discussed in Chapter 5 at [5.55]–[5.99].

The best interests and rights of the child

- 48** Introduction
- 48** United Nations Convention on the Rights of the Child
- 49** Provision for best interests in the Adoption Act
- 50** Best interests of the child in other legislation
- 53** People with an interest in the adoption and the best interests concept

5. The best interests and rights of the child

Introduction

- 5.1 The terms of reference ask the Commission to review the *Adoption Act 1984* (Vic) to ensure that the best interests and rights of the child are the foremost consideration in any decision under the Adoption Act.
- 5.2 This chapter focuses on how the Adoption Act aims to provide for the best interests and rights of the child. It explores the current provisions for the best interests of the child, including how the Adoption Act attempts to balance and protect the rights and interests of all parties in an adoption to ensure each adoption is in a child's best interests.
- 5.3 The Commission is seeking the views of the community on any changes that may be required to the Adoption Act to ensure that the best interests and rights of the child are paramount.

United Nations Convention on the Rights of the Child

- 5.4 The principle of making decisions in the best interests of the child is well established in international law.¹
- 5.5 Article 3 of the United Nations *Convention on the Rights of the Child* (CRC) provides a general 'best interests of the child' principle which applies to all actions concerning children:

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.²
- 5.6 Article 21 of the CRC provides specifically for the best interests of the child in an adoption.³ The wording is stronger than the general best interests of the child principle in article 3. It stipulates that in an adoption, the best interests of the child are to be the paramount consideration rather than a primary consideration:

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 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

1 See generally Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 36.

2 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

3 See generally Sylvain Vité and Hervé Boéchat, *Article 21: Adoption* (Martinus Nijhoff, 2008).

concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.⁴

- 5.7 This requires that in adoption decisions, the best interests of the child take precedence over all other interests, including those of birth parents, adoptive parents and political, state security or economic interests.⁵ It calls for the child and his or her needs to be at the centre of any decisions about adoption.
- 5.8 An adopted child is entitled to all the rights in the CRC. The specific rights provided in relation to adoption should be read in the context of all the rights provided in the CRC.⁶ These include:
- the principle of non-discrimination⁷
 - the right for the child to know and be cared for by his or her parents⁸
 - the right for the child not to be arbitrarily separated from his or her parents and to be raised by them⁹
 - the right for the child to be heard in matters affecting them.¹⁰
- 5.9 There is also a 'presumption within the Convention that children's best interests are served by being with their parents wherever possible'.¹¹
- 5.10 Australia ratified the CRC on 17 December 1990.

Provision for best interests in the Adoption Act

- 5.11 The Adoption Act includes an overarching provision which requires that: 'In the administration of this Act, the welfare and interests of the child concerned shall be regarded as the paramount consideration.'¹²
- 5.12 The provision requiring that the welfare and interests of the child are the paramount consideration was introduced by the *Adoption of Children Act 1964* (Vic).¹³
- 5.13 In 1964, when this principle was introduced, the Second Reading Speech in the Legislative Council described it as 'the keynote of this proposed legislation. All else in this Bill really stems from the primary consideration that the welfare and interests of the child are paramount.'¹⁴
- 5.14 The Adoption Act and the *Adoption Regulations 2008* (Vic) use inconsistent terminology to refer to the idea that the best interests of the child are the paramount consideration. In addition to the phrase 'welfare and interests of the child', the following phrases are used: 'best interests of the child',¹⁵ 'best interests of the welfare of an adopted child'¹⁶ and 'child's interests'.¹⁷

4 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 21(a).

5 Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 295; Sylvain Vité and Hervé Boéchat, *Article 21: Adoption* (Martinus Nijhoff, 2008) 24.

6 See Sylvain Vité and Hervé Boéchat, *Article 21: Adoption* (Martinus Nijhoff, 2008) 8; Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 303.

7 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 2.

8 *Ibid* art 7(1).

9 *Ibid* art 9.

10 *Ibid* art 12.

11 Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 296; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 7, 9 and preamble.

12 *Adoption Act 1984* (Vic) s 9.

13 *Adoption of Children Act 1964* (Vic) s 8. Prior to this section 6(b) of the *Adoption of Children Act 1958* (Vic) required that consideration be given to the welfare of the infant but it was not the paramount consideration: 'the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant'.

14 Victoria, *Parliamentary Debates*, Legislative Council, 24 March 1964, 3284 (Rupert Hamer).

15 *Adoption Act 1984* (Vic) ss 42(3), 46(4), 691(1), 691(2), 69W(1).

16 *Ibid* ss 60(1), 60(2).

17 *Adoption Regulations 2008* (Vic) sch 7 form 2 (b).

- 5.15 It appears that the various terms are used interchangeably and are not intended to convey different meanings. It seems likely that these inconsistencies have arisen through the multiple amendments that have been made to the legislation since 1984.
- 5.16 Both the *Children, Youth and Families Act 2005 (Vic)* (CYF Act) and the *Family Law Act 1975 (Cth)*, which are key pieces of legislation in decision making about Victorian children, use the term 'best interests of the child' rather than 'welfare and interests of the child' or the other formulations of this idea provided in the Adoption Act or Adoption Regulations.¹⁸
- 5.17 In its 1997 *Review of the Adoption of Children Act 1965 (NSW)*, the New South Wales Law Reform Commission considered the difference between the terms 'welfare and interests of the child' and 'best interests of the child'. It concluded that 'welfare and interests' of the child and 'best interests' are interchangeable. It recommended the use of the term 'best interests of the child'.¹⁹
- 5.18 There is a risk that the different wording might lead decision makers to interpret each formulation differently and therefore make inconsistent decisions.
- 5.19 The Commission's preliminary view is that to ensure clarity for decision makers, as well as consistency with international conventions and other legislation, it would be preferable if the Adoption Act was changed to require that the 'best interests of the child shall be the paramount consideration' and that this terminology should be used consistently throughout the Adoption Act and Adoption Regulations.
- 5.20 The remainder of this chapter refers to the best interests of the child rather than the welfare and interests of the child.

Question

- 1 Should the Adoption Act use consistent terminology to guide decision makers in a decision relating to adoption? If not, in what circumstances should terminology other than the best interests of the child be used?

Best interests of the child in other legislation

- 5.21 The best interests concept has been criticised as:
- indeterminate and subject to the values and views of the decision maker²⁰
 - paternalistic and paying insufficient attention to the rights of children as human beings with agency and views of their own²¹
 - susceptible to being used as a vehicle for political or ideological views.²²
- 5.22 One possible response to criticisms of the best interests concept is to provide guidance in the legislation about how to determine the best interests of the child. The Adoption Act does not provide any guidance about what factors should be considered.

18 *Children, Youth and Families Act 2005 (Vic)* s 10; *Family Law Act 1975 (Cth)* s 60CA.

19 New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 16.

20 See, eg, Robert Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226.

21 See, eg, Nicola Ross, 'Images of Children: Agency, Art 12 and Models for Legal Representation' (2005) 19 *Australian Journal of Family Law* 94, 96–97; David Archard and Marit Skivenes, 'Balancing a Child's Best Interests and a Child's Views' (2009) 17 *International Journal of Children's Rights* 1.

22 See, eg, John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press, 1994) 42, 44.

- 5.23 A number of other Acts that provide for decision making about Victorian children give guidance about how to decide what is in a child's best interests. This section outlines the guidance provided by the Family Law Act and the CYF Act.
- 5.24 It also considers the guidance provided in adoption law in other Australian states and territories about how to decide a child's best interests.
- 5.25 These other laws might provide some ideas about how the best interests of the child could be better determined under the Adoption Act. The Commission is seeking the community's views on whether decision making about the best interests of the child could be improved by providing guidance to decision makers, and if so how.

Family Law Act 1975 (Cth)

- 5.26 The Family Law Act provides the main law in Australia on issues relating to parenting arrangements after parents have separated.²³
- 5.27 It requires that 'in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration'.²⁴
- 5.28 It details matters that the court must consider to determine a child's best interests.²⁵ They are divided into primary considerations and additional matters. The two primary considerations are:
- the benefit to the child of a meaningful relationship with both parents
 - the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.²⁶
- 5.29 The court is required to give greater weight to the second consideration.²⁷
- 5.30 The Family Law Act provides an extensive list of additional considerations for determining the child's best interests.²⁸ They are not listed in a hierarchy. Many overlap with best interests considerations in the adoption law from other states and territories discussed below, so are not listed separately here.

Children, Youth and Families Act 2005 (Vic)

- 5.31 The CYF Act underpins the Victorian system of statutory child protection. It requires that the best interests of the child must always be paramount for the purposes of the Act.²⁹
- 5.32 In all cases when deciding whether something is in the best interests of a child, a decision maker under the CYF Act must consider the need to protect the child from harm, to protect the child's rights and to promote the child's development, taking into account the child's age and stage of development.³⁰
- 5.33 Like the Family Law Act, the CYF Act provides an extensive list of additional considerations 'where they are relevant to the decision or action'. Many of these overlap with best interests considerations in the adoption legislation of other states and territories discussed below, so are not listed separately here.

23 Family Court of Australia, *Family Law in Australia: the Law* (19 January 2015) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-law-in-australia/the-law/>>.

24 *Family Law Act 1975* (Cth) s 60CA.

25 *Ibid* s 60CC. The court is not required to consider these matters when making an order with the consent of all parties: s 60CC(5).

26 *Ibid* s 60CC(2).

27 *Ibid* s 60CC(2A).

28 *Ibid* s 60CC(3).

29 *Children, Youth and Families Act 2005* (Vic) s 10(1).

30 *Ibid* s 10(2).

Adoption Acts in other Australian states and territories

5.34 The *Adoption Act 2000* (NSW) gives guidance about how to determine the best interests of the child. It requires the decision maker to consider the following matters:

- wishes expressed by the child
- the child's age, maturity, level of understanding, gender, background and family relationships, and any other characteristics of the child that the decision maker thinks are relevant
- the child's physical, emotional and educational needs, including their sense of personal, family and cultural identity
- any disability that the child has
- wishes expressed by either or both parent(s)
- the relationship of the child with his or her parents and siblings (if any) and significant other people (including relatives) that the decision maker considers to be relevant
- the attitude of each proposed adoptive parent to the child and to the responsibilities of parenthood
- the relationship of the child with the proposed adoptive parents
- the suitability and capacity of the proposed adoptive parents, or any other person, to provide for the needs of the child, including emotional and intellectual needs
- the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to these things
- the alternatives to an adoption order, and the likely short-term and long-term effects on the child of changes in their circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.³¹

5.35 Adoption law in other states and territories gives varying levels and types of guidance for determining a child's best interests. The matters considered relevant include:

- the term 'best interests' refers to childhood and the rest of the person's life³²
- the likely effect of the decision on the life course of the child³³
- consideration of ethnicity and religion of the birth parents, and the principle that it is preferable to place a child with a family that has the same ethnic and cultural origins as the child's birth parents to facilitate an environment that will promote the child's cultural heritage and identity³⁴
- the child's age, level of understanding, level of maturity, gender, and personal characteristics³⁵
- the child's physical, emotional and educational needs³⁶
- the views of the child³⁷
- the relationship of the child with their parents, siblings and any other relatives³⁸
- the benefits of placing a child with the same family as any sibling of the child who is also to be adopted or has previously been adopted³⁹

31 *Adoption Act 2000* (NSW) s 8(2).

32 *Adoption Act 2009* (Qld) s 9.

33 *Adoption Act 1993* (ACT) s 5(2)(a).

34 *Adoption of Children Act* (NT) s 8(2), sch 1.

35 *Adoption Act 1993* (ACT) s 5(2)(b).

36 *Ibid* s 5(2)(c).

37 *Ibid* s 5(2)(d).

38 *Ibid* s 5(2)(e).

39 *Adoption Act 2009* (Qld) s 160.

- the child's relationship with the adoptive parents⁴⁰
- the suitability and capacity of the adoptive parents to meet the child's needs⁴¹
- the alternatives to adoption to secure permanent family arrangements⁴²
- possible ongoing contact with members of the child's birth family, or the exchange of information between the child or the child's adoptive parents and members of the child's birth family.⁴³

5.36 It may assist decision makers to have guidance in the Adoption Act about the factors that should be considered in determining the best interests of the child. The Commission is interested in the community's view on this matter.

Question

- 2 Should the Adoption Act provide guidance about how to determine what is in a child's best interests? If yes:
- (a) What should decision makers be required to consider?
 - (b) Should all the matters have equal weight or should some be weighted more heavily than others?
 - (c) If some matters should be weighted more heavily than others, what are they?

People with an interest in the adoption and the best interests concept

- 5.37 The child's best interests are the paramount consideration in decisions about adoption. The needs of the child are at the centre of decision making and are prioritised over the needs and interests of other parties in the adoption. This does not mean that other parties in an adoption have no rights or interests.
- 5.38 In this chapter, 'parties in an adoption' refers only to the adopted child, the birth parents and the adoptive parents. There are many other people who have a significant interest in an adoption and who play an important role in a child's life. These include siblings of the adopted child, relatives of the child (including extended family), carers, community members, and members of the child's cultural or ethnic group. The way in which the Adoption Act provides for and balances each of these interests to uphold the child's best interests is also considered.
- 5.39 There are different views about how to determine what is in the best interests of a child, and how the interests of each party in an adoption should be balanced to uphold the best interests of the child.
- 5.40 As outlined above, there is a presumption in the CRC that it is in a child's best interests to be with his or her parents wherever possible.⁴⁴ The CRC provides a set of minimal procedural requirements to help ensure adoptions are in the best interests of the child including:

40 *Adoption Act 1993* (ACT) s 5(2)(f).

41 *Ibid* s 5(2)(g).

42 *Ibid* s 5(2)(h).

43 *Adoption Act 2009* (Qld) s 6(2)(j).

44 Rachel Hodgkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 3rd ed, 2007) 296; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 7, 9 and preamble.

- an adoption of a child is authorised only by competent authorities
 - the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians
 - if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary.⁴⁵
- 5.41 These elements are provided for in the Adoption Act.
- 5.42 The Adoption Act does not provide explicit guidance or principles about how to ensure that decisions are in the best interests of the child. However, it does include various features that protect the rights and interests of all parties in an adoption, to ensure it is in a child’s best interests.
- 5.43 The key ways it does this are:
- a general requirement that the parents of a child consent to an adoption⁴⁶ (discussed at [5.55]–[5.96])
 - an ability to revoke consent within specified timeframes⁴⁷ (discussed at [5.92]–[5.94])
 - an ability for the court to dispense with the consent of a parent in particular circumstances⁴⁸ (discussed at [5.97]–[5.99])
 - eligibility requirements for people who wish to adopt a child⁴⁹ (discussed in Chapter 7)
 - an ability for the birth parents to express wishes in relation to the religion, race or ethnic background of the proposed adoptive parent(s)⁵⁰ (discussed in Chapter 7)
 - a requirement to consider the wishes of the child⁵¹ (discussed at [5.108]–[5.127])
 - a requirement that the child is represented in particular circumstances⁵² (discussed at [5.128]–[5.155])
 - the ability to provide for ongoing information exchange or contact between the adopted child and the parents⁵³ (discussed at [5.100]–[5.107])
 - rights for various people with a legitimate interest in an adoption—including relatives who are not parties in the adoption—to access information about the adoption⁵⁴ (discussed in Chapter 8).
- 5.44 The Commission is interested in community views on whether the Adoption Act has achieved the right balance between the interests of each party in an adoption, and has provided for the interests of non-parties who are important in the child’s life, while still ensuring that the best interests of the child are paramount.
- 5.45 The next sections outline the provisions in the Adoption Act that attempt to balance the rights of the parties in an adoption. They also consider how the interests of non-parties to an adoption who have a significant interest in the adoption, such as siblings and other relatives, are provided for. The Commission seeks the community’s views on how all these provisions might be improved.

45 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 21(a).

46 *Adoption Act 1984* (Vic) s 33.

47 *Ibid* s 41.

48 *Ibid* s 43.

49 *Ibid* ss 11–13.

50 *Ibid* s 15(1)(b); *Adoption Regulations 2008* (Vic) regs 18(1)–(2), sch 7 form 1.

51 *Adoption Act 1984* (Vic) s 14.

52 *Ibid* s 106.

53 *Ibid* s 15(1)(c), s37, s 50, s 59A; *Adoption Regulations 2008* (Vic) regs 18(3), 30, sch 7 form 2.

54 *Adoption Act 1984* (Vic) pt VI.

Relatives and community members of the child and best interests

- 5.46 There are many people who are not a party in an adoption, but who have a stake in it, and whose role should be considered in any decision about the best interests of the child. They include the adopted person’s siblings, grandparents, aunts and uncles, the children of adoptive parents, and carers. They may also include the extended family and the child’s cultural and linguistic community.
- 5.47 The ways the Adoption Act currently provides for the benefits to the child of maintaining connection to these people and the interests of these people are:
- requirements that the people seeking to adopt the child have a suitable appreciation of the importance of contact with parents and family and exchange of information about the child with the child’s parent and family⁵⁵
 - the ability, in some circumstances, for the court to place conditions on an adoption order providing for parents to receive information about the child and parents and relatives of the child to have contact with the child (discussed at [5.100–5.107])⁵⁶
 - an ability to make consent to the adoption of an Aboriginal or Torres Strait Islander child subject to conditions that the relevant parent, specified relatives, and members of the Aboriginal or Torres Strait Islander community to which the child belongs have rights to have contact with the child (discussed in Chapter 6)⁵⁷
 - rights for various people with a legitimate interest in an adoption—including relatives who are not parties in the adoption—to access information about the adoption⁵⁸ (discussed in Chapter 8).

Child’s relationships in other legislation

- 5.48 Some other states and territories provide stronger obligations to consider the relationship of the child with their parents, siblings and any other relatives. For example, adoption law in the Australian Capital Territory requires that in forming a view about the best interests of a child or young person, a person making a decision must take into account the relationship the child or young person has with the parents, any siblings and any other relatives.⁵⁹
- 5.49 Queensland adoption law focuses more explicitly on the child’s relationships with siblings, both pre- and post-placement, for adoption and finalisation of an adoption order. It requires the Department of Communities, Child Safety and Disability Services to have regard to the consideration that it would ordinarily be in a child’s best interests to be placed with the same family as any sibling of the child who is also to be adopted or has previously been adopted.⁶⁰
- 5.50 The *Adoption Act 2009* (Qld) provides principles to be followed, including that it may be in a child’s best interests to have ongoing emotional connections, contact or exchange of information with their birth family.⁶¹
- 5.51 Queensland adoption law aims to protect the best interests of the child through a number of requirements aimed at ensuring the parents’ focus is primarily on that child. One way it does this is by trying to ensure there are age gaps between the child placed for adoption and any other children. This includes:

55 Ibid s 15(1)(a); *Adoption Regulations 2008* (Vic) reg 35(g).
 56 *Adoption Act 1984* (Vic) s 59A.
 57 Ibid ss 37, 59.
 58 Ibid pt VI.
 59 *Adoption Act 1993* (ACT) s 5(2)(e).
 60 *Adoption Act 2009* (Qld) s 160.
 61 Ibid s 6(2)(j).

- Eligibility criteria requiring that a woman seeking to adopt is not pregnant, that a person seeking to adopt is not undergoing fertility treatment, and that anyone seeking to adopt does not have custody of a child less than one year old or a child who has been in their custody for less than one year.⁶²
 - Requirements for the department to consider that it would ordinarily be in a child's best interests to be the youngest child in their adoptive family by at least two years at the time of the placement, and that no other children should join the adoptive family for at least one year after the placement. These considerations do not apply where siblings are placed together with the same family.⁶³
- 5.52 While these requirements are included in the best interests of the adopted child, they may also promote the best interests of other children in the family by ensuring that parents have sufficient time to devote to each child and help manage sibling jealousy, which may be accentuated if the children are very close in age.
- 5.53 The Commission understands that as a matter of policy, issues relating to fertility, pregnancy and spacing of children are considered as part of the assessment process determining whether someone is suitable to adopt.⁶⁴ However, in Victoria this is a matter of practice rather than a legislative requirement.
- 5.54 Questions about how to provide for a child's contact with members of their family of origin are asked following [5.107].

Questions

- 3 Should the Adoption Act have requirements about the age differences between the adopted child and any other children in the family? If yes, what requirements?
- 4 Should the Adoption Act include a principle requiring decision makers to consider placing siblings for adoption in the same family? If not, in what other ways could the Adoption Act ensure that sibling relationships are considered in decisions about adoption?

Consent and 'best interests'

- 5.55 The starting point of the Adoption Act is that consent for an adoption is required from the child's mother and father, or in the case of a non-citizen child, the person who is the guardian of that child under the *Immigration (Guardianship of Children) Act 1946* (Cth).⁶⁵ In some circumstances it is possible for a court to dispense with consent.⁶⁶ This is discussed below.
- 5.56 The general requirement for consent protects the rights of the birth parents.⁶⁷ It also protects a child's right to know and be cared for by their parents,⁶⁸ not to be arbitrarily

62 Ibid s 76(1). This does not include children of whom the person is an approved carer.

63 Ibid s 161.

64 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 54–5 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

65 *Adoption Act 1984* (Vic) s 33. See *Adoption Act 1984* (Vic) s 36 for the circumstances in which consent may be given by a guardian or delegate of a guardian for a non-citizen child.

66 Ibid s 43.

67 Usually consent to an adoption is a general consent to the adoption of the child, rather than consent to an adoption by a specific person or people. However, in the case of consent to an adoption by a relative of the child or domestic partner of a parent, consent to adoption is only in relation to adoption by that particular relative or domestic partner: *Adoption Act 1984* (Vic) s 39(2), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 10 which will come into operation when proclaimed or no later than 1 September 2016.

68 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1).

separated from their parents and to be raised by them.⁶⁹

- 5.57 The importance placed on consent being properly obtained and valid is emphasised by the fact that the Adoption Act includes offences relating to improperly obtained consent. It is an offence for someone to falsely represent themselves to be a person whose consent is required to an adoption.⁷⁰ It is also an offence to use a consent document knowing that it is forged or altered, or to use a consent document knowing that the signature was obtained by fraud or duress.⁷¹
- 5.58 The Adoption Act places great importance on the proper witnessing of consent documents. To ensure documents are correctly witnessed, the Act includes an offence for a person who does not follow the rules for witnessing a consent document.⁷²
- 5.59 There are different consent provisions for Aboriginal and Torres Strait Islander children, discussed in Chapter 6.

Forced adoption and the apologies

- 5.60 In the past, some adoptions occurred without effective consent, against the will of parents. These are known as ‘forced adoptions’.
- 5.61 In 2012 the Senate Community Affairs References Committee completed its report on the *Commonwealth Contribution to Former Forced Adoption Policies and Practices*. It defined ‘forced adoption’ as an ‘adoption where a child’s natural parent, or parents, were compelled to relinquish a child for adoption’.⁷³ This included situations where no consent was given, where alternatives to adoption were not explained, where consent was given under duress, and where consent was revoked.⁷⁴
- 5.62 On 25 October 2012 the Parliament of Victoria issued a formal apology to those affected by past forced adoption practices in Victoria.⁷⁵ The apology acknowledged that ‘many thousands of Victorian babies were taken from their mothers, without informed consent, and that this loss caused immense grief’.⁷⁶ It also acknowledged ‘the devastating and ongoing impacts of these practices of the past’ and offered an unreserved apology to all those harmed.⁷⁷ The apology included a commitment to ‘never forget what happened and to never repeat these practices’.⁷⁸
- 5.63 On 21 March 2013, the Prime Minister Julia Gillard apologised on behalf of the Australian Government to people affected by forced adoption or removal policies and practices.⁷⁹ The apology included commitments ‘to make sure these practices are never repeated’ and to ‘remember the lessons of family separation’. It also stated that the nation’s focus will be ‘on protecting the fundamental rights of children and on the importance of the child’s right to know and be cared for by his or her parents’.⁸⁰
- 5.64 There are ongoing concerns from some community members that consent to adoptions may be forced or coerced. Forced adoptions occurred in Victoria under previous adoption legislation, despite those laws containing consent provisions.⁸¹
- 5.65 For Victorians affected by forced adoption, the commitments made in the apologies to avoid repeating the mistakes of the past are critical.

69 Ibid art 9.

70 *Adoption Act 1984* (Vic) s 125.

71 Ibid s 126.

72 Ibid s 127.

73 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 6.

74 Ibid 54.

75 Victoria, *Parliamentary Debates*, Legislative Assembly, 25 October 2012, 4771, 4779 (moved by Ted Baillieu, Premier).

76 Ibid 4771.

77 Ibid.

78 Ibid.

79 Motions of apology were moved in the House of Representatives and the Senate and passed on 3 December 2013 and 14 May 2013: Commonwealth, *Parliamentary Debates*, Legislative Assembly, 3 December 2013, 1414, 1415 (moved by Christopher Pyne); Commonwealth, *Parliamentary Debates*, Senate, 14 May 2013, 2404–06 (moved by Christine Milne).

80 *Parliamentary Debates*, Legislative Assembly, 3 December 2013, 1415 (moved by Christopher Pyne).

81 *Adoption of Children Act 1958* (Vic) s 5(3); *Adoption of Children Act 1964* (Vic) s 13, div 3. The consent provisions in the *Adoption Act 1984* (Vic) are substantially more robust than those of the preceding Acts.

- 5.66 Ensuring free and informed consent to adoption requires a robust legal framework. But that alone is insufficient. It also requires concerted effort from all those involved in the adoption process, from social workers and counsellors to those witnessing and taking consent, and from the court, to ensure that provisions are complied with properly.

Who provides consent?

- 5.67 If the child's parents are or were married at any time between conception and the birth of the child, the people whose consent is required are the mother and her husband, or former husband.⁸²
- 5.68 If the child has been adopted previously, the appropriate people to give consent are the adoptive parents.⁸³
- 5.69 Consent is not required if the court is satisfied that there is no appropriate person to give consent to the adoption.⁸⁴
- 5.70 If the child's parents were not married to each other at any time between conception and the birth of the child, the Adoption Act sets out a range of situations in which a man is presumed to be the father and therefore, in addition to the mother, the appropriate person to give consent to an adoption.⁸⁵

Requirements to identify and contact father

- 5.71 The Adoption Act does not place a positive obligation on anyone to identify the father. It does provide some obligations to contact a man reasonably believed to be the father of the child.⁸⁶
- 5.72 The Secretary or principal officer of the approved agency arranging the adoption must contact a man he or she believes on reasonable grounds may be the father. This must happen within two business days of the mother giving her consent to the adoption.⁸⁷ This obligation to contact the man believed to be the father only applies if his name or address is known.⁸⁸
- 5.73 The man believed to be the father must be advised that the Secretary or principal officer believes that he may be the child's father. He must also be advised that his consent will not be required unless he commences proceedings to obtain a declaration of paternity, in which case he must do so before the end of the period that the mother can revoke consent.⁸⁹
- 5.74 The court may dispense with the requirement to contact the man believed to be the father. The Secretary or principal officer must apply for this dispensation within two business days of the mother giving consent.⁹⁰ The Adoption Act does not specify any grounds for dispensation but it seems likely that this provision would cover situations where the court considered it appropriate that the mother should have sole decision-making responsibility. This might include situations of rape or incest, or situations where there would be an unacceptable risk of harm to the mother or child if the father was informed.
- 5.75 As discussed in Chapters 6 and 8, a child's access to their cultural and genetic heritage may be key to their identity. Knowledge of their father and his family, and contact with them, are generally acknowledged to be in the best interests of the child. This raises the

82 *Adoption Act 1984* (Vic) s 33(2). See also *Status of Children Act 1974* (Vic) s 5, which creates a presumption as to parenthood that 'a child born to a woman during her marriage or within ten months after the marriage has been dissolved by death or otherwise shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be'.

83 *Adoption Act 1984* (Vic) s 33(5).

84 *Ibid* s 33(1)(b).

85 *Ibid* s 33(3).

86 *Ibid* s 49.

87 *Ibid* s 49(2).

88 *Ibid* ss 49(1)(a)–(b),(2). In practical terms it would appear to require that the name and address of the man presumed to be the father is known. However, the wording of the section uses 'or' rather than 'and'.

89 *Ibid* ss 49(1)–(2).

90 *Ibid* s 49(1)(b)(ii).

possibility that there should be a more positive duty on those involved in the adoption process to identify the father.

- 5.76 Queensland law imposes a greater duty to identify the father than Victorian law. It requires the Department of Communities, Child Safety and Disability Services to take reasonable steps to establish the identity and location of the father.⁹¹
- 5.77 It also requires that the father or a person reasonably suspected to be the father be notified that the mother and any guardian has given consent to the adoption. He must be told how he may:
- give consent to the adoption, or
 - establish whether he is the child's father, or
 - apply for a parenting order for the child in the Family Court of Australia.⁹²
- 5.78 The Queensland legislation provides for situations where it considers that it would not be appropriate to contact the father. There is no requirement for the department to contact the father in cases of incest, rape, or if there would be an unacceptable risk of harm to the child or mother if the person were made aware of the child's birth or proposed adoption.⁹³

Questions

- 5 Should there be a greater obligation to identify and contact the father of the child to obtain his consent to an adoption? If yes, what steps are reasonable to try to obtain a father's consent?
- 6 Are there any situations when no attempts should be made to contact the father to seek his consent to an adoption? If yes, what are they?

Providing effective consent

Information and counselling requirements

- 5.79 For consent to be effective it must be in a prescribed form signed by the person giving consent.⁹⁴ A consent form includes specific information to ensure that information provided about the effect of an adoption order is consistent and that the person providing consent understands the effect of an adoption order.
- 5.80 In most cases the form includes a statement that when the court makes an adoption order, the person giving consent will lose his or her rights as a parent of the child, those rights will be transferred to the person or persons who adopt the child, and the child will be treated in law as the child of the person or persons who adopt the child.⁹⁵
- 5.81 If consent is given in Victoria, the person giving consent must have received counselling from an approved counsellor.⁹⁶

91 *Adoption Act 2009* (Qld) s 32.

92 *Ibid* s 33.

93 *Ibid* s 33(2).

94 *Adoption Act 1984* (Vic) ss 34(1), 36. See also *Adoption Regulations 2008* (Vic) reg 20, sch 9.

95 *Adoption Regulations 2008* (Vic) reg 20(a)(i),(iii), sch 9 form 1, form 3. This does not apply where consent is given by the child's parent to the adoption of his or her child by the parent's spouse or de facto spouse. In that case the form includes statements that the person consents on the understanding that his or her rights as a parent will not be altered in any way by an adoption order in favour of his or her spouse and that the person understands that an adoption order gives the person and his or her spouse the same rights as parents of the child that both would have if they were married when the child was born: *Adoption Regulations 2008* (Vic) reg 20(a)(ii), sch 9 form 2. Note that the forms will need to be updated to reflect the changes under the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7(7) which replaces the term 'de facto spouse' in the *Adoption Act 1984* (Vic) s 11(6) with the term 'domestic partner'.

96 *Adoption Act 1984* (Vic) s 35(1)(a). Counselling must be provided by a person approved for the purpose by the Secretary or the principal officer of an approved agency.

- 5.82 The person giving consent must have received written information from the person who gave them counselling. Information must be provided about the effect of an adoption order, the alternatives to adoption, and the names and addresses of organisations that provide family support services. Generally this information should be provided no less than seven days before consent is given.⁹⁷
- 5.83 If consent is given outside Victoria, the counselling requirements do not apply.⁹⁸ However, in all cases where consent is given in Victoria or overseas, the person giving consent must have received information about the effect of the adoption order, procedures for revoking consent and for extending the period for revoking consent.⁹⁹
- 5.84 A document of consent that is signed in accordance with the law of another state or territory is a valid form of consent to the adoption of the child.¹⁰⁰

Requirements for witnessing and taking consent

- 5.85 The consent form must be signed in the presence of two eligible witnesses.¹⁰¹
- 5.86 If consent is given in Australia, there are two classes of eligible witness. One witness must be drawn from each class of witness.¹⁰²
- 5.87 The first category of witness is a person approved by the Secretary or principal officer of an approved agency. Generally this witness would be the approved counsellor who provided counselling before the consent was given. If this person is unavailable, or it is not practical for the person to be present, the witness must be a person who has a detailed knowledge of adoption practice. In particular, they must be knowledgeable about the effects of an adoption order, the procedure for extending the period for revoking consent and the procedure for revoking consent.¹⁰³
- 5.88 The second category of witness is court officials.¹⁰⁴
- 5.89 If consent is given in a country outside Australia, the two types of witness are an Australian diplomatic officer and a judge or magistrate in that country.¹⁰⁵
- 5.90 When consent is signed outside Australia, one of the two witnesses must provide information to the person giving consent about the effect of an adoption order and the alternatives to adoption available in Victoria. Generally this information should be provided no less than seven days before consent is given.¹⁰⁶
- 5.91 The witnesses must sign a prescribed statement. Irrespective of whether consent is signed in Australia or outside, a witness must not sign the statement unless he or she believes that the person giving the consent understands:
- the effect of an adoption order
 - the procedure for revoking consent to the adoption
 - the procedure for extending the period for revoking consent to the adoption.¹⁰⁷

97 Ibid ss 35(1)–(2) create a general requirement that the information is provided no less than seven days before the consent is given but if there are special circumstances, the witness drawn from the court official class of witnesses may approve that the counsellor provide this information in a time less than seven days but not less than 24 hours.

98 Ibid s 35(4).

99 *Adoption Regulations 2008* (Vic) regs 17(1)(b)–(c), 23, sch 10, sch 11.

100 *Adoption Act 1984* (Vic) s 40.

101 Ibid s 34.

102 Ibid s 34(1)(a).

103 Ibid s 34(1)(a)(ii), *Adoption Regulations 2008* (Vic) reg 22(1).

104 *Adoption Act 1984* (Vic) ss 34(1)–(2). Section 34(2)(c) of the Act provides that if the consent is signed in another state or territory, the relevant witness is a person who is the principal administrative officer of a court in that state or territory or a deputy of such an officer. If the consent is signed in Victoria, the prescribed court officials are set out in the *Adoption Regulations 2008* (Vic) reg 22(2). There is also provision for gazettal of an authorised person.

105 *Adoption Act 1984* (Vic) s 34(3).

106 Ibid s 34(3)(b),(4).

107 Ibid s 34; *Adoption Regulations 2008* (Vic) regs 17(1)(b)–(c), 23, schs 10, 11.

Rights to revoke consent

- 5.92 A consent to the adoption of a child may be revoked within 28 days from the date on which consent was signed.¹⁰⁸
- 5.93 The timeframe for revoking consent may be extended by a maximum of 14 days.¹⁰⁹
- 5.94 If the Secretary or principal officer considers that it is no longer possible to place the child with the proposed adoptive parent or parents, each person who gave consent must be informed in writing of the right to revoke consent. The timeframe for revoking consent is 56 days after the notice is given.¹¹⁰

Ineffective consent

- 5.95 Generally, consent may not be given earlier than 14 days after the birth of the child. Where it is in the best interests of the child, the court can order that consent may be given earlier.¹¹¹
- 5.96 Consent will not be effective if:
- It was not given in accordance with the Adoption Act.¹¹²
 - It was obtained by duress or fraud.¹¹³
 - It was revoked before it had become irrevocable.¹¹⁴
 - A material part of the document providing consent has been altered without authority.¹¹⁵
 - The person giving or purporting to give consent was not in a fit condition to give consent, or did not understand the nature of the consent when the document was signed.¹¹⁶
 - The document providing consent was signed before the birth of the child.¹¹⁷

Questions

- 7 Should any changes be made to the current consent provisions? If yes, what changes?
- 8 Should any other people be consulted about, or required to consent to, an adoption? If so, who?

108 *Adoption Act 1984* (Vic) s 41(1)(a).

109 *Ibid.*

110 *Ibid* s 38(1). See also sections 38(2) and 46(1)(e) of the Act which provide that if consent is not revoked within the 56-day period it is deemed to be revoked after 140 days. See sections 37(2)–(4) for the requirements and time limits for revoking a conditional consent for the adoption of an Aboriginal or Torres Strait Islander child where no suitable person or persons to adopt can be found.

111 *Ibid* ss 42(2)–(3).

112 *Ibid* s 42(1)(a).

113 *Ibid* s 42(1)(b).

114 *Ibid* s 42(1)(c).

115 *Ibid* s 42(1)(d).

116 *Ibid* s 42(1)(e).

117 *Ibid* s 42(1)(f).

Court may dispense with consent

5.97 The Adoption Act enables the court to dispense with a person's consent to an adoption in certain circumstances.¹¹⁸

5.98 These are:

- The person cannot be found, after reasonable inquiry.¹¹⁹
- The person's physical or mental condition means they are not capable of properly considering the question of whether they should give consent, and this situation is unlikely to change (this requires a certificate signed by a minimum of two registered medical practitioners).¹²⁰
- The person has abandoned, deserted, persistently neglected or ill-treated the child.¹²¹
- The person has seriously ill-treated the child to the extent that it is unlikely that the child would accept, or be accepted by the person within, the family of that person.¹²²
- The person has, for a period of not less than one year, failed, without reasonable cause, to discharge the obligations of a parent of the child.¹²³
- The person has such a physical or mental disability, or is otherwise so impaired, that the person would be unable to meet the needs of the child.¹²⁴
- For any reason the child is unlikely to be accepted into, or to accept, a family relationship with the person.¹²⁵
- There are any other special circumstances by reason of which, in the interests of the welfare of the child, the consent may properly be dispensed with.¹²⁶

5.99 The Commission understands that generally in practice the court is only asked to dispense with consent if the person cannot be found. However, as detailed above, the Adoption Act provides for consent to be dispensed with in a range of other circumstances.

Question

9 Are the grounds for dispensing with consent appropriate for adoption in contemporary Victoria? If not, what changes should be made?

Conditions on an adoption order

5.100 The Adoption Act refers to 'access to the child'. The term used throughout this section is 'contact with the child' which is the more contemporary way of describing this idea.¹²⁷ A question about updating the terminology in the Adoption Act is asked in Chapter 9.

5.101 An adoption order may be made subject to conditions relating to contact with the child or the provision of information about the child.¹²⁸

118 Ibid s 43. The court may not dispense with the consent of a guardian of the child under the *Immigration (Guardianship of Children) Act 1946* (Cth).

119 *Adoption Act 1984* (Vic) s 43(1)(a). Section 43(2) details the steps that must be taken to demonstrate that a reasonable inquiry has been made for a person before the court may determine that this has been done and that the person cannot be found.

120 *Adoption Act 1984* (Vic) ss 43(1)(b), (3).

121 Ibid s 43(1)(c).

122 Ibid s 43(1)(d).

123 Ibid s 43(1)(e).

124 Ibid s 43(1)(f).

125 Ibid s 43(1)(g).

126 Ibid s 43(1)(h).

127 See, eg, *Children, Youth and Families Act 2005* (Vic) s 3(1) which provides that 'contact (unless the context otherwise requires) means the contact of a child with a person who does not have care of the child by way of—(a) a visit by or to that person, including attendance for a period of time at a place other than the child's usual place of residence; or (b) communication with that person by letter, telephone or other means—and includes overnight contact'.

128 *Adoption Act 1984* (Vic) s 59A.

- 5.102 The ability for the court to place conditions on an adoption order only applies to adoption orders made with the consent of the parent or parents.¹²⁹ It does not apply to situations where consent was dispensed with by the court.
- 5.103 Conditions relating to contact with the child and information about the child may be made where the court is satisfied that:
- circumstances exist which make it desirable to do so¹³⁰
 - after consent to the adoption, the birth parent(s) and the adoptive parent(s) have agreed that the adoption order should be made subject to certain conditions.¹³¹
- 5.104 Two types of condition may be made on the adoption order. The first are conditions providing that specified people have the right to have contact with the child. This may be the child's parents or other relatives.¹³²
- 5.105 The other type of condition that may be made is one that requires the adoptive parent or parents to provide information about the child. In this case, the Adoption Act provides for the Secretary or principal officer of an approved agency to act as an intermediary. Information is provided to the Secretary or principal officer and passed on to the parent(s).¹³³
- 5.106 It is possible to add the conditions described above to an adoption order after an adoption.¹³⁴ It is also possible for the court to vary or revoke conditions after an adoption.¹³⁵ The court must be satisfied that it is in the 'best interests of the welfare of the adopted child'.
- 5.107 Special provisions in the Adoption Act enable the parents of Aboriginal and Torres Strait Islander children to give conditional consent to an adoption, providing that consent is only given subject to conditions about ongoing contact with the child. These provisions are discussed in Chapter 6.

Question

- 10 Should the court be able to put conditions on an adoption order in a broader range of circumstances if it is in the best interests of the child? These circumstances might include situations where:
- (a) the court has dispensed with the consent of a parent but it is in the best interests of the child to have contact with the parent or with relatives of that parent
 - (b) consent was given but the adoptive parents and the birth parent giving consent have not agreed about contact or exchanging information about the child.

129 Ibid s 59A(b).
 130 Ibid s 59A(a).
 131 Ibid s 59A(b).
 132 Ibid s 59A(c).
 133 Ibid s 59A(d).
 134 Ibid s 60(1).
 135 Ibid s 60(2).

Questions

- 11 How should adoption law provide for the child's contact with family members other than parents? For example:
 - (a) Should contact arrangements be considered as part of a best interests principle?
 - (b) Should a decision maker, such as DHHS, be required to consider contact with family members other than parents after an adoption?
 - (c) Should the court be required to consider making conditions for contact with family members other than parents after an adoption?
- 12 Are there any other issues within the terms of reference that should be considered in determining the best interests of the child and balancing the rights and interests of other people with an interest in the adoption? If yes, what are they?

Wishes of the child

- 5.108 Article 12 of the CRC provides a right for a child who is capable of forming his or her own views to express those views freely in all matters affecting him or her. It requires that the views of the child are given due weight in accordance with the age and maturity of the child.¹³⁶
- 5.109 This right, often described as the right to be heard or the right to participation, has been identified by the United Nations Committee on the Rights of the Child as one of the four general principles of the CRC which 'highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights'.¹³⁷
- 5.110 Recently, the United Nations Committee on the Rights of the Child expressed concern 'that only three out of eight jurisdictions in [Australia] require the consent of the adopted child (as of 12 years of age) prior to adoption'.¹³⁸

The child's wishes in the Adoption Act

- 5.111 The *Adoption of Children Act 1964* (Vic) included a general requirement for the consent of a child from the age of 12 years.¹³⁹ This requirement was removed from the 1984 Act. It was replaced with the current requirements for mandatory counselling and consideration of the wishes of the child.
- 5.112 One reason for this change was the view that a child's signature on a consent form did not necessarily demonstrate that the child understands the implications of adoption or of consent.¹⁴⁰
- 5.113 A second concern was that requiring a child's consent places a heavy responsibility on a child and 'may subject the child to unwarranted pressure and manipulation from the parents'.¹⁴¹

136 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
137 *General Comment No 12 (2009): The Right of the Child to be Heard*, United Nations Committee on the Rights of the Child (UN CRC), 51st sess, CRC/C/GC/12 (20 July 2009) [2].

138 UN CRC, 60th sess, 1725th mtg, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [53].

139 *Adoption of Children Act 1964* (Vic) s 30. The court could decide it was not required if it was satisfied that there were 'special reasons, related to the welfare and interests of the child, why the order should be made notwithstanding that the child has refused to consent to the adoption or his consent has not been sought'.

140 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee (1983)* 157.
141 *Ibid.*

- 5.114 There is currently no requirement in Victoria that the child consent to their adoption. Instead, children must receive counselling subject to their age and understanding, and consideration must be given to the wishes of the child.
- 5.115 In general, counselling must be provided to the child a minimum of 28 days before the adoption order is to be made.¹⁴² Counselling is not required if the court is satisfied that it would not be appropriate considering the age and understanding of the child.¹⁴³
- 5.116 The counsellor must counsel the child about the effects of the adoption and provide a written report to the court.¹⁴⁴
- 5.117 The court must be satisfied that the wishes of the child have been ascertained and have been given due consideration. The age and understanding of the child are taken into account.¹⁴⁵

The child's consent or wishes in other legislation

- 5.118 Some other states and territories require the consent of a child to their adoption if the child is aged 12 or older.¹⁴⁶ For example, the *Adoption Act 2000* (NSW) requires the consent of the child to an adoption if the child is 12 to 18 years of age, capable of giving consent, and the court has not dispensed with the child's consent.¹⁴⁷
- 5.119 The *Adoption Act 2009* (Qld) removed a requirement that a child aged 12 years or older consent to an adoption. This was replaced with requirements to provide: information to help the child form their views about the proposed adoption; counselling; and a requirement that the court consider the child's views before deciding whether or not to make an adoption order.¹⁴⁸
- 5.120 The new requirements aimed to:
- balance a child's right to participate in the decision making with ensuring the child does not feel responsible for the decision and is not under undue pressure, particularly where the decision involves choosing between a birth parent and the person who is caring for the child.¹⁴⁹
- 5.121 Similar provisions in the Family Law Act were also removed. Prior to 1983, the Family Law Act included a requirement that the court did not make an order contrary to the child's wishes if the child was aged 14 or older, unless there were special circumstances that made it necessary to do so.¹⁵⁰
- 5.122 This requirement was removed in 1983. There were concerns that it sometimes had the effect of forcing a child to express a preference in favour of one parent, which many children did not want to do.¹⁵¹ There was also concern that pressure was sometimes placed on a child to express preference for a particular parent and the associated risk that the wish expressed was not the genuine wish of the child.¹⁵² The age of 14 was seen as arbitrary and unsatisfactory for that reason.¹⁵³
- 5.123 It was replaced with the requirement that the court consider any wishes expressed by the child and give the wishes the weight that the court considers appropriate in the circumstances of the case.¹⁵⁴ A provision was also included which provided unambiguously that no one may require a child to express his or her wishes.¹⁵⁵

142 *Adoption Act 1984* (Vic) s 14(1)(a).

143 *Ibid* s 14(2).

144 *Ibid* ss 14(1)(a), 14(3).

145 *Ibid* s 14(1)(b).

146 *Adoption Act 2000* (NSW) s 55; *Adoption of Children Act* (NT) s 10(2); *Adoption Act 1988* (SA) s 16; *Adoption Act 1994* (WA) s 17(1)(c)(ii).

147 *Adoption Act 2000* (NSW) s 55.

148 *Adoption Act 2009* (Qld) ss 44, 45, 179.

149 Queensland Government, *Future Adoption Laws for Queensland* (2008) 11.

150 *Family Law Act 1975* (Cth) s 64(1)(b), later amended by *Family Law Amendment Act 1983* (Cth) s 29.

151 Anthony Dickey, *Family Law* (Lawbook, 6th ed, 2014) 336.

152 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1983, 1914 (Cecil Blanchard).

153 Lisa Young and Geoff Monahan, *Family Law in Australia* (LexisNexis Butterworths, 7th ed, 2009) 382.

154 *Family Law Amendment Act 1983* (Cth) s 29(b).

155 *Ibid* s 29(d).

- 5.124 The Family Law Act still says that no one may require a child to express his or her wishes.¹⁵⁶
- 5.125 The requirement to consider the wishes of the child was amended in 2006 to require that the child's views be considered. The change from 'wishes' to 'views' was aimed at enabling 'a child's perceptions and feelings' to be considered 'and [...] for any decision to be made in consultation with the child without the child having to make a decision or express a "wish" as to which parent he or she is to live with or spend time with'.¹⁵⁷ The amendment to 'views' was not intended to prevent a child from expressing wishes if he or she wanted to do so.¹⁵⁸
- 5.126 The current formulation requires that in determining the child's best interests, one of the considerations is 'any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views'.¹⁵⁹
- 5.127 The two main ways that the Family Court currently finds out the child's views are through a report prepared by a family consultant or by appointing an independent children's lawyer.¹⁶⁰ A family consultant is a psychologist or social worker who specialises in child and family issues after separation and divorce.¹⁶¹ The role of the independent lawyer is discussed below.

Question

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

Representation of the child

- 5.128 To give effect to the right in article 12 of the CRC for children to express views in all matters affecting them, article 12 provides that:
- 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.¹⁶²
- 5.129 The Adoption Act requires that the child must have separate representation in the following three circumstances:
- a contested application for adoption
 - an application for an order to dispense with the consent of a person to the making of an adoption order
 - an application to discharge an adoption order.¹⁶³

156 *Family Law Act 1975* (Cth) s 60CE.

157 Revised Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2006 (Cth) 15.

158 *Ibid.*

159 *Family Law Act 1975* (Cth) s 60CC(3)(a).

160 *Ibid* s 60CD.

161 Family Court of Australia, *Fact Sheet: Family Consultants* (1 March 2013) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications>>.

162 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12(2).

163 *Adoption Act 1984* (Vic) s 106(1).

- 5.130 The Adoption Act also gives the court a broad power to order that the child has separate representation, if it appears to the court that the child should be separately represented.¹⁶⁴
- 5.131 The court may order that a child be separately represented if someone applies for the child to be separately represented. It may also do so of its own accord without anyone applying.¹⁶⁵ The range of people who may apply for a child to be separately represented is broad; it includes ‘any other person’.¹⁶⁶
- 5.132 The Adoption Act does not provide any guidance about how the person appointed to provide separate representation should carry it out.

Representation of the child in other legislation

- 5.133 There are two key models used for the legal representation of a child in Australia. They are a ‘best interests’ model and a ‘direct representation’ model.¹⁶⁷
- 5.134 In a best interests model the lawyer ‘determines how the child is represented on the basis of the lawyer’s own understanding of the child’s best interests’.¹⁶⁸
- 5.135 In a direct representation model the child provides instructions to the lawyer. The lawyer must act in accordance with the child’s instructions irrespective of their views on the best interests of the child. A direct representative has the same duties in relation to the child as they would have in relation to an adult client. These duties include confidentiality, competent representation, and undivided loyalty.¹⁶⁹
- 5.136 This section outlines the approach taken to the legal representation of children in the Family Law Act and the CYF Act. It also considers how adoption laws in other Australian states and territories provide for a child to be represented.
- 5.137 The Commission is seeking the community’s views on the circumstances in which a child should have separate legal representation under the Adoption Act and how this representation should be provided. Elements of laws from elsewhere may be appropriate for application in Victoria.

Family Law Act 1975 (Cth)

- 5.138 The Family Law Act provides for the appointment of an independent children’s lawyer if ‘it appears to the court that the child’s interests in the proceedings ought to be independently represented by a lawyer’.¹⁷⁰
- 5.139 The Family Law Act uses the best interests model of representation. The independent children’s lawyer is not the child’s legal representative, and is not obliged to act on the child’s instructions in relation to the proceedings.¹⁷¹ Rather, the role of the independent children’s lawyer is as an ‘impartial best interests advocate’.¹⁷²

164 Ibid s 106(2).

165 Ibid.

166 Ibid.

167 See generally Felicity Bell, *Discussion Paper: Facilitating the Participation of Children in Family Law Processes* (Southern Cross University, Legal Aid NSW, 2015); Law Society of New South Wales, *Representation Principles for Children’s Lawyers* (4th ed, 2014); Rae Kaspiew et al ‘Getting the Word Out: The Role of Independent Children’s Lawyers in the Family Law System’ (2014) 28(1) *Australian Journal of Family Law* 29; Nicola Ross, ‘Two Sides of the Same Coin? Lawyers’ Representation of Children and Children’s Participation in Legal Proceedings’ (Paper presented at 5th World Congress on Family Law and Children’s Rights, Halifax, 16–23 August 2009); Nicola Ross, ‘Images of Children: Agency, Art 12 and Models for Legal Representation’ (2005) 19 *Australian Journal of Family Law* 94. For a history of the development of the models, particularly in the Victorian context, see *A v Children’s Court of Victoria* [2012] VSC 589 (5 December 2012, revised on 7 December 2012) [41]–[71].

168 Nicola Ross, ‘Two Sides of the Same Coin? Lawyers’ Representation of Children and Children’s Participation in Legal Proceedings’ (Paper presented at 5th World Congress on Family Law and Children’s Rights, Halifax, 16–23 August 2009) 2.

169 Law Society of New South Wales, *Representation Principles for Children’s Lawyers* (4th ed, 2014) 8.

170 *Family Law Act 1975* (Cth) s 68L(2).

171 Ibid s 68LA(4).

172 National Legal Aid, *Guidelines for Independent Children’s Lawyer* (2013), 2, guideline 4 <<http://www.nationallegalaid.org/assets/Family-Law/ICL-Guidelines-2013.pdf>>. The guidelines have been endorsed by the Chief Justice of the Family Court of Australia, the Family Court of Western Australia and by the Federal Circuit Court of Australia.

- 5.140 The Family Law Act outlines the duties and obligations of the independent children's lawyer.¹⁷³ Guidance on how to carry out the role is also provided by the *Guidelines for Independent Children's Lawyers*.¹⁷⁴
- 5.141 The Family Law Act requires that the independent children's lawyer:
- form an independent view, based on the evidence available, of what is in the best interests of the child¹⁷⁵
 - act in what they believe to be the best interests of the child in relation to the proceedings¹⁷⁶
 - make a submission to the court suggesting a particular course of action if they believe that it is in the best interests of the child.¹⁷⁷
- 5.142 It also provides specific duties to:
- act impartially in dealings with the parties to the proceedings¹⁷⁸
 - ensure that any views expressed by the child are fully put before the court¹⁷⁹
 - analyse any report or document that relates to the child and is to be used in the proceedings, to identify those matters that the lawyer considers to be most significant for determining the child's best interests, and bring these matters to the court's attention¹⁸⁰
 - endeavour to minimise the trauma to the child associated with the proceedings¹⁸¹
 - facilitate an agreed resolution of matters, to the extent to which doing so is in the best interests of the child.¹⁸²
- 5.143 The lawyer may tell the court any information that the child communicates to them if they consider it is in the best interests of the child.¹⁸³ This applies even if it is against the wishes of the child.¹⁸⁴ However, the independent children's lawyer is not required to tell the court any information the child communicates to them.¹⁸⁵

Children, Youth and Families Act 2005 (Vic)

- 5.144 The CYF Act provides for both the direct representation and the best interests models of representation for child protection matters.¹⁸⁶
- 5.145 Generally, a child aged 10 or over must have separate legal representation in child protection matters in the Family Division of the Children's Court.¹⁸⁷
- 5.146 Legal representation to a child aged 10 or over is usually on a direct representation basis. A legal practitioner must act in accordance with any instructions given or wishes expressed by the child, so far as it is practicable to do so having regard to the maturity of the child.¹⁸⁸

173 *Family Law Act 1975* (Cth) s 68LA.

174 National Legal Aid, *Guidelines for Independent Children's Lawyers* (2013). The guidelines have been endorsed by the Chief Justice of the Family Court of Australia, the Family Court of Western Australia and also by the Federal Circuit Court of Australia.

175 *Family Law Act 1975* (Cth) s 68LA(2)(a).

176 *Ibid* s 68LA(2)(b).

177 *Ibid* s 68LA(3).

178 *Ibid* s 68LA(5)(a).

179 *Ibid* s 68LA(5)(b).

180 *Ibid* s 68LA(5)(c).

181 *Ibid* s 68LA(5)(d).

182 *Ibid* s 68LA(5)(e).

183 *Ibid* s 68LA(7).

184 *Ibid* s 68LA(8).

185 *Ibid* s 68LA(6).

186 *Children, Youth and Families Act 2005* (Vic) s 524.

187 *Ibid* s 525(1).

188 *Ibid* s 524(10).

- 5.147 The court may decide that a child aged 10 or over is not mature enough to give instructions to a lawyer.¹⁸⁹ In reaching this decision the court considers the child's ability to form and communicate his or her own views, the child's ability to give instructions in relation to the primary issues in dispute, and any other relevant matter.¹⁹⁰
- 5.148 In general, independent legal representation is not required for a child under 10, or for a child aged 10 or over when the court has decided the child is not mature enough to give instructions. In both cases, in 'exceptional circumstances' the court may decide that it is in the best interests of a child to be legally represented.¹⁹¹
- 5.149 Legal representation for a child under 10, or for a child who the court has decided is not mature enough to instruct a lawyer, is on a best interests model.¹⁹² The legal practitioner must act in accordance with what he or she believes to be in the best interests of the child and communicate to the court the instructions given or wishes expressed by the child to the extent that it is practicable to do so.¹⁹³

Adoption Acts in other Australian jurisdictions

- 5.150 Adoption legislation in the other states and territories provides for the legal representation of children in various ways. Some does not provide for separate legal representation.¹⁹⁴ Other legislation provides for separate legal representation but does not provide any direction about how it should be carried out.¹⁹⁵ The third group provides for representation and gives direction about how this should be carried out. This latter approach is taken in Queensland, Western Australia and New South Wales.
- 5.151 The Queensland approach provides purely for the best interests model. It requires that the lawyer must act in the child's best interests, regardless of any instructions from the child. It also requires that the lawyer present the child's views and wishes to the court as far as possible.¹⁹⁶
- 5.152 The Western Australian legislation provides for both the direct representation model and the best interests approach. The direct representation approach, in which the lawyer acts on the instructions of the child, is taken if the child has sufficient maturity and understanding to give instructions and wishes to give instructions.¹⁹⁷ If the child does not have sufficient maturity and understanding, or does not wish to give instructions, the legal practitioner must 'act in the best interests of the child'.¹⁹⁸
- 5.153 The New South Wales legislation provides for both direct representation and best interests representation. The direct representation approach is used if the child is capable of giving instructions to a lawyer.¹⁹⁹ If the child is not capable of giving instructions, a best interests style of representation is used.²⁰⁰ There is a presumption, which can be challenged, that a child aged 10 or over is capable of giving instructions to a lawyer.²⁰¹
- 5.154 New South Wales also enables the court to appoint a person to act as a representative of the child if there are special circumstances that warrant the appointment and the child will benefit.²⁰² This person is a *guardian ad litem*. They are not a legal representative for the child; they are responsible for safeguarding and representing the interests of the child and instructing the lawyer representing the child.²⁰³ If a *guardian ad litem* is appointed,

189 Ibid s 524(1B).

190 Ibid.

191 Ibid s 524(4).

192 Ibid s 524(11).

193 Ibid.

194 *Adoption Act 1988* (SA); *Adoption Act 1988* (Tas).

195 *Adoption of Children Act* (NT) s 80; *Adoption Act 1993* (ACT) s 107.

196 *Adoption Act 2009* (Qld) s 235(4).

197 *Adoption Act 1994* (WA) s 134(5). Section 134(6) provides that a decision about whether the child has sufficient maturity and understanding to give instructions is made by the court.

198 Ibid s 134(5).

199 *Adoption Act 2000* (NSW) s 122(3)(c).

200 Ibid s 122(6).

201 Ibid s 122(4).

202 Ibid s 123(1).

203 Ibid s 123(3).

the court must also appoint a legal practitioner to represent the child and the legal practitioner must act on the instructions of the guardian.²⁰⁴

- 5.155 Western Australia also provides for the appointment of a non-legal representative for the child. The department must appoint a suitably qualified person to represent a child who is a prospective adoptee or adoptee and has a disability that is likely to affect the placement of the child.²⁰⁵ A suitably qualified representative must also be appointed to represent a parent who is under 18 years of age and who is considering the adoption of her or his child.²⁰⁶ The representative may instruct a legal representative on the child's behalf.²⁰⁷

Questions

- 14 In what circumstances, if any, should a child have separate legal representation in adoption proceedings?
- 15 Should the Adoption Act provide guidance about the duties and role of a legal representative? For example, should a lawyer act in what they think is the best interests of the child, or should they follow the instructions of the child even if they don't think this is in the child's best interests?
- 16 Should the Adoption Act provide for non-legal representation or support of a child in adoption proceedings? If yes, what kind of representation or support should this be?

204 Ibid ss 122(2)(a), 3(c)(ii).
205 *Adoption Act 1994* (WA) s 134(1a).
206 Ibid s 134(1b).
207 Ibid s 134(2).

Aboriginal and Torres Strait Islander children and the best interests principle

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6. Aboriginal and Torres Strait Islander children and the best interests principle

Introduction

- 6.1 The previous chapter considered the best interests and rights of the child under the *Adoption Act 1984 (Vic)*, including how the Act aims to ensure that the best interests and rights of the child are the foremost consideration. It also sought community views on how the Adoption Act might be amended to improve processes and decision making in adoption.
- 6.2 This chapter focuses on how the Adoption Act seeks to provide for the best interests of Aboriginal and Torres Strait Islander children through the incorporation of an Aboriginal and Torres Strait Islander Child Placement Principle. It also discusses the special ability for parents to add conditions on consent to an adoption of an Aboriginal child or Torres Strait Islander child, providing for specified people to have contact with the child after adoption.
- 6.3 Some people consider that special provisions are unnecessary and that the provisions for adoption should be the same for all children.¹ This chapter explores the reasons for the special provisions for the adoption of Aboriginal and Torres Strait Islander children, as well as the opposing arguments for making adoption law in Victoria the same for all children.
- 6.4 The chapter poses questions to the community about whether the provisions in the Adoption Act provide appropriately for the best interests of Aboriginal and Torres Strait Islander children. In particular, the Commission will be seeking the views of Aboriginal and Torres Strait Islander people and representative organisations.

Background

- 6.5 The rates of adoption for Aboriginal and Torres Strait Islander children are very low. In 2014–15, only one Aboriginal or Torres Strait Islander child had an adoption order finalised anywhere in Australia.²
- 6.6 Although adoption is used very rarely in Victoria for Aboriginal and Torres Strait Islander children, this is a matter of policy and practice rather than a legislative requirement.
- 6.7 Although the Adoption Act provides additional requirements for the adoption of Aboriginal and Torres Strait Islander children, it does not prevent it or provide an explicit presumption against it. This stands in contrast to the approach taken in some other Australian jurisdictions, which is discussed below in [6.65]–[6.70].
- 6.8 In Victoria, adoption has not been the preferred option for children in the child protection system, irrespective of their cultural background. There has been a focus on family

1 See, eg, Jeremy Sammut, *The Kinship Conundrum: The Impact of Aboriginal Self-Determination on Indigenous Child Protection* (Centre for Independent Studies, 2014) 2, 15–28.

2 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 46. The Commission acknowledges that there may have been Aboriginal or Torres Strait Islander children who were not identified so this number may be higher than reported.

preservation and reunification where possible. The Commission understands that where neither family preservation nor family reunification are possible, there has been a policy preference for permanent care (legally finalised through a permanent care order) rather than adoption.

- 6.9 Recent amendments to the *Children, Youth and Families Act 2005* (Vic) (CYF Act) raise the possibility that there may be an increased use of adoption for children from child protection. These amendments and the interaction between the CYF Act and the Adoption Act are discussed in Chapter 4.
- 6.10 At 30 June 2015, Victorian Aboriginal and Torres Strait Islander children were 12.9 times more likely to be in out-of-home care than non-Aboriginal or Torres Strait Islander children.³ Any general shift towards increased adoption for children from child protection would disproportionately affect Aboriginal and Torres Strait Islander children.
- 6.11 Statutory adoption is generally not viewed as a culturally appropriate option for Aboriginal and Torres Strait Islander children. A future shift in policy and practice in Victoria could result in increased adoption for Aboriginal and Torres Strait Islander children without any changes to the Adoption Act. The fact that there is no legislative impediment to the adoption of Aboriginal and Torres Strait Islander children, combined with the high rates of Aboriginal and Torres Strait Islander children in out-of-home care in Victoria, highlights the need to ensure that any provisions relating to the adoption of Aboriginal and Torres Strait Islander children are robust and appropriate.

Aboriginal and Torres Strait Islander Child Placement Principle

- 6.12 The Aboriginal and Torres Strait Islander Child Placement Principle exists in varying forms in laws across Australia. However, the way it is described, and the elements included, are not entirely consistent across the various laws.
- 6.13 Frequently, a single child placement principle that applies to both Aboriginal children and Torres Strait Islander children is used. At different times this is called the Indigenous Child Placement Principle⁴ or the Aboriginal Child Placement Principle.⁵
- 6.14 In some cases, two separate principles are provided to accommodate the differences between Aboriginal and Torres Strait Islander concepts in relation to family and child care. In this situation they are distinguished as the Aboriginal Child Placement Principles and the Torres Strait Islander Child Placement Principles.⁶
- 6.15 For clarity, the remaining discussion uses the term ‘child placement principle’, unless referring to a term used in a specific document or law. In that case the term used there is also used here. This chapter also includes discussion and a question about whether there should be separate child placement principles for Aboriginal children and Torres Strait Islander children.
- 6.16 In addition to the fact that the child placement principle is named differently in different pieces of legislation, its content is not entirely consistent. The next section traces the development of the concept and identifies key elements of the concept.

3 Australian Institute of Health and Welfare, *Child Protection Australia 2014–15*, Child Welfare Series Number 63 (2016) 54.

4 See, eg, Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 587–8.

5 See, eg, *Children, Youth and Families Act 2005* (Vic) s 13.

6 See, eg, *Adoption Act 2000* (NSW) ss 35, 39.

Development of the child placement principle

6.17 The development of an Aboriginal and Torres Strait Islander child placement principle was driven by Aboriginal and Torres Strait Islander people and Aboriginal and Torres Strait Islander child care agencies in the 1970s and 1980s. These groups and individuals wished to:

- address the growing and disproportionate number of Aboriginal and Torres Strait Islander children in out-of-home care or adopted by people who did not have a cultural connection with them
- reduce rates of removal of Aboriginal and Torres Strait Islander children from their family and community
- preserve Aboriginal and Torres Strait Islander children’s connection to culture, family and community
- ensure that if a child is separated or removed from their family, the links with family, culture and community are actively maintained.⁷

6.18 In 1984, the Council of Social Welfare Ministers endorsed a recommendation about the placement of Aboriginal children for adoption.⁸ This was supported by all states and territories. The recommendation was that:

in the adoptive placement of an Aboriginal child a preference be given, in the absence of good cause to the contrary (and after considering the wishes of the consenting parent to confidentiality and anonymity) to a placement with: other members of the child’s Aboriginal community who have the correct relationship with the child in accordance with Aboriginal customary law; other approved Aboriginal couples.⁹

6.19 It was not recommended that the child placement principle be enacted through Commonwealth legislation. Since that time, states and territories have taken varying approaches to the implementation of the child placement principle. In Victoria, a version of the Aboriginal and Torres Strait Islander child placement principle is included in both the Adoption Act and the CYF Act.¹⁰ The two versions are not identical.

Bringing Them Home

The Stolen Generations and the apologies

6.20 In 1997, the Human Rights and Equal Opportunity Commission published *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Bringing Them Home)*.¹¹ It considered the past laws, practices and policies which had resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies. It examined the then-current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children, and advised on changes required, taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples.

6.21 ‘Stolen Generations’ is the name commonly given to the generations of Aboriginal and Torres Strait Islander children removed from their families. *Bringing Them Home* indicated that it was not possible to state with any precision how many children had been forcibly removed but that it was possible to ‘conclude with confidence that between one in

7 Secretariat of National Aboriginal and Islander Child Care (paper drafted by Claire Tilbury), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (2013) 3–4.

8 See generally New South Wales Law Reform Commission (Jennifer Lock), *The Aboriginal Child Placement Principle*, Research Report 7 (1997) 55–63; Secretariat of National Aboriginal and Islander Child Care (paper drafted by Claire Tilbury), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (2013) 5.

9 Working Party of the Standing Committee of Social Welfare Administrators, *Aboriginal Fostering and Adoption: Review of State and Territory Principles, Policies and Practice* (1983) 37. Secretariat of National Aboriginal and Islander Child Care (paper drafted by Claire Tilbury), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (2013) 5.

10 *Adoption Act 1984* (Vic) s 50; *Children, Youth and Families Act 2005* (Vic) ss 12–14.

11 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970'.¹²

- 6.22 On 17 September 1997 the Legislative Assembly of the Parliament of Victoria issued an apology to the Aboriginal people for the past policies leading to the removal of Aboriginal children from their families and communities.¹³ The debates on the motion included acknowledgment of the ongoing effects of the policy and practice, and commitments 'to make sure that such events do not take place again'.¹⁴
- 6.23 An apology was also issued in the Australian Parliament on 13 February 2008.¹⁵
- 6.24 The policies and legislation which resulted in the Stolen Generations were seen by law and policy makers as being in the best interests of the child at that time.

While there was no officially defined 'best interests principles' at the time, it is clear from official records that placing 'part-white' Aboriginal children with non-Indigenous people and institutions was seen as providing these children 'with a better chance in life' and therefore acting in their benefit. Aboriginality was one of the criteria for child removal decisions.¹⁶

- 6.25 This view is now discredited. The subsequent apologies recognised that these policies and actions were not in the best interests of the children involved. The majority of Victoria's Aboriginal and Torres Strait Islander people have experienced the consequences of these practices, either personally or through their extended families.¹⁷ The ongoing impact of family disruption and child removal on contemporary Victorian Aboriginal and Torres Strait Islander families has been widely acknowledged.¹⁸

Recommendation on child placement principle

- 6.26 As discussed above, the child placement principle existed prior to *Bringing Them Home*. Because the report is such a key document in considering how best to provide for Aboriginal and Torres Strait Islander children, many people think the child placement principle originates from the recommendations in *Bringing Them Home*. It is important to consider what the report said about the child placement principle and the adoption of Aboriginal and Torres Strait Islander children.
- 6.27 *Bringing Them Home* endorsed a version of the child placement principle, which it described as the Indigenous Child Placement Principle. It recommended that national standards legislation applicable to all Aboriginal and Torres Strait Islander children should provide that 'when an Indigenous child must be removed from his or her family, including for the purpose of adoption, the placement of the child, whether temporary or permanent, is to be made in accordance with the Indigenous Child Placement Principle'.¹⁹

12 Ibid 37.

13 Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 1997, 107, 120 (moved by Jeff Kennett, Premier).

14 See, eg, ibid 108 (Jeff Kennett, Premier).

15 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (moved by Kevin Rudd, Prime Minister).

16 Victorian Aboriginal Child Care Agency, *Aboriginal Cultural Competence Framework* (Victorian Government Department of Human Services, 2008) 13.

17 See, eg, ibid 14.

18 See, eg, Philip Cummins, Dorothy Scott and Bill Scales, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (Department of Premier and Cabinet, 2012) 281; Victoria, *Royal Commission into Family Violence, Report* (2016) vol 5, 10, 48.

19 Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 582–3, 588 (Recommendations 44, 45a, 51a).

- 6.28 The report recommended the following order of placement preference:
1. placement with a member of the child's family (as defined by local custom and practice) in the correct relationship to the child in accordance with Aboriginal or Torres Strait Islander law
 2. placement with a member of the child's community in a relationship of responsibility for the child according to local custom and practice
 3. placement with another member of the child's community
 4. placement with another Indigenous carer.²⁰
- 6.29 Where placement is with a non-Aboriginal or Torres Strait Islander carer, the following principles were recommended: 'family reunion is a primary objective; continuing contact with the child's Indigenous family, community and culture must be ensured; and the carer must live in proximity to the child's Indigenous family and community'.²¹
- 6.30 The report also recommended that placements of an Aboriginal or Torres Strait Islander child should not be made:
- except on the advice and with the recommendation of the appropriate accredited Indigenous organisation. Where the parents or the child disagree with the recommendation of the appropriate accredited Indigenous organisation, the court must determine the best interests of the child.²²

Recommendation that adoption be a last resort

- 6.31 *Bringing Them Home* considered that adoption should be a last resort for Aboriginal and Torres Strait Islander children and that culturally appropriate alternatives to adoption should be preferred.²³ Its recommendation headed 'Adoption a last resort' was that:
- an order for adoption of an Indigenous child is not to be made unless adoption is in the best interests of the child and that adoption of an Indigenous child be an open adoption unless the court or other decision maker is satisfied that an open adoption would not be in the best interests of the child. The terms of an open adoption order should remain reviewable at any time at the instance of any party.²⁴

Child placement principle in the Adoption Act

History

- 6.32 The Adoption Act, which predates *Bringing Them Home*, includes a version of the child placement principle.²⁵
- 6.33 This provision was introduced by the 1984 Act. The 1964 Act did not provide any specific reference to adoption of Aboriginal or Torres Strait Islander children.
- 6.34 The Second Reading Speech in the Legislative Assembly indicates that the provision in 1984 of separate requirements for the adoption of Aboriginal and Torres Strait Islander children, including the introduction of a child placement principle, represented a major policy shift:
- the Adoption Bill, for the first time, makes separate legal provision for the adoption of Aboriginal children. This measure has been sought by the Aboriginal community for many years. It is now accepted by all those experienced in adoption matters that the adoption of Aboriginal children is a particularly delicate and sensitive matter which

20 Ibid 588 (Recommendation 51b).

21 Ibid 589 (Recommendation 51d).

22 Ibid (Recommendation 51e).

23 Ibid 589.

24 Ibid 590 (Recommendation 52). The report discusses adoption and acknowledges a broadly different approach to adoption between Torres Strait Islander and Aboriginal peoples. However, the recommendation does not distinguish between the two groups.

25 *Adoption Act 1984* (Vic) s 50.

cannot be handled through the same processes as other adoptions. The history of adoption of Aboriginal children by white families has resulted in many breakdowns of adoption arrangements, often associated with the difficulties of adolescent Aborigines in establishing their identity.²⁶

- 6.35 During the debates in Parliament, some members criticised the separate provisions for the adoption of Aboriginal and Torres Strait Islander children because they thought them unnecessary.²⁷
- 6.36 The following reasons were given in support of the separate provisions:
- the history of the forced removal of Aboriginal children
 - the lack of a counterpart to adoption in Aboriginal culture
 - the lack of a fit between statutory adoption and Aboriginal concepts of child care
 - potential identity issues if an Aboriginal child is adopted by non-Aboriginal parents, which were identified as leading to the breakdown of adoption arrangements.²⁸
- 6.37 The 1983 Adoption Legislation Review Committee report recommended that a child placement principle be included in a new Adoption Act, incorporating the following placement priority:
- extended family
 - other members of the kinship network
 - other Aboriginal families
 - applicants approved to adopt by both the Aboriginal agency and the adoption agency.²⁹
- 6.38 The surrounding discussion in the Adoption Legislation Review Committee's report suggests that 'extended family' was intended to refer to Aboriginal extended family.
- 6.39 It recommended that this placement priority should apply 'unless the particular placement needs of the child require or the natural parents formally nominate a different priority'.³⁰
- 6.40 The Second Reading Speech in the Legislative Assembly indicates that the recommendations of the Adoption Legislation Review Committee on Aboriginal fostering and adoption had been considered.³¹ However, the Adoption Act did not include (Aboriginal or Torres Strait Islander) extended family as first placement preference, despite it being the first placement preference in the report. Instead, the first preference is that at least one of the proposed adoptive parents is a member of the Aboriginal or Torres Strait Islander community to which a parent who gave consent belongs.³²
- 6.41 The debates do not address this apparent inconsistency with the report and, as indicated above, subsequent versions of the child placement principle from various agencies have often referred to extended family or relatives as the first placement preference.³³

26 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4248–49 (Pauline Toner, Minister for Community Welfare Services). The content of the Second Reading Speech relates to the Adoption Bill as originally introduced to the Legislative Assembly on 18 April 1984. This was subsequently withdrawn and the Adoption Bill (No 2) was introduced on 11 September 1984. However, clause 50 of the Bill was not amended.

27 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 1984, 364 (Barry Steggall).

28 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 1984, 381–4 (Ken Coghill); Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4248–49 (Pauline Toner, Minister for Community Welfare Services).

29 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee*, (1983) 71. See Chapter 2 for a description of the work of the Adoption Legislation Review Committee. The report underpinned the changes made in the *Adoption Act 1984* (Vic).

30 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee*, (1983) 71.

31 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4249 (Pauline Toner, Minister for Community Welfare Services). See footnote 26 for a description of the history of the passage of the *Adoption Act 1984* (Vic).

32 *Adoption Act 1984* (Vic) s 50(2).

33 See, eg, Secretariat of National Aboriginal and Islander Child Care (paper drafted by Claire Tilbury), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (2013) 8. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) vol 1, 255–256 recommended that 'preference should be given, in the absence of good cause to the contrary, to placements with (1) a parent, (2) a member of the child's extended family, (3) other members of the child's community (and in particular, persons with responsibilities for the child under the customary laws of that community)'. But see New South Wales Law Reform Commission, *Review of the Adoption of Children Act 1965 (NSW)*, Report No 81 (1997) 344–346 (Recommendation 73).

- 6.42 It is possible that in 1984 Parliament chose not to refer to extended family in the Adoption Act to ensure consistency with other parts of the Act, which introduced a presumption against relative adoption.³⁴

Counselling requirement

- 6.43 Section 50 of the Adoption Act provides special requirements for the adoption of Aboriginal children.³⁵ The section states that it is 'enacted in recognition of the principle of Aboriginal self-management and self-determination and that adoption is absent in customary Aboriginal child care arrangements'.³⁶
- 6.44 The section specifies counselling requirements and a child placement principle for Aboriginal and Torres Strait Islander children.
- 6.45 The court must be satisfied that the parent received counselling from an Aboriginal agency, or that the parent expressed a wish in writing not to receive counselling from an Aboriginal agency in the following two circumstances.
- where consent is given to the adoption of a child by an Aboriginal or Torres Strait Islander parent who states in the consent document that they wish for the child to be adopted within the Aboriginal or Torres Strait Islander community.³⁷
 - where consent is given to the adoption of a child by a non-Aboriginal or non-Torres Strait Islander parent, if that parent states in the consent document that he or she believes that the other parent is an Aboriginal or Torres Strait Islander person and that they wish for the child to be adopted within the Aboriginal or Torres Strait Islander community.³⁸
- 6.46 The Commission understands there is currently no organisation declared under the Adoption Act as an Aboriginal agency. Therefore, no agency is currently permitted to perform the function of providing counselling as an Aboriginal agency for the purposes of the Adoption Act.³⁹

Elements of the child placement principle

- 6.47 The Adoption Act details a placement hierarchy that applies in both the consent situations described above, where the parent has stated that they wish the child to be adopted within the relevant Aboriginal or Torres Strait Islander community.⁴⁰ The placement hierarchy is:
1. The proposed adoptive parents are members, or at least one of them is a member, of the Aboriginal or Torres Strait Islander community to which a parent who gave consent belongs.
 2. If a member of the Aboriginal or Torres Strait Islander community to which a parent who gave consent belongs is not reasonably available as an adoptive parent, then at least one of the proposed adoptive parents is a member of an Aboriginal or Torres Strait Islander community.

34 The Children (Guardianship and Custody) Bill 1984 was introduced at the same time as the Adoption Bill 1984 (Vic). It provided an alternative to adoption for relatives and step-parents, providing for guardianship and custody orders.

35 There are also notification requirements where an order is made for the adoption of a child to whom section 50 applies. They require that the Registrar of Births, Deaths and Marriages notify the Secretary and the relevant Aboriginal agency (if any) within 28 days of the child reaching the age of 12 years. The Secretary is required to take reasonable steps to ensure that notice is given to the effect that the adopted child may be entitled to certain rights and privileges that exist for the benefit of the child. This notice is to be given to the adopted child and the adoptive parent or other carer if the adoptive parents cannot be found. See *Adoption Act 1984* (Vic) ss 70(2), 114.

36 *Ibid* s 50(1).

37 *Ibid* s 50(2)(a)(i).

38 *Ibid* s 50(2)(a)(ii).

39 Sections 50(3)–(4) of the Act provide for an organisation to be declared as an Aboriginal agency for the purposes of section 50 by Order of the Governor in Council published in the Government Gazette.

40 *Adoption Act 1984* (Vic) ss 50(2)(c)–(e).

3. If a person from either of these two categories is not reasonably available as an adoptive parent, the proposed parents must be approved by an Aboriginal agency as suitable to adopt an Aboriginal or Torres Strait Islander child.⁴¹
- 6.48 The placement principle also applies in some cases where the court has dispensed with parental consent. It applies in this situation if the Secretary or principal officer of an approved agency believes on reasonable grounds that the child has been accepted by an Aboriginal or Torres Strait Islander community as an Aboriginal or Torres Strait Islander person.⁴²
- 6.49 Except in the circumstance described above where the court has dispensed with consent, the placement principle does not apply unless one of the parents has expressed a wish that the child be adopted within the Aboriginal or Torres Strait Islander community.⁴³
- 6.50 In a number of other jurisdictions the child placement principle is not dependent on the wishes of the parent and applies because the child has been identified as an Aboriginal or Torres Strait Islander. For example, in New South Wales the Secretary or appropriate principal officer is required to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal child. If the relevant person is satisfied that a child is an Aboriginal child, the Aboriginal child placement principles are to be applied.⁴⁴
- 6.51 The child placement principle in the Adoption Act includes a number of key features identified as important in discussion of the child placement principle, including:
- a statement that the section is enacted in recognition of the principle of Aboriginal self-management and self-determination
 - a placement preference which places non-Aboriginal or Torres Strait Islander people as last preference
 - a requirement to involve an Aboriginal agency in decision making, including in the provision of counselling and in approving non-Aboriginal people as suitable persons to adopt.⁴⁵
- 6.52 There is no consistent formulation of the child placement principle across Australia, or even in different legislation within one state or territory. While acknowledging this lack of consistency, there are two ways in which the child placement principle in the Adoption Act does not match the elements in some key statements of the child placement principle. First, it does not provide Aboriginal or Torres Strait Islander extended family as the first placement preference. Secondly, there is no requirement relating to proximity to the child's family and Aboriginal and Torres Strait Islander community for an adoption by someone who is not an Aboriginal or Torres Strait Islander person.

41 This requirement is in addition to approval by or on behalf of the Secretary or the principal officer of an approved agency. Sections 50(3)–(4) of the *Adoption Act 1984* (Vic) provide for an organisation to be declared as an Aboriginal agency for the purposes of section 50 by Order of the Governor in Council published in the Government Gazette. As observed in the section headed 'Counselling requirement', the Commission understands there is currently no organisation declared as an Aboriginal agency and, therefore, no agency is currently permitted to approve a proposed adoptive parent under section 50(2)(e) of the Act.

42 Ibid s 50(2)(b).

43 Ibid s 50(2).

44 *Adoption Act 2000* (NSW) s 34. See also *Adoption Act 1994* (WA) s 52(1)(ab); *Adoption Act 2009* (Qld) s 163; *Adoption Act 1988* (SA) s 11; *Adoption of Children Act* (NT) s 11.

45 See Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 468; Secretariat of National Aboriginal and Islander Child Care (paper drafted by Claire Tilbury), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (2013) 6–7. But see Jeremy Sammut, *The Kinship Conundrum: The Impact of Aboriginal Self-Determination on Indigenous Child Protection* (Centre for Independent Studies, 2014) 28, who argues that the goal of self-determination is discredited and outdated and that there should not be separate provisions for Aboriginal and Torres Strait Islander children.

The child placement principle in the CYF Act

- 6.53 The CYF Act includes a section headed 'Aboriginal Child Placement Principle'.⁴⁶ Its formulation of the child placement principle differs from that in the Adoption Act.
- 6.54 It requires that if it is in the best interests of an Aboriginal or Torres Strait Islander child to be placed in out-of-home care, regard must be had to:⁴⁷
- the advice of the relevant Aboriginal agency
 - the criteria provided in the section about placement preferences, which sets out the preferred order of placement⁴⁸
 - additional principles for placement of an Aboriginal or Torres Strait Islander child.⁴⁹
- 6.55 The CYF Act provides that the preferred placement is 'within the Aboriginal or Torres Strait Islander extended family or relatives and, where this is not possible, other extended family or relatives'.⁵⁰ As outlined above, extended family or relatives is not one of the listed options in the placement preference provided in the Adoption Act. The CYF Act then provides a similar hierarchy to that in the Adoption Act.
- 6.56 Unlike the Adoption Act, the CYF Act includes a proximity consideration if an Aboriginal or Torres Strait Islander child is placed with a non-Aboriginal or Torres Strait Islander family. The last placement preference is 'a non-Aboriginal family living in close proximity to the child's natural family'.⁵¹ This requirement was recommended in *Bringing Them Home*.⁵²
- 6.57 The CYF placement criteria also require that 'any non-Aboriginal placement must ensure the maintenance of the child's culture and identity through contact with the child's community'.⁵³ This requirement is not reflected in the Adoption Act.

Criticisms of the child placement principle

- 6.58 Criticisms of the child placement principle are made from two opposing perspectives. The first type comes from people who strongly support the principle because they consider it improves outcomes for Aboriginal and Torres Strait Islander children. Their criticisms relate to a wish to enhance and improve the child placement principle.
- 6.59 The second type is by people who do not support a child placement principle. They consider that outcomes for Aboriginal and Torres Strait Islander children are worsened by providing different criteria for them. They support 'mainstreaming' of decision making about Aboriginal and Torres Strait Islander children.
- 6.60 The main criticisms from those who support the child placement principle and wish to improve it are that it is not adhered to in practice; there are associated concerns about compliance, implementation and monitoring.⁵⁴

46 *Children, Youth and Families Act 2005* (Vic) s 13. Section 3(1) of the Act defines 'Aboriginal person' to include both Aboriginal and Torres Strait Islander people.

47 *Ibid* s 13(1).

48 *Ibid* s 13(1)(b). The criteria are provided by section 13(2).

49 *Ibid* s 13(1)(c). The additional principles are provided by section 14.

50 *Ibid* s 13(2)(a).

51 *Ibid* s 13(2)(b)(iii).

52 Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 589 (Recommendation 51d).

53 *Children, Youth and Families Act 2005* (Vic) s 13(2)(c). Section 14(5) also provides similarly.

54 See, eg, Andrew Jackomos, 'Family Matters Gathering' (Speech delivered at the Family Matters Gathering, Old Parliament House, Canberra, 10 January 2016); Fiona Arney et al, 'Enhancing the Implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and Practice Considerations' (Paper No 34, Australian Institute of Family Studies, August 2015) 5-6 <<https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child>>.

6.61 A related criticism is that it is mistakenly understood as being solely about a placement hierarchy:

The Child Placement Principle is not simply about where or with whom an Aboriginal or Torres Strait Islander child is placed [...] The Child Placement Principle recognises the destructive and ongoing impact of policies and practices of assimilation and the separation and removal of Aboriginal and Torres Strait Islander people from their parents and communities. It recognises that Aboriginal and Torres Strait Islander people have the knowledge and experience to make the best decisions concerning their children and recognises the importance of each child staying connected to their family, community, culture and country. It promotes a partnership between government and Aboriginal and Torres Strait Islander communities in decision making about children's welfare, in order to ensure that the connections are understood and maintained.⁵⁵

6.62 The Secretariat of National Aboriginal and Islander Child Care suggests that the underlying aims of the child placement principle are to:

- recognise and protect the rights of Aboriginal and Torres Strait Islander children, family members and communities
- increase the level of self-determination for Aboriginal and Torres Strait Islander people in child welfare matters
- reduce the disproportionate representation of Aboriginal and Torres Strait Islander children in the child protection system.⁵⁶

6.63 The criticism about the child placement principle being understood as only a placement hierarchy suggests that it will not be effective if attention is not paid to its underlying principles; rather, it becomes a formal exercise without promoting connection to culture. Criticism of the child placement principle on this basis does not suggest removing it. Instead, it suggests that it would be more effective if it was monitored and implemented more thoroughly and if more attention was paid to the purpose of the principle.

6.64 An opposing criticism of the child placement principle is from those who believe there should not be separate provisions for Aboriginal and Torres Strait Islander people. This view suggests that providing separate provisions for Aboriginal and Torres Strait Islander children creates a double standard. It is argued that this privileges cultural considerations over the safety of children and disadvantages Aboriginal and Torres Strait Islander children:

The continuation of separatist child protection policies means that some Indigenous children [...] will end up being raised in circumstances that deny them the chance to access the full rights and opportunities of Australian citizenship enjoyed by other Indigenous and non-Indigenous children. The alternative approach is to mainstream the child protection [...] arrangements for Indigenous children, in recognition that this does not mean loss of identity. This should include ending all forms of Aboriginal exceptionalism in child protection. Indigenous and non-Indigenous children should be treated the same, including the use on a non-discriminatory basis of open adoption (or permanent guardianship) to provide Indigenous children who cannot live safely with their parents or kin with a safe and nurturing adoptive family.⁵⁷

55 Secretariat of National Aboriginal and Islander Child Care (paper drafted by Claire Tilbury), *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and Core Elements* (2013) 3.

56 *Ibid* 6–7.

57 Jeremy Sammut, *The Kinship Conundrum: The Impact of Aboriginal Self-Determination on Indigenous Child Protection* (Centre for Independent Studies, 2014) 28. See also, Jeremy Sammut, *The Madness of Australian Child Protection: Why Adoption Will Rescue Australia's Underclass Children* (Connor Court Publishing, 2015) in which Sammut makes a broader argument for increasing the use of adoption in child protection circumstances. The use of adoption for Aboriginal and Torres Strait Islander children is discussed at 173–210, 230–39.

Questions

- 17 Should there be a positive duty on the Secretary of DHHS to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal or Torres Strait Islander child? If yes, what type of inquiry might be reasonable?
- 18 Should there be separate rules and guidelines that apply only to the adoption of Aboriginal and Torres Strait Islander children? If yes, is the child placement principle in the Adoption Act (section 50) an appropriate mechanism? If not what changes should be made?
- 19 Should there be a requirement that in any adoption of an Aboriginal or Torres Strait Islander child the first preference is to place a child for adoption with Aboriginal or Torres Strait Islander extended family or relatives? If not, what should the order of preference be for placing Aboriginal and Torres Strait Islander children for adoption?

Requirement to consider other options ahead of adoption

- 6.65 The Adoption Act does not direct that other arrangements for care of children should be considered ahead of adoption for Aboriginal and Torres Strait Islander children. Rather, it includes an acknowledgment that adoption is absent in customary Aboriginal child care arrangements.⁵⁸ This does not go as far as was suggested in *Bringing Them Home*, which considered that adoption should be the last resort for Aboriginal and Torres Strait Islander children.⁵⁹
- 6.66 A number of other jurisdictions have incorporated a requirement that adoption be a last resort for Aboriginal and Torres Strait Islander children. The Western Australian legislation provides:

It is acknowledged that adoption is not part of Aboriginal or Torres Strait Island culture and that therefore the adoption of a child who is an Aboriginal person or a Torres Strait Islander should occur only in circumstances where there is no other appropriate alternative for that child.⁶⁰
- 6.67 As discussed in Chapter 4, the permanency objective requirements in the CYF Act, which came into effect on 1 March 2016, require that in case planning for children in the child protection system, adoption be considered as an option ahead of other options such as permanent care or long-term out-of-home care.⁶¹
- 6.68 In New South Wales, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides a hierarchy of permanent placement principles, which puts adoption ahead of orders placing the child under the parental responsibility of the minister. However, it provides an amended hierarchy for Aboriginal and Torres Strait Islander children, according to which adoption is the last preference.⁶²

58 *Adoption Act 1984* (Vic) s 50(1).

59 Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997) 589–90 (Recommendation 52).

60 *Adoption Act 1994* (WA) s 3(2). See also *Adoption Act 1988* (SA) s 11(1); *Adoption Act 2009* (Qld) s 7; *Adoption Act 2000* (NSW) s 36; *Adoption of Children Act* (NT) s 11.

61 *Children, Youth and Families Act 2005* (Vic) s 167.

62 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 10A.

- 6.69 This requirement is mirrored in the *Adoption Act 2000* (NSW) which requires that an 'Aboriginal child is not to be placed for adoption unless the Secretary is satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the care of the child'.⁶³
- 6.70 This stands in counterpoint to the general position in New South Wales, where the government has indicated a policy of increasing adoption and has made a number of legislative changes to facilitate the increased use of adoption for children who are in out-of-home care.
- 6.71 The requirement to consider other options ahead of adoption is not replicated for Torres Strait Islander children in the *Adoption Act 2000* (NSW).

Question

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

Torres Strait Islander culture and adoption

- 6.72 Torres Strait Islanders are a separate people in origin, history and way of life. It would be inaccurate to suggest that arrangements providing for the permanent transfer of a child from one family to another do not exist in Torres Strait Islander culture.
- 6.73 The New South Wales Law Reform Commission's 1997 research report on the Aboriginal Child Placement Principle noted the difficulties associated with applying an identical principle in relation to Torres Strait Islander and Aboriginal people. The report suggested that 'differences in attitudes to adoption between the Aboriginal and Torres Strait Islander communities may warrant a separate Principle'.⁶⁴
- 6.74 Torres Strait Islanders have sought legal recognition for the practice often called *Kupai Omasker* (in preference to 'customary' or 'traditional' adoption) over many years.⁶⁵ This practice involves the permanent transfer of a child from one family to another. This idea of permanent transfer suggests that the type of arrangement expressed by *Kupai Omasker* does not correspond to a fostering concept, which is a more temporary arrangement for the care of children.
- 6.75 The Adoption Act provides no acknowledgment of the different approaches to providing for child care between Aboriginal and Torres Strait Islander culture, and does not refer to *Kupai Omasker* or Torres Strait Islander customary or traditional adoption.
- 6.76 The *Adoption Act 2009* (Qld) acknowledges the practice without providing legal recognition of it. It provides a general principle that:
- because adoption (as provided for in this Act) is not part of Aboriginal tradition or Island custom, adoption of an Aboriginal or Torres Strait Islander child should be considered as a way of meeting the child's need for long-term stable care only if there is no better available option.⁶⁶

63 *Adoption Act 2000* (NSW) s 36.

64 New South Wales Law Reform Commission (Jennifer Lock), *The Aboriginal Child Placement Principle*, Research Report 7 (1997) 234–35.

65 See generally Paul Ban et al, 'Torres Strait Islander Family Life' (1993) 35 *Family Matters* 16; Simon Lara and Irma Lara & Tom Marley and Elizabeth Sharp [2003] FamCA 1393 (19 December 2003); *Beck v Whitby* [2012] FamCA 129 (2 March 2012); Kirsten McKillop, 'Torres Strait Islander Customary Adoption: Providing Legal Recognition for Alternative Paradigms of Family in Australia' in Ceridwen Spark and Denise Cuthbert (eds), *Other People's Children* (Australian Scholarly Publishing, 2009) 129.

66 *Adoption Act 2009* (Qld) s 7(1)(a).

- 6.77 It mentions *Kupai Omasker* as a note to the general preference for alternatives to statutory adoption in relation to both Torres Strait Islander and Aboriginal children. The note acknowledges that Torres Strait Islander custom 'includes a customary child-rearing practice that is similar to adoption in so far as parental responsibility for a child is permanently transferred to someone other than the child's parents'.⁶⁷
- 6.78 The *Adoption Act 2000* (NSW) treats the adoption of Aboriginal and Torres Strait Islander children distinctly in relation both to adoptions generally and to each other.⁶⁸ In addition to providing two distinct child placement principles, one for Aboriginal children and one for Torres Strait Islander children, it provides that 'an Aboriginal child is not to be placed for adoption unless the Secretary is satisfied that the making of the adoption order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the care of the child'.⁶⁹ This provision is not replicated in relation to Torres Strait Islander children.

Question

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

Conditional consent to adoption of Aboriginal and Torres Strait Islander children

- 6.79 There is a general ability in the Adoption Act to make an adoption order subject to conditions relating to contact (see Chapter 5).⁷⁰ This only applies to adoption orders made with the consent of the parent or parents.⁷¹ It does not apply to situations where the court dispensed with consent. Conditions relating to contact may be made where the court is satisfied that:
- circumstances exist which make it desirable to do so⁷²
 - after consent is given to the adoption, the parent(s) and the adoptive parent(s) have agreed that the adoption order should be made subject to certain conditions.⁷³
- 6.80 A condition may be made on the adoption order providing particular direct contact rights for specified people who may be the parents of the child or other relatives.⁷⁴
- 6.81 A condition may also be made requiring the adoptive parent or parents to provide information about the child at certain times in accordance with terms specified in the adoption order.⁷⁵

67 Ibid s 7(1)(a).

68 *Adoption Act 2000* (NSW) ss 33–39.

69 Ibid s 36.

70 *Adoption Act 1984* (Vic) s 59A.

71 Ibid s 59A(b). Section 15(1)(c) of the Act requires the court to be satisfied that the Secretary or principal officer has given consideration to any wishes expressed by the parent of the child after consent was given or dispensed with about access to or information about the child and any arrangements agreed between the parent and the proposed adoptive parents of the child for access to the child or for the giving of information about the child. However, the court's ability under section 59A to make this part of the adoption order only applies where consent has been given. There is no equivalent ability where consent was dispensed with.

72 Ibid s 59A(a).

73 Ibid s 59A(b).

74 Ibid s 59A(c).

75 Ibid s 59A(d).

- 6.82 In the adoption of an Aboriginal or Torres Strait Islander child there are additional abilities for a parent to give consent to an adoption subject to conditions about contact with the child. As noted above, the general provisions allow conditions about contact to be made by the court if there is agreement between the parent(s) and the adoptive parent(s) after consent has been given. These conditions may be available for all adoptions. In contrast, the Aboriginal and Torres Strait Islander conditional consent provisions are only available in the adoption of an Aboriginal or Torres Strait Islander child.⁷⁶
- 6.83 A conditional consent of this nature can be given if an Aboriginal or Torres Strait Islander parent consents to the adoption of their child. It can also be given if a parent who is not an Aboriginal or Torres Strait Islander person, but believes that the other parent is, provides consent for the child to be adopted. In both cases, it also requires that the person has expressed a wish in the consent document that the child be adopted within the Aboriginal or Torres Strait Islander community.⁷⁷
- 6.84 If consent is given in the above situation, it may be given subject to conditions that the relevant parent, specified relatives of the child, and members of the Aboriginal community or Torres Strait Islander community to which the child belongs have rights to have contact with the child.⁷⁸
- 6.85 The range of people who can be given rights of contact with the child is much broader than the range of people who can be given contact rights under the general condition provisions which provide for contact with parents or 'relatives'.⁷⁹
- 6.86 The contact rights are not unlimited and the legislation provides for an Aboriginal agency to support contact arrangements to help ensure that they are successful.⁸⁰
- 6.87 If no one suitable to adopt the child can be found, the parent must be informed in writing of the inability to find a suitable person. The parent must also be advised of the right to vary the conditions or revoke the consent within 28 days after the notice.⁸¹
- 6.88 If no revocation of consent or variation of the conditions is made within the 28-day timeframe, the Secretary or principal officer of the relevant approved agency may apply to the court for the revocation or alteration of the conditions relating to the consent.⁸² The court may make an order varying or revoking the conditions. The court must be satisfied that the Secretary or principal officer took reasonable steps to satisfy the conditions, and it must consider a report from an Aboriginal agency.⁸³

Question

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

76 Ibid s 37(1). These conditions can be placed on the adoption order: s 59.

77 Ibid ss 37(1), 50(2).

78 Ibid s 37(1). Rights of access are in accordance with prescribed terms set out in the *Adoption Regulations 2008* (Vic) reg 30.

79 *Adoption Act 1984* (Vic) s 59A. See also section 4 which provides that 'relative, in relation to a child means a grandparent, brother, sister, uncle or aunt of the child, whether the relationship is of the whole blood or half-blood or by affinity, and notwithstanding that the relationship depends upon the adoption of any person'.

80 Ibid s 37(1); *Adoption Regulations 2008* (Vic) reg 30. Sections 50(3)–(4) of the *Adoption Act* provide for an organisation to be declared as an Aboriginal agency for the purposes of section 50 by Order of the Governor-in-Council published in the *Government Gazette*. As observed in the section headed 'Counselling requirement', the Commission understands there is currently no organisation declared as an Aboriginal agency and so no agency is currently permitted to support contact arrangements under s 37(1) of the Act.

81 *Adoption Act 1984* (Vic) s 37(2).

82 Ibid s 37(3).

83 Ibid s 37(4).

Eligibility, suitability, contemporary attitudes and the law

88 Introduction

88 Applicants' relationship status

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107 Selection of adoptive parents

7. Eligibility, suitability, contemporary attitudes and the law

Introduction

- 7.1 This chapter considers applicants for adoption and the requirements they must meet to be able to adopt a child.
- 7.2 To be able to adopt, an applicant must be:
- eligible under the *Adoption Act 1984* (Vic)
 - assessed as suitable to adopt a child in accordance with the *Adoption Regulations 2008* (Vic).
- 7.3 Eligibility is the focus of the first part of this chapter, which considers how relationship status and living arrangements affect a person's or couple's eligibility to adopt a child. The terms of reference ask the Commission to review these requirements to ensure they are consistent with community attitudes and contemporary law relating to family.
- 7.4 The second part of the chapter discusses the limitations on adoptions by step-parents and relatives of a child. These 'known-child adoptions' are generally discouraged.
- 7.5 Assessment of suitability, which is carried out by the Secretary or a principal officer of an approved agency, is considered in the third part of the chapter. The Commission is asked to review this process to identify how this part of the Adoption Act and Adoption Regulations could operate better, including by ensuring that procedural requirements are set out clearly.
- 7.6 The final part of the chapter discusses a significant part of the adoption process about which the Adoption Act and Adoption Regulations are largely silent: the selection of adoptive parents for a child.

Applicants' relationship status

- 7.7 This part of the chapter considers issues relating to relationship status under Victoria's adoption law. Relationship status, in this context, refers to whether a person is in a relationship and the type and duration of the relationship.
- 7.8 The discussion below uses the terminology brought in by the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) (see Chapters 1 and 2 for more information).

Relationship status in the Adoption Act

- 7.9 A person's ability to adopt a child in Victorian depends on the person's relationship status. This is because, first, the Adoption Act differentiates between adoptions by two people jointly (couples) and adoptions by one person (sole applicants). It is premised on the desirability of adoption by couples.
- 7.10 Further, within the group of couples who are eligible to adopt, different requirements apply depending on the couple's type of relationship.
- 7.11 There are also different types of sole applicant. The requirements that apply to each type of applicant vary according to the person's relationship status.
- 7.12 The various differences are highlighted below and set out in Table 1 on page 91.

Adoption by two people (couples)

- 7.13 The Adoption Act allows four types of couple to adopt a child:¹
- married couples
 - couples in traditional Aboriginal marriages
 - couples in 'registered domestic relationships'
 - couples in 'domestic relationships'.
- 7.14 A traditional Aboriginal marriage is a marriage recognised by the Aboriginal community the couple belong to.²
- 7.15 A registered domestic relationship is a relationship registered under the *Relationships Act 2008* (Vic).³ These are referred to below as 'registered relationships'.
- 7.16 A domestic relationship is a relationship between two people who are not married or in a registered relationship but 'who are living together as a couple on a genuine basis (irrespective of sex or gender)'.⁴
- 7.17 The same eligibility requirement applies to married couples and couples in traditional Aboriginal relationships and registered relationships. These couples are eligible to adopt if they have been in their relationship for at least two years.⁵ They may also be eligible if they have been in a combination of the relationship types (a domestic relationship and marriage, for example), for at least two years.⁶
- 7.18 This two-year requirement is designed to ensure that couples adopting children are in stable relationships. It exists to protect the interests of adopted children.⁷ All Australian jurisdictions have a similar requirement but the length of time varies between two years,⁸ three years⁹ and five years.¹⁰

1 *Adoption Act 1984* (Vic) s 11(1), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7.

2 *Ibid* s 11(1)(b). The language used in this sub-section in full is '[relationship] recognized as a traditional marriage by an Aboriginal community or an Aboriginal group to which the [two people] belong'.

3 *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 4(1) (definition of 'registered domestic relationship'); *Relationships Act 2008* (Vic) s 3 (definition of 'registered domestic relationship').

4 *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 4(1) (definition of 'domestic relationship').

5 *Adoption Act 1984* (Vic), ss 10A(a), 11(1), s 20A, as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) ss 6–7, 9.

6 *Adoption Act 1984* (Vic) s 11(1), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7.

7 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4248 (Pauline Toner, Minister for Community Welfare Services). There was no requirement relating to the duration of a marriage in the *Adoption of Children Act 1964* (Vic) but the Adoption Legislation Review Committee (discussed in Chapter 2) reported that adoption agencies required couples to have 'been married (and living together) for at least 2 years – preferably 3 years'. This was to allow 'time for the couple to have made the personal adjustments that are necessary to bring stability to the marital relationship'. See Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 189.

8 *Adoption Act 2000* (NSW) s 28(4); *Adoption Act 2009* (Qld) s 76(1)(h); *Adoption of Children Act* (NT) s 13.

9 *Adoption Act 1993* (ACT) s 14(b); *Adoption Act 1988* (Tas) s 20; *Adoption Act 1994* (WA) s 39(1)(e).

10 *Adoption Act 1988* (SA) s 12(1). The court can make an adoption order if a couple has been in their relationship for a continuous period of less than five years if 'there are special circumstances justifying the making of the order': s 12(2).

- 7.19 Couples in domestic relationships must also meet the two-year requirement. But an additional requirement applies to these couples. They must show that they live together and have lived together as a couple in a domestic relationship for at least two years.¹¹
- 7.20 This ‘co-habitation’ requirement arises from how ‘domestic relationship’ is defined. The same definition, or similar definitions, is commonly used in other Victorian legislation.¹²
- 7.21 In the adoption context, the definition means that the eligibility of couples in domestic relationships to adopt depends on their living arrangements. The same does not apply to the other types of couple. The Adoption Act does not expressly require that those couples live together.¹³
- 7.22 Adoption legislation in some other Australian jurisdictions includes a ‘co-habitation’ requirement, but in most cases where this occurs the requirement applies to married couples and unmarried couples equally.¹⁴
- 7.23 The Commission seeks the community’s views about this issue.

Question

- 23 To be able to adopt, couples in domestic relationships are required to prove that they live together and have lived together for two years. This requirement does not apply to other couples such as married couples.
- (a) Is a co-habitation requirement consistent with contemporary family life and the best interests of the child?
- (b) If yes, should a co-habitation requirement apply to all couples equally?

Adoption by one person

- 7.24 There are three types of sole applicant:
- a person who is single (not in a relationship)¹⁵
 - one person in a couple applying to adopt alone (rather than jointly with the person’s partner)¹⁶
 - a person who is technically married or in a registered relationship, but separated.¹⁷
- 7.25 In each of these cases, the sole applicant is able to adopt only if there are ‘special circumstances in relation to the child’ that make the adoption ‘desirable’.¹⁸ This requirement is referred to below as the ‘special circumstances requirement’.
- 7.26 The Adoption Act does not define ‘special circumstances’ or the ‘special circumstances’ which would make an adoption by a sole applicant ‘desirable’. How it has applied in practice in the case of single people is discussed below (see the discussion beginning at [7.33]).

11 The court must also be satisfied that neither person in the domestic relationship is married to, or in a registered relationship with, another person: *Adoption Act 1984* (Vic) s 11(1A), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7.

12 See, eg, *Children, Youth and Families Act 2005* (Vic) s 3 (definition of ‘domestic partner’); *Equal Opportunity Act 2010* (Vic) s 4 (definition of ‘domestic partner’); *Relationships Act 2008* (Vic) s 35 (definition of ‘domestic relationship’).

13 The 1983 report of the Adoption Legislation Review Committee (discussed in Chapter 2) indicated that, at the time of its review of adoption law and practice, adoption agencies required married couples wanting to adopt to live together: Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 189. This was not a legal requirement but part of adoption practice at the time. The requirement was not incorporated into the Adoption Act.

14 *Adoption Act 1993* (ACT) s 14(2); *Adoption Act 2000* (NSW) ss 28(1), (4); *Adoption Act 2009* (Qld) s 76(1)(h); *Adoption Act 1984* (SA) ss 12(1), s 4 (definition of ‘marriage relationship’). In South Australia, the court cannot make an adoption order ‘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 ... in private, that the spouse consents to the adoption’: *Adoption Act 1984* (SA) s 12(5).

15 *Adoption Act 1984* (Vic) s 11(3).

16 *Ibid* s 11(4), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7(5).

17 *Ibid*.

18 *Ibid* s 11(3).

- 7.27 Additional requirements may apply where one person in a couple applies to adopt. In certain situations, the Adoption Act requires that the applicant’s partner agrees to the adoption.¹⁹ These are where:
- The couple is married or in a registered relationship and living together.²⁰
 - The couple is in a domestic relationship and has been living in that relationship for at least two years.²¹
- 7.28 In situations other than these—for example, where the couple is not living together, or the domestic relationship’s duration is less than two years—it seems the partner’s consent is not required.²²
- 7.29 The special circumstances requirement also applies to a person who is technically married or in a registered relationship but separated from their former partner. Adoption is not permitted in these situations unless the person is ‘living separately and apart from’ the former partner.²³

Summary of differences

- 7.30 Table 1 sets out the differences in the requirements that apply to people wanting to adopt based on their relationship status.

Table 1. Summary of differences in requirements based on relationship status

Type of couple or person wanting to adopt	Requirements
Married couples, couples in traditional Aboriginal marriage and couples in registered relationships	Can adopt if they have been in that type of relationship (or a combination of the specified relationships) for at least two years. No requirement that the couple live together.
Couples in domestic relationships	Must live together and have lived together in the domestic relationship for at least two years.
Single people (not in a relationship)	Must be special circumstances in relation to the child which make the adoption desirable.
One person in a couple	Must be special circumstances in relation to the child which make the adoption desirable. Partner’s consent is required if: - couple is married or in a registered relationship and living together - the couple is in a domestic relationship and has been living in that relationship for at least two years.
Person technically married or in registered relationship but separated from the other person.	Must be special circumstances in relation to the child which make the adoption desirable. Must be living separately and apart from the other person.

19 Other jurisdictions have a similar requirement. See, eg, *Adoption Act 2000* (NSW) s 27(3); *Adoption Act 1988* (Tas) s 20(5)(b).

20 *Adoption Act 1984* (Vic) s 11(4)(b), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7(5).

21 *Ibid* s 11(4)(c), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7(5).

22 Consent is required where a person ‘is married or is in a registered domestic relationship, and is living with [the] person’s spouse or domestic partner’ or is ‘living in a domestic relationship and has been so living for not less than 2 years’.

23 *Adoption Act 1984* (Vic) s 11(4)(a), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7(5).

- 7.31 The Commission must consider whether these differences are consistent with contemporary attitudes and contemporary law relating to family. It must also consider whether they are consistent with the best interests of the child, as this is the paramount consideration in adoption law (see Chapter 5 for a detailed discussion about this principle).
- 7.32 The Commission seeks the community's views about the limitation that applies to single people wanting to adopt. This issue is discussed below.

Ability of single people to adopt under the Adoption Act

- 7.33 Single people in Victoria are only allowed to adopt in limited circumstances: there must be 'special circumstances in relation to the child' which make the adoption 'desirable'.²⁴
- 7.34 When the Adoption Act was introduced, the responsible minister explained that special circumstances:²⁵
- might exist where there is already a strong relationship between the child and a particular adult or where a particular child copes better when it has only one adult to relate to. Each application by a single person to adopt will be assessed on its merits according to what is in the best interests of the child.
- 7.35 In practice, the special circumstances requirement has meant that single people are only able to adopt children with special needs.²⁶ As discussed in Chapter 3, these children include children older than 12 months of age, children with disabilities and children from difficult backgrounds. This practice is not specified in the Adoption Act or the Adoption Regulations but appears to be an interpretation of the special circumstances requirement.
- 7.36 The law in some other Australian jurisdictions is similar to Victoria's.²⁷ However, in other jurisdictions, single people are subject to the same requirements as couples.²⁸
- 7.37 The Commission has expressed a view about the Victorian law in a previous report. In 2007, it recommended that the special circumstances requirement be removed.²⁹ The recommendation was not implemented. The current reference requires the Commission to examine this question again.
- 7.38 The discussion in this section briefly considers the following points:
- how the concept of 'family' in the Adoption Act has evolved in some ways, but has not developed in the case of single people
 - the reasons behind the special circumstances requirement
 - whether the special circumstances requirement is consistent with contemporary family life and contemporary attitudes about family
 - the Commission's 2007 recommendation, and a recent recommendation to change South Australia's law relating to single people
 - how the special circumstances requirement compares with other Victorian laws relating to family.

24 Ibid s 11(3).

25 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4247 (Pauline Toner, Minister for Community Welfare Services).

26 Department of Human Services, Government of Victoria, *Infant Adoption* (March 2007); *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 6: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/>>. See Chapter 3.

27 *Adoption of Children Act* (NT) s 14; *Adoption Act 1988* (SA) s 12(3)(b); *Adoption Act 1988* (Tas) 20(4).

28 *Adoption Act 1993* (ACT) s 14; *Adoption Act 2009* (NSW) s 27; *Adoption Act 1994* (WA) ss 38, 40, 68.

29 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 109.

The concept of family in the Adoption Act

- 7.39 Family structures and community attitudes about family have changed over the 30 years since the Adoption Act became law. Some of these changes have been reflected in the Adoption Act.
- 7.40 For example, the range of couples allowed to adopt has expanded from legally married men and women to include men and women in de facto relationships (in 1997) and, most recently (in 2015), same-sex couples and people who do not identify with a specific sex or gender. These developments responded to social change and expanded the concept of family contemplated by the Adoption Act.
- 7.41 The law relating to single people, however, has remained fixed since 1984, and continues to specify that single people should only be allowed to adopt where special circumstances exist in relation to the child. The Commission must consider whether this is consistent with contemporary attitudes and law, and puts the best interests of the child foremost.

Reasons underpinning the special circumstances requirement

- 7.42 The law relating to single people is based on the 1983 report of the Adoption Legislation Review Committee (discussed in Chapter 2) and modelled on the previous adoption legislation, the *Adoption of Children Act 1964* (Vic).
- 7.43 Under that Act, adoption was limited to a ‘husband and wife’, other than in ‘exceptional circumstances’. A single person could not adopt unless the court was satisfied that ‘exceptional circumstances’ made it ‘desirable’ to allow the adoption.³⁰ In practice, adoption agencies would only give consideration to a person who was ‘divorced, widowed [or] unmarried’ if:
- circumstances of the child [made] adoption by a single person ... the most appropriate plan available, and the circumstances and personal qualities and experience of the single person [would] be of positive benefit to the child. Often, such applications involve[d] situations where child and applicant already [had] an established relationship.³¹
- 7.44 The Adoption Legislation Review Committee considered it was in a child’s best interests to be placed with ‘two-parent families’ ‘where possible’.³² The Committee said that allowing a child ‘to experience a relationship with a mother and father’ would meet ‘the wishes of many natural parents’ and be ‘more beneficial for the child in terms of life experience and development’. It recommended that:
- A child may be placed for adoption with a single parent where in the opinion of the Director-General or Principal Officer, circumstances exist, related to the child’s needs, which make it desirable to do so.³³
- 7.45 The recommendation was implemented in the Adoption Act as the ‘special circumstances’ requirement.
- 7.46 There is a question whether this requirement and the ideas underpinning it continue to reflect contemporary family life and attitudes.

30 *Adoption of Children Act 1964* (Vic) s 10.

31 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 190.

32 *Ibid* 200.

33 Recommendation 176, *ibid* 204.

Contemporary family life and attitudes

- 7.47 Single parenthood is more common today than it was 30 years ago.³⁴ It is now an ordinary part of contemporary family life for many Australians.
- 7.48 A recent review of South Australia’s adoption legislation considered the ‘best available evidence’ relating to the impact on children of being brought up in same-sex couple and single-person households.³⁵ It concluded that children in those families can be expected to do ‘just as well’ as children ‘who grow up in different-sex couple households’.³⁶
- 7.49 In 2007, this Commission stated that ‘single people are able to provide secure and loving environments for children’, in a report about assisted reproductive technology (ART) and adoption.³⁷
- 7.50 Both the South Australian review and the Commission’s 2007 report reviewed adoption laws relating to single people and recommended that the laws be changed. Their recommendations are discussed briefly below.

Recent reviews of the law

2015 South Australian review

- 7.51 South Australia’s law is similar to Victoria’s. The court can allow adoption by a single person if satisfied that there are ‘special circumstances justifying [the adoption]’.³⁸
- 7.52 The South Australian review in 2015 received a large number of submissions in favour of changing the law to allow single people to adopt. It also received submissions which argued for the contrary position.³⁹
- 7.53 The review recommended that the special circumstances requirement be removed and that the South Australian law make no distinction between single people and couples.⁴⁰ It emphasised that this recommendation was not made to ‘satisfy family formation desires for ... single person households’ but was based on ‘the rights, best interests, welfare and needs of a child’. The review said it is important that the assessment of single people ‘pay special attention’ to the ‘informal social support networks’ around them.⁴¹

Victorian Law Reform Commission review

- 7.54 In 2007 the Commission recommended that Victoria’s special circumstances requirement be removed and that single people be able to adopt ‘in accordance with the same criteria that apply to couples’.⁴² It made this recommendation for the following reasons:

The commission believes that single people are able to provide secure and loving environments for children. ... We believe that the adoption legislation provides an adequate process for assessing the suitability of a single person to adopt a child, without the need to prove to the court that ‘special circumstances’ exist. The assessment process already examines the financial circumstances of the applicants, the current demands of the applicant’s employment and the extent of family, friendship and community networks.⁴³

- 7.55 In the same report, the Commission recommended that single women have access to ART

34 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12 (2007)* 24–5. The proportion of one-parent families with dependent children in Australia increased from 7% in 1976 to 11% in 2011: Ruth Weston and Lixia Qu, ‘Trends in Family Transitions, Forms and Functioning: Essential Issues for Policy Development and Legislation’ in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law* (Australian Institute of Family Studies, 2014) 7, 11.

35 Lorna Hallahan, *Adoption Act 1988 (SA) Review (2015)* 44.

36 Ibid.

37 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12 (2007)* 109. ‘Assisted reproduction refers to procedures that are used to help a person conceive a child when conception through heterosexual intercourse is impossible or difficult, or carries a risk that a disease or genetic abnormality may be transmitted to a child’: 18.

38 *Adoption Act 1988 (SA)* s 12(3)(b).

39 Lorna Hallahan, *Adoption Act 1988 (SA) Review (2015)* 43.

40 Ibid 45.

41 Ibid.

42 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12 (2007)* 12 (Recommendation 71).

43 Ibid 109.

services.⁴⁴ This recommendation was implemented in the *Assisted Reproductive Treatment Act 2008* (Vic).⁴⁵ This means that single women have the ability to start a family through ART services, but single people can only adopt a child in special circumstances. This appears to be an inconsistency in Victorian law.

Single people in the *Children, Youth and Families Act 2005* (Vic)

- 7.56 The Adoption Act also appears to be inconsistent with the approach under with the *Children, Youth and Families Act 2005* (Vic) (CYF Act).
- 7.57 Under the CYF Act, the Children’s Court can make permanent care orders for children in Victoria’s child protection system who cannot live with their parents. Permanent care orders give a person ‘parental responsibility for [a] child ... to the exclusion of all other persons’ until the child turns 18.⁴⁶ Parental responsibility ‘means all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children’.⁴⁷
- 7.58 The Children’s Court can make permanent care orders in favour of single people as well as couples.⁴⁸ The same criteria apply to both groups of people. These include:
- The person is suitable having regard to matters prescribed in the *Children, Youth and Families Regulations 2007* (Vic) and any wishes expressed by the child’s parent about those matters.⁴⁹
 - The person is willing and able to assume responsibility for the permanent care of the child by having parental responsibility for the child.⁵⁰
 - The best interests of the child will be promoted by making the order.⁵¹
- 7.59 When these laws are compared with the Adoption Act, there appears to be an inconsistency. Whereas a single person can have full parental responsibility for a child under the CYF Act, a single person can only adopt a child in special circumstances under the Adoption Act.

Principle of non-discrimination in Victorian law

- 7.60 The different treatment of single people and couples in the Adoption Act seems at odds with the contemporary idea that people should not be treated differently because of their relationship status. This idea is reflected in Victorian law in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Equal Opportunity Act 2010* (Vic). The Charter contains a ‘right to equal and effective protection against discrimination’⁵² and the Equal Opportunity Act prohibits discrimination based on marital status in certain fields of activity.⁵³
- 7.61 Legal protection from discrimination is not absolute, however. The law can place reasonable limits on Charter rights⁵⁴ and permit discrimination in certain situations.⁵⁵
- 7.62 Discrimination can be justified and necessary, for example, to ensure children are protected. Eligibility and suitability criteria are necessary in adoption law for this reason. The best interests of the child remain the paramount consideration, above equal rights for people who want to adopt.⁵⁶

44 Ibid 10 (Recommendation 26), 58, 66–7.

45 *Assisted Reproductive Treatment Act 2008* (Vic) s 10. A guiding principle of this legislation is that ‘persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion’: s 5(e).

46 *Children, Youth and Families Act 2005* (Vic) ss 321(1)(a), (c).

47 Ibid s 3 (definition of ‘parental responsibility’).

48 Ibid ss 319(1)(c), 320(1).

49 Ibid s 319(1)(c).

50 Ibid s 319(1)(d).

51 Ibid s 319(1)(f).

52 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(3).

53 *Equal Opportunity Act 2010* (Vic) pt 4.

54 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

55 *Equal Opportunity Act 2010* (Vic) s 75.

56 *Adoption Act 1984* (Vic) s 9. See Chapter 5 for a detailed discussion about this paramount consideration.

- 7.63 The requirements in the Adoption Act are intended to ensure that children's best interests are protected. The question the Commission must consider, and seeks the community's views about, is whether these requirements remain appropriate and necessary, in light of contemporary understanding and law relating to family and the best interests of the child.
- 7.64 It is not clear that the best interests principle requires that the restriction on adoption by single people remain in place. The Commission notes its previous recommendation that the special circumstances requirement be removed and that single people be able to adopt 'in accordance with the same criteria that apply to couples'.⁵⁷
- 7.65 The Department of Health and Human Services' (DHHS) *Standards in Adoption* (referred to in Chapter 3) state that 'it is in the interests of children to have the maximum range of prospective adoptive parents available'.⁵⁸
- 7.66 The Commission seeks the community's views on this issue.

Question

- 24 Single people can adopt a child only if there are 'special circumstances in relation to the child' which make the adoption 'desirable'.
- (a) Is this requirement consistent with the best interests of the child?
- (b) Should this requirement be amended? If yes, what criteria should apply to adoptions by single people?

Harmonious operation with the Equal Opportunity Act

- 7.67 A final question concerning relationship status relates to the interaction between the recent amendments to the Adoption Act which enable same-sex couples and people who do not identify with a specific sex or gender to adopt,⁵⁹ and an exemption in the Equal Opportunity Act that applies to 'religious bodies'.⁶⁰
- 7.68 When the *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) was introduced, it was reported that one approved agency was 'opposed to allowing same-sex adoption'.⁶¹
- 7.69 The exemption in the Equal Opportunity Act allows a religious body to discriminate against a person based on the person's 'marital status', 'sexual orientation' or 'gender identity' (for example), where the body acts in accordance with the 'doctrines, beliefs or principles' of the religion.⁶²
- 7.70 The *Adoption Amendment (Adoption by Same-Sex Couples) Act* intended to amend this exemption, to ensure that a religious body providing adoption services as an approved agency cannot refuse to provide services to same-sex couples and others.⁶³ However, this proposed amendment was not enacted.

57 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 12 (Recommendation 71).
58 Department of Human Services, Government of Victoria, *Standards in Adoption* (1986) 33 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. The Department of Human Services preceded DHHS, which was established on 1 January 2015.

59 *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic).

60 *Equal Opportunity Act 2010* (Vic) s 82(2).

61 'Same-sex adoption laws pass Victorian Parliament after Government accepts religious exemptions', *ABC News* (online), 9 December 2015 <<http://www.abc.net.au/news/2015-12-09/same-sex-adoption-passes-victorian-parliament/7013502>>.

62 *Equal Opportunity Act 2010* (Vic) s 82(2). 'Religious belief or activity' means '(a) holding or not holding a lawful religious belief of view; (b) engaging in, not engaging in or refusing to engage in a lawful religious activity': *Equal Opportunity Act 2010* (Vic) s 4 (definition of 'religious belief or activity').

63 *Adoption Amendment (Adoption by Same-Sex Couples) Bill 2015* (Vic) cl 17.

- 7.71 The Commission is not reviewing Parliament's decision but is required to consider its consequences as it relates to the Commission's terms of reference. These ask the Commission to consider whether the Adoption Act operates harmoniously with other relevant Victorian legislation. The Commission is considering whether the amendments allowing adoption by same-sex couples and others, on the one hand, and the 'religious bodies' exemption in the Equal Opportunity Act, on the other, operate harmoniously.
- 7.72 The Commission notes that the recent review of the Charter of Human Rights and Responsibilities recommended that the Government consider changing a similar exception in the Charter.⁶⁴ The Government supports this recommendation.⁶⁵

Question

- 25 A religious body that provides adoption services may refuse to provide services to same-sex couples and people who do not identify with a specific sex or gender, if the body acts in accordance with its religious doctrines, beliefs or principles. Is this consistent with amendments to the Adoption Act that enable same-sex couples, and people who do not identify with a specific sex or gender, to adopt?

Step-parents and relatives ('known-child adoptions')

- 7.73 This section discusses the limitations that apply to adoption by step-parents and relatives of a child. As discussed in Chapter 3, adoptions by step-parents and relatives are called 'known-child adoptions'. That term is used below to refer to both groups collectively.
- 7.74 The term 'step-parent' is used here to refer both to spouses and domestic partners of a child's parent or adoptive parent (domestic partners are people in a registered relationship or domestic relationship, defined above at [7.15]–[7.16]).⁶⁶ Both groups of people may adopt their partner's child under the Adoption Act,⁶⁷ where the relationship is at least two years in duration.⁶⁸ They apply to adopt as sole applicants.⁶⁹
- 7.75 The term 'relative' is defined in the Adoption Act.⁷⁰ It means:
- A grandparent, brother, sister, uncle or aunt of the child, whether the relationship is of the whole blood or half-blood or by affinity, and notwithstanding that the relationship depends upon the adoption of any person.
- 7.76 Relatives may apply to adopt as sole applicants or jointly with their spouses or domestic partners. The spouse or domestic partner may apply as a sole applicant, where the relationship is at least two years in duration.⁷¹ Where a spouse or domestic partner applies as a sole applicant, the provisions relating to relatives also apply to the spouse or domestic partner.⁷²

64 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(4); Michael Brett Young, *From Commitment to Culture - The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) Recommendation 18, 72–4.

65 Department of Justice and Regulation, Government of Victoria, *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* (22 July 2016) <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/government+response+to+the+2015+review+of+the+charter+of+human+rights+and+responsibilities+act>>.

66 *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 4(1) (definition of 'domestic partner').

67 *Adoption Act 1984* (Vic) s 11(5), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 7.

68 *Ibid* ss 10A(b), 20A(b), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) ss 6(2), 9(2).

69 *Ibid* s 11(5), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) 7. The partner (ie the child's parent) does not also apply to adopt their child.

70 *Ibid* s 4 (definition of 'relative').

71 *Ibid* ss 10A(b), 20A(b), as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) ss 6(2), 9(2).

72 *Ibid* s 12, as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 8.

- 7.77 At the time the Adoption Act was introduced, approximately half of adoptions in Victoria were by step-parents.⁷³ Today, known-child adoptions are not common (see Chapter 3) and the Adoption Act limits when they can occur.⁷⁴ This is because known-child adoptions are generally discouraged.⁷⁵
- 7.78 The following sections discuss why there is concern about known-child adoptions and the legal requirements that apply to these adoptions.

The concerns about known-child adoptions

- 7.79 Known-child adoptions are generally discouraged because adoption alters the legal relationship between the child and the child's parents and family members (see Chapter 3 for information about the legal effect of adoption).
- 7.80 In the case of adoption by a step-parent, the adoption terminates one parent's legal relationship with the child.⁷⁶ Adoption by a step-father, for example, severs the father's legal relationship with the child, along with the legal connection with his family.⁷⁷ This may decrease the chances of the child having ongoing contact with that side of the child's family.⁷⁸
- 7.81 When a relative adopts a child, this can distort family relationships. For example, when a grandmother adopts a child, in law she becomes the child's mother and the mother becomes the child's sister.⁷⁹ The Adoption Legislation Review Committee stated that: 'This distortion of biological relationships ... caused by the change in legal relationships, is very confusing for children.'⁸⁰ The Committee observed that some relative adoptions were attempts to hide 'an ex-nuptial birth' or shelter a child from 'the consequences of [parents'] death and divorce'.⁸¹
- 7.82 The Committee considered that known-child adoptions were generally not in the best interests of children.⁸² At that time, adoption was being used increasingly by step-parents.⁸³ The Committee objected to step-parent adoption as a 'widespread practice'⁸⁴ and considered relative adoption should only be permitted in special circumstances.⁸⁵
- 7.83 For these reasons, there is a presumption in the Adoption Act against allowing adoptions by step-parents and relatives. Parenting orders under the *Family Law Act 1975* (Cth) (discussed in Chapter 3), which do not have the same legal effect as adoption, are preferred in these situations. Victoria's adoption policy is that 'in all but a few cases', parenting orders better meet 'the welfare and interests of a child raised by a relative or stepparent' than adoption orders.⁸⁶

73 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4244, 4248 (Pauline Toner, Minister for Community Welfare Services).

74 *Adoption Act 1984* (Vic) ss 11(5)–(6), 12, as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) ss 7–8.

75 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption*, Report No 12 (2007) 104.

76 *Adoption Act 1984* (Vic) s 53; Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 54; *ibid* 104.

77 At the time the Adoption Act was introduced, the responsible Minister said this 'created a number of problems in that a separated parent may lose all legal relationship to his or her child who has been adopted': Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4248 (Pauline Toner, Minister for Community Welfare Services).

78 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 54; Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption*, Report No 12 (2007) 104; Department of Human Services, Government of Victoria, 'Stepchildren and Adoption: Information for Parents and Step-parents' (2009); *Adoption and Permanent Care Procedures Manual* (2004) 130: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

79 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 56; Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption*, Report No 12 (2007) 104.

80 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 56.

81 *Ibid* 56, 96.

82 *Ibid* 54, 56.

83 *Ibid* 51. In 1981–82, '57% of adoption orders granted in Victoria' were for step-parent adoptions: 53. Adoption by step-parents became common during the 1970s: Department of Human Services, Government of Victoria, 'Stepchildren and Adoption: Information for Parents and Step-parents' (2009); *Adoption and Permanent Care Procedures Manual* (2004) 130: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

84 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 54; Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption*, Report No 12 (2007) 104.

85 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 56.

86 Department of Human Services, Government of Victoria, 'Stepchildren and Adoption: Information for Parents and Step-parents' (2009) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. This document states that 'orders through the Family Court should be the main option'. See also Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 130; *Information for parents considering adoption of their child* (2008) 22: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

Legal requirements

- 7.84 The Adoption Act only permits known-child adoptions where:⁸⁷
- a parenting order under the Family Law Act ‘would not make adequate provision for the welfare and interests of the child’
 - exceptional circumstances exist which warrant making an adoption order, and
 - an adoption order would make better provision for the welfare and interests of the child than a parenting order.
- 7.85 The Adoption Act gives no guidance about when these requirements would be satisfied. The *Adoption and Permanent Care Procedures Manual*⁸⁸ (discussed in Chapter 3) provides some guidance as to when a parenting order would be inadequate, an adoption order would be preferable and exceptional circumstances may exist.⁸⁹
- 7.86 It states that the permanency of adoption might be preferred where greater ‘legal security’ is needed or it would give a child ‘a greater sense of belonging within the family’.⁹⁰
- 7.87 Exceptional circumstances might exist where a parent has died or been ‘totally absent from the child’s life’, or where the parents have a ‘history of violence’ or a child was ‘conceived by rape’.⁹¹ Generally, a combination of circumstances is required for exceptional circumstances to exist.⁹²
- 7.88 The County Court generally discourages adoption by step-parents where the child’s parents were ‘previously married’ or ‘had a lengthy relationship’.⁹³
- 7.89 The Family Law Act requires that step-parents obtain permission from the Family Court to apply to the County Court for the adoption order.⁹⁴
- 7.90 The approach in Victoria is consistent with other Australian jurisdictions.⁹⁵ Some jurisdictions require that an adoption order be ‘preferable’, or ‘clearly preferable’, to alternative orders.⁹⁶

Is the law appropriate?

- 7.91 In its 2007 report on ART and adoption (discussed above at [7.54]–[7.55]), the Commission expressed the view that it:
- agrees that the current policy, which favours Family Court parenting orders over step-parent and relative adoptions, is appropriate where the child has a second parent and extended family.⁹⁷
- 7.92 The Commission seeks the community’s views on whether the law relating to known-child adoptions continues to be appropriate.

87 *Adoption Act 1984* (Vic) ss 11(5)–(7), 12, as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) ss 7–8. Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

88 Ibid 134–5.

89 Ibid 135.

90 Ibid 134; Department of Human Services, Government of Victoria, ‘Stepchildren and Adoption: Information for Parents and Step-parents’ (2009) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/>>.

92 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/>> 134.

93 County Court of Victoria, *County Court Guide to Making an Application for Adoption*, 3 <<https://www.countycourt.vic.gov.au/adoption-and-parentage-procedure>>.

94 *Family Law Act 1975* (Cth) s 60G. If the court does not give leave, the adoption order may not have full effect, as a parenting order under the Family Law Act may continue to operate in favour a child’s parent or another person, or a parent may continue to have parental responsibility for the child: s 61E and s 61J. See Chapter 3 for more information about parenting orders. In some jurisdictions, a step-parent cannot obtain an adoption order without the Family Court’s leave: *Adoption Act 1993* (ACT) s 14(d); *Adoption Act 2009* (Qld) s 92(1)(d); *Adoption Act 1988* (SA) s 10(2).

95 The Northern Territory and Tasmanian legislation is in similar terms to the Adoption Act: *Adoption of Children Act* (NT) s 15; *Adoption Act 1988* (Tas) ss 20(6)–(8), 21. Other legislation is similar but framed differently: see, eg, *Adoption Act 1993* (ACT) s 14(d)–(e); *Adoption Act 2000* (NSW) ss 29–30; *Adoption Act 2009* (Qld) s 208; *Adoption Act 1988* (SA) s 10; *Adoption Act 1994* (WA) ss 67, 68(1)(fa)–(fb).

96 *Adoption Act 1993* (ACT) s 14(e); *Adoption Act 2000* (NSW) ss 29–30; *Adoption Act 1988* (SA) s 10; *Adoption Act 1994* (WA) s 68(1)(fa).

97 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 108.

Question

- 26 Step-parents and relatives of a child can only adopt a child in their care in limited circumstances. Parenting orders under the Family Law Act are the preferred option in these situations. Is this appropriate? If not, what changes are needed?

Assessment of applicants

- 7.93 This section is about the assessment of the suitability of people who want to adopt.
- 7.94 All applicants must be assessed as suitable.⁹⁸ The assessment is made against a set of suitability criteria called ‘prescribed requirements’ contained in the Adoption Regulations.⁹⁹ DHHS and approved agencies carry out this ‘screening process’.
- 7.95 The terms of reference ask the Commission to review this assessment process to:
- identify whether changes should be made to improve the operation of the Adoption Act and Adoption Regulations
 - ensure that procedural requirements are articulated clearly in the Adoption Act and Adoption Regulations.
- 7.96 These procedural requirements encompass:
- the suitability criteria in the Adoption Regulations which applicants must satisfy
 - other policy requirements that DHHS and approved agencies take into account
 - the steps involved in the assessment process.
- 7.97 The Commission is interested in the community’s views about:
- whether the suitability criteria are appropriate and clearly expressed
 - whether all requirements that applicants must meet are clear
 - whether the assessment process is clear
 - whether any improvements could be made to the assessment process.

The Adoption Act and the assessment of applicants

- 7.98 Although the assessment of applicants is a central part of the adoption process, there is little detail about it in the Adoption Act and the Adoption Regulations. Most of the detail is contained in DHHS policy documents such as the *Adoption Manual* and an *Adoption and Permanent Care Learning Guide* (the *Learning Guide*) which is a training resource for staff.¹⁰⁰
- 7.99 The Adoption Act says:
- the County Court must be satisfied that applicants meet ‘prescribed requirements relating to approval of applicants’¹⁰¹
 - the Court must also be satisfied that applicants, other than applicants who are related to a child, have approval as ‘fit and proper persons to adopt a child’¹⁰²

98 *Adoption Act 1984* (Vic) s 15(1)(a).

99 *Adoption Regulations 2008* (Vic) regs 35, 37.

100 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

101 *Adoption Act 1984* (Vic) s 15(1)(a).

102 *Ibid* ss 15(1)(a), 13. Section 15(1)(a) states that ‘except in the case of an order [relating to the relatives of a child under section 12], the applicants have been approved [as fit and proper persons] under section 13’.

- certain people may apply to the Secretary or a principal officer for this approval¹⁰³
 - the application for approval must comply with the Adoption Regulations¹⁰⁴
 - the Secretary or a principal officer may give approval if the applicants satisfy the ‘prescribed requirements relating to approval of applicants’.¹⁰⁵
- 7.100 The ‘prescribed requirements’ are the suitability criteria contained in the Adoption Regulations. They are set out in full below at [7.117].
- 7.101 The Adoption Regulations state that the application for approval as a ‘fit and proper person’ must be in writing and must include certain information set out in schedules to the Adoption Regulations.¹⁰⁶
- 7.102 The *Supreme Court (Adoption) Rules 2015 (Vic)* require the Secretary or principal officer arranging the adoption to give the court a report that addresses whether the applicant satisfies the suitability criteria.¹⁰⁷
- 7.103 No other detail about the assessment process is given in the Adoption Act or Adoption Regulations. Legislation and regulations in other Australian jurisdictions set out their assessment processes in more detail, as discussed below.

Clarity and circularity

- 7.104 As well as saying little about the assessment process, the relevant provisions in the Adoption Act in some ways appear to operate in a circular fashion.
- 7.105 For example, as indicated above, the Adoption Act refers to two types of assessment:
- a general assessment of suitability that applies to all applicants
 - ‘a fit and proper person approval’ requirement that applies to all applicants other than relatives.
- 7.106 Both assessments are based on the same suitability criteria. This means that although relatives do not need ‘fit and proper person’ approval, they must satisfy the suitability criteria on which the approval is based.
- 7.107 In addition, even though all applicants except relatives are required to have ‘fit and proper person’ approval, the Adoption Act states that only a certain group of applicants ‘may apply’ to the Secretary or a principal officer for this approval.¹⁰⁸ The group of applicants who ‘may apply’ are couples who are eligible to adopt.¹⁰⁹ Other types of applicant, such as single people, other sole applicants and step-parents, are not expressly excluded from applying but they are not included in the group of people who ‘may apply’.¹¹⁰
- 7.108 This appears to have the effect that single people, other sole applicants and step-parents are unable to obtain the approval needed to be able to adopt. The operation of this part of the Adoption Act is unclear. The legislation in Western Australia, by contrast, states that:
- a person who wishes to adopt a child ‘is to apply ... to be assessed for suitability for adoptive parenthood’
 - the application can be ‘made by one person, or by 2 persons jointly’

103 Ibid s 13(1).

104 Ibid s 13(2).

105 Ibid s 13(3).

106 *Adoption Regulations 2008 (Vic)* reg 36, schs 4–5.

107 *Adoption Act 1984 (Vic)* s 15; *Supreme Court (Adoption) Rules 2015 (Vic)* r 23.

108 *Adoption Act 1984 (Vic)* s 13(1).

109 Section 13(1) states that the people who ‘may apply’ for approval are ‘persons capable of making an application under section 10A(a) for an adoption order under section 11’. These people are ‘2 persons who are married or living in a relationship referred to section 11(1)’: s 10A(a) as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015 (Vic)* s 6. The relationships referred to in section 11 (as amended by *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015 (Vic)*) are marriages, traditional Aboriginal marriages, registered relationships and domestic relationships. See [7.13]–[7.16].

110 This is because they are not ‘persons capable of making an application under section 10A(a) for an adoption order under section 11’ (see fn 109 above).

- this does not apply to a step-parent, relative or carer of a child who wishes to adopt the child.¹¹¹
- 7.109 In Victoria applicants who obtain ‘fit and proper person’ approval are placed on the register of people who may be selected to adopt a child.¹¹² The Commission understands this register is for infant adoption, which is only available to couples.
- 7.110 Other applicants, such as single people and step-parents, must also satisfy the suitability criteria that ‘fit and proper person’ approval is based on, because (as mentioned above) all applicants are required to satisfy these criteria to be able to adopt.¹¹³
- 7.111 This means that, even though they are not included in the group that ‘may apply’ for ‘fit and proper person’ approval, single people and step-parents must satisfy the same suitability criteria that couples must satisfy to be approved as ‘fit and proper persons’. The Adoption Act also requires that the Secretary or principal officer assess whether single people and step-parents meet the criteria and give their assessment to the Court.¹¹⁴

Summary

7.112 The provisions relating to the assessment of applicants can be summarised as follows:

- All applicants for adoption, except relatives, are required to have ‘fit and proper person’ approval.¹¹⁵
- The only applicants who the Adoption Act states ‘may apply’ for the approval are couples who are eligible to adopt.¹¹⁶
- All applicants for adoption must meet the suitability criteria on which the ‘fit and proper person’ approval is based.¹¹⁷

7.113 This situation is depicted in Table 2 below.

Table 2. Summary of provisions relating to the assessment of applicants

Type of applicant	Is ‘fit and proper person’ approval required?	May the person apply for approval?	Must the person meet the suitability criteria?
Couples who are eligible to adopt	Yes	Yes	Yes
Single people and other sole applicants	Yes	No	Yes
Relatives of a child	No	No	Yes
Step-parents	Yes	No	Yes

111 *Adoption Act 1994 (WA)* s 38.

112 *Adoption Act 1984 (Vic)* s 13A.

113 *Ibid* s 15(1)(a). Section 20A(b) of the Adoption Act refers to the ‘assessment of suitability’ of a person who ‘is married or living in a relationship referred to in section 11(1) and proposes adopting a child of that person’s spouse or domestic partner or a child who is related to that person’s spouse or domestic partner’. The Adoption Manual and a DHHS guide for step-parents considering adoption state that they need to contact an adoption agency, which will interview the person and the person’s family and provide information to the court: Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 138–9; ‘Stepchildren and Adoption: Information for Parents and Step-parents’ (2009): both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

114 *Adoption Act 1984 (Vic)* s 15; *Supreme Court (Adoption) Rules 2015 (Vic)* r 23.

115 *Adoption Act 1984 (Vic)* s 15(1)(a).

116 *Ibid* s 13(1).

117 *Ibid* ss 13(3), 15(1)(a); *Adoption Regulations 2008 (Vic)* regs 35, 37.

- 7.114 The following sections focus on the three aspects of the assessment of applicants:
- the suitability criteria that apply to all applicants
 - additional policy requirements that are applied in practice when couples seek to adopt infants
 - the procedural steps in the assessment process.

Suitability criteria

- 7.115 All applicants' suitability to adopt is assessed against the suitability criteria in the Adoption Regulations.
- 7.116 The Commission seeks views on whether the suitability criteria are appropriate and whether they are clearly expressed.

What are the suitability criteria?

- 7.117 The criteria, in full, are:¹¹⁸
- The health of the applicants, including emotional, physical and mental health, is suitable.
 - The age and maturity of the applicants are suitable.
 - The applicants have suitable skills and life experience.
 - The applicants' financial circumstances are suitable.
 - The applicants have the capacity to provide a stable, secure and beneficial emotional and physical environment during a child's upbringing until the child reaches social and emotional independence.
 - The applicants have the capacity to provide appropriate support to the maintenance of a child's cultural identity and religious faith (if any).
 - The applicants have a suitable appreciation of the importance of:
 - contact with a child's birth parent and family
 - exchange of information about the child with the child's birth parent and family.
 - The general stability of character of the applicants is suitable and the criminal history (if any) of the applicants does not make the applicants unsuitable.
 - The stability and quality of the applicants' relationship with each other, and between them and the other household and family members, is suitable.
 - The criminal history (if any) of the household members does not make the applicants unsuitable.
 - If the applicants have had the care of a child before applying for approval as fit and proper persons to adopt a child, the applicants have shown an ability to provide a stable, secure and beneficial emotional and physical environment for the child.

Are the suitability criteria appropriate?

- 7.118 This broad range of criteria is intended to determine applicants' ability to bring up an adopted child in a positive and stable family environment. This includes applicants' physical, emotional, social and financial ability, the strength of their relationship and support systems, and their willingness to be open about the child's origins and to maintain contact with, or give information to, the child's parents.¹¹⁹

118
119

Adoption Regulations 2008 (Vic) reg 35.
Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 58; *Standards in Adoption* (1986) 33; *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 9: all documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

7.119 The criteria are similar to those that apply in New South Wales.¹²⁰ The criteria in other jurisdictions are generally similar, though expressed differently and in varying levels of detail.¹²¹ Some jurisdictions have fewer criteria than Victoria, while others include factors not contained in Victoria's Adoption Regulations. Some these are mentioned at [7.124]–[7.126].

Are the suitability criteria clear and transparent?

7.120 As seen above (at [7.117]), the criteria are stated in general terms. The Adoption Regulations do not specify, for example, what 'suitable health' means or what age range is suitable.¹²² These questions are determined by DHHS.

7.121 Some information about what the criteria mean is available in DHHS materials. Some are publicly available: for example, the DHHS website states applicants 'should be fit and healthy enough to care for a child safely through to adulthood' and this means they need to be 'within the spread of ages at which most people become parents'.¹²³ More detailed information is provided to people applying for approval to adopt, in the application paperwork.

7.122 Because the criteria are stated broadly, assessors have discretion when evaluating whether the criteria are satisfied. Factors that guide the exercise of the assessor's discretion are contained in policy documents, such as the *Adoption Manual*, rather than the Adoption Regulations. For example, although a person's Body Mass Index (healthy weight) is a relevant factor in assessing whether a person's health is suitable,¹²⁴ this is not mentioned in the Adoption Regulations.

7.123 The Commission acknowledges that it is not always possible or desirable to specify all relevant detail in legislation and regulations. It is also necessary that decision makers retain a degree of flexibility.¹²⁵ However, flexibility must be balanced against the need for transparency in the decision-making process.

Question

27 Are the suitability criteria in the Adoption Regulations appropriate? Should any criteria be added, removed or changed?

Additional policy requirements

7.124 Additional criteria not mentioned in the Adoption Regulations are applied in practice as part of the screening process. These requirements are set out in policy documents such as the *Adoption Manual* and the application paperwork.

120 *Adoption Regulations 2015* (NSW) reg 45.

121 See, eg, *Adoption Act 1993* (ACT) ss 18, 39F(1)(c); *Adoption Act 2009* (Qld) ss 120–133; *Adoption Regulation 2009* (Qld) reg 7; *Adoption Regulations 2004* (SA) reg 9(3); *Adoption Act 1988* (Tas) s 24; *Adoption Regulations 2006* (Tas) reg 18; *Adoption Act 1994* (WA) s 68(2).

122 By contrast, the Queensland *Adoption Act 2009* (Qld) s 122, for example, contains a more detailed provision relating to health requirements.

123 Department of Human Services, Government of Victoria, *Applying to adopt an infant in Victoria* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/applying-to-adopt-an-infant-in-victoria>>.

124 The Commission obtained this information in the preliminary consultation process and from attending an infant adoption information session.

125 See, eg, Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 3.

- 7.125 Examples include requirements relating to citizenship¹²⁶ and acceptance of infertility issues.¹²⁷ Applicants are also expected to take 12 months off work if a child is placed with them, to develop bonding and attachment.¹²⁸
- 7.126 In practice, the additional requirements may determine whether a person is able to adopt, but they are not set out in the Adoption Act or Adoption Regulations. Similar requirements in other jurisdictions are set out in legislation or regulations.¹²⁹
- 7.127 The Commission is interested in whether the factors guiding decisions about suitability to adopt should be made more transparent.

Question

- 28 Should the requirements applicants must satisfy for approval to adopt be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make this clearer?

The assessment process

- 7.128 The Adoption Act does not set out the procedural steps involved in the assessment process. It states only that:
- An application may be made to the Secretary or a principal officer for approval as a 'fit and proper person to adopt a child'.¹³⁰
 - The application must comply with the Adoption Regulations.¹³¹
 - The Secretary or principal officer may approve applicants as fit and proper persons if they satisfy the suitability criteria.¹³²
- 7.129 The Adoption Regulations state that the application must be in writing and contain certain information (for example, the applicant's personal details, education and qualifications and financial circumstances).¹³³
- 7.130 DHHS has developed the steps in the assessment process. They are set out in policy documents such as the *Adoption Manual* and the *Learning Guide*. The process that applies to assessment of couples seeking to adopt an infant is set out in detail.¹³⁴ The steps in that process are outlined below.

126 DHHS documents given to people considering expressing interest in attending infant adoption training state: 'It is a requirement that one or both adoptive applicants in Victoria are Australian citizens. If only one is an Australian citizen, the other must have an Australian Permanent Residence visa when making an application to be considered suitable to adopt.' These documents are provided at the infant adoption information session. Schedule 4 of the *Adoption Regulations 2008* (Vic), which relates to the information that must be included in an application for approval as a fit and proper person, indicates that applicants may be asked to provide 'citizenship certificates'.

127 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 55; *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 23: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. Applicants must have completed fertility treatment at least six months before attending infant adoption training: Department of Human Services, Government of Victoria, *Applying to adopt an infant in Victoria* (3 July 2013) <<http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/adoption-and-permanent-care/adoption-in-victoria/applying-to-adopt-an-infant-in-victoria>>.

128 The Adoption Standards state it is expected children placed will be 'in the full time care of a parent for ... the first eighteen months of life': Department of Human Services, Government of Victoria, *Standards in Adoption* (1986) 36 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. The Commission understands the period of full-time care currently required is generally 12 months.

129 *Adoption Act 1994* (WA) s 39; *Adoption Regulations 2004* (SA) regs 8(1), 9(3)(j)–(k); *Adoption Act 2009* (Qld) ss 76(1)(b),(e), 89(7), 129, 189(1).

130 *Adoption Act 1984* (Vic) s 13(1).

131 *Ibid* s 13(2).

132 *Ibid* s 13(3).

133 *Adoption Regulations 2008* (Vic) reg 36, schs 4–5.

134 The Commission was also informed about the assessment process during preliminary consultations and through attending an information session for the infant adoption program. The Adoption Act refers to assessment of step-parents (see s 20A(b)) and the Adoption Manual provides details about this process. Less information is available about assessment of single people.

Assessment—infant adoption

- 7.131 There are many steps in the assessment process.
- 7.132 Before making an application for ‘fit and proper person’ approval, couples must attend a two-hour group information session and a subsequent two-day group education program.¹³⁵
- 7.133 The assessment process then involves the following steps:¹³⁶
- The couple submits the application for assessment. This involves a large amount of paperwork and medical and criminal history checks.
 - The assessor interviews the couples a number of times and considers the information in the application.
 - The assessor writes a report, which makes a recommendation about the couple’s suitability. The report is provided to an ‘applicant assessment committee’.
 - The committee considers the report and any other relevant information.
 - The committee decides whether to give approval, decline approval or defer the decision.
- 7.134 None of this procedural detail is contained in the Adoption Act or Adoption Regulations. This differs from legislation and regulations in some other jurisdictions. The Queensland legislation and Tasmanian regulations set out the steps in the assessment process.¹³⁷ The New South Wales regulations set out what is involved in the assessment process, including education and training,¹³⁸ documents that must be included in the application,¹³⁹ checks that are carried out¹⁴⁰ and what decision makers are required to do.¹⁴¹ Western Australia’s legislation makes it clear that an ‘adoption applications committee’ decides applications based on assessment reports prepared by appointed people.¹⁴²
- 7.135 The Commission is interested in the community’s views about, and experiences of, the assessment process. In particular, it seeks views on whether the assessment process should be set out more clearly in the adoption legislation.

Questions

- 29 Should the steps in the assessment process be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make the assessment process clearer?
- 30 Could any other improvements be made to the assessment process? If yes, what improvements could be made?

135 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 42 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

136 Ibid 49, 51, 67–68; Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 2 ‘Infant Adoption’) 8, 10, 14, 27: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

137 *Adoption Act 2009* (Qld) ss 109–110 (see also s 77, which requires the chief executive of the department to give applicants information about ‘the selection and assessment processes’); *Adoption Regulations 2006* (Tas) reg 12. See also *Adoption Regulations 2004* (SA) regs 6–10, 15.

138 *Adoption Regulation 2015* (NSW) reg 39.

139 Ibid reg 42.

140 Ibid reg 44.

141 Ibid regs 43–44.

142 *Adoption Act 1994* (WA) ss 13, 40–41. See also s 37, which requires the CEO of the department to give people considering adoption information about adoption, and s 41A, which states the CEO ‘may conduct any check (including a criminal record check) that the CEO considers appropriate’.

Selection of adoptive parents

- 7.136 In Victorian adoption practice, the process of selecting the adoptive parents is called 'linking' (this term is not used in the Adoption Act or Adoption Regulations). Linking involves matching a child with a family that is best able to meet the child's needs and, to the extent possible, the wishes of the child's birth parent(s).¹⁴³ It has 'far-reaching consequences' for an adopted child: it 'determines the life opportunities and experiences the child will have'.¹⁴⁴
- 7.137 The Commission is interested in the community's views on whether:
- the linking process is set out clearly in the Adoption Act and Adoption Regulations
 - the matters a parent can express wishes about are appropriate.

Is the linking process clear in the Adoption Act and Regulations?

- 7.138 Although it is a significant part of the adoption process, the linking decision is not covered in the Adoption Act and Adoption Regulations. The process is described in DHHS policy documents such as the *Adoption Manual* and *Learning Guide*.
- 7.139 The Adoption Act gives no detail about how adoptive parents are selected, who makes the decision and when it is made.¹⁴⁵ The Act provides power to make regulations about 'factors to be considered in the placement of a child for the purposes of adoption' but this has not been done.¹⁴⁶
- 7.140 Again, the absence of detail in the Adoption Act about the linking process is in contrast to adoption legislation in some other jurisdictions, which outline how adoptive parents are selected.¹⁴⁷

How the process works

- 7.141 The linking process is carried out by adoption teams within DHHS and approved agencies. Practices vary across agencies.¹⁴⁸
- 7.142 Generally, suitable adoptive parents are selected from the register of approved people. Adoption teams select adoptive parents who are best able to meet a child's needs and the birth parents' preferences, if they are known.¹⁴⁹
- 7.143 Under the Adoption Act, parents can express preferences about:¹⁵⁰
- the religion, race and ethnic background of the adoptive parents
 - contact they would like to have with, or information they would like to receive about, the child.

143 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 60; *Standards in Adoption* (1986) 86: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

144 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 2 Infant Adoption') 47 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. The Adoption Standards state that: 'The views and responses of children about a particular adoptive family are of central importance in the selection of a family': Department of Human Services, Government of Victoria, *Standards in Adoption* (1986) 86 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

145 The *Adoption Act 1984* (Vic) make some references to 'placement' of a child. See, eg, ss 44(1)(b), 46(2), 105. Section 38 also refers to the 'inability to place a child'.

146 *Ibid* s 130(f).

147 The Queensland *Adoption Act 2009* (Qld) sets out how the decision is to be made, including what must be taken into account: ss 154–163. The Western Australian *Adoption Act 1994* (WA) contains a set of prerequisites: s 52. The New South Wales *Adoption Regulation 2015* (NSW) gives decision makers detailed guidance: regs 68–74. The Tasmanian *Adoption Regulations 2006* (Tas) clearly states that the Secretary or a principal officer makes the decision and sets out the matters they must have regard to: reg 29. See also *Adoption Act 1993* (ACT) s 35A.

148 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 47 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

149 *Ibid* 49; Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 60; *Standards in Adoption* (1986) 86: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

150 *Adoption Act 1984* (Vic) s 15(1)(b)–(c).

- 7.144 In practice, parents' expressed preferences extend to a broader range of matters, including 'location, education level, opportunities, and relationship with their relinquishment counsellor'.¹⁵¹ These wishes are taken into account when selecting adoptive parents.¹⁵²
- 7.145 Birth parents have the opportunity to be involved in the process of selecting the adoptive parents, although this is not stated in the Adoption Act. The adoption teams encourage them to be 'actively' involved in selecting the adoptive parents.¹⁵³ This is discussed with the parents at the time of giving consent to the adoption (see Chapter 5 for information about the consent process).¹⁵⁴
- 7.146 If the parents choose to be involved, they are given de-identified information about two or three suitable families chosen by the adoption team on the basis of the parents' expressed preferences.¹⁵⁵ The parents select their preferred family.¹⁵⁶ The Secretary or principal officer must approve the decision, because they are the child's legal guardian under the Adoption Act (see Chapter 3).¹⁵⁷ Generally the Secretary or principal officer accepts the parents' decision.
- 7.147 It appears that parents could veto a proposed selection, even if only one suitable family was available. The *Adoption Manual* states that it is 'unlikely' the placement would proceed if the parents were strongly opposed to it.¹⁵⁸

This approach is based on the assumption that it is important for birth parents to participate in planning for their child's future wherever possible. It is envisaged that birth parents are likely to select a family with whom they feel some compatibility exists, and that this will assist the parties in feeling comfortable during future contacts.

Birth parents' role in the selection process

- 7.148 The extent of birth parents' role in the selection of adoptive parents is not clearly expressed in the Adoption Act or the Adoption Regulations. This differs from the Western Australian legislation, which states that birth parents have the opportunity to 'study' information about and 'select' prospective adoptive parents.¹⁵⁹ The New South Wales Act provides that information about the proposed adoptive parents is given to the birth parents.¹⁶⁰
- 7.149 The role of birth parents is referred to indirectly in the Adoption Act. It states that, before making an adoption order, the court must be satisfied that the Secretary 'has given consideration to any wishes expressed by a parent of the child' regarding:
- the adoptive parents' religion, race and ethnic background¹⁶¹
 - having contact with, or receiving information, about the child.¹⁶²

151 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 49 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

152 Ibid.

153 Ibid 47; Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

154 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

155 Ibid 49, 60; Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 49–50; *Information for parents considering adoption of their child* (2008) 11, 15: all documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

156 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 50 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

157 *Adoption Act 1984* (Vic) s 46; Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 26; *Adoption and Permanent Care Learning Guide* (Part 2 'Infant Adoption') 47, 49: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

158 Department of Human Services, Government of Victoria, *Adoption and Permanent Care Procedures Manual* (2004) 60 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

159 *Adoption Act 1994* (WA) s 45.

160 *Adoption Act 2000* (NSW) s 45A. See also *Adoption Act 2009* (Qld) s 6(2)(e).

161 *Adoption Act 1984* (Vic) s 15(1)(b).

162 Ibid s 15(1)(c).

- 7.150 The Adoption Regulations require that the Secretary or principal officer give parents the opportunity to express their wishes about these matters at the time of giving consent to the adoption.¹⁶³
- 7.151 As seen above, in practice birth parents have a greater role in the selection of adoptive parents than is specified in the Adoption Act and Adoption Regulations. It is not clear whether the practice reflects the intention of the Adoption Act and Adoption Regulations.
- 7.152 The Commission is interested in the community's views about whether the selection process, including the role of birth parents, should be set out more clearly in the adoption legislation, as it is in some other jurisdictions.

Question

- 31 Should the process by which adoptive parents are selected be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make the selection process clearer?

Are the matters birth parents can express wishes about appropriate?

- 7.153 A further question is which matters are appropriate for birth parents to express preferences about.
- 7.154 Currently a parent can express preferences about:
- the religion, race and ethnic background of adoptive parents
 - contact with, and access to information about, the child.¹⁶⁴
- 7.155 Expressing wishes about contact with, or access to information about, the child is consistent with open adoption practices (see Chapter 2).
- 7.156 From one point of view, the other matters might be considered inappropriate on the basis that expressing wishes about a person's religion, race or ethnic background is counter to non-discrimination principles. (Non-discrimination principles are discussed above at [7.60].)
- 7.157 On the other hand, respecting a parent's wishes about the race or cultural background of the adoptive parents may help to maintain a child's identity and heritage. The *Adoption Standards* state that maintaining a child's connection to their cultural background is important,¹⁶⁵ and laws in other jurisdictions contain provisions aimed at achieving this.¹⁶⁶ It is also supported by article 8 of the United Nations *Convention on the Rights of the Child*.¹⁶⁷
- 7.158 The range of matters that parents can express wishes about varies across jurisdictions. They include:
- 'preferred background, beliefs or domestic relationship' of the adoptive parents (New South Wales)¹⁶⁸

163 *Adoption Regulations 2008* (Vic) reg 18.

164 *Adoption Act 1984* (Vic) s 15(1)(b)–(c).

165 Department of Human Services, Government of Victoria, *Standards in Adoption* (1986) 8 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

166 *Adoption Act 1994* (WA) s 52; *Adoption Act 2000* (NSW) ss 8(1)(e), 32, 90(1)(h); *Adoption Regulation 2015* (NSW) reg 72; *Adoption Act 2009* (Qld) ss 6(2)(f), 132, 189(1); *Adoption Act 1993* (ACT) s 39D(3)(d).

167 Article 8 states that every child has the right 'to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference': *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 8(1).

168 *Adoption Act 2000* (NSW) s 45B.

- 'child's upbringing and the preferred attributes of the adoptive family' (Western Australia)¹⁶⁹
 - 'religion, marital status, sexual orientation, race, or ethnic background of the prospective adoptive parents' (Tasmania)¹⁷⁰
 - 'social, religious and financial characteristics of the adoptive family' (ACT)¹⁷¹
 - 'child's religious upbringing', 'characteristics of the child's adoptive parents and adoptive family' and 'the degree of openness in the adoption' (Queensland).¹⁷²
- 7.159 These matters are broader than those parents can express wishes about under the Adoption Act. But, as seen above, in practice parents' wishes are not limited to the matters stated in the Adoption Act. It may be appropriate to reflect these matters in the adoption legislation.
- 7.160 That approach would be consistent with decisions about permanent care placements under the CYF Act.¹⁷³ The Children's Court can make a permanent care order if the proposed carer(s) are suitable, having regard to:
- prescribed matters set out in the *Children, Youth and Families Regulations 2007* (Vic)
 - 'any wishes expressed by the parent' about those matters.¹⁷⁴
- 7.161 This allows parents to express wishes about the full suitability criteria that apply under the CYF Act. The criteria are more limited than the suitability criteria in the Adoption Regulations, but they include characteristics such as a person's health, 'skills and experience' and 'general character'.¹⁷⁵ They also include matters that are similar to those in the Adoption Act.¹⁷⁶
- 7.162 The 2015 report by Eamonn Moran PSM QC, which recommended the amendments to the Adoption Act relating to same-sex couples and people who do not identify with a specific sex or gender, suggested that consideration be given to whether the approach under the CYF Act might be appropriate under the Adoption Act.¹⁷⁷
- 7.163 The Commission is not able to consider whether birth parents should be able to express wishes about the relationship status, sex or gender of adoptive parents. The Moran report recommended against allowing this, as it could be inconsistent with the amendments which enable same-sex couples and people who do not identify with a specific sex or gender to adopt.¹⁷⁸ This recommendation was followed. The Commission considers this matter to be excluded from the present review.

Question

- 32 Is it appropriate that birth parents are able to express wishes about the religion, race and ethnic background of adoptive parents? What matters should parents be able to express wishes about? Should other matters be included in the Adoption Act?

169 *Adoption Act 1994* (WA) s 45.

170 *Adoption Act 1988* (Tas) s 24.

171 *Adoption Act 1993* (ACT) s 39D(3)(a).

172 *Adoption Act 2009* (Qld) s 157.

173 See [7.57] above.

174 *Children, Youth and Families Act 2005* (Vic) s 319(1)(c).

175 *Children, Youth and Families Regulations 2007* (Vic) regs 18(a)–(b), (g).

176 *Ibid* regs 18(e)–(f).

177 Eamonn Moran and Teresa Porritt, *Adoption by Same-Sex Couples Legislative Review* (2015) 30. See Chapter 2 for more information about this report.

178 *Ibid* 29–32, 41.

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8. Information and identity

Introduction

- 8.1 This chapter considers three issues central to an adopted person's identity:
- the ability to obtain information about an adoption
 - how an adopted person's identity is reflected on their birth certificate
 - the ability to change a child's name when they are adopted.
- 8.2 These issues also affect birth parents, adoptive parents and other parties.
- 8.3 The *Adoption Act 1984* (Vic) gives adopted people, parents, adoptive parents and other people rights to obtain information about an adoption. The 'information provisions', introduced in 1984, were a major reform, both in Victoria and Australia.¹ The terms of reference ask the Commission to review the information provisions and consider whether there are any gaps in the legislation. This is discussed in the first part of the chapter.
- 8.4 The Commission cannot consider submissions about 'contact statements', which were introduced in 2013 to prohibit parents of an adopted person contacting the person against their wishes (see Chapter 2). Contact statements were removed in 2015 and are excluded from the Commission's review (see Chapter 1).
- 8.5 The terms of reference ask the Commission to consider whether there should be any changes to how an adopted person's identity is reflected on their birth certificate. Adopted people, birth parents and adoptive parents have views about this and there have been some recent recommendations for reform. These are discussed in the second part of the chapter.
- 8.6 The third part of the chapter considers a related question: whether adoptive parents should be able to change the name of the child they adopt.

Language used in the chapter

- 8.7 The information provisions give rights of access to information on the basis of specified terms. These include 'natural parent', 'natural relative' and 'natural child'.² To avoid confusion, this chapter uses the terms used in the legislation (including the parts of the chapter that do not relate to the information provisions). The definitions of these terms are set out below at [8.18]–[8.30].

1 The information provisions are contained in Part VI of the *Adoption Act 1984* (Vic), 'Access to information'. Victoria was the first jurisdiction in Australia to introduce information provisions. See, eg, Department of Health and Human Services, Government of Victoria, *Adoption: Myth and Reality – Family Information Networks and Discovery Service Victoria* (2015) 8 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>; Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 184.

2 The report of the Adoption Legislation Review Committee, on which the *Adoption Act 1984* (Vic) is based (see Chapter 2), uses this language throughout the report.

Information provisions

- 8.8 The information provisions in the Adoption Act give certain people access to adoption information. They also provide a process for obtaining the information, and include provisions intended to protect people’s privacy.
- 8.9 The Commission is required to consider whether there are any gaps in the information provisions. The following sections discuss:
- why the information provisions exist
 - how the information provisions operate
 - the process of seeking adoption information
 - people’s rights to adoption information and the limitations on those rights
 - how the information provisions affect people’s right to privacy
 - lack of clarity in the provisions relating to the release of adoption information.

The need for information

- 8.10 Information about adoptions is private, and access to this information is restricted by the Adoption Act.³
- 8.11 The information provisions provide rights to information for particular people involved in and affected by an adoption. They include the adopted person and their natural parents, natural relatives, adoptive parents and natural children.
- 8.12 Information about their adoption and origins is crucial to an adopted person’s sense of identity.⁴ At different points in their lives, as they grapple with questions about their identity and background, adopted people may want to understand who their natural parents were and why they were adopted. They may want to know about, and possibly make contact with, their families of origin.
- 8.13 Natural mothers and natural fathers may want to know what has happened in the life of the adopted person and to re-connect with them. A natural grandparent, uncle or aunt may also seek information about, or want contact with, the adopted person. A sibling may want to find a brother or sister who was adopted.
- 8.14 Adoptive parents may need information about an adopted child’s family medical history, or information that might help explain the adoption to their child.
- 8.15 An adopted person’s children might want to find out about their parent’s adoption and the families they are connected to but do not know.

3 See, eg, *Adoption Act 1984* (Vic) ss 83, 85, 107; *Supreme Court (Adoption) Rules 2015* (Vic) r 24. See Chapter 2 for a history of secrecy surrounding adoption and the development of open adoption. See also Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 37, 171–3; Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 73.

4 Article 7 of the United Nations *Convention on the Rights of the Child* states that every child has a right to know his or her parents: *Convention on the Rights of the Child 1989*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1). See also, eg, Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 2, 85, 90–1; Department of Human Services, Government of Victoria, ‘Stepchildren and Adoption: Information for Parents and Step-parents’ (2009); *Information for parents considering adoption of their child* (2008) 8; *Adoption and Permanent Care Learning Guide* (Part 1 ‘Introduction’) 17; (Part 2 ‘Infant Adoption’) 41; (Part 4 ‘Special Issues’) 26–29; all documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>; Department of Health and Human Services, Government of Victoria, *Adoption: Myth and Reality – Family Information Networks and Discovery Service Victoria* (2015) 11–12 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>; Pauline Kenny and Daryl Higgins, ‘Past Adoption Practices: Key Messages for Service Delivery Responses and Current Policies’ in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law* (Australian Institute of Family Studies, 2014) 29, 31–35.

- 8.16 The information provisions were introduced to make this information available. However, the rights to information are not identical and access to it is regulated. The information provisions regulate:
- who is entitled to receive adoption information
 - what information they can receive
 - how they receive it
 - when they can and cannot have access to it.
- 8.17 These points are discussed below.

Who has rights to adoption information?

- 8.18 The Adoption Act specifies who has rights to adoption information. They are:
- adopted people
 - natural parents of adopted people
 - adoptive parents of adopted people
 - natural children of adopted people
 - natural relatives of adopted people.
- 8.19 Each of these groups of people, other than adoptive parents, is defined by the Adoption Act, as set out below. People in each group made requests for information in 2014–15. In that year, 616 requests were made.⁵

Adopted person

- 8.20 The term ‘adopted person’ includes a person adopted under the Adoption Act or Victoria’s previous adoption legislation.⁶ This means a person adopted before 1984 has the same rights to information as someone adopted under the Adoption Act.
- 8.21 A large proportion of adopted people who seek information about their adoption were adopted before the Adoption Act came into effect.⁷
- 8.22 Adopted people made the majority of requests for information in 2014–15 (429 requests out of the total 616).⁸
- 8.23 An adopted person will only know to use the information provisions if they know they were adopted. Adoptive parents are strongly encouraged to tell their children about their origins, but they are not required to.

5 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 31–2.

6 *Adoption Act 1984* (Vic) s 82 (definition of ‘adopted person’). Former wards of the state (known as ‘Forgotten Australians’) are not included in the Adoption Act. They may seek access to records relating to them through the *Freedom of Information Act 1982* (Vic): Department of Human Services, Government of Victoria, *Former Victorian Wards of the State* (14 May 2015) <<http://www.dhs.vic.gov.au/for-individuals/ applying-for-documents-and-records>>.

7 Nationally in 2014–15, the majority of adopted people seeking information (87%) were aged 35 and over, and most of these were aged 45 and over: Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 30–2.

8 Adopted people made 429 requests for identifying information in 2014–15, making up nearly 75% of the total number of requests for identifying information (548) and nearly 70% of the total number of requests (616): *ibid* 30. ‘Identifying information’ and ‘non-identifying information’ are explained at [8.38]–[8.39].

Natural parent

- 8.24 A 'natural parent' of an adopted person is a person who is named in the birth registration entry relating to an adopted person.⁹
- 8.25 A man not named in the birth registration¹⁰ is recognised as a natural parent in certain circumstances,¹¹ including where:
- The Supreme Court has declared the man is the adopted person's father under the *Status of Children Act 1974* (Vic).¹²
 - The Family Court of Australia has made a parenting order in his favour.¹³
 - The man satisfies the Secretary of the Department of Health and Human Services (DHHS) 'that there is prima facie evidence that [he] is the father of [the adopted person]'.¹⁴
- 8.26 Natural parents made 69 requests for information in 2014–15. Natural mothers made most of these requests (56).¹⁵

Natural relative

- 8.27 A 'natural relative' of an adopted person is defined as a grandparent, brother, sister, uncle or aunt who is a blood relation of an adopted person. (The Adoption Act uses the terms 'whole blood and half-blood'. Chapter 9 considers whether language such as this needs to be updated.)¹⁶
- 8.28 This definition means that relations through marriage do not have rights to adoption information.
- 8.29 Natural relatives made 57 requests for information in 2014–15.¹⁷

Natural child of an adopted person

- 8.30 'Natural child' of an adopted person means the adult son or daughter of an adopted person 'where the relationship is of the whole blood'.¹⁸ This definition excludes step-children and adopted children of an adopted person. As a result, an adult natural child has the right to seek information about their parent's adoption, but a step-child or adopted child of an adopted person does not have the same right.
- 8.31 Natural children of adopted people made 50 requests for information in 2014–15.¹⁹

Other people

- 8.32 People who do not have rights to adoption information may apply to the County Court for access to adoption information.²⁰ The Adoption Act does not specify who these people might be. The Court may grant access to the information if:
1. The Secretary or an approved counsellor provides a report.
 2. The Court is satisfied that 'circumstances exist which it make it desirable' that the applicant receive the information.

9 *Adoption Act 1984* (Vic) s 82 (definition of 'natural parent').

10 During the era of forced adoptions in the 1950s–1970s, fathers were commonly not identified and therefore not named in birth registrations: Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 12, 249, 252–4.

11 *Adoption Act 1984* (Vic) s 82 (definition of 'natural parent').

12 *Status of Children Act 1974* (Vic) ss 9–10;

13 See Chapter 3 for information about parenting orders.

14 *Adoption Act 1984* (Vic) s 82 (definition of 'natural parent'). This applies to sections 95, 96 and 103 of the Adoption Act.

15 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 30.

16 *Adoption Act 1984* (Vic) s 97(1).

17 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 31.

18 *Adoption Act 1984* (Vic) s 96A.

19 Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 30.

20 *Adoption Act 1984* (Vic) s 100.

8.33 The Adoption Act does not indicate what these circumstances would be.

Should anyone else have rights to adoption information?

8.34 The definitions set out above, particularly the definitions of 'natural relative' and 'natural child', limit the people who can have access to adoption information. A question arises as to whether the definitions should be expanded to include other people who may have an interest in information about an adoption.

Question

33 Should any other people have rights to adoption information under the Adoption Act? If yes, who should be given these rights and what should their rights be?

What is adoption information?

8.35 The Adoption Act defines the information that people can have access to. It uses a broad term: 'information about the adopted person'. This means:²¹

information about the adopted person or the natural parents or the relatives of the adopted person which ... –

(a) is reasonably likely to be true; and

(b) does not unreasonably disclose information relating to the personal affairs of a natural parent, a relative or any other person.

8.36 The Adoption Act uses the term 'relative' in this definition, rather than 'natural relative'. The term 'relative' captures a broader range of people:²²

a grandparent, brother, sister, uncle or aunt of the child, whether the relationship is of the whole blood or half-blood or by affinity, and notwithstanding that the relationship depends upon the adoption of any person.

Information about people

8.37 The definition of adoption information therefore enables people to receive information about another person. For example:

- An adopted person or adoptive parent can receive information about a natural parent or a relative of the adopted person.
- Natural parents and natural relatives can receive information about the adopted person.
- A natural child of an adopted person can receive information about a relative of the adopted person.

²¹ Ibid s 91.

²² Ibid s 4 (definition of 'relative'). This definition uses the language of the *Adoption of Children Act 1964 (Vic)*, which defined 'relative' as 'a grandparent, brother, sister, uncle or aunt of the child, whether the relationship is of the whole blood or half-blood or by affinity, and notwithstanding that the relationship is traced through, or to, an illegitimate person or depends upon the adoption of any person': s 4. See Chapter 9 for a discussion about whether language in the 1984 Adoption Act needs updating.

Non-identifying and identifying information

- 8.38 The information provisions allow access to:
- general information that does not identify the person, such as information relating to the person's education, age, nationality, health and general physical appearance
 - information that identifies the person or could lead to a person being identified.
- 8.39 The first type of information is referred to as 'non-identifying information'. The second type of information is referred to as 'identifying information'.²³ Identifying information can also include a person's whereabouts.²⁴
- 8.40 Nearly 90 per cent of requests for adoption information in 2014–15 were for identifying information.²⁵ Most of these were made by adopted people.²⁶ Natural parents and natural children of adopted people also sought identifying information.²⁷
- 8.41 Natural relatives made the majority of requests for non-identifying information (more than 80 per cent).²⁸ As discussed below at [8.60]–[8.61], there are limits on natural relatives' rights to identifying information. Adoptive parents also made a small number of requests for non-identifying information in 2014–15.²⁹

Information in records

- 8.42 Information about adoptions is contained in adoption records and court records. The Commission understands that records are held across DHHS, approved agencies, the County Court and the Registry of Births, Deaths and Marriages (BDM).³⁰

How do people gain access to adoption information?

- 8.43 The Adoption Act creates a process for people to search for adoption information and family members. It establishes an 'adoption information service' within DHHS and approved agencies.³¹ A person seeking adoption information contacts an adoption information service.³² The Adoption Act imposes duties on the adoption information service to assist and support people with their searches.³³

23 These terms are not used in the *Adoption Act 1984* (Vic). The Adoption Act describes identifying information in language such as 'information about the adopted person from which the identity of either of the natural parents ... may be ascertained' (s 94(1)(b)) and 'information about the adopted person from which the adoptive parents ... may be identified or the whereabouts of the adopted person ascertained' (s 96(1)(b)). It describes non-identifying in language such as 'information about the adopted person (other than information from which whether directly or indirectly the adoptive parents ... may be identified or the whereabouts of the adopted person ascertained)' (s 96(1)(b)).

24 See, eg, *Adoption Act 1984* (Vic) ss 93(2), 96(1)(b), 96A(4), 97(2)(b). Whether identifying information encompasses information about a person's whereabouts in all cases is unclear.

25 A total of 616 requests for information were made in 2014–15, of which 89% (548) were for identifying information and 11% (68) were for non-identifying information: Australian Institute of Health and Welfare, *Adoptions Australia 2014–15*, Child Welfare Series Number 62 (2015) 30.

26 Adopted people made 429 requests for identifying information: *ibid* 30.

27 Natural mothers made 56 requests for identifying information, natural fathers made 13 requests, and natural children made 50 requests: *ibid* 30.

28 Of the 68 requests for non-identifying information, natural relatives made 57 requests, adoptive mothers made 6 requests and adoptive fathers made 5 requests: *ibid* 31.

29 *Ibid*.

30 See, eg, *Adoption Act 1984* (Vic) ss 79A–79B, 83, 85–86. Section 79A states that the Registrar of BDM 'has the management and control of any records concerning adoptions which are in the possession of the County Court, Supreme Court and Magistrates' Court'.

31 *Ibid* s 102. The service within DHHS is called Family Information Networks and Discovery (FIND): Department of Health and Human Services, Government of Victoria, *Adoption: Myth and Reality – Family Information Networks and Discovery Service Victoria* (2015) 8 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. There is some variation across agencies in the practices of the adoption information services.

32 Other organisations such as the Victorian Adoption Network for Information and Self Help (VANISH) also assists people searching for information or family members. See Chapter 9 for more information. See also Department of Health and Human Services, Government of Victoria, *Adoption: Myth and Reality – Family Information Networks and Discovery Service Victoria* (2015) 10–11 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

33 *Adoption Act 1984* (Vic) ss 102, 104.

Registration

- 8.44 The adoption information service registers the person seeking the information on a statewide 'adoption information register'.³⁴ The adoption information register records the names and addresses of people who have used an adoption information service or asked to register their information.³⁵ It records their wishes about whether they agree to:
- their information being disclosed if a request is made about them
 - being contacted by a party to the adoption (adopted person, natural parent, adoptive parent) or person related to the adoption (relative or natural child of the adopted person).³⁶

Searches

- 8.45 The adoption information services carry out searches to locate the information the person is seeking.³⁷ If the information is not contained in records they hold, they must make 'reasonable enquiries' to obtain it.³⁸ The Adoption Act describes these as:

such reasonable enquiries as in all the circumstances of the case ought reasonably to be made for the purposes of obtaining the information.

- 8.46 The searches typically involve requests to another agency, such as BDM.³⁹

- 8.47 An adoption information service must provide the information it holds or obtains if the person is entitled to the information under the Adoption Act.⁴⁰

Interview

- 8.48 When the information is found, it is provided to the person in an interview with 'an approved counsellor'.⁴¹ The counsellor explains the rights under the information provisions and how people can be affected by learning information about an adoption.
- 8.49 The interview is a mandatory part of the process. The adoption information service cannot provide the information unless the person attends an interview (or an exception applies).⁴²

34 Ibid ss 102–103.

35 Ibid s 103(a).

36 Ibid s 103(b); Department of Health and Human Services, Government of Victoria, *Access to Information about an Adoption: Information Sheet for Adopted Persons, Natural Parents and Other Family* (2015) 3–4 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

37 Department of Health and Human Services, Government of Victoria, *Access to Information about an Adoption: Information Sheet for Adopted Persons, Natural Parents and Other Family* (2015) 3 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

38 *Adoption Act 1984* (Vic) s 90(1)(b).

39 Section 79B of the *Adoption Act 1984* (Vic) states that a 'relevant authority' (ie an adoption information service) 'may apply to the Registrar [of BDM] for copies of or information contained in any records of the County Court, Supreme Court or Magistrates' Court which are in the custody of the Registrar'. It requires the Registrar to give the information, if it is in the Registrar's possession or control. Section 90(2) states that an approved agency's adoption information service may request the Registrar to provide any information in the BDM Register relating to births, deaths and marriages of an adopted person's natural parents or natural relatives. However, in this instance, the Adoption Act does not require the Registrar to provide the information.

40 Ibid s 90.

41 Ibid s 87. An approved counsellor is a counsellor approved by the Secretary of DHHS: ss 4 (definition of 'approved counsellor'), 5. The counsellor must be an officer or employee of DHHS, employed by an approved agency or a person who the Secretary considers has appropriate qualifications and experience. See also Department of Health and Human Services, Government of Victoria, *Adoption: Myth and Reality – Family Information Networks and Discovery Service Victoria* (2015) 10; *Access to Information about an Adoption: Information Sheet for Adopted Persons, Natural Parents and Other Family* (2015) 3: both documents at <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

42 The requirement does not apply if the adopted person and a natural parent have 'already exchanged information which may identify that natural parent or a relative of the adopted person': *Adoption Act 1984* (Vic) s 87(3).

Finding family members

- 8.50 The adoption information service can provide further assistance to find and make contact with a person's family member. It can approach the person and assist with facilitating contact between the parties.⁴³
- 8.51 However, the adoption information service does not have to be involved. People may undertake their own searches, using the information they have received, and try to make contact with the other party directly. Issues that can arise when this happens are discussed in the section on privacy at [8.62].
- 8.52 The Commission is interested in hearing about people's experiences of using the adoption information services and, in particular, whether they have encountered any problems that might require legal changes to be considered.

Question

- 34 Do any problems arise when people seek adoption information through an adoption information service? If yes, what are the problems and what legal changes, if any, are required to address them?

Rights to information

- 8.53 The information provisions give people rights to:
- request information (the Adoption Act describes the request as an 'application to a relevant authority')⁴⁴
 - receive the information if all requirements in the Adoption Act are complied with.⁴⁵

Limitations on rights

- 8.54 There are limitations on people's rights to receive adoption information. Some limitations apply in all (or most) situations, whether the information sought is identifying or non-identifying. The mandatory interview discussed above is an example. Generally a person cannot receive any information (identifying or non-identifying) without attending an interview.⁴⁶ Another limitation that applies in all cases is that a person is not entitled to any information which 'unreasonably discloses the personal affairs' of another person.⁴⁷
- 8.55 Some limitations apply only to requests for identifying information about another person. The main type of limitation in these situations is the need for a person's consent, discussed below.

43 Department of Health and Human Services, Government of Victoria, *Adoption: Myth and Reality – Family Information Networks and Discovery Service Victoria* (2015) 11 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>. See also Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 100.

44 A relevant authority includes the Secretary of DHHS and an approved agency: *Adoption Act 1984* (Vic) s 82 (definition of 'relevant authority'). An adoption information service receives applications for information: s 102(c).

45 As stated at [8.47], the *Adoption Act 1984* (Vic) requires information in the possession or control of the Secretary or an approved agency to be given to the person requesting the information, if all the Act's requirements have been complied with: s 90.

46 *Adoption Act 1984* (Vic) s 87. The exception is set out at fn 42 above. The requirement in the Adoption Act differs from the counselling requirement in the *Assisted Reproductive Treatment Act 2008* (Vic). Under that Act, the Registrar of BDM cannot release identifying information to a person who has not received counselling but the Registrar is only required to offer counselling to a person seeking non-identifying information:

s 61.
47 *Ibid* s 88.

Identifying information and consent

- 8.56 In some cases where a person seeks identifying information about another person, the information cannot be given without the person's written consent.⁴⁸ However, a person's consent is not required in all cases where identifying information is requested. Whether consent is required generally depends on who is seeking the information and who the information relates to.⁴⁹
- 8.57 An adopted person aged 18 or over can generally receive identifying information about a natural relative without the relative's consent.⁵⁰ However, a natural relative cannot obtain identifying information about the adopted person unless the person consents to the information being given.⁵¹
- 8.58 The consent requirement means that, if consent is not given (because a person refuses to give consent or because the person cannot be found), the person seeking the information is denied access to it. In this situation the person can apply to the County Court for access to the information.⁵²
- 8.59 In some situations a person can consent to the disclosure of the information on certain conditions.⁵³ In some cases the adoption information service must comply with the conditions.⁵⁴ In other situations it has a discretion to withhold information, to give effect to any conditions put on the consent.⁵⁵

Other limitations

- 8.60 Other specific limitations may apply, depending on the situation. For example:
- An adopted child's wishes must be taken into account when a natural parent seeks identifying information about the child.⁵⁶ An adoption information service can withhold information to give effect to the child's wishes.⁵⁷
 - An adult adopted person must be notified about certain requests for information. For example, an adoption information service must notify an adopted person if it intends to give identifying information about a natural parent to the person's adoptive parents.⁵⁸
 - A natural relative can have access to identifying information about an adopted person or their adoptive parents only where 'circumstances exist which make it desirable'.⁵⁹
 - An adopted child needs the consent of their adoptive parents to seek any information, identifying or non-identifying.⁶⁰

48 To protect people's privacy: Victoria, *Parliamentary Debates*, Legislative Assembly, 2 May 1984, 4250 (Pauline Toner, Minister for Community Welfare Services).

49 It can also depend on the type of information requested and whether information is contained in the records held by the adoption information service. For example, a person's consent might be required if information would disclose the person's whereabouts and it is not contained in the records held by the adoption information service. See fn 50 below and Appendix B for more information.

50 *Adoption Act 1984* (Vic) s 93(1). There is one exception to this, where the information would reveal the natural relative's whereabouts and the information is not contained in the records held by the adoption information service: s 93(2)(b).

51 *Ibid* ss 97(2)–(3).

52 *Ibid* s 99.

53 See, eg, *ibid* ss 93(2), 95(2)(a)(ii), 96A(4)(d), 97(3)(a), 98(2)(a).

54 See, eg, *ibid* ss 93(2), 96A(4)(d).

55 See, eg, *ibid* ss 95(2)(b), 97(3)(b), 98(2)(b).

56 *Ibid* s 95(2)(a)(i).

57 *Ibid* s 95(2)(b).

58 *Ibid* s 98(2)(aa).

59 *Ibid* s 97(3)(a)(i).

60 *Ibid* s 94(2).

61 Or the County Court makes an order for the information to be given: *Adoption Act 1984* (Vic) s 99.

62 *Ibid*.

63 *Ibid*.

64 *Ibid* s 97(3)(a). The County Court can also order that the information be given: s 99.

Different rights

8.61 Because different limitations apply, people have different rights to adoption information. A full description of the rights of each type of person and the limitations on their rights is set out in Appendix B. A summary of key rights to information is provided in Table 3.

Table 3. Summary of rights to information

Person	Rights to information about another person
Adult adopted person (over 18)	Can receive identifying information about a natural parent or a natural relative without their consent.
Adopted child (under 18)	Cannot receive any information (identifying or non-identifying) without adoptive parents' agreement. Identifying information about a natural parent can only be given if the natural parent consents to the disclosure. ⁶¹
Natural parent	Can receive identifying information about an adult adopted person and adoptive parent without their consent. Identifying information about an adopted child can only be given if each adoptive parent consents to the disclosure. ⁶² The child's wishes must also be considered.
Adoptive parent	Identifying information about a natural parent can only be given if the natural parent consents. ⁶³
Natural relative	Identifying information about an adopted person or adoptive parent cannot be given unless 'circumstances exist which make [the disclosure] desirable'. ⁶⁴ Consent requirements apply.
Adult children of adopted person	Can receive identifying information about a natural parent or a natural relative of the adopted person without the parent or relative's consent. ⁶⁵ The adopted person must be notified. ⁶⁶

Question

35 Are the rights to adoption information and the limitations on those rights fair to all people involved in the adoption process? If not, what changes are needed?

Privacy

- 8.62 Privacy is important for many people affected by adoption, who may not want information about them disclosed or contact from another party.
- 8.63 Privacy is protected in Victorian law. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) contains a right to privacy.⁶⁷ The *Privacy and Data Protection Act 2014* (Vic), which applies to the adoption information services, protects people's personal information.
- 8.64 However, protection of privacy is not absolute. The right to privacy in the Charter is limited to protection from unlawful or arbitrary interference with a person's privacy.⁶⁸ The Privacy and Data Protection Act gives way to other laws, such as the Adoption Act, which allow personal information to be disclosed.⁶⁹
- 8.65 The information provisions in the Adoption Act authorise and require disclosure of identifying information about a person. The Adoption Act also contains provisions which seek to balance the rights of one person to have information relating to an adoption with another person's right to privacy.
- 8.66 The Adoption Act states that a person is not entitled to any information about the personal affairs of someone else unless the Adoption Act allows it.⁷⁰
- 8.67 The privacy protections in the Adoption Act include the consent requirements discussed above and the ability to record wishes about contact and disclosure of information on the information register.⁷¹ A person's name and address on the information register cannot be disclosed unless the Adoption Act permits it.⁷² Adoption information services must ensure that any information given does not 'unreasonably' disclose 'the personal affairs' of a natural parent, relative or any other person.⁷³
- 8.68 However, in some situations the protection of privacy is limited, for example where:
- An adult adopted person seeks identifying information about a natural parent or a relative.
 - A natural parent seeks identifying information about an adopted person.
- 8.69 In these cases, the identifying information can be released without the consent of the other party (see Table 3 above).⁷⁴ The information can be released even if the person has recorded on the adoption information register that they do not want information disclosed or contact from another party.⁷⁵ The person cannot prevent the release of the information.

65 Ibid s 96A(2).

66 Ibid s 96A(3).

67 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13.

68 Ibid. The right is also subject to reasonable limits: s 7(2).

69 *Privacy and Data Protection Act 2014* (Vic) s 6(1).

70 *Adoption Act 1984* (Vic) s 88.

71 Ibid s 103(3).

72 Ibid s 103(4).

73 Ibid s 91.

74 Ibid ss 90, 93(1).

75 The *Adoption Act 1984* (Vic) does not require adoption information services to comply with the person's wishes. As discussed above, the Act requires the information to be disclosed if the person is entitled to it. See *Access to Information about an Adoption: Information Sheet for Adopted Persons, Natural Parents and Other Family* (2015) 3 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

- 8.70 The information can be given without the person's knowledge, because (except in limited cases)⁷⁶ there is no requirement in the Adoption Act that people be notified about a request for information relating to them.⁷⁷ Nor is there a requirement that wishes recorded on the adoption information register be conveyed to the person requesting the information. The Commission understands this would generally happen in practice, but if a person is told about those wishes, the wishes may not be respected.⁷⁸
- 8.71 This means unwanted contact can occur. For example, an adopted person could obtain identifying information about a natural parent without the natural parent's knowledge. The adopted person could then make contact with the natural parent. If the contact is not welcome, this could be a highly distressing situation for all concerned.
- 8.72 The Commission is interested in the community's views about whether the Adoption Act strikes a fair and reasonable balance between the rights of people seeking adoption information and the privacy rights of people affected by a request for information.

Questions

- 36 Is the balance in the Adoption Act between providing access to information and protecting people's privacy appropriate? If not, what changes are needed?
- 37 What factors should be taken into account in deciding to release identifying information about a person?

The release of information

- 8.73 This section discusses issues that could arise when decisions are made about the release of adoption information. The provisions that apply in these situations are not always clear.

Decisions by adoption information services

- 8.74 When handling a request for information, an adoption information service must determine whether the person is entitled to the information under the information provisions.
- 8.75 This decision might be difficult. Depending on the circumstances, it can be difficult to determine whether information is 'identifying' or 'non-identifying' information under the Adoption Act. For example, while a person's date of birth alone may not identify the person, in combination with other pieces of information, it could lead to the person being identified.

⁷⁶ An adopted person (adult) must be notified when an adoption information service intends to give identifying information about a natural parent or natural relative to an adoptive parent or adult natural child of the adopted person: see [8.60] above and *Adoption Act 1984* (Vic) s 96A(3).

⁷⁷ By contrast, section 62 of the *Assisted Reproductive Treatment Act 2008* (Vic) provides that if the Registrar of BDM 'intends to disclose identifying information' to a person entitled to the information under that Act (see Part 6, Division 3), 'the Registrar must make all reasonable efforts to give notice of the intended disclosure to the person to whom the information relates'.

⁷⁸ The Adoption Legislation Review Committee recommended that an adoption information service 'have an obligation to inform [an adopted person] of the wishes of the natural parent regarding contact, if such information is recorded. Contact should not be actively promoted where a natural parent or adult adoptee has indicated that they do not want contact' (Recommendation 66). See Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 103.

- 8.76 The decision whether information is ‘identifying’ or ‘non-identifying’ is important because it could mean that a person’s consent is required before the information can be released (see the section beginning at [8.56] above). However, there is little guidance in the Adoption Act about what identifying information is.⁷⁹

Decisions by other agencies

- 8.77 Complications could arise when an adoption information service requests information from another agency.
- 8.78 Agencies must comply with a request for information from the Secretary ‘so far as [they are] able to do so’.⁸⁰ These words leave room for interpretation. An agency may hold the required information but consider there are legal and policy reasons which prevent its release.⁸¹

Question

- 38 Should the provisions of the Adoption Act relating to the release of adoption information be made clearer? If yes, what changes are needed?

Birth certificates

- 8.79 This section discusses how an adopted person’s identity is reflected on their birth certificate. The terms of reference ask the Commission to consider this issue, which is important for many adopted people, parents and adoptive parents.

The issues

- 8.80 Birth certificates are significant documents.⁸² They provide legal proof of a person’s identity⁸³ and are the primary form of identification used in a wide range of situations, including school enrolments and passport applications. They are evidence of parental responsibility for a child.⁸⁴
- 8.81 A birth certificate tells the story of a person’s beginnings. It is a record of a person’s birth and includes details such as when and where a person was born, the names they were given, who their parents are and the families they belong to. This aspect of a birth certificate has particular significance for adopted people and their natural parents.

79 As explained at fn 23 above, the *Adoption Act 1984* (Vic) does not define ‘identifying information’ and ‘non-identifying information’ or use these terms. The terms are used in the *Assisted Reproductive Treatment Act 2008* (Vic). It defines ‘identifying information’ as ‘information from which a person will or may be identified, directly or indirectly’: s 64. See also s 3 (definition of ‘identifying information’). ‘Non-identifying information’ means ‘information other than identifying information’: s 3 (definition of ‘non-identifying information’). The *Queensland Adoption Act 2009* (Qld) also uses the terms ‘identifying information’ and ‘non-identifying information’. ‘Identifying information’ means ‘information that identifies a party to an adoption’: s 279. This includes information that is likely to lead to a person being identified: s 248. The Act clarifies that ‘[i]nformation may identify a person, if given to another person, because of other information that the person has or is able to obtain’: s 248. It defines ‘non-identifying information’ as ‘information other than identifying information’: s 279.

80 *Adoption Act 1984* (Vic) ss 90(1)(a)(ii), 123. See also ss 79B, 90(2) explained at fn 39 above. The Adoption Legislation Review Committee considered that an adoption information service would not be able to ‘operate effectively and without risk of error unless it [had] direct access to [the] records’. It stated: ‘The Adoption Information Service should be given the legal right of access to records at the Government Statist [now the Registrar of BDM] and court adoption records. This may be the only way by which information on a particular child can be ascertained’. See Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee (1983)* 98.

81 For example, BDM has a policy relating to access to its records: *Births, Deaths and Marriages Registration Act 1996* (Vic) s 47; Births, Deaths and Marriages Victoria, *Access Policy* (23 March 2015) <<http://www.bdm.vic.gov.au/utility/about+bdm/legislation+and+policies/>>.

82 See, generally, Victorian Law Reform Commission, *Birth Registration and Birth Certificates, Report No 25* (2013).

83 *Births, Deaths and Marriages Act 1996* (Vic) s 46. A certificate issued by the Registrar of BDM certifying particulars in an entry in the BDM Register is ‘admissible in legal proceedings as evidence of (a) the entry to which the certificate relates; and (b) the facts recorded in the entry’. See, generally, Victorian Law Reform Commission, *Birth Registration and Birth Certificates, Report No 25* (2013).

84 *Status of Children Act 1974* (Vic) s 8; *Family Law Act 1975* (Cth) ss 69R, 102.

- 8.82 When a child is adopted, a new birth certificate is created. It replaces the child's original birth certificate, which is no longer valid. The new certificate looks like the birth certificate of every other person. It names the adoptive parents as the child's parents and does not mention the parents to whom the child was born.
- 8.83 This reflects the legal effect of adoption. As discussed in Chapter 3, the adoptive parents become the child's parents and the law treats the child as if the child were born to them.⁸⁵
- 8.84 Thus, the birth certificate does not reflect that an adopted person is part of two families. For some adopted people, this means a crucial part of their identity and origins is not reflected on the birth certificate—the main official record of their identity. It is also significant to some natural mothers and fathers, because their relationship with the adopted person is not reflected on the birth certificate. For them, this represents an extinguishment of their fundamental connection with the child.
- 8.85 The concerns of adopted people and natural parents were expressed to the 2012 Senate Community Affairs References Committee on Commonwealth Contribution to Former Forced Adoption Policies and Practices.⁸⁶ It 'heard evidence from both adopted people and mothers saying that the truthful recording of a birth was fundamental to a person's identity'.⁸⁷ It referred to the anguish caused to adopted people and natural mothers and fathers.⁸⁸
- 8.86 The 2015 review of South Australia's adoption law (discussed in earlier chapters) heard similar concerns and reported adopted people's feelings of identity confusion and 'pain'.⁸⁹
- 8.87 Both the Senate Committee and South Australian review recommended changes. These are discussed below at [8.100]–[8.101]. The following sections discuss the historical background and the relevant law in Victoria.

Historical background

- 8.88 Victoria's earliest adoption legislation, the *Adoption of Children Act 1928* (Vic), 'provided adopted children with a new birth certificate naming the adoptive parents as [the child's parents]'.⁹⁰ The new certificate was a copy of information entered into an 'Adopted Children Register' when a child was adopted.⁹¹ The original birth certificate was not available, 'except under an order of a court'.⁹²

85 *Adoption Act 1984* (Vic) s 53.

86 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012). See Chapter 2 for more information about this Inquiry.

87 *Ibid* 250.

88 *Ibid* 250–1.

89 Lorna Hallahan, *Adoption Act 1988 (SA) Review* (2015) 15, 66.

90 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 73; *Adoption of Children Act 1928* (Vic) ss 17–18.

91 *Adoption of Children Act 1928* (Vic) ss 17–18. The 1928 Act required the child's birth entry to be marked with the word 'Adopted' and a 'fresh entry' of the child's birth to be made: ss 17(3), 18(1). A 'certified copy' of an entry in the Adopted Children Register provided proof of the adopted person's date of birth 'in all respects as though [it] were an entry in a register book of births': s 17(5).

92 *Adoption of Children Act 1928* (Vic) s 18(3); Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 73.

- 8.89 The same practices continued under the *Adoption of Children Act 1958* (Vic)⁹³ and *Adoption of Children Act 1964* (Vic).⁹⁴
- 8.90 When the Adoption Legislation Review Committee reviewed Victoria's adoption law in 1983 (see Chapter 2), the committee considered what form an adopted person's birth certificate should take. Its view was that an adopted person's birth certificate should look identical to every other person's birth certificate:⁹⁵
- The Committee has concluded that a birth certificate for an adoptee should not differ in format or content (apart from the schedule Number) from the birth certificate of a natural born child. While the Committee considers that adoption should be an open matter, disclosure of the person's status should be a matter for the choice of that person and/or his/her adoptive parents and not inevitable through the production of the birth certificate. Further, the fact that a person is adopted is irrelevant to many people to whom a birth certificate may need to be produced.
- 8.91 The Committee's view was reflected in the 1984 Adoption Act, which followed the same approach as the previous legislation,⁹⁶ but enabled adopted people to have access to their original birth certificate on turning 18.⁹⁷

Birth certificates in Victoria today

- 8.92 Current law does not require birth certificates in Victoria to be in any particular form.⁹⁸ The main legislation that relates to birth certificates in Victoria, the *Births, Deaths and Marriages Registration Act 1996* (Vic) (BDMR Act), leaves the form of birth certificates to the discretion of the Registrar of Births, Deaths and Marriages (BDM).⁹⁹ There is no provision in the BDMR Act that relates specifically to the birth certificates of adopted people.¹⁰⁰

93 The 1958 Act largely replicated the provisions in the 1928 Act, but it did not require a 'fresh' birth entry to be made. See ss 18–19. See also fn 135 below. The report of the Senate Community Affairs References Committee noted that a 1961 Victorian brief regarding national model adoption legislation (see Chapter 2) stated that 'the "sealing of [a] child's previous registration of birth and substitution of one in which [the child] is recorded as a child of the adopters" was one of the two principal effects of an adoption order': Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 172. See also 12, 155, 173.

94 The *Adoption of Children Act 1964* (Vic) required the Government Statist to register 'memorandums of adoption orders' in a 'Register of Adoptions' and 'make alterations' to the entry in the 'Register of Births' as prescribed by regulations: ss 57, 67. The *Adoption of Children Regulations 1965* (Vic) required the Government Statist to mark the entry in the Register of Births with the word 'Adopted'. The Government Statist could not 'open for inspection or issue an extract from or copy of any entry' with that marking except under court order: reg 36. The Government Statist entered particulars in the Adopted Children Register, including the child's name, sex and date of birth and names and addresses of the child's 'Father and Mother', who were the 'two spouses' who adopted the child: regs 33, 39, eighth sch. A 'certified copy of an entry in the Adopted Children Register' could be issued (reg 37), which the 1964 Act provided 'was *prima facie* evidence of ... the facts stated [in the copy]': s 66. See also Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 30.

95 Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 31. Recommendation 10.1 stated: 'That the Birth Certificate (Certified Copy of Entry) of an adopted child be identical in format with, but under a different schedule from that of a natural born child': 38. The Committee also recommended: 'That provision be made in legislation for a person to apply in writing to the Government Statist to ascertain whether he/she had been adopted, and for the Government Statist to give this information': Recommendation 10.3, 38. That recommendation was not implemented.

96 The provisions in the 1984 Act followed the 1965 Adoption of Children Regulations. See, eg, *Adoption Act 1984* (Vic) ss 70, 74–78. Sections 74 and 78 were later amended by the *Adoption (Amendment) Act 1987* (Vic). From 1984 to 1987, s 78 stated that: 'Upon application, the Government Statist shall... issue... an extract from, or certified copy of, an entry in the Adopted Children Register'.

97 The Adoption Legislation Review Committee considered that adopted people were entitled to a copy of their original birth certificate (Recommendation 43). See Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 31, 90, 98, 101. The Committee also considered that where a step-parent or relative adopted a child, 'access to the original birth certificate be maintained' in addition to the issuing of a new birth certificate (Recommendations 31 and 33): see 55–6. The Committee's recommendations are reflected in section 92 of the *Adoption Act 1984* (Vic).

98 Previous legislation has prescribed that adopted people's birth certificates be in a particular form. 'Sixth Schedule' birth certificates were issued under the *Adoption of Children Act 1958* (Vic) and *Registration of Births, Deaths and Marriages Regulations 1960* (Vic). See fn 135 below. From 1989 to 1997, the *Births Deaths and Marriages (Prescribed Forms and Procedures) Regulations 1986* (Vic) (as amended by a series of amending regulations in 1989, 1992 and 1993) prescribed 'Birth Registration' forms for the purposes of s 78 of the *Adoption Act 1984* (Vic). These regulations also provided for copies of entries from the Adopted Children Register to be issued: reg 21, as amended by the *Births Deaths and Marriages (Prescribed Forms and Procedures) (Amendment) Regulations 1987* (Vic) regs (2)–(4).

99 *Births, Deaths and Marriages Act 1996* (Vic), s 46. The Registrar may issue a certificate 'certifying particulars in an entry'.

100 The *Births, Deaths and Marriages Act 1996* (Vic) contains few provisions about adoption. It states that one of the objects of the Act is the keeping of registers for recording and preserving information about adoptions: s 3(c). Adoption is a 'registrable event': s 4 (definition of 'registrable event').

- 8.93 The Adoption Act contains a number of provisions relating to adopted people's birth records and birth certificates.¹⁰¹ These provisions are similar to those in Victoria's previous adoption legislation. They require:
- the County Court to send a record of the adoption order (called a memorandum of adoption order) to the Registrar of BDM¹⁰²
 - the Registrar to record details of the adoption in the BDM register,¹⁰³ including:¹⁰⁴
 - the child's date and place of birth and name under the adoption order
 - the adoptive father's given and family names and age when the child was born
 - the adoptive mother's given names, family name and maiden name and age when the child was born
 - the Registrar to mark the birth registration entry that relates to the child with the word 'adopted'.¹⁰⁵
- 8.94 The new information supersedes the original birth registration entry containing the details of the child's natural parents. That entry, marked 'adopted', is closed.¹⁰⁶ The new entry becomes the current record of the child's birth. It provides the information that goes onto the child's new birth certificate.¹⁰⁷
- 8.95 The adopted person can obtain the original birth certificate under the Adoption Act when the person turns 18,¹⁰⁸ but it cannot be used as valid proof of identity.¹⁰⁹ Only the post-adoption birth certificate can be used for identification purposes.
- 8.96 Some options for change are discussed in the next section.

Options and considerations

- 8.97 The Commission's terms of reference require it to consider alternative ways of reflecting an adopted person's identity on a birth certificate. This section considers some possible options for reform and some of the factors that will need to be taken into account.

101 The Commission understands that this part of the Adoption Act requires modernising as it refers to practices no longer in use at BDM. See Chapter 9.

102 *Adoption Act 1984* (Vic) s 70(1)(a). The form is available on the County Court website: County Court Victoria, *Adoption and Parentage Procedure* <<https://www.countycourt.vic.gov.au/adoption-and-parentage-procedure>>. See also *Adoption of Children Act 1928* (Vic) s 17(4); *Adoption of Children Act 1958* (Vic) s 18(4); *Adoption of Children Act 1964* (Vic) s 57.

103 The *Adoption Act 1984* (Vic) continues to refer to the Adopted Children Register: s 70. The *Births, Deaths and Marriages Act 1996* (Vic) refers to a single 'Register', which 'may be wholly or partly in the form of a computer data base, in documentary form, or in another form the Registrar considers appropriate': see s 41.

104 *Adoption Act 1984* (Vic) s 70(1)(b); *Adoption Regulations 2008* (Vic) reg 38(3). See also *Adoption of Children Act 1928* (Vic) s 17(1)–(3), sch; *Adoption of Children Act 1958* (Vic) s 18(1)–(3), 19, second sch; *Adoption of Children Regulations 1965* (Vic) regs 33, 39, eighth sch.

105 *Adoption Act 1984* (Vic) s 74. See also *Adoption of Children Act 1928* (Vic) s 17(3)–(4); *Adoption of Children Act 1958* (Vic) s 18(3)–(4); *Adoption of Children Regulations 1965* (Vic) reg 36.

106 Unless the Adoption Act or a court order gives access to it: *Adoption Act 1984* (Vic) s 74(3). The Registrar must not permit inspection of the entry, or issue an extract from or copy of the entry, except as provided by the Adoption Act or required by a court order. The Adoption Act allows the Registrar to issue a copy of the entry to a natural parent: s 74(4). The *Supreme Court (Adoption) Rules 2015* (Vic) require a couple applying for an adoption order to serve a copy of the child's birth certificate on the child's guardian (the Secretary or a principal officer): r 13. The report to the court about the proposed adoption must include a copy of the birth certificate: r 23(3).

107 This is not expressly provided as it was under the previous adoption legislation and the previous version of s 78 of the *Adoption Act 1984* (Vic) (see fns 91, 94, 96 above). The current s 78, introduced in 1987, states that if an adopted person or adoptive parent applies to the Registrar of BDM 'for an extract from, or copy of an entry in the Register of Births relating to the birth of the adopted person', the Registrar must issue an extract or copy under the BDMR Act 'which, as far as is practicable, contains all of the items of information which are required to be included in an extract or copy issued to a person who is not an adopted person': s 78(1)–(2). See also (3)–(8). The current *Births, Deaths and Marriages Registration Act 1996* (Vic) does not prescribe a particular form of birth certificate: see [8.92] above.

108 *Ibid* ss 92(2)(a), (4)–(6); *Adoption Regulations 2008* (Vic) reg 40, sch 22. The adopted person must receive counselling in accordance with s 87: see [8.48] and Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 98. See also fn 97 above; *Adoption Act 1984* (Vic) ss 92(1), 74(4), 78; Department of Human Services, Government of Victoria, *Adoption and Permanent Care Learning Guide* (Part 1 'Introduction') 9 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

109 The relevant provisions of the *Adoption Act 1984* (Vic) (s 92) are unclear and the Commission understands some of them may be redundant (see Chapter 9). The Adoption Act states that the Registrar may issue 'an extract from, or certified copy of, the entry in the Register of Births relating to the person': s 92. An extract must be marked with the word 'adopted': *Adoption Act 1984* (Vic) s 92(5)–(6). The Commission understands that an extract or certified copy is not a certificate issued under section 46 of the *Births, Deaths and Marriages Act 1996* (Vic). Under previous legislation, certified copies of birth entries provided *prima facie* evidence of births: see, eg, *Registration of Births Deaths and Marriages Act 1928* (Vic) ss 46, 50; *Registration of Births Deaths and Marriages Act 1958* (Vic), ss 49, 53; *Registration of Births Deaths and Marriages Act 1959* (Vic) ss 47, 53, later amended by *Registration of Births Deaths and Marriages (Amendment) Act 1985* (Vic) s 8.

- 8.98 There are different views about how this should be done. Origins Victoria suggested to the Senate Committee that an adopted person have two certificates, the original birth certificate and post-adoption birth certificate, both legally valid.¹¹⁰
- 8.99 The Senate Committee expressed concerns about this suggestion. It considered that ‘risks of security, fraud and identity theft’ could arise if a person had two ‘legally valid identity documents’.¹¹¹
- 8.100 The South Australian review recommended that a birth certificate ‘reflect the “truest possible” account’ of a child’s birth history, but did not recommend a particular way of doing this.¹¹²

Integrated birth certificates

- 8.101 The Senate Committee recommended the introduction of an ‘integrated birth certificate’ that records both the natural and adoptive parents of an adopted person. It recommended that:
- all jurisdictions adopt integrated birth certificates, that these be issued to eligible people upon request, and that they be legal proof of identity of equal status to other birth certificates.¹¹³
- 8.102 The Victorian Government responded to this recommendation in 2012 with ‘support for the development of an integrated birth certificate in conjunction with national reforms relating to documentation and provisions of birth and adoption records’.¹¹⁴
- 8.103 New South Wales legislation is consistent with the Senate Committee’s recommendation.¹¹⁵ An adopted person can receive an ‘adopted person’s birth record’.¹¹⁶ This is a ‘single certificate’ that certifies details about both birth and adoption.¹¹⁷ The Commission understands it cannot be used for identification purposes.
- 8.104 The view of the Victorian Registry of Births Death and Marriages (BDM) is that the BDMR Act does not enable BDM to issue an integrated document with the legal status of a birth certificate.¹¹⁸ In addition, the Commission understands that it is not currently technically possible for BDM to produce integrated birth certificates from the BDM Register. BDM is considering the feasibility of creating integrated birth certificates as part of specifications for a replacement IT system, due to be implemented in 2017.¹¹⁹

110 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) 252, 256.

111 Ibid 256.

112 Lorna Hallahan, *Adoption Act 1988 (SA) Review* (2015) 15, 66–7.

113 Senate Community Affairs References Committee, Parliament of Australia, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (2012) Recommendation 13.

114 The Hon Ted Baillieu MP, Premier and Minister for the Arts, and The Hon Mary Wooldridge MP, Minister for Mental Health, Minister for Women’s Affairs and Minister for Community Services, ‘Parliament apologises for past adoption practices’ (Media release, 25 October 2012).

115 New South Wales Registry of Births, Deaths and Marriages, *Birth Certificate Content Review* (2014) 7 <www.bdm.nsw.gov.au/Documents/BDM-birth-cert-review-2014.pdf>.

116 *Adoption Act 2000* (NSW) s 133C; *Births, Deaths and Marriages Registration Act 1995* (NSW) s 49(4). These provisions were enacted in 2000.

117 *Births, Deaths and Marriages Registration Act 1995* (NSW) s 49(4). The New South Wales Registry of Births, Deaths and Marriages website states that an adopted person’s birth record cannot be used for identification purposes: New South Wales Registry of Births, Deaths and Marriages, *Adoptions* (18 April 2016) <www.bdm.nsw.gov.au/Pages/births/adoptions.aspx>.

118 Email correspondence from Erin Keleher, Registrar of Births, Deaths and Marriages, to the Commission, 5 June 2016. Under section 46 of the *Births, Deaths and Marriages Act 1996* (Vic), the Registrar may issue a certificate certifying particulars contained in an entry in the BDM Register and the certificate is admissible in legal proceedings as evidence of the entry to which the certificate relates and the facts recorded in the entry.

119 Email correspondence from Erin Keleher, Registrar of BDM, to the Commission, 5 June 2016.

Birth certificates of donor-conceived people

- 8.105 In 2007, the Commission considered birth certificates for people conceived through donor treatment procedures, in its report on assisted reproductive technology (ART) and adoption.¹²⁰
- 8.106 In 2008, Parliament enacted a provision relating to the birth certificates of donor-conceived people, in the BDMR Act.¹²¹
- 8.107 The Commission's views in the 2007 report and the reasons behind the BDMR Act provision are relevant to this discussion and outlined below.

Commission's 2007 report on ART and adoption

- 8.108 The Commission received submissions about the form of birth certificates from donor-conceived people and people involved in adoption. People in both groups considered 'that birth certificates should always display the names of a child's genetic parents, to reflect the biological truth about his or her parentage, and to guard against the secrecy that has historically accompanied donor conception and adoption'.¹²² Some submissions from donor-conceived people argued for the donor's details to be included on their birth certificates. Other submissions suggested that donor-conceived people should have two birth certificates: 'one that records all the relevant information about a child's parentage, and another that contains only the information which is required for official purposes'.¹²³
- 8.109 The Commission considered these arguments and concluded that no change should be made to the birth certificates of donor-conceived people, due to 'the primary role that birth certificates play as documents with legal consequences'.¹²⁴ The report stated:¹²⁵

Having regard to these consequences, the Commission believes that only those people who are recognised as the legal parents of the child should be named on the birth certificate ... A donor should not be recorded on the register of births or on a child's birth certificate.

Although birth certificates do have symbolic value for many people, that is not their primary purpose. To include information on the birth certificates that does not give rise to legal obligations and which does not assist in identifying a person for legal and administrative purposes would create confusion about a person's legal status in respect of the child. This could lead to problems with organisations such as government agencies, schools and health providers. It is also likely that a birth certificate listing such information would not be accepted for official purposes both within Australia and internationally.¹²⁶

120 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007). See Chapter 2 for more information.

121 *Assisted Reproductive Treatment Act 2008* (Vic) s 153, as repealed by *Statute Law Revision Act 2015* (Vic) s 3, sch 1, cl 6.

122 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 142.

123 *Ibid* 143.

124 *Ibid* 145–6. See also 191 and Recommendation 128.

125 *Ibid*.

126 The Commission was concerned about creating a potential conflict with the *Status of Children Act 1974* (Vic). It explained that if a donor were named on a person's birth certificate, the person could produce the certificate in court as evidence that the donor was a parent of the child, to establish a legal right, for example, to the donor's deceased estate: *Births, Deaths and Marriages Registration Act 1996* (Vic) s 46; *Status of Children Act 1974* (Vic) s 8; *Family Law Act 1975* (Cth) ss 69R, 102. The Commission considered '[t]his would clearly conflict with the provisions of the Status of Children Act that remove any legal responsibilities from the donor' and, although the presumption could be rebutted, it would be 'undesirable for this conflict to arise in the first place'.

Amendment to BDMR Act in 2008

- 8.110 Parliament passed legislation in response to the Commission's 2007 report.¹²⁷ This included a provision relating to the birth certificates of donor-conceived people.¹²⁸
- 8.111 This provision requires that when the Registrar issues a birth certificate relating to the birth of a person conceived by a donor treatment procedure,¹²⁹ the Registrar must attach an addendum to the certificate stating that 'further information is available' about the person's birth.¹³⁰
- 8.112 The provision was introduced to ensure that information about the person's genetic origins is available to them.¹³¹ Members of Parliament who supported the provision considered donor-conceived people were entitled to this information about their identity and background. They intended that the provision would encourage parents to be open with their donor-conceived children about the children's origins.¹³²
- 8.113 Supporters of the provision also stressed that it did not create a different form of birth certificate, but simply indicated on a separate document that further information was available.¹³³ They considered it important that the birth certificates of donor-conceived people be indistinguishable from other birth certificates, to respect their privacy and avoid possible discrimination.¹³⁴ Some speeches spoke of not repeating past practices such as 'Sixth Schedule' birth certificates, which had provided a 'subtle' or 'cryptic' indication that a person had been adopted.¹³⁵

Considerations

- 8.114 The function of a birth certificate must be considered as well as its form. A birth certificate is relied upon for many purposes as legal proof of a person's identity. There is a question whether an integrated birth certificate, or another form of birth certificate, should or can be used for this purpose.
- 8.115 The Commission must ensure any recommendations for change are practical and do not give rise to the kinds of potential problem identified in the 2007 ART and adoption report and the Senate Committee's 2012 report. It is also important that any recommendation can be implemented operationally. These considerations need to be taken into account.

127 *Assisted Reproductive Treatment Act 2008* (Vic).

128 *Ibid* s 153, as repealed by *Statute Law Revision Act 2015* (Vic) s 3, sch 1, cl 6. The provision was added to the Assisted Reproductive Technology Bill during the parliamentary debates: Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 2008, 4013–19; 4 December 2008, 5048–57.

129 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B. A 'donor treatment procedure' is 'a treatment procedure in which donor gametes or a donor embryo is used': *Births, Deaths and Marriages Act 1996* (Vic) s 17B(4); *Assisted Reproductive Treatment Act 2008* (Vic) s 3 (definition of 'donor treatment procedure'). 'Treatment procedure', 'donor gametes' and 'donor embryo' are defined in section 3 of the *Assisted Reproductive Treatment Act 2008* (Vic) (ART Act). As noted above at fn 95, the Adoption Legislation Review Committee recommended 'that provision be made in legislation for a person to apply in writing to the Government Statist to ascertain whether he/she had been adopted, and for the Government Statist to give this information': Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) Recommendation 10.3, 38. The recommendation was not implemented.

130 *Births, Deaths and Marriages Registration Act 1996* (Vic) s 17B(2). The Registrar must not issue the addendum to any person other than the person conceived by a donor treatment procedure named in the entry.

131 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 2008, 4013–14 (Robert Hudson), 4014–15 (Robert Clark), 4015–16 (Christine Campbell). If the person wishes to obtain further information, the person may make an application to the Registrar of BDM under Part 6 of the ART Act. One of the parliamentary speeches emphasised the importance of access to genetic information concerning inheritable diseases: Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 2008, 4015 (Peter Crisp).

132 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 2008, 4013 (Robert Hudson), 4014–15 (Robert Clark), 4015–16 (Christine Campbell), 4016–4017 (Telmo Languiller), 4017–18 (Denis Napthine), 4018 (Robert Hudson), 4019 (Robert Clark); 4 December 2008, 5050 (Robert Clark), 5053 (Robert Hudson). One of the guiding principles of the ART Act is that 'children born as the result of the use of donated gametes have a right to information about their genetic parents': s 5(c). The Adoption Act does not contain a principle like this. The Adoption Legislation Review Committee considered that giving adopted people a 'right of access to information would encourage openness about the adoption which could enable the child to achieve a proper sense of identity': Victoria, Adoption Legislation Review Committee, *Report of Adoption Legislation Review Committee* (1983) 91. There is no requirement in the ART Act or the Adoption Act that parents tell their children about their origins.

133 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 9 October 2008, 4014 (Robert Hudson), 4014–15 (Robert Clark), 4016–17 (Telmo Languiller), 4018 (Robert Hudson), 4019 (Robert Clark); 4 December 2008, 5048 (Rob Hulls, Attorney-General).

134 See, eg, *ibid*, 9 October 2008, 4016 (Rob Hulls, Attorney-General), 4016–17 (Telmo Languiller), 4017–18 (Denis Napthine).

135 See, eg, *ibid*, 9 October 2008, 4013–14 (Robert Hudson), 4015 (Robert Clark). 'Sixth Schedule' birth certificates were issued under the *Adoption of Children Act 1958* (Vic) and *Registration of Births, Deaths and Marriages Regulations 1960* (Vic). The form of the certificate was prescribed by the Sixth Schedule of the 1960 Regulations. It was a 'certified copy of an entry in the Adopted Children Register' (reg 8) that the Government Statist was required to maintain under the 1958 Act: s 18. The certificate showed the child's date of birth, sex, full given name(s) and surname (the surname of the adoptive father or child's adopter) and the names and occupations of adoptive parents, who appeared on the certificate as 'Father and Mother'. These details were kept in the Adopted Children Register: ss 18–19. The Sixth Schedule certificate provided proof of the person's date of birth 'in all respects as though [it] were a certified copy of an entry in a register book of births': s 18(5). Certified copies of entries were *prima facie* evidence of a person's birth: *Registration of Births Deaths and Marriages Act 1959* (Vic) s 53.

- 8.116 It must be clear who has legal responsibility for a child, as the Commission noted in its 2007 report.¹³⁶ It is important that adoptive parents are able to clearly establish their role as parents.
- 8.117 Adopted people, natural parents and adoptive parents all have an interest in this issue. The Commission seeks their views, and those of the wider community, in response to the questions below.

Questions

- 39 How should an adopted person's identity be reflected on their birth certificate?
- 40 If a different form of birth certificate were available to adopted people, what legal status should it have?
- 41 Are there any problems with introducing integrated birth certificates or another form of birth certificate? If yes, what are the problems and how could they be addressed?

Changing the adopted child's name

- 8.118 This section considers the ability under the Adoption Act of adoptive parents to change the given names of the child they adopt.¹³⁷
- 8.119 A child's name is central to their identity. It may provide a connection to the child's family of origin and cultural background. Article 8 of the United Nations *Convention on the Rights of the Child* states that every child has a right 'to preserve his or her identity, including nationality, name and family relations'.¹³⁸ A guiding principle in the New South Wales Adoption Act is that:¹³⁹
- the child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved.
- 8.120 The court must consider this principle before approving a change to the given names of children who are more than one year old or non-citizen children.¹⁴⁰
- 8.121 In Victoria, an adopted child's name may change under the Adoption Act. The child's family name usually changes to the adoptive family's surname, provided the County Court approves.¹⁴¹ The child's given names may also change if the adoptive parents request it in the application for the adoption order, and if the County Court approves.
- 8.122 Before approving a change of given name, the Court must be satisfied that, as far as practicable given the child's age and level of understanding, the wishes and feelings of the child have been ascertained and given due consideration.¹⁴² The Court must also have regard to the overarching principle that 'the welfare and interests of the child' are the 'paramount consideration'.¹⁴³

136 Victorian Law Reform Commission, *Assisted Reproductive Technology & Adoption, Report No 12* (2007) 145–6. See also 113–14, 185–6.

137 The Adoption Act does not affect the ability to change the name of an adopted child after the adoption order is made, under the *Births, Deaths and Marriages Registration Act 1996* (Vic): *Adoption Act 1984* (Vic) s 56(3).

138 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 8(1).

139 *Adoption Act 2000* (NSW) s 8(1)(e).

140 *Ibid* s 8(1)(e), s 101(5). For information about non-citizen children, see Chapter 3.

141 *Adoption Act 1984* (Vic) s 56; *Adoption Regulations 2008* (Vic) sch 6; Department of Human Services, Government of Victoria, *Information for parents considering adoption of their child* (2008) 16 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications>>.

142 *Adoption Act 1984* (Vic) s 56(3).

143 *Ibid* s 9.

- 8.123 South Australia's law is similar to Victoria's, except that it requires that a child over 12 consent to a change of name (unless the child is 'intellectually incapable of consenting').¹⁴⁴
- 8.124 The recent South Australian review recommended that this law be changed to ensure a child's name is retained unless 'special circumstances' apply.¹⁴⁵ It considered that:
- [a] 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.
- 8.125 It suggested that where one of those special circumstances applied, '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'.
- 8.126 In the Australian Capital Territory a child's name can only be changed in 'exceptional circumstances'.¹⁴⁶ The legislation gives the following example:
- An exceptional circumstance would be if the given name is likely to make the child or young person vulnerable to ridicule or teasing in everyday life in Australian society.
- 8.127 The Commission seeks community views regarding the ability to change an adopted child's given names under the Adoption Act.

Questions

- 42 Is changing a child's given names consistent with the best interests of the child?
- 43 In what circumstances (if any) should the Adoption Act allow a child's given names to be changed?

144 *Adoption Act 1988* (SA) s 23(3). A child over 12 must consent in other jurisdictions: see, eg, *Adoption Act 2000* (NSW) s 101; *Adoption Act 1994* (WA) s 74.

145 Lorna Hallahan, *Adoption Act 1988 (SA) Review* (2015) 53.

146 *Adoption Act* (ACT) s 45(5).

Modernisation and operation of the Adoption Act

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9. Modernisation and operation of the Adoption Act

Introduction

- 9.1 The terms of reference ask the Commission to provide recommendations to modernise and improve the operation of the *Adoption Act 1984* (Vic) and *Adoption Regulations 2008* (Vic).
- 9.2 The previous chapters have considered a variety of issues and posed questions seeking community responses. These issues include consideration of the best interests principle and special provisions for Aboriginal and Torres Strait Islander children (Chapters 5 and 6), community attitudes and contemporary law about the family, including whether parts of the adoption process could be set out more clearly in the Adoption Act or Adoption Regulations (Chapter 7), and the information and privacy provisions (Chapter 8).
- 9.3 This chapter considers two topics: modernisation of the Act, and the issue of post-adoption support. The Commission is seeking community views on how to ensure that the procedural and operational requirements in the Adoption Act are suited to contemporary society and consistent with other law.

Modernisation

- 9.4 The Adoption Act became law in 1984. Since that time there have been numerous and significant amendments to it. They have reduced the readability of the Adoption Act, which is now difficult to understand and navigate.
- 9.5 The Commission's role is not to draft legislation, which is the role of the Office of the Chief Parliamentary Counsel.
- 9.6 The Commission notes that if a new Adoption Act were drafted for Victoria, it would be structured and modernised by the Office of the Chief Parliamentary Counsel in accordance with contemporary drafting practice. Many of the inconsistencies and structural issues in the Adoption Act would be resolved in this process. The navigability and readability of the Act would be improved.
- 9.7 The Commission's adoption report may make recommendations to help modernise the Adoption Act, including recommendations that may arise from considerations in preceding chapters. The next sections discuss possible improvements, including:
- the inclusion of a principles section
 - whether the terminology could be updated
 - whether procedural requirements in the Adoption Act provide appropriate safeguards without being unduly burdensome.

Principles to guide the adoption system

- 9.8 Chapter 5 considered whether it might be appropriate to provide more guidance to decision makers in determining a child’s best interests. One of the possibilities explored was the inclusion of a principles section in the Adoption Act which sets out the matters to be considered in determining the best interests of the child.
- 9.9 The Commission is also interested in the community’s views on whether the clarity and certainty of the Adoption Act might be improved through the inclusion of an ‘object’ section and (or alternatively) an overarching principles section to guide all decisions.
- 9.10 The adoption legislation in some Australian jurisdictions includes an object, to clarify the purpose of the Act, and principles to guide the exercise of power under the Act. This section discusses the approach taken in New South Wales and Queensland, which are the two most recent pieces of adoption legislation in Australia. These other laws might provide ideas that could usefully be applied in Victoria.

Adoption Act 2000 (NSW)

- 9.11 The *Adoption Act 2000* (NSW) provides that the objects of the Act are:
- to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice
 - to make it clear that adoption is to be regarded as a service for the child concerned
 - to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage
 - to recognise the changing nature of practices of adoption
 - to ensure that equivalent safeguards and standards to those that apply to children from New South Wales apply to children adopted from overseas
 - to ensure that adoption law and practice complies with Australia’s obligations under treaties and other international agreements
 - to encourage openness in adoption
 - to allow access to certain information relating to adoptions
 - to provide for the giving in certain circumstances of post-adoption financial and other assistance to adopted children and their birth and adoptive parents.¹
- 9.12 The *Adoption Act 2000* (NSW) provides a set of principles for people making decisions about the adoption of a child.² It requires a decision maker to have regard to the principles ‘as far as is practicable or appropriate’.³
- 9.13 The principles are:
- The best interests of the child, both in childhood and in later life, must be the paramount consideration.
 - Adoption is to be regarded as a service for the child.
 - No adult has a right to adopt the child.
 - If the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances.
 - The child’s given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved.

1 *Adoption Act 2000* (NSW) s 7.
 2 *Ibid* s 8(1).
 3 *Ibid*.

- Undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare.
- If the child is Aboriginal, the Aboriginal child placement principles are to be applied.
- If the child is a Torres Strait Islander, the Torres Strait Islander child placement principles are to be applied.⁴

Adoption Act 2009 (Qld)

9.14 *The Adoption Act 2009* (Qld) includes a 'main object section'. It describes the main object of the Act as:

to provide for the adoption of children in Queensland, and for access to information about parties to adoptions in Queensland, in a way that—

- (a) promotes the wellbeing and best interests of adopted persons throughout their lives; and
- (b) supports efficient and accountable practice in the delivery of adoption services; and
- (c) complies with Australia's obligations under the Hague convention.⁵

9.15 In addition to a main object section the Queensland legislation includes 'guiding principles'. It provides that 'this Act is to be administered under the principle that the wellbeing and best interests of an adopted child, both through childhood and the rest of his or her life, are paramount'.⁶

9.16 It requires that the Act be administered under a range of listed principles. These principles are subject to the requirement that the wellbeing and best interests of an adopted child, both through childhood and the rest of his or her life, be paramount. The list of principles is extensive. It includes:

- an explanation of the purpose of adoption, as being to provide for a child's long-term care, wellbeing and development by creating a permanent parent-child relationship between the child and the adoptive parents
- a principle providing guidance about when adoption is an appropriate long-term care option
- a principle that parties to an adoption or proposed adoption should be given the information reasonably needed to participate effectively in adoption processes
- a principle that the child should be kept informed of matters affecting him or her in a way and to an extent appropriate, having regard to the child's age and ability to understand
- a principle that the adoption process should include consideration of the views of the parents and the child (if the child is able to form and express views about the adoption, having regard to the child's age and ability to understand)
- a principle that an adopted child should have access to information about his or her ethnic or cultural heritage, opportunities to develop and maintain a connection with their ethnicity or culture, and opportunities to maintain contact with his or her community or language group
- principles about how the adopted child should be cared for, including that the care should promote openness and honesty about the child's adoption and the development of the child's emotional, mental, physical and social wellbeing
- a principle that although the adoption order changes legal relationships it may be in a child's best interests to have some form of contact with his or her family of origin.⁷

Questions

- 44 Should the Adoption Act include a section identifying the main object of the Act? If yes, how should the main object be described?
- 45 Should the Adoption Act include general principles to guide the exercise of power? If yes, what should these principles be?

Terminology

- 9.17 The terms of reference ask the Commission to ensure that the Adoption Act uses clear, contemporary language. The Commission has identified terminology that may require updating because it is inconsistent with other legislation, out of step with contemporary usage, or inadequately defined.
- 9.18 The Commission is seeking the community's views on what terminology in the Adoption Act needs updating.

Terminology that is inconsistent with other legislation

- 9.19 The Adoption Act uses the terms 'guardianship' and 'custody'.⁸ The concepts of guardianship and custody have been removed from both the *Children, Youth and Families Act 2005* (Vic) (CYF Act) as part of amendments made in 2014 and the *Family Law Act 1975* (Cth) as part of amendments made in 1995.⁹ These terms were replaced with 'parental responsibility'. This change in terminology was intended to displace the idea that parents have rights over children and instead focus attention on the responsibilities that parents have towards their children.¹⁰
- 9.20 The term 'access' is used in the Adoption Act to describe arrangements for various people with whom the child is not living to have contact with the child.¹¹ Amendments to the CYF Act in 2013 replaced the term access with 'contact' because access was considered to be 'outdated'.¹² The Family Law Act refers to people with whom the child communicates.¹³
- 9.21 In a small number of cases, specific terminology in the Adoption Act is used because it refers to a term used in another piece of legislation. An example of this is the various references in the Adoption Act to a 'guardian' for a non-citizen child under the *Immigration (Guardianship of Children) Act 1946* (Cth).¹⁴ The Commission is of the preliminary view that such terminology should not change because it would then become inconsistent with other legislation.
- 9.22 In other parts of the Adoption Act, the terminology is inconsistent with other legislation and it may be appropriate to update it to ensure consistency and clarity. An example of this is the references to 'the making of an order in relationship to the guardianship and custody of a child under the Family Law Act'.¹⁵ As discussed above, the Family Law Act now uses the concept of parental responsibility rather than guardianship.

⁸ See, eg, *Adoption Act 1984* (Vic) ss 45, 46, 53(1)(d).

⁹ *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic) s 4, amending *Children, Youth and Families Act 2005* (Vic) s 3(1); *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic) s 5, repealing *Children, Youth and Families Act 2005* (Vic) ss 4-5; *Family Law Reform Act 1995* (Cth) s 31, repealing and substituting *Family Law Act 1975* (Cth) pt VII.

¹⁰ Anthony Dickey, *Family Law* (Lawbook, 6th ed, 2014) 251.

¹¹ See, eg, *Adoption Act 1984* (Vic) ss 37(1), 59, 59A(c), 60(5), 62(2), s 68(1).

¹² *Children Youth and Families Amendment Act 2013* (Vic) s 4, repealing and inserting *Children Youth and Families Amendment Act 2005* (Vic) s 3(1); Explanatory Memorandum, *Children Youth and Families Amendment Bill 2013* (Vic) 2.

¹³ See, eg, *Family Law Act 1975* (Cth) ss 60B(2)(b), 64B(2)(e), 65NA.

¹⁴ See, eg, *Adoption Act 1984* (Vic) ss 33(6), 36.

¹⁵ *Ibid* ss 11(6)(a), 12(a).

Outdated terminology

- 9.23 The Adoption Act became law in 1984. Some of the language is difficult to understand because it is technical. Other terminology is outdated and inconsistent with contemporary language usage.
- 9.24 The Commission has identified the following language that it considers may be out of date or unduly technical:
- 'relationship of the whole blood or half-blood'¹⁶
 - 'relationship by affinity'¹⁷
 - 'putative father'¹⁸
- 9.25 The Adoption Act uses the terms 'adopted child' or 'adopted person', 'adoptive parent(s)' and 'natural parent(s)' to differentiate between the parties to an adoption, where differentiation is required for clarity. As acknowledged in Chapter 1, the Commission is aware that many people involved in adoption do not consider this language appropriate. Alternative terminology used in adoption legislation in other states and territories includes 'birth parents'¹⁹ and 'biological parents'.²⁰ The Commission notes that at times it is necessary to distinguish between the various parties to an adoption in order to delineate and protect rights and duties. It is seeking the community's views on the best terminology to use.
- 9.26 Amendments to the Adoption Act mean that same-sex couples and people who do not identify with a specific sex or gender will be eligible to adopt in Victoria from 1 September 2016 at the latest.²¹ At the time the amendments were made, there were no corresponding changes to the consent provisions. The existing consent provisions do not anticipate a situation where the relevant parents to provide consent to an adoption are, for example, two fathers or two mothers.²² It appears that this situation could already arise in fact.
- 9.27 The term 'Aborigine' is used in the Adoption Act and is defined as:
- a person who is descended from an Aborigine or Torres Strait Islander, identifies as an Aborigine or Torres Strait Islander, and is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.²³
- 9.28 The Commission acknowledges that the term 'Aborigine' is often considered inappropriate and may cause offence.²⁴ It also notes that the term 'Aboriginal person' or 'Aborigine' does not include Torres Strait Islander people, although it has been defined to do so in the Adoption Act.²⁵ The Commission recognises that Torres Strait Islanders are a separate people in origin, history and way of life.

16 Ibid ss 4(1) (definition of relative); 96A(1), 97(1).

17 Ibid s 4(1) (definition of relative).

18 Ibid s 49 (heading).

19 See, eg, *Adoption Act 2000* (NSW) ss 45A, 124, 133E.

20 See, eg, *Adoption Act 2009* (Qld) sch 3 definitions. 'Birth parent' is defined to describe both biological parents and someone who was a parent of the adopted person under a previous adoption.

21 *Adoption Amendment (Adoption by Same-Sex Couples) Act 2015* (Vic) s 2 provides that it will come into operation when proclaimed or no later than 1 September 2016.

22 *Adoption Act 1984* (Vic) ss 33(2), (3).

23 Ibid s 4(1).

24 See, eg, Oxfam Australia, *Aboriginal and Torres Strait Islander Cultural Protocols* (1 December 2007), 7 <resources.oxfam.org.au/pages/view.php?ref=223&k=>; Reconciliation Queensland, *Appropriate Terminology Use in Reconciliation Groups* (November 2008) 1 <rqi.org.au/wp-content/uploads/2012/01/appropriate_terminology.pdf>.

25 See, eg, Oxfam Australia, *Aboriginal and Torres Strait Islander Cultural Protocols* (1 December 2007), 7 <resources.oxfam.org.au/pages/view.php?ref=223&k=>; Reconciliation Queensland, *Appropriate Terminology Use in Reconciliation Groups* (November 2008), 1 <rqi.org.au/wp-content/uploads/2012/01/appropriate_terminology.pdf>.

Question

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

Outdated procedural requirements

- 9.29 Some of the procedural requirements in the Adoption Act may be out of step with contemporary technology, unduly time-consuming or arduous.
- 9.30 Some of the requirements relating to how the Registrar of Births, Deaths and Marriages keeps adoption records may be out of date. Contemporary record keeping is electronic rather than paper-based and therefore searchable in a different way. The Commission understands that some of the requirements to keep indexes of records may be obsolete.²⁶
- 9.31 Another example raised with the Commission is some of the requirements to publish notices in the *Government Gazette*, where these gazettals may not necessarily provide additional safeguards and oversight to ensure quality service provision. For example, the Secretary must publish notice in the *Gazette* when a welfare organisation applies for approval as an adoption agency or for renewal of its existing approval.²⁷ There is also a requirement that the approval or renewal of approval be published in the *Gazette*.²⁸ There are various other gazettal requirements in the Adoption Act, including a requirement to publish the names of approved counsellors.²⁹
- 9.32 It is likely that the requirement to publish the approvals or renewal of approvals of adoption agencies is meant to ensure there is a public record of which agencies were approved at a particular time. Such gazettals may prove useful in situations where, for example, a complaint is made about a counsellor or approved agency at some time in the future. The *Gazette* record would help to establish if that counsellor or agency had been approved to undertake their duties in relation to the Adoption Act at the time of the alleged conduct. There may be other ways to ensure an appropriate public 'point of time' record.
- 9.33 It is likely that the requirement to publish applications for approval in the *Gazette* is intended to publicise the application and so provide people with an opportunity to raise any concerns with the Department of Health and Human Services (DHHS). However, it seems unlikely that the gazettal of such applications would actually have this effect because the *Gazette* is not widely accessed by members of the public.
- 9.34 If one of the aims of publication in the *Gazette* is to inform the public and enable them to raise concerns, gazettal alone may be insufficient or ineffective.

26 See *Adoption Act 1984* (Vic) ss 75, 77, 79A(5)(b).
 27 See *ibid* ss 21(3), 26(2).
 28 *Ibid* s 30(1).
 29 *Ibid* s 5(1).

Question

- 47 Are there requirements in the Adoption Act or Adoption Regulations that are out of step with contemporary technology or unduly burdensome without providing effective additional safeguards? If yes, what are they and what would provide appropriate alternatives?

Post-adoption support

- 9.35 This section considers whether the operation of the Adoption Act and outcomes for all those involved in an adoption might be improved by increasing legislative requirements to provide post-adoption support.

Current provision for post-adoption support

- 9.36 This is limited provision in the Adoption Act or Adoption Regulations for support services once a child has been adopted. In this chapter these services are called 'post-adoption support services'.
- 9.37 The main form of post-adoption support provided for in the Adoption Act is provisions for relatives and parties to an adoption to access information about an adoption and to receive counselling as part of that process. This is discussed in Chapter 8.
- 9.38 There are some other circumstances in which the Adoption Act or Adoption Regulations provide specifically for other forms of post-adoption support. These are:
- support by an Aboriginal agency to facilitate contact between an Aboriginal or Torres Strait Islander child and relatives or members of the Aboriginal and Torres Strait Islander community³⁰ (the Commission understands that this does not currently occur in practice)
 - an ability for the Secretary to make grants or provide financial or other assistance to the adoptive parent(s) of children with a physical, sensory, intellectual or emotional disability, children of a family group who have been adopted by the same adoptive parent or parents, or children who the Secretary considers have unusual or difficult circumstances³¹
 - an ability to place conditions on an adoption order providing for the Secretary or principal officer of an approved agency to act as a 'mailbox', passing on information about the child from the adoptive parents to the birth parents.³²
- 9.39 The fact that there is limited legislative provision or requirement for post-adoption support services does not mean that none are provided. The Commission understands that although the DHHS and approved agencies do not automatically provide post-adoption support, they will do so if requested.
- 9.40 Additionally, post-adoption support may be provided by other non-governmental agencies which are not involved in arranging adoptions. For example, a range of groups provide advocacy and support services for the Stolen Generations and people affected by forced adoptions.
- 9.41 Support is provided by agencies such as the Victorian Adoption Network for Information and Self Help (VANISH), which provides counselling services and assistance to people with their search for relatives from whom they have been separated by adoption.

30 *Adoption Regulations 2008* (Vic) reg 30.

31 *Adoption Act 1984* (Vic) s 105; *Adoption Regulations 2008* (Vic) reg 42.

32 *Adoption Act 1984* (Vic) s 59A(d).

- 9.42 Permanent Care and Adoptive Families provides services and opportunities for families involved in permanent care or adoption to share their experiences and seek information and support. These include telephone support, support groups and journal clubs for adoptive parents and permanent carers, and playgroups. Training opportunities are provided for permanent carers and adoptive parents.
- 9.43 However, in general, the legislation does not provide an obligation to provide post-adoption support services for people involved in adoptions.

Reasons for limited legal requirements for post-adoption support

- 9.44 Historically, there has been limited provision for post-adoption support because the legal effect of an adoption is to sever a child's legal relationships with their parents and to provide that the adoptive parents are treated in law as parents of the child as if the child had been born to them.³³
- 9.45 Generally, the state does not intervene in family life, which is viewed as a private matter. The main situations in which the state does become involved with families are when there is a child protection concern or when parents separate and the parties are unable to resolve disputes for themselves.
- 9.46 Traditionally, once an adoption order was made by the court, the state viewed its role as being to withdraw. This meant that 'the focus for service provision was on the pre-adoption stage; once an order was made then no further professional intrusion was generally either available or wanted'.³⁴
- 9.47 Part of the goal of closed adoption practice was to 'protect child and adoptive parents respectively from what were then regarded as the stigmas of illegitimacy and infertility'.³⁵ This goal would have been undermined by state involvement post-adoption.
- 9.48 The 'clean break' theory underpinning closed adoptions held that by cutting off all connections to the adopted child's origins, the adoptive environment would shape the child. 'The adopted child transplanted into an adoptive family, should grow up "as if" born to them.'³⁶ This meant that there was no need to support contact arrangements between the child and their family of origin because it was intended that there would be no contact once the child had been adopted.

Changing views on post-adoption support services

- 9.49 The view that the state should not be involved post-adoption has changed over time. There is now a realisation that the interests of the adopted person need to be supported and safeguarded throughout their life.³⁷ It is recognised that adoption is a lifelong process, an ongoing, evolving experience and not a one-time occurrence.³⁸
- 9.50 The 1984 Adoption Act introduced open adoptions. The shift from closed to open adoptions means that one of the traditional reasons for the state to withdraw post-adoption no longer applies. The shift in practice from closed to open adoption acknowledges the harm caused by secrecy.

33 *Adoption Act 1984* (Vic) s 53.

34 Kerry O' Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and Practice* (Springer, 3rd ed, 2015) 444.

35 *Adoption of PAT* [1995] NZFLR 817, 819 (Blanchard J).

36 Keith Griffith, 'The Legal and Social History of Adoption in New Zealand' in *Adoption and Healing: Proceedings of the International Conference on Adoption and Healing* (New Zealand Adoption Education and Healing Trust, 1997) 45, 46.

37 Kerry O' Halloran, *The Politics of Adoption: International Perspectives on Law, Policy and Practice* (Springer, 3rd ed, 2015) 444.

38 Kris Faasse, Sarah Horton Bobo and Angela Magnuson, 'The Post-Adoption Life: Supporting Adoptees, Birth Parents, and Families After Adoption' (2014) 78 *Adoption Advocate* 1, 7 <<https://www.adoptioncouncil.org/publications/>>.

- 9.51 It is now accepted that in many cases it is in the child's best interests to have ongoing contact with his or her family of origin as part of an open adoption.³⁹ Contact can be difficult for all parties involved and it may be more likely to be successful if support is provided.⁴⁰
- 9.52 Research has identified a range of issues that may arise for the parties to an adoption after an adoption has been legally finalised and which may require support. It is now acknowledged that, while some of the challenges and stressors that families face are the same no matter how the family is formed, some are unique to adoption.⁴¹ Some of these challenges may arise soon after the adoption and others may occur years later. They include:
- The child and their parents may experience grief and loss at various stages.⁴²
 - The child may struggle with their identity.⁴³
 - There may be challenges with attachment and bonding for the child and adoptive parents.⁴⁴
 - The adoptive parents may experience post-adoption depression, which is similar to postpartum depression.⁴⁵
 - There may be a need for additional health, educational or psychological interventions, with associated financial burdens.⁴⁶
 - There may be challenges associated with maintaining contact arrangements with members of the family of origin, in particular direct contact. These may be practical issues such as arranging when and where to meet, or emotional, relating to how the various people involved react to direct contact or the lack of it if the arrangements fail.⁴⁷
- 9.53 Internationally, there has been a growing recognition that 'adoption disruption' may be reduced by providing appropriate post-adoption support.⁴⁸ The term 'adoption disruption' is used here to describe the following situations:
- An adoption placement is terminated before legal finalisation.
 - An adoption order is made but the child leaves the home of the adoptive family early (before the age of 18).
 - An adoption order is discharged by the court. This may occur if the adoption order or a consent was obtained by fraud, duress or other improper means, or if 'special circumstances exist why the adoption order should be discharged'.⁴⁹

39 See, eg, *Adoption Act 2009* (Qld) s 6(2)(j).

40 Toni Beauchamp, *Post-adoption Support Services: A Critical Element in Successful and Permanent Adoptions* (October 2014) Australian Policy Online, 3 <<http://apo.org.au/node/41833>>.

41 Children's Bureau, *Impact of Adoption on Adoptive Parents* (August 2015) Child Welfare Information Gateway, 4 <<https://www.childwelfare.gov/pubs/factsheets/impact-parent/>>.

42 See, eg, Kris Faasse, Sarah Horton Bobo and Angela Magnuson, 'The Post-Adoption Life: Supporting Adoptees, Birth Parents, and Families After Adoption' (2014) 78 *Adoption Advocate* 1, 2 <<https://www.adoptioncouncil.org/publications/>>; Children's Bureau, *Impact of Adoption on Adopted Persons* (August 2013) Child Welfare Information Gateway, 2-3 <<https://www.childwelfare.gov/pubs/f-adimpact/>>.

43 See, eg, Kris Faasse, Sarah Horton Bobo and Angela Magnuson, 'The Post-Adoption Life: Supporting Adoptees, Birth Parents, and Families After Adoption' (2014) 78 *Adoption Advocate* 1, 8 <<https://www.adoptioncouncil.org/publications/>>.

44 See, eg, *ibid* 6.

45 See, eg, Karen J Foli and John R Thompson, *The Post-Adoption Blues: Overcoming the Unforeseen Challenges of Adoption* (Rodale, 2004); Children's Bureau, *Impact of Adoption on Adoptive Parents* (August 2015) Child Welfare Information Gateway, 5 <<https://www.childwelfare.gov/pubs/factsheets/impact-parent/>>.

46 See Kris Faasse, Sarah Horton Bobo and Angela Magnuson, 'The Post-Adoption Life: Supporting Adoptees, Birth Parents, and Families After Adoption' (2014) 78 *Adoption Advocate* 1, 9-10, <<https://www.adoptioncouncil.org/publications/>>; Susan Livingston Smith, *Keeping the Promise: The Critical Need for Post-Adoption Services to Enable Children and Families to Succeed* (Evan B. Donaldson Adoption Institute, 2010).

47 See Kris Faasse, Sarah Horton Bobo and Angela Magnuson, 'The Post-Adoption Life: Supporting Adoptees, Birth Parents, and Families After Adoption' (2014) 78 *Adoption Advocate* 1, 4-5 <<https://www.adoptioncouncil.org/publications/>>; Elsbeth Neil et al, *Supporting Post Adoption Contact in Complex Cases – Briefing Paper* (Adoption Research Initiative, 2010).

48 See, eg, Susan Livingston Smith, *Keeping the Promise: The Critical Need for Post-Adoption Services to Enable Children and Families to Succeed* (Evan B. Donaldson Adoption Institute, 2010); Elsbeth Neil et al, *Supporting Post Adoption Contact in Complex Cases – Briefing Paper* (Adoption Research Initiative, 2010); Michael Yates and Kristi Kulesz, 'Supporting the Promise of Permanency: Post-Adoption Services for Children and Families' (2013) 56 *Adoption Advocate* 1, 7 <<https://www.adoptioncouncil.org/publications/>>.

49 *Adoption Act 1984* (Vic) s 19.

- 9.54 Adoption disruption is highly traumatic for all involved. It has both emotional and financial costs.⁵⁰
- 9.55 Support may be needed at various stages throughout the adoption process and the idea that the state should withdraw completely is unlikely to produce the best outcomes for the child or their families.
- 9.56 Possible post-adoption support services may take a variety of forms, including information, advice, facilitated support groups, counselling services, mediation, financial assistance, or medical, educational or psychological services. While there is little research on post-adoption support in Australia, a Queensland survey of adoptive parents highlighted the need for post-adoption support training to meet the actual needs of adoptive families, which change over time, rather than their perceived needs.⁵¹
- 9.57 In Victoria, during the adoption placement (prior to an adoption order) the child is still under the guardianship of the Secretary or principal officer of an approved agency.⁵² During this time the adoptive parents and the child would still be supported by DHHS or the approved agency through home visits.
- 9.58 Once an adoption order is made, legal responsibility for the child shifts to the adoptive parents. While post-adoption support may be provided in some circumstances, there is very little legal requirement for any person or authority to provide this.

Questions

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

50 Meredith Carter and Associates, *Background Paper: The Potential of Permanent Care* (2015) Centre for Excellence in Child and Family Welfare Inc, 19 <<http://www.cfecfw.asn.au/background-paper-potential-permanent-care-2015>>; Julie Selwyn, Dinithi Wijedasa and Sarah Meakings, *Beyond the Adoption Order: Challenges, Interventions and Adoption Disruption – Research Brief* (Department for Education (UK), 2014) 24–5; Toni Beauchamp, *Post-adoption Support Services: A Critical Element in Successful and Permanent Adoptions* (October 2014) Australian Policy Online, 3 <<http://apo.org.au/node/41833>>.

51 Local Adoption Support Group Queensland, *What Keeps Adoptive Parents Awake at Night? 2012 Survey of Queensland Adoptive Families* (2014), 15 <<http://www.pcafamilies.org.au/resources/research-studies>>. Researchers at Griffith University are currently undertaking a national study on post-adoption support for inter-country adoptions. See <<https://experts.griffith.edu.au/project/n051c5c6ea4c57bb3ef50cf1117504943>>.

52 *Adoption Act 1984* (Vic) s 46.

Conclusion

10. Conclusion

- 10.1 This consultation paper has reviewed a range of issues relating to the operation of Victoria's adoption laws.
- 10.2 As required by the terms of reference, the review is aimed at ensuring the Adoption Act and the Adoption Regulations are relevant and appropriate to contemporary family and community needs and that the best interests of the child are the paramount principle guiding the operation of the legislation.
- 10.3 This consultation paper has covered a broad range of issues relevant to the application of the Adoption Act and the Adoption Regulations, as well as canvassing potential options for reform.
- 10.4 The consultation paper does not express concluded views on the matters raised by the terms of reference. Those conclusions will be stated in the Commission's report, to be delivered to the Attorney-General by 28 February 2017.
- 10.5 The Commission welcomes submissions from all parts of the community. It particularly invites submissions from those who have had experience of or been affected by adoption, as well as from professionals with specialist knowledge in adoption law and practice.
- 10.6 You can provide input into the Commission's review of Victoria's adoption laws by responding to the questions throughout the paper. The Commission's questions are also included at the back of this paper. Information about how to provide the Commission with a submission is on page vii. To allow the Commission time to consider your views before deciding on final recommendations, submissions are due by 16 September 2016.
- 10.7 Your responses to these questions will assist the Commission to determine whether changes are needed to improve the operation of this significant area of the law.

Questions

Questions

Chapter 5 The best interests and rights of the child

The Commission is seeking the views of the community on any changes that may be required to the Adoption Act 1984 to ensure that the best interests of the child are paramount.

- 1 Should the Adoption Act use consistent terminology to guide decision makers in a decision relating to adoption? If not, in what circumstances should terminology other than the best interests of the child be used?
- 2 Should the Adoption Act provide guidance about how to determine what is in a child's best interests? If yes:
 - (a) What should decision makers be required to consider?
 - (b) Should all the matters have equal weight or should some be weighted more heavily than others?
 - (c) If some matters should be weighted more heavily than others, what are they?
- 3 Should the Adoption Act have requirements about the age differences between the adopted child and any other children in the family? If yes, what requirements?
- 4 Should the Adoption Act include a principle requiring decision makers to consider placing siblings for adoption in the same family? If not, in what other ways could the Adoption Act ensure that sibling relationships are considered in decisions about adoption?
- 5 Should there be a greater obligation to identify and contact the father of the child to obtain his consent to an adoption? If yes, what steps are reasonable to try to obtain a father's consent?
- 6 Are there any situations when no attempts should be made to contact the father to seek his consent to an adoption? If yes, what are they?
- 7 Should any changes be made to the current consent provisions? If yes, what changes?
- 8 Should any other people be consulted about, or required to consent to an adoption? If so, who?
- 9 Are the grounds for dispensing with consent appropriate for adoption in contemporary Victoria? If not, what changes should be made?

- 10 Should the court be able to put conditions on an adoption order in a broader range of circumstances if it is in the best interests of the child? These circumstances might include situations where:
 - (a) the court has dispensed with the consent of a parent but it is in the best interests of the child to have contact with the parent or with relatives of that parent
 - (b) consent was given but the adoptive parents and the birth parent giving consent have not agreed about contact or exchanging information about the child.
- 11 How should adoption law provide for the child's contact with family members other than parents? For example:
 - (a) Should contact arrangements be considered as part of a best interests principle?
 - (b) Should a decision maker, such as DHHS, be required to consider contact with family members other than parents after an adoption?
 - (c) Should the court be required to consider making conditions for contact with family members other than parents after an adoption?
- 12 Are there any other issues within the terms of reference that should be considered in determining the best interests of the child and balancing the rights and interests of other people with an interest in the adoption? If yes, what are they?
- 13 In some states and territories, children aged 12 and over consent to an adoption. Should this be required in Victoria? If not, are there any changes that should be made to the Adoption Act to ensure it provides appropriately for the views and wishes of the child?
- 14 In what circumstances, if any, should a child have separate legal representation in adoption proceedings?
- 15 Should the Adoption Act provide guidance about the duties and role of a legal representative? For example, should a lawyer act in what they think is the best interests of the child, or should they follow the instructions of the child even if they don't think this is in the child's best interests?
- 16 Should the Adoption Act provide for non-legal representation or support of a child in adoption proceedings? If yes, what kind of representation or support should this be?

Chapter 6 Aboriginal and Torres Strait Islander children and the best interests principle

The Commission is seeking the views of the community about whether the Adoption Act provides appropriately for the best interests of Aboriginal and Torres Strait Islander children.

- 17 Should there be a positive duty on the Secretary of DHHS to make reasonable inquiries as to whether a child to be placed for adoption is an Aboriginal or Torres Strait Islander child? If yes, what type of inquiry might be reasonable?
- 18 Should there be separate rules and guidelines that apply only to the adoption of Aboriginal and Torres Strait Islander children? If yes, is the child placement principle in the Adoption Act (section 50) an appropriate mechanism? If not, what changes should be made?

- 19 Should there be a requirement that in any adoption of an Aboriginal or Torres Strait Islander child the first preference is to place a child for adoption with Aboriginal or Torres Strait Islander extended family or relatives? If not, what should the order of preference be for placing Aboriginal and Torres Strait Islander children for adoption?
- 20 Should the Adoption Act require that adoption be considered for Aboriginal and Torres Strait Islander children only where there is no other appropriate alternative?
- 21 Should there be different principles for the adoption of Aboriginal children as compared to Torres Strait Islander children? For example, should there be a separate child placement principle for Torres Strait Islander children as compared to Aboriginal children as is the case in New South Wales adoption law?
- 22 Should parents of Aboriginal and Torres Strait Islander children retain the ability, that parents of other children do not have, to put conditions on their consent to the adoption of their children? If not, what options should there be to protect the connection of Aboriginal and Torres Strait Islander children to country, kin, language and community?

Chapter 7 Eligibility, suitability, contemporary attitudes and the law

The Commission is seeking the views of the community about who should be eligible to adopt, and whether current suitability and eligibility requirements are consistent with contemporary views and expectations about family.

- 23 To be able to adopt, couples in domestic relationships are required to prove that they live together and have lived together for two years. This requirement does not apply to other couples such as married couples.
 - (a) Is a co-habitation requirement consistent with contemporary family life and the best interests of the child?
 - (b) If yes, should a co-habitation requirement apply to all couples equally?
- 24 Single people can adopt a child only if there are 'special circumstances in relation to the child' which make the adoption 'desirable'.
 - (a) Is this requirement consistent with the best interests of the child?
 - (b) Should this requirement be amended? If yes, what criteria should apply to adoptions by single people?
- 25 A religious body that provides adoption services may refuse to provide services to same-sex couples and people who do not identify with a specific sex or gender, if the body acts in accordance with its religious doctrines, beliefs or principles. Is this consistent with amendments to the Adoption Act that enable same-sex couples, and people who do not identify with a specific sex or gender, to adopt?
- 26 Step-parents and relatives of a child can only adopt a child in their care in limited circumstances. Parenting orders under the Family Law Act are the preferred option in these situations. Is this appropriate? If not, what changes are needed?
- 27 Are the suitability criteria in the Adoption Regulations appropriate? Should any criteria be added, removed or changed?
- 28 Should the requirements applicants must satisfy for approval to adopt be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make this clearer?

- 29 Should the steps in the assessment process be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make the assessment process clearer?
- 30 Could any other improvements be made to the assessment process? If yes, what improvements could be made?
- 31 Should the process by which adoptive parents are selected be set out more clearly in the Adoption Act and/or Adoption Regulations? If yes, what changes are required to make the selection process clearer?
- 32 Is it appropriate that birth parents are able to express wishes about the religion, race and ethnic background of adoptive parents? What matters should parents be able to express wishes about? Should other matters be included in the Adoption Act?

Chapter 8 Information and identity

The Commission is seeking the views of the community on access to adoption information under the Adoption Act, how an adopted person's identity should be reflected on their birth certificate and the ability to change a child's given names.

- 33 Should any other people have rights to adoption information under the Adoption Act? If yes, who should be given these rights and what should their rights be?
- 34 Do any problems arise when people seek adoption information through an adoption information service? If yes, what are the problems and what legal changes, if any, are required to address them?
- 35 Are the rights to adoption information and the limitations on those rights fair to all people involved in the adoption process? If not, what changes are needed?
- 36 Is the balance in the Adoption Act between providing access to information and protecting people's privacy appropriate? If not, what changes are needed?
- 37 What factors should be taken into account in deciding to release identifying information about a person?
- 38 Should the provisions of the Adoption Act relating to the release of adoption information be made clearer? If yes, what changes are needed?
- 39 How should an adopted person's identity be reflected on their birth certificate?
- 40 If a different form of birth certificate were available to adopted people, what legal status should it have?
- 41 Are there any problems with introducing integrated birth certificates or another form of birth certificate? If yes, what are the problems and how could they be addressed?
- 42 Is changing a child's given names consistent with the best interests of the child?
- 43 In what circumstances (if any) should the Adoption Act allow a child's given names to be changed?

Chapter 9 Modernisation and operation of the Adoption Act

The Commission is seeking the views of the community on modernisation of the Adoption Act and also on how to ensure that the procedural and operational requirements in the Act are suited to contemporary society and consistent with other laws.

- 44 Should the Adoption Act include a section identifying the main object of the Act? If yes, how should the main object be described?
- 45 Should the Adoption Act include general principles to guide the exercise of power? If yes, what should these principles be?
- 46 Is there terminology in the Adoption Act that should be changed because it is unclear, outdated or inconsistent with other law? If yes, what are the issues and what changes would be appropriate?
- 47 Are there requirements in the Adoption Act or Adoption Regulations that are out of step with contemporary technology or unduly burdensome without providing effective additional safeguards? If yes, what are they and what would provide appropriate alternatives?
- 48 Should there be increased requirements in the Adoption Act to provide post-adoption support? If yes:
 - (a) Who should be responsible for providing this support?
 - (b) What type of post-adoption support should be provided, and in what circumstances?
 - (c) Who should be eligible for it?

Appendices

Appendix A: Key differences: Adoption Orders, Permanent Care Orders and Parenting Orders

	Adoption Order <i>Adoption Act 1984</i> (Vic)	Permanent Care Order <i>Children, Youth and Families Act 2005</i> (Vic)	Parenting Order <i>Family Law Act 1975</i> (Cth)
Who can apply?			
Secretary of DHHS	No	Yes—Secretary makes all applications on behalf of person(s) approved as suitable to have parental responsibility for child	No
Married couple ¹	Yes	Yes—through Secretary	Yes
Couple in domestic/de facto relationship ²	Yes	Yes—through Secretary	Yes
Partner ³ of parent/adoptive parent	Yes	Yes—through Secretary	Yes
Single person	Yes—but only if special circumstances exist in relation to the child	Yes—through Secretary	Yes
Child’s relatives	Yes	Yes—through Secretary	Yes
The child	No	No	Yes
Other	No	Yes—through Secretary	Yes
Is parents’ consent required?	Yes	No	N/A
Court with jurisdiction	The County Court of Victoria ⁴	The Children’s Court of Victoria	The Family Court or the Federal Circuit Court of Australia

1 This includes a relationship between a man and a woman recognised as a traditional marriage by an Aboriginal community or group.
2 The current *Adoption Act 1984* (Vic) and the *Family Law Act 1975* (Cth) use the term ‘de facto relationship’ to cover couples who are living in a genuine domestic relationship and not married. Amendments to the *Adoption Act* coming into force by 1 September 2016 will replace the term ‘de facto relationship’ with ‘domestic relationship’, to cover couples who are living together and not married, or in a ‘registered domestic relationship’, irrespective of sex or gender. The *Children, Youth and Families Act 2005* (Vic) uses similar terminology. The Family Law Act definition of ‘de facto relationship’ includes same sex couples.
3 This includes a spouse, de facto partner or ‘domestic partner’ of a parent or adoptive parent.
4 Both the Supreme Court and the County Court have jurisdiction (*Adoption Act 1984* (Vic) s 6) but in practice adoption matters are heard and determined by the County Court.

	Adoption Order <i>Adoption Act 1984</i> (Vic)	Permanent Care Order <i>Children, Youth and Families Act 2005</i> (Vic)	Parenting Order <i>Family Law Act 1975</i> (Cth)
Effect of order: Parental responsibility	Adoptive parent(s) become child's parents—assume all parental rights and responsibilities	Parental responsibility ⁵ conferred on permanent carer, generally to exclusion of all other people	Parental responsibility ⁶ conferred or allocated. Parental responsibility of other parties not diminished unless stated in the order
Legal parentage	Transferred from birth parents to adoptive parents	Unaffected—birth parents remain legal parents	Unaffected—birth parents remain legal parents
Is change of name part of process?	Surname—generally yes Given names—on application	No	No
Birth certificate	New birth certificate created showing the adoptive parent(s) as the child's parent(s)	No change to birth certificate	No change to birth certificate
Effect on inheritance	Inheritance rights transferred. Child inherits from adoptive parents, not birth parents	Inheritance rights unaffected	Inheritance rights unaffected
Duration of order	Permanent unless discharged	Until child turns 18 or marries	Until child turns 18, marries, enters into a de facto relationship or upon adoption of the child
Conditions on order	May include conditions regarding contact with birth parents and relatives and/or information sharing with birth parents	Mandatory conditions regarding preserving child's identity, cultural connection and relationships with 'birth family', unless the court provides otherwise May include conditions regarding contact with parents, siblings and others of significance, and/or a cultural plan	May include conditions covering variety of parenting arrangements, including contact, communication, residence and decision making
Can the conditions be varied?	Yes—in very limited circumstances	Yes—in limited circumstances	Yes

5 'Parental responsibility', in relation to a child, means all the duties, powers, responsibilities and authority which, by law or custom, parents have in relation to children: *Children, Youth and Families Act 2005* (Vic) s 3.

6 'Parental responsibility', in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children: *Family Law Act 1975* (Cth) s 61B.

	Adoption Order <i>Adoption Act 1984</i> (Vic)	Permanent Care Order <i>Children, Youth and Families Act 2005</i> (Vic)	Parenting Order <i>Family Law Act 1975</i> (Cth)
Contact with birth parents, relatives and others	By court order or agreement	By court order or agreement	By court order or agreement
Provisions for Aboriginal children?	Yes	Yes	Yes
Ongoing financial/professional support from government	Limited	Yes	No
Possibility of challenge by birth parent, relative or other	Yes—only where fraud, duress, improper means or other special circumstances	Yes—in limited circumstances	Yes

Appendix B: Rights to adoption information under the information provisions

1. This appendix summarises people's rights to adoption information under the information provisions of the *Adoption Act 1984* (Vic) discussed in Chapter 8.¹

Terminology

Adoption information

2. In this appendix, the terms 'information' or 'adoption information' mean 'information about an adopted person', which is the term used in the information provisions. This term means:²
 - information about the adopted person or the natural parents or the relatives³ of the adopted person which ...
 - (a) is reasonably likely to be true; and
 - (b) does not unreasonably disclose information relating to the personal affairs of a natural parent, a relative or any other person.
3. 'Identifying information' is information which reveals or may reveal a person's identity or, in some cases, whereabouts. 'Non-identifying information' is general information about a person which does not reveal their identity or whereabouts.

Relevant authority

4. To obtain adoption information, a person requests the information through an adoption information service within the Department of Health and Human Services (DHHS) or an approved agency.⁴ The Adoption Act describes the request as 'an application to a relevant authority'. This appendix uses the term 'relevant authority', as it is used in the information provisions.⁵ Relevant authorities include the Secretary of DHHS and approved agencies.⁶

1 *Adoption Act 1984* (Vic) pt VI.

2 *Ibid* s 91.

3 A 'relative' is 'a grandparent, brother, sister, uncle or aunt of the child, whether the relationship is of the whole blood or half-blood or by affinity, and notwithstanding that the relationship depends upon the adoption of any person': *Ibid* s 4 (definition of 'relative').

4 See *Ibid* ss 102–103.

5 Chapter 8 uses the term 'adoption information service' for simplicity. The Commission understands that, in practical terms, the two terms are interchangeable.

6 *Ibid* s 82 (definition of 'relevant authority').

Rights

5. Each person's rights to adoption information are set out below.

Adopted person

6. An 'adopted person' includes a person adopted under the Adoption Act or Victoria's previous adoption legislation.⁷
7. An adopted person's access to adoption information differs depending on whether they are an adult or a child.

Adopted adult

8. An adopted adult can access non-identifying and identifying information about a natural parent or relative.⁸
9. Where an adopted adult seeks to access information that reveals a natural parent or natural relative's⁹ whereabouts, and the information is not contained in the records of the relevant authority, written consent from the natural parent or natural relative is required before the information can be disclosed.¹⁰ This consent can be given subject to conditions which the relevant authority must comply with.¹¹

Adopted child

10. An adopted child may apply for non-identifying and identifying information 'from the records of the relevant authority, or, where the application is made to the Secretary, from the records of the Secretary, an agency, another body or a person'.¹²
11. Each adoptive parent¹³ of the adopted child must consent in writing to the child accessing non-identifying or identifying information.¹⁴
12. An adopted child may only have access to information that reveals the identity of a natural parent with that natural parent's written consent.¹⁵

Natural parents

13. A 'natural parent' is a person named in the birth registration entry of an adopted person.¹⁶ A man not named in the birth registration is recognised as a natural parent in certain circumstances,¹⁷ including where:
 - The Supreme Court has declared the man is the adopted person's father under the *Status of Children Act 1974* (Vic).¹⁸
 - The Family Court of Australia has made a parenting order in his favour.¹⁹
 - The man satisfies the Secretary of DHHS 'that there is prima facie evidence that [he] is the father of [the adopted person]'.²⁰
14. A natural parent's access to adoption information differs depending on whether the adopted person is an adult or a child.

7 Ibid s 82 (definition of 'adopted person').

8 Ibid s 93(1).

9 'Natural relative' is 'a grandparent, brother, sister, uncle or aunt of the adopted person where the relationship is of the whole blood or half-blood': *ibid* s 97(1).

10 Ibid s 93(2)(a)–(c). Consent is not required if the person whose whereabouts would be disclosed has died or cannot be found after the relevant authority has made all reasonable enquiries: s 93(3).

11 Ibid s 93(2)(d).

12 Ibid s 94(1)(a)–(b).

13 Or guardian if the child's guardian is not an adoptive parent.

14 *Adoption Act 1984* (Vic) s 94(2). Consent is not required if the adoptive parents have died and the relevant authority has evidence of the adoptive parents' death.

15 Ibid s 94(3). Consent is not required if the natural parent has died and the relevant authority has evidence of the natural parent's death. It appears from the wording of section 94(1) that identifying information about a natural relative can be given without that person's consent.

16 Ibid s 82 (definition of 'natural parent').

17 *Ibid*.

18 *Status of Children Act 1974* (Vic) ss 9–10.

19 See Chapter 3 for information about parenting orders.

20 *Adoption Act 1984* (Vic) s 82. This applies to sections 95, 96 and 103 of the Adoption Act.

15. Where the adopted person is an adult, natural parents can access:
 - non-identifying information about the adopted person and adoptive parents²¹
 - information about the whereabouts of the adopted person²²
 - information about the identity of the adoptive parents.²³
16. Where the adopted person is a child, natural parents can access:
 - non-identifying information about the adopted person and the adoptive parents²⁴
 - information about the identity of the adoptive parents and the whereabouts of the adopted person,²⁵ with the written consent of each adoptive parent.²⁶
17. An adoptive parent can give consent subject to conditions.²⁷
18. The relevant authority must consider any wishes expressed by the adopted child.²⁸
19. The relevant authority can withhold information to give effect to the adoptive parents' conditions or the adopted child's wishes.²⁹

Adoptive parents

20. Adoptive parents can access non-identifying information about an adopted person's natural parent or relative.³⁰
21. Adoptive parents can also access identifying information about a natural parent,³¹ but only with that natural parent's written consent.³² This consent can be given subject to conditions.³³ The relevant authority can withhold information to give effect to the conditions.³⁴
22. Where the adopted person is an adult, the relevant authority must notify the adopted person that it intends to give the identifying information to the adoptive parent or parents.³⁵

Natural relatives

23. A 'natural relative' of an adopted person is a brother, sister, uncle, aunt and grandparent 'where the relationship is of the whole blood or half-blood'.³⁶
24. A natural relative can access non-identifying information that does not reveal the identity of the adoptive parents or the adopted person's whereabouts.³⁷
25. Natural relatives can only access information about the identity of adoptive parents or whereabouts of the adopted person where:
 - 'circumstances exist which make it desirable' to give the information³⁸
 - written consent has been given by:
 - an adopted person who is an adult,³⁹ or
 - where the adopted person is a child, the adoptive parents.⁴⁰

21 Ibid s 96(1)(a).

22 Ibid s 96(1)(b).

23 Ibid.

24 Ibid s 95(1)(a).

25 Ibid s 95(1)(b).

26 Ibid s 95(2)(a)(ii). Or guardian if the child's guardian is not an adoptive parent. An adoptive parent or guardian's consent is not required where the person has died and the relevant authority has evidence of the person's death.

27 Ibid s 95(2)(a)(ii).

28 Ibid s 95(2)(a)(i).

29 Ibid s 95(2)(b).

30 Ibid ss 98(1)(a), 91.

31 Ibid s 98(1)(b).

32 Ibid s 98(2)(a). Unless the natural parent has died and the relevant authority has evidence of the person's death.

33 Ibid.

34 Ibid s 98(2)(b).

35 Ibid s 98(2)(aa). Unless the adopted person has died and the relevant authority has evidence of the person's death.

36 Ibid s 97(1).

37 Ibid s 97(2)(a).

38 Ibid s 97(3)(a)(i).

39 Ibid s 97(3)(a)(ii). Unless the adopted person has died and the relevant authority has evidence of the person's death.

40 Ibid s 97(3)(a)(iii)(B). Or the guardian's consent, if the guardian is not an adoptive parent. An adoptive parent or guardian's consent is not required where the person has died and the relevant authority has evidence of the person's death.

26. The adopted adult or adoptive parents' consent can be given subject to conditions.⁴¹
27. In addition, any wishes expressed by an adopted child must be considered.⁴²
28. The relevant authority can withhold information to give effect to any conditions that attach to the consent or the adopted child's wishes.⁴³

Natural adult children of adopted people

29. A 'natural child' of an adopted person is 'a son or daughter of the adopted person where the relationship is of the whole blood'.⁴⁴
30. A natural adult child of an adopted person can access non-identifying and identifying information about their parent's adoption, including information that reveals the identity of a natural parent or natural relative of the adopted person.⁴⁵
31. Where the information reveals the identity of a natural parent or natural relative, the relevant authority must notify the adopted person that it intends to give that information to the adopted person's natural child.⁴⁶
32. Where the information reveals a natural parent or natural relative's whereabouts, and the information is not contained in the records of the relevant authority, written consent from the natural parent or natural relative is required before the information can be disclosed.⁴⁷ This consent can be given subject to conditions which the relevant authority must comply with.⁴⁸

41 Ibid ss 97(3)(a)(ii), (iii)(B).

42 Ibid s 97(3)(a)(iii)(A). Unless the adopted child has died and the relevant authority has evidence of the child's death.

43 Ibid s 97(3)(b).

44 Ibid s 96A(1).

45 Ibid s 96A(2).

46 Ibid s 96A(3).

47 Ibid s 96A(4)(a)–(c). Consent is not required if the person has died or cannot be found after the relevant authority has made all reasonable enquiries.

48 Ibid s 96A(4)(d).



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Review of the Adoption Act 1984
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