Adoption or Anti-adoption? Time for a National Review of Australian Law

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INTRODUCTION

Adoption was an integral feature of Roman family law. It has always been a part of Continental European legal systems based on Roman law, largely for inheritance purposes. These systems invariably require that a large part of a person's inheritance (in German law, a *Pflichtteil*) devolve on legitimate heirs. Complete freedom of testation is not permitted. Non-natural heirs have to be created by the process of adoption.

In English-speaking countries, adoption is a relatively new institution. Unlike the laws of Continental Europe, its purpose has been to provide a stable family for a child born in unhappy circumstances. Thus in Australia, the first adoption legislation was not passed until 1896, in Western Australia. It was not until the early 1930s that all the Australian States had legislation governing adoption.[1]

The distinguishing feature of Australian adoption has been that it results in a complete rupture of the child from its original family and an

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1 For the history of Australian adoption, and an analysis of the legislation of the 1960s, see D. Hambly, 'Adoption of Children: An Analysis of the *Uniform Act*' (1968) 8 *Western Australia Law Review* 281.

entry into a new family. Accordingly, relations with the child's natural family do not exist. So that, for example, an adopted child cannot inherit from his or her birth father or mother. The classic distinction between adoption and foster care has been that adoption is a permanent rearrangement and foster care is a form of temporary caretakership. It is this fundamental difference that has been overturned by the concept of 'open adoption'. To the extent that 'open adoption' allows for — indeed, encourages — residual contact between the child and the natural parent or parents, it is indistinguishable from long-term foster care. The essential distinction between adoption and foster care has thus been blurred.

The 'adoption revolution' has done more than blur the distinction between adoption and foster care. It may have created the obsolescence of adoption. Already voices are being heard saying that adoption should be abolished.[2] It may not be too extreme to argue that adoption is becoming a 'politically incorrect' concept. If this occurs, it will be a most unhappy consequence of the adoption revolution, for adoption has proved to be the most satisfactory form of substitute parenting. It gives the child a permanent home. Usually, adoptive parents are highly motivated, and they are the only parents in the community who receive compulsory parental education. We need to know whether would-be adoptive parents are baulking at the restrictions and potential conflicts that openness may bring. It may be that the concept of openness is acting as a deterrent to adoption.

In the 1970s and early 1980s, there was considerable academic interest in adoption in Australia. There were several major conferences and reports.[3] The subject aroused great passion, and generated heated debate.[4] The culmination of this fevered concern was the passage in 1984 of a radical new Act in Victoria,[5] designed to give effect to the new philosophies and the profoundly different situation that prevailed since the last spate of legislative activity in the 1960s. The demand for babies now greatly ex-

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[2] See, for example, R. Ludbrook (Director of the National Youth Centre, Sydney), Submission to NSW Law Reform Commission, Review of the Adoption of Children Act 1965 (NSW), Discussion Paper 34, 1994. Mr Ludbrook's views on why adoption is 'fundamentally flawed' are set out in this review at 34–35.

[3] C. Picton (ed.), *Proceedings of the First Australian Conference on Adoption* (Melbourne, 1976); C. Picton (ed.), *Proceedings of the Second Australian Conference on Adoption* (Melbourne, 1978); R. Oxenberry (ed.), *Proceedings of the Third Australian Conference on Adoption: Changing Families* (University of Adelaide, 1982); A. Cushan (ed.), *Proceedings of the Conference on Adoption and AID Access to Information* (Melbourne, 1983); P. and S. Swain, *To Search for Self* (Sydney: Federation Press, 1992): dealing with issues raised at an International Conference on Adoption and Permanent Care at Melbourne in 1989.

[4] For an analysis of some of the arguments which raged over the issue of access to information, see F. Bates and J.N. Turner, *The Family Law Casebook* (Sydney: Law Book Co. Ltd, 1985), Chapter 10. The influence and history of lobby groups such as the National Council for the Single Mother and Her Children and the Association of Relinquishing Mothers are described in D. Lee, 'The Growth and Role of Self-Help Groups', in P. and S. Swain, *supra* n. 3 at Chapter 2.

[5] *Adoption Act 1984* (Vic.). It was not proclaimed to come into force until 1987.

ceeded the supply.[6] Most adoptions were by step-parents or relatives. Inter-country adoption had greatly increased, following the war in Vietnam. Above all, the new legislation was inspired by research that seemed to persuade adoption practitioners that the insistence on secrecy of the adoption process that permeated this 1960s legislation was misconceived.[7] 'Openness' became the *leitmotiv* of the reformers.

In essence, this openness was translated into reality in two major ways. First, the new legislation provided for the parties to an adoption to obtain information about the circumstances of the adopted child's birth, or, for the relinquishing natural parent, the circumstances of the child's adoption. Second, provision was specifically made for a natural parent to express a wish to maintain contact with his or her relinquished child; indeed, the tenor of the legislation suggested that this was to be rather encouraged. The Victorian Act has served as a prototype for legislation of other States.[8]

These major reforms had the consequence, seemingly, of curtailing any further research into adoption. It was as if there were a consensus among scholars and practitioners that the legislation had silenced all adoption's critics.[9] In reality, however, adoption practice has not proceeded as smoothly as the reformers might have hoped. The *Kajal case*, involving a tug-of-love between two sets of Victorian adoptive parents vying for an Indian child, brought to public notice a dissatisfaction with the

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[6] In NSW, the number of children surrendered for adoption declined from 2,000 in 1972 to 155 in 1983. The decline has continued. In 1990, the NSW Department for Family and Community Services arranged placements for only 170 children, of whom only 65 were local children. See P. Boss, *Adoption Australia* (Melbourne: National Children's Bureau of Australia, 1992), 9 for comparable declines in other States.

[7] Especially influential were the writings of John Triseliotis, a Scottish commentator: J. Triseliotis, 'Obtaining Birth Certificates', in P. Bean (ed.), *Adoption Essays in Social Policy Law and Sociology* (London: Tavistock Publications, 1984). In Australia, Patricia Harper was a key figure in initiating change: P. Harper, 'Changing Law for Changing Families' (Institute of Family Studies, Discussion Paper No. 9, 1982).

[8] The operative statutes are: *Adoption Act 1993* (ACT); *Adoption of Children Act 1965* (NSW) — this Act has been the subject of recent review by the NSW Law Reform Commission (Discussion Paper No. 34, 1994, *Adoption of Children Act 1994* (NT); *Adoption of Children Act 1964* (Qld); *Adoption of Children Act 1988* (SA); *Adoption Act 1988* (Tas.); *Adoption Act 1984* (Vic.); *Adoption Act 1994* (WA) (as at December 1994 passed, but not yet proclaimed).

[9] This is not to say that adoption has been totally ignored by scholars. Important scholarly articles include: M. Otlowski, 'The Changing Face of Adoption Law in Tasmania' (1989) 3 *Australian Family Law* 161; B. English, 'Inter Country Adoption: The Context of Recent Developments and the Need for Research' (1990) 15 *Children Australia* 16; O. Jessep and R. Chisholm, 'Step Parent Adoptions and the *Family Law Act*' (1992) 6 *Australian Journal of Family Law* 179; F. Bates, 'The Children of Mansoul — Adopted Children and Natural Parents' (1989) 63 *Australian Law Journal* 314. Non-legal articles investigating open adoption include M. Clare, 'Family Systems Thinking Adoption Practice' (1991) 44(3) *Australian Social Work* 3; H. Argent, 'Looking at Open Adoption', (1989) 21 *Social Work Today* (13 March 1989). There was, however, little serious questioning of the fundamental bases for modern adoption law and practice, until the recent Review of the *Adoption of Children Act 1965* (NSW), NSW Law Reform Commission, Discussion Paper No. 34, 1994 (hereinafter called the 'NSW Review').

inter-country adoption process that had been felt for some time.[10] While several cases of successful reunions of natural parents and long-lost children had been reported in the media, it was patent that the new 'openness' had brought anxiety to many adoptive parents and relinquishing parents — especially where those adoptions had taken place before the Act came into operation, under the promise of secrecy.[11]

The time therefore seemed ripe for a comparative review of adoption law and practice throughout Australia similar to that written by David Hambly in 1968.[12] Professor Peter Boss, assisted by Mrs Sue Edwards, surveyed the legislation operating in every State and produced a book of 460 pages which sets out in a readable form all the major provisions operating, or shortly to be put into operation, in the Australian Capital Territory and the States.[13] This book is a timely reminder of the fact that adoption is, constitutionally, not within the province of the federal legislature.[14] On the contrary, it is governed by State laws, which are far from uniform.

The most disturbing aspect to emerge from the Boss survey is the very diversity of Australian law and practice. While diversity in some areas of law might be desirable, Australians involved in the adoption process surely merit the same uniformity of law and practice as that accorded to them in the area of divorce and its ancillary matters. Moreover, significant variations in the laws offer the potential for 'forum-shopping'. For instance, in Victoria, *de facto* couples cannot adopt in any circumstances. They can do so in New South Wales, provided they have lived together for at least three years.[15] This might well encourage a Victorian *de facto* couple to cross the Murray River and establish residence in New South Wales, especially as the NSW legislation does not require the necessary three years' cohabitation to have taken place exclusively in NSW territory. Conversely, a NSW couple wishing to adopt a healthy baby are obliged to be infertile. This is not a requirement in Victoria. Therefore, a

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[10] This case was widely reported in the press. See R. West, 'Whatever Happened to the Best Interests of the Child?' *Age*, 11 August 1989. The fiasco led to an investigation by Fogarty J of the Family Court of Australia: Family and Children's Services Council, A Review of the Inter-Country Adoption Service in Victoria, October 1989 (Fogarty Report). This Report contains a full account of the *Kajal case*. For an analysis of inter-country adoption in Victoria, see J.N. Turner, 'Why Don't You Take More of Our Children' (1995) 69 *Law Institute Journal* 559.

[11] This anxiety was clearly articulated to the NSW Law Reform Commission when it conducted a review of the *Adoption Information Act 1990*, and reported in 1992. See J.N. Turner, 'Review of the *Adoption Information Act 1990* (NSW)', July 1992 [NSW Law Reform Commission Report No. 69] (1994) 19 *Monash University Law Review* 343.

[12] The National Children's Bureau of Australia, of which I was then the President, conducted this research in 1992. See Hambly, *supra* n. 1.

[13] Boss, *supra* n. 6.

[14] The federal Parliament, however, has recently legislated on certain aspects of adoption, though the constitutionality of this legislation has been doubted. See O. Jessep and R. Chisholm, 'Step-Parent Adoptions and the *Family Law Act*' (1992) 6 *Australian Journal of Family Law* 179.

[15] See *infra*, p. 51.

fertile NSW couple might be tempted to move to Victoria. People waiting to adopt are often desperate, and might not hesitate to transfer residence to satisfy their yearning.[16]

A further impetus to the Boss study was Australia's ratification of the *United Nations Convention on the Rights of the Child*.[17] This convention now serves as the *fons et origo* of all practices relating to children. It must permeate all legislation and case law affecting children. In particular, the survey has revealed laws and practices that must be regarded as dubious, in the light of the Convention.[18]

The 'adoption revolution' has been translated into reality by piecemeal legislation, at both the State and federal levels. The relative 'uniformity' of the 1960s legislation has been replaced by fragmentation. The time is ripe for a careful national appraisal of adoption, and for new uniform legislation.

In this article, it is proposed to examine some of the most significant variations in adoption law, and to highlight concerns about certain aspects of current philosophies, laws and practices. It is argued that adoption should regain its respectability, and become properly recognised as a necessary and desirable institution in the interests of those children who have the misfortune to be born into irreparably dysfunctional families.

THE ADOPTION COURT[19]

While in non-contested cases the adoption court tends to be regarded as merely rubber-stamping adoptions arranged by social workers, it is submitted that it has an important symbolic and supervisory role. It must ensure that the adoption is in the best interest of the child. There is an extraordinary diversity of State courts that have jurisdiction to make an adoption order. In Victoria, both the Supreme Court and the County Court have jurisdiction. In the Australian Capital Territory, New South Wales and the Northern Territory, the relevant court is the Supreme Court. In

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[16] In September 1993, the writer received a telephone call from a legal practitioner in Queensland, seeking advice on whether his clients could 'circumvent' the Queensland adoption law by transferring their residence temporarily to Victoria.

[17] This Convention was ratified by Australia in December 1990. For an appraisal of its significance in Australia, see P. Alston, S. Parker and J. Seymour (eds), *Children, Rights and the Law* (Oxford: Clarendon Paperbacks, 1992); J. Harvey, U. Dolgopol and S. Castell-McGregor, *Implementing the UN Convention on the Rights of the Child in Australia* (South Australian Children's Interest Bureau, 1993). A critique of the performance of Australia in complying with the Convention in its first two years of operation is contained in the submission to the United Nations' Monitoring Committee, *Where Rights are Wronged* (Melbourne: National Children's Bureau of Australia, 1993).

[18] Article 21 of this Convention specifically deals with adoption. Its applicability is examined by Boss, *supra* n. 6 at Chapter 3. Several other Articles are considered in this chapter to be being breached.

[19] Relevant provisions: ACT, ss. 4 and 7; NSW, s. 6; NT, s. 3; SA, s. 4(1); Qld, ss. 7 and 41A; Tas., s. 4; Vic., s. 6; WA, s. 4.

Tasmania, a single magistrate exercises jurisdiction. The appropriate court in South Australia is the Children's Court, but it must be composed of three persons (a judge or magistrate and two Justices of the Peace), and one of those three must be a woman. In Queensland, the making of an adoption order is an administrative task, the prerogative of the Director-General of the Department of Family Services and Aboriginal and Islander Affairs. No Queensland court has jurisdiction in adoption, except where there is a dispute over dispensation of consent.

Only in Western Australia does the court that is best equipped have the jurisdiction to make adoption orders: the Family Court of Western Australia. This court was established in 1976 to take jurisdiction over both federal and State family laws. Western Australia is the only State to take advantage of the opportunity accorded to all States under the *Family Law Act 1975* (Cth). As a result, adoption cases are decided in Western Australia by a court that has a counselling service attached to it, by specially qualified judges and in an informal atmosphere.

It is a great pity that the Family Court of Australia, which operates in all other States, does not have jurisdiction over all adoption cases. It is manifestly the most appropriate forum. Occasionally, by reason of cross-vesting legislation, adoption cases may fall into the Family Court's jurisdiction — for example, where the child is made the subject of a cross-application for custody. The Family Court now does have a limited jurisdiction with regard to step-parent adoptions.[20] However, all other cases continue to be heard in the State courts. It is most unfortunate that the Family Court, with its array of counselling and mediation facilities, and its other attributes as a helping court, does not have exclusive jurisdiction over adoption.[21]

WHO MAY ADOPT?

One might have thought that, on this most important issue, there would have been uniformity. That is not the case, as the provisions of each State differ markedly.

[20] See *infra*, p. 54.

[21] This view does not accord with that of the NSW Law Reform Commission that the State courts should continue to be used, or with that of the NSW Committee of Adoption that a tribunal rather than a court should be used. See NSW Review, pp. 99–103.

Married Persons Living Together[22]

In all States and the Australian Capital Territory, a husband and wife jointly may adopt a non-related child. The age at which spouses may adopt, and the requisite length of their marriage, are the subject of considerable variation.

In Victoria, there is no specific minimum age, but they must have been married two years. In the Australian Capital Territory, however, each adopter must be at least 21, but the length of their marriage is not specified. The *Adoption Act 1993* (ACT), however, provides that to be eligible to adopt, a couple must have lived together in a heterosexual relationship for a period of three years.[23] In New South Wales and the Northern Territory, there are no age limits or length of marriage restrictions.

In Queensland, legislation permits all married couples to adopt, but regulations made under the Act require that they have been married at least two years, unless the child is a 'special needs' child.[24] This provision is one of several scattered through the various States' provisions that lower the standards of adopters of 'special needs' children. There is a disturbing paradox in this philosophy, for 'special needs' children require special parental guidance, of men and women with greater rather than lesser capacities.

The South Australian provisions relating to capacity to adopt are far more stringent. In that State, adoptive parents must have been married at least *five* years. Moreover, a person cannot apply for registration as a prospective adoptive parent unless he or she is between the ages of 25 and 47. It is true that these provisions can be waived in special circumstances, which specifically include the adoption of a 'special needs' child.[25] The stricter South Australian approach is surely to be recommended, on the ground that adoption is a difficult task requiring maturity and evidence of a stable relationship.

In contrast to the South Australian position, the minimum age for adoptive parents in Tasmania is only 18. While previous legislation simply required that adoptive parents be married, the *Adoption Act 1988* requires that the married couple have lived together for three years (which may include a period of *de facto* cohabitation before marriage).[26] The new provisions in Western Australia[27] are similar to those in Tasmania.[28]

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[22] Relevant provisions: ACT, s. 18; NSW, s. 19; NT, s. 13; Qld, s. 12; SA, s. 12; Tas., s. 13; Vic., s. 11; WA, ss. 4 and 39.

[23] ACT, s. 18(i)(b). This also applies to *de facto* spouses.

[24] Qld, s. 13. For a discussion on special needs children, see below.

[25] Adoption Regulations 1988 (SA), Reg. 8.

[26] Tas., s. 20.

[27] An extensive review of Western Australian adoption law and practice was completed in February 1991. The proposed changes referred to in the text are derived from the recommendations of the report of the Adoption Legislative Review Committee, entitled *Final Report, A New Approach to Adoption*. See P. Boss, *supra* n. 6 at 399.

[28] WA, ss. 4, 39(1)(d) and (3).

It needs hardly to be emphasised that there is a substantial variation in the above provisions. It is not beyond the bounds of probability that a South Australian married couple might find the local restrictions so irksome that they decide to move to a more liberal State. Suppose a South Australian male divorcee aged 45, who has had a vasectomy, marries a 19-year-old single woman. Unless their situation was held to amount to 'special circumstances', there would be every inducement to forum-shop.

Married Persons Living Apart[29]

Some States have made special provisions for the circumstance of a separated married couple. The legislation of the 1960s was predicated on the apparent assumption that the adopters must necessarily be living together. Surprisingly, however, Tasmania, Victoria, New South Wales, Queensland and the Australian Capital Territory specifically permit an adoption order to be made in favour of a married person *singly*, if he or she is living apart from his or her spouse.[30] South Australia also permits it, provided the other spouse consents.[31] Western Australia is silent on this possibility, so one must presume that it is not permitted.

It is difficult to imagine how an adoption order in favour of a married but separated person can ever be in a child's best interest. If it is deemed to be so, it seems strange that South Australia should insist on the other spouse's consent. One would have thought that a separated spouse had forfeited any right of veto.

Single Persons[32]

All States and the Australian Capital Territory permit adoption by a single person, but the circumstances that permit the court to make such an order vary from jurisdiction to jurisdiction. The provisions of most States variously categorise the circumstances as 'special', 'particular' or 'exceptional', and one looks forward with some philological excitement to learning of the different connotations of these words. Reference has already been made to a more serious variation. In New South Wales and Queensland, a 'special needs' child is singled out as being capable of being adopted by a single person.[33] This provision is of very dubious merit.

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[29] Boss, *supra* n. 6 at 33–35.
[30] Relevant provisions: ACT, s. 18(4); NSW, s. 19(2); Qld, s. 12; Tas., s. 20; Vic., s. 11(4).
[31] SA, s. 12.
[32] Relevant provisions: ACT, s. 1(3); NSW, s. 19(2); NT, s. 14; Qld, s. 10(5); SA, s. 12(3); Tas., s. 13; Vic., s. 11(3); WA, s. 4(2).
[33] Qld, s. 10(5).

As in many other particulars, South Australia has a unique provision whereby it is specifically provided that a single person may only adopt where he or she has lived with a birth or adoptive parent of the child in a marriage relationship for at least five years, or less if the court is satisfied that there are special circumstances.[34] It would appear that that is the only situation in South Australia where a single person may adopt. South Australia is thus the only State that specifies a minimum length of co-habitation for step-parent adoptions.

De facto Couples[35]

In the Northern Territory, Queensland, Victoria and Tasmania, *de facto* couples may not adopt. In the Australian Capital Territory, New South Wales and Western Australia, a *de facto* couple of three years may adopt.[36] In South Australia, a *de facto* relationship of five years qualifies.[37] The Northern Territory specifically permits adoption by persons in a traditional Aboriginal marriage of at least two years.[38]

The Australian Capital Territory, Western Australian, New South Wales and South Australian provisions give rise to serious problems. In the first place, it is difficult to see how a *de facto* relationship can ever provide sufficient guarantee of permanence for the child. It is true that a marriage is not difficult to dissolve in Australia, but at least it requires a period of separation and the formality of a court decision. A *de facto* relationship, however, is terminable at will, without any compulsory scrutiny of the child's welfare.

There is also a thorny question of status. The natural child of a *de facto* relationship is, of course, ex-nuptial or, in popular and still much-used terminology, 'illegitimate'. There are still considerable legal disadvantages in being an ex-nuptial child.[39] Legislation permitting *de facto* couples to adopt thus allows the status of ex-nuptiality to be vested in a child by a court. It is quite impossible to support this misconceived liberalisation, which is a classic example of 'adult-oriented' permissiveness at the expense of the interests of children.[40] This argument applies *a fortiori* to homosexual couples.

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[34] SA, s. 12(3).

[35] Boss, *supra* n. 6 at 33.

[36] Relevant provisions: ACT, s. 18(1); NSW, s. 19(1A) (a lesser period than three years may qualify in special circumstances); WA, s. 39(3).

[37] SA, s. 12(3). A lesser period suffices in special circumstances.

[38] NT, s. 13(1)(b).

[39] See Bates and Turner, *supra* n. 4 at Chapter 12.

[40] The submission of the NSW Anti-Discrimination Board that preference to married couples constitutes a breach of the *Anti-Discrimination Act 1977* (NSW) seems quite misconceived. In the first place, the Act was not intended to cover adoption, but rather discrimination in employment and services; second, there is a rational basis for the preference (see NSW Review, pp. 121–6).

Relative and Step-parent Adoptions[41]

The preceding discussion related only to non-relative adoptions. The provisions relating to step-parent and relative adoptions are a great deal more permissive. Apart from foreign adoptions, these now constitute the greater part of adoptions. Stringent age and other requirements do not normally apply to them, or can be readily waived. Consent to the adoption of a child by a relative or step-parent adoption is a special, rather than general, consent, and the adopter is not required to undergo any assessment or training, or to serve any probationary period. Notwithstanding vehement criticism of 'relative' adoptions as having the potential for creating confusion in a child,[42] they have been much less stringently controlled than 'non-relative' adoptions.

Several States have sought to curtail step-parent adoptions and the matter has also received federal attention.[43] The gravamen of the criticism of them is that they result in a rupture of the relationship of the child with one of his or her natural parents.[44] In the past, when a divorced mother remarried and she and her new husband sought to establish a complete parental relationship with her child or children, adoption was seen as the obvious solution. The second husband would in this way demonstrate his total commitment to the new marriage. While the natural father's consent was necessary, adoption courts were often prepared to dispense with that consent. Pressure to consent was often placed on the natural father.

In the 1980s, however, adoption wisdom condemned this approach.[45] The new thinking has been embodied in some, but not all, State legislation. The recent Tasmanian legislation is typical:

> The Court shall not make an adoption order in favour of two persons, one or both of who are relatives of the child, unless it is satisfied that:
> (a) an adoption order would serve the welfare and interests of the child better than a custody or guardianship order; and
> (b) special circumstances exist which warrant the making of an adoption order.[46]

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[41] Some, but not all, States distinguish between adoption by step-parents and adoption by other relatives (usually by blood) of the natural parents. Relevant provisions: ACT, ss. 4 and 18(5); NSW, s. 19(4) (husband and wife — there is no specific legislation relating to adoption by other relatives); Qld, ss. 12(5) and 7; SA, s. 10; Tas., s. 20; Vic., s. 12; WA, s. 4. Other sections may also be applicable to specific situations from which relative and step-parent adoptions are exempted. Furthermore, in Victoria the *Children (Guardianship and Custody) Act 1984*, s. 12, applies to applicants for adoption.

[42] For a particularly trenchant criticism of intra-family adoption, see the NSW Review, pp. 76–77.

[43] See *infra*, p. 54.

[44] See P. Harper, *Legal Status and Family Relationships of Children in Step-Families — The Legal Opinions* (Melbourne: Institute of Family Studies, 1982).

[45] See the Conferences referred to in *supra* n. 3, all of which contained papers critical of relative adoptions.

[46] Tas., s. 20.

It should be noted that (1) the Tasmanian legislation addresses both relative and step-parent adoptions; (2) the legislation is framed as a negative imperative; and (3) the terms 'custody' and 'guardianship' are used as alternative dispositions.

The Victorian legislation, embodying a similar provision, is more positively framed but refers only to a 'guardianship order'.[47] The South Australian provisions require the court to be satisfied that 'adoption is clearly preferable to guardianship in the interests of the child'.[48] The relevant Queensland section refers to a 'guardianship *or* custody order',[49] as does that of the Australian Capital Territory.[50] The Northern Territory and NSW statutes do not appear to contain any similar precept.

On the face of it, there seems to be little significance in the different wordings. It is, however, submitted that this legislation has been hastily conceived, and imperfectly drafted, and that its ramifications have not been fully appreciated. 'Guardianship' and 'custody' are now clearly defined and distinguished in the *Family Law Act 1975*.[51] 'Guardianship' denotes the power to make long-term, major decisions about a child. It is extremely difficult to see how a 'guardianship' order could ever be made in favour of a step-father unless the natural father were dead or abdicated or were deprived of the guardianship that would normally vest in him on divorce. In any event, it is hard to see how an adoption court could make a guardianship order at all! It is difficult to conceive of two men acting independently as guardians of a child jointly with one woman (the wife and ex-wife of the two of them). If it were possible to make such an order, it would be remarkable if that division of responsibility could ever be in the interests of a child.

The distinction between guardianship and adoption is further highlighted by the fact that the former automatically ceases at the age of 18, whereas adoption creates a life-long parental relationship. Moreover, a guardianship and custody order predicated on a mere written agreement is more easily revocable than an adoption order, and therefore does not afford the children the stability of adoption. Recent cases in England have suggested that many judges have resiled from the philosophy of similar legislation of that country, and have now assumed (or resumed) a *prima facie* preference for adoption.[52]

The lot of children in blended families is never enviable, but there seems no warrant for an anti-adoption starting-point, when it is likely to give rise to such a great confusion of rights, duties and entitlements.

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[47] Vic., s. 12.
[48] SA, s. 10.
[49] Qld, s. 12(5).
[50] ACT, s. 18(2).
[51] *Family Law Act 1975*, s. 60A (Cth).
[52] See J. Heald, 'Whither Adoption Present and Future Developments' (1992) 22 *Family Law* 29; for a similar recent instance in Australia, see *Re D'Arcy and Lay; Clark* (1994) FLC 92-466 (Wilczek J).

It is only the legislation of Western Australia that does not take a *prima facie* negative stance on step-parent adoption.[53] The orientation of this provision is that a step-parent may adopt the child if there are perceived to be positive advantages to this. It must be shown that there is an existing parent/child relationship between the step-parent and the child, that the marriage of the step-parent and the child's parent is stable and that the step-parent is suitable to adopt. Moreover, a report must be prepared by the Director-General in applications for step-parent adoptions.[54] The court must take this into account, as well as the wishes of parents and other evidence.[55] The Western Australian provision is manifestly fairer than those of the States that begin with a presumption disfavouring adoption. It is also manifestly superior to that of the controversial recent provisions of the Commonwealth *Family Law Act 1975*.

These provisions, introduced in 1991, are complex and have been widely criticised.[56] Their constitutionality has been questioned. They permit the Family Court of Australia to intervene in the case of a proposed relative adoption. In effect, unless the Family Court's consent is granted to an adoption by a step-parent, a *de facto* spouse, or a joint adoption by the two of them, then the natural parent does not lose the right of custody and guardianship.[57] The Family Court thus can exercise a veto on the effect of an adoption order made by the State court.

Apart from the unhappy use of the term parental 'right' in the legislation, the effect of this amendment is once again to emphasise the perceived *prima facie* superiority of guardianship to adoption. The legislation appears to have been ill-conceived, ill-drafted and of doubtful constitutionality. Fortunately, it appears to have had minimal effect in practice.

WHO MAY BE ADOPTED?[58]

In all States, a child under the age of 18 may be adopted. Adoption is indeed primarily a service for children, but adoption of adults is permitted in special circumstances.[59] It is rare, but not so uncommon as might

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[53] WA, s. 68(2).
[54] WA, s. 61.
[55] WA, s. 68(2).
[56] See, for example, H.A. Finlay, A.J. Bradbrook and R.J. Bailey-Harris, *Cases and Materials in Family Law* (2nd ed., Sydney: Butterworths, 1993), 1013; O. Jessep and R. Chisholm, 'Step-Parent Adoption and the Family Law Act' (1992) 6 *Australian Journal of Family Law* 179.
[57] *Family Law Act 1975*, ss. 60, 60AA and 63F(4).
[58] Relevant provisions: ACT, ss. 9 and 10; NSW, ss. 6 and 18; NT, s. 12; Qld, ss. 6 and 11; SA, s. 4 (cf s. 13 — a child from 18 to 20 years); Tas., ss. 3 and 12; Vic., ss. 4 and 10; WA, s. 66.
[59] The WA legislation expressly limits this to 'carers' or step-parents: WA, s. 66(2).

be supposed. An adult adoptee must give his consent to the adoption, even if he is intellectually handicapped.[60]

An interesting example of an adult adoption occurred in the NSW case, *Re K.*[61] There was a family trust under which the beneficiaries were nominated to be the children of Mr Z. C and M, aged 18 and 23 respectively, had been brought up and educated by Mr and Mrs Z, and applied for an adoption order so that they could benefit from this trust. Young J held that, although adult adoption orders should not be made for purely collateral purposes, these two applicants were mature adults and had made a conscious and independent decision to seek adoptive status. The application was granted.[62] Under current legislation, the mother in *Re K* would have been allowed greater time to reconsider.[63]

ASSESSMENT, TRAINING AND PLACEMENT

There are two separate, though interrelated, desiderata to be considered in every adoption case: general eligibility and particular suitability.

1. Are the applicants eligible to be adopters in general?
2. If so, are they suitable to have this particular child *placed* with them?

On these fundamental questions, there are no uniform legislative guidelines. The criteria are to be found in a variety of legislative provisions, subordinate regulations and practice directions. Some States have legislated more comprehensively than others. Traditionally, a great deal has been left to the wisdom of the 'coalface'. Social workers have to make judgments on such nebulous criteria as 'personality', 'emotional maturity', 'capacity to provide a beneficial environment', 'awareness of the needs of a child' and 'capacity to be stable, loving and concerned parents'.

In recent years, attempts have been made to furnish more concrete touchstones of suitability. Most of these are still capable of great flexibility and are susceptible to subjective interpretation. But social workers are becoming increasingly aware of their vulnerability to legal action.[64] If a social worker arbitrarily rejects a couple for adoption, he or she can be taken either to a court or to an administrative tribunal. In some States, indeed, there are specific procedures and forms for adoption appeals and

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[60] See *In the Adoption of WGS* (1984) 2 SR(WA) 139, per Barblett J. In this case, the adoptee had a mental age of 11. He had been in foster care since the age of eight, and his foster-parents were seeking to adopt him.

[61] (1988) 12 Fam LR 263.

[62] Under the *Adoption of Children Act 1965* (NSW), s. 18(1)(b).

[63] See *infra*, p. 65.

[64] See S. Charlesworth, J.N. Turner and L. Foreman, *Lawyers, Social Workers and Families* (Sydney: Federation Press, 1990), 124–5.

reviews.[65] The disappointed applicants might claim that they were discriminated against, perhaps for racial or religious reasons. They might claim that natural justice was not observed, or that the social worker was biased, or did not give them a fair hearing or a right of representation. The social worker might even be sued for defamation, especially if he or she is required to produce the assessment report under freedom of information legislation. In Victoria, an applicant for adoption is specifically given a legally enforceable right to such a report.[66]

The new Western Australian legislation has initiated a particularly interesting approach, by establishing Adoption Applications Committees, whose function is to approve or reject applications to become prospective adoptive parents.[67]

If, on the other hand, adopters who are favourably assessed turn out to be unsuitable, there is also the potential for civil action. To take an extreme, though by no means fanciful, example: if a child were placed with a couple, one of whom later sexually abused the child, that child might well have a civil action in negligence against the social worker.

For these reasons, there is a case to be made for a comprehensive set of guidelines, reducing the element of subjectivity in assessment, and providing explicit instructions on factors regarding placement. But what form should these take? It could be argued that a legislative directive requesting that a child with a musical heritage should only be adopted by musical parents would delimit the present *embarras de choix*. But would such prescriptions be practical? Should facial characteristics be 'matched'? Eyes? Hair? Should heavy babies be placed with well-built parents, slight babies with slender ones?

Precise prescriptions of this nature have not usually found their way into legislation in Australia. It has been felt wiser to allow questions of suitability and matching to be left to the discretion of professionals, albeit that some criteria have been drawn up in regulations or policy guidelines.[68]

It is impossible to avoid a substantial amount of guesswork and subjectivity in both assessment and placing. But the fundamental question seems to be, is it desirable to place a child with adopters who might pass for his or her natural parents? This is presumably the issue which prompted a Review Committee in Western Australia to recommend that, in inter-country adoption, a child should be placed with adopters with a

[65] See, for example, SA, s. 5; and SA, Regulations 1988, Regs 16–19; Vic., s. 129A; and WA, ss. 110–119, provide a detailed and comprehensive structure for reviews and appeals.

[66] See Charlesworth *et al.*, *supra* n. 64 at 124–5 for a full discussion.

[67] WA, s. 12.

[68] See *infra*, p. 57. Several regulations are set out in Boss, *supra* n. 6 *seriatim*. Some of them are stringent. It is arguable that delegated legislation is particularly undemocratic in this matter.

similar ethnic and cultural background.[69] Queensland already states that the Director should give preference to applicants of a similar indigenous or ethnic background.[70] Tasmania has proposed that the natural parent may express a wish concerning the race and ethnic background of the adopters.[71] It is doubtful whether these precepts befit a multicultural society. They may, indeed, be castigated as a form of racism.[72]

Several States, taking the lead from Victoria, have enacted legislation on the same principle with regard to *Aboriginal* children, whereby the natural parent of an Aboriginal child has the right to specify the wish that his or her child be adopted within the Aboriginal community.[73] The special treatment of Aborigines is justified as a reversal of the previous policy whereby Aboriginal children were indiscriminately torn from their communities and placed with white adopters, often with disastrous consequences.[74] Thus, in a NSW case in 1984, *F v Langshaw*,[75] Waddell J, in refusing to grant white applicants an adoption order of a part-Aboriginal child against the wish of the Aboriginal father, adverted to the special problems of Aboriginal adoptions and specifically refused to draw an analogy from a study of Australian adoptions of Vietnamese children.[76]

Among the smorgasbord of guidelines to be found in the various regulations and practice guidelines, mention will be made of some of the more interesting, imaginative and perhaps eccentric criteria:

(a) the applicants' attitude towards children, particularly the discipline of children (SA);[77]
(b) reactions from relatives to the adoption (SA);[78]
(c) capacity to rear a child who is aware of his or her adopted status (NSW);[79]
(d) if the applicant has a child, the child to be placed for adoption must be at least two years younger than the existing child (NSW);[80]

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[69] See *A New Approach to Adoption: Final Report*, Adoption Legislative Review Committee, WA (1991), Recommendation 107, cited in Boss, *supra* n. 6 at 409. This recommendation, however, did not find its way into the *Adoption Act 1994* (WA).

[70] Qld, s. 18A.

[71] See Boss, *supra* n. 6 at 308.

[72] For a full discussion of the issue of ethnicity, race and adoption, see the NSW Report, Chapter 9. The notes to that chapter provide an excellent bibliography.

[73] Relevant provisions: ACT, s. 21; NT, s. 11; SA, s. 11; Vic, ss. 4 and 50. For a thorough discussion of the Aboriginal perspective on adoption, see *Adoption — An Indigenous Approach* (Melbourne: Secretariat of the National Aboriginal and Islander Child Care (SNAIC), 1988).

[74] See C. Edwards and P. Read, *The Lost Children* (Sydney: Doubleday, 1989).

[75] (1984) 8 Fam LR 823.

[76] There is an excellent discussion of this complex issue in the NSW Report, *supra* n. 8 at Chapter 8.

[77] Regulations 1988, Reg. 9 (SA).

[78] Regulations 1988, Reg. 9 (SA).

[79] Regulations 1965, Reg. 18 (NSW).

[80] Regulations 1965, Reg. 18 (NSW).

(e) fertility — except for a child with special needs and a child from overseas, evidence of the applicants' or either of the applicants' infertility or the medical inadvisability for the female applicant to become pregnant (NSW and Qld);[81] [NB This is another example of less stringent criteria being applied to special needs children — a very dubious distinction, seemingly contrary to the philosophy of the paramountcy of the child's interests.]
(f) a non-discriminating attitude to race and understanding of general community attitudes to racial differences (NSW);[82] [NB This applies only to inter-country adoptions.]
(g) no more than one child in the family (Qld).[83] [NB Once more, this does not apply to *special needs* or overseas children.]

The recent Western Australian legislation has grappled with this issue with more dedication than that of any other State. It has, in effect, provided a comprehensive set of criteria. In the assessment of applicants for adoptive parenthood, the assessor (appointed by the Director-General) must take into account the applicant's mental and physical capacity to care for and support the child until the age of 18. Moreover, the applicant must be 'of good repute' and have a stable marriage. It is specifically provided that an applicant must not have been found guilty of specific offences, including an offence against a child. Other criteria may also be prescribed by regulation.[84]

In addition, Western Australia has sought to provide directions to the Director-General regarding the matching and placement of a child with a particular adoptive parent.[85] These include the requirement that each adoptive parent meets the wishes of birth parents regarding the preferred attributes of the adoptive family,[86] and also the child's wishes. The adopter must also show a desire and ability to continue the child's cultural, religious and educational arrangements. Most interestingly, it is required that the adoptee must be the youngest member of the family and at least 12 months younger than the second youngest member. The legislation also seeks to ensure that siblings are adopted in the same family.

The Western Australian prescriptions are backed up by the requirement that all parties are required to negotiate an 'adoption plan'.[87] The child may be represented in this process. The plan is designed to cover exchange of information between the adoptive parents and the birth par-

[81] Regulations 1965, Reg. 12 (NSW): see NSW Government Gazette No. 162 (October 1987); Regulations 1988, Sixth Schedule (Qld).
[82] Regulations 1965, Reg. 18 (NSW).
[83] Regulations 1988, Reg. 5 (Qld).
[84] WA, s. 40.
[85] WA, s. 52.
[86] WA, s. 45.
[87] WA, s. 46.

ent or parents with regard to medical matters and significant events in the child's life, as well as arrangements as to contact by the birth parent. This requirement places enormous pressure on adoption applicants to agree to 'open adoption'.[88]

AGES AND RELIGION

Most States have legislated minimum and maximum ages for adoptive parents,[89] and specified age differences between the parent and the child. There is an extraordinary diversity of maximum ages among States. Victoria has a provision the rationale of which is incomprehensible. Each adopter of a child under ten must be between 18 and 40 years older than the child; but if the child is ten or over, the adopter may be up to 45 years older. In other words, a 50-year-old may not adopt a nine-year-old child, but a 56-year-old may adopt an 11-year-old.[90] Victoria, however, is alone in having such an aberration. Most States simply state minimum and maximum ages. The concept of an age difference rather than a maximum age limit has merit, but the Victorian expression of it is difficult to justify.

As far as *minimum* age limits are concerned, these vary from State to State. In some States, it is possible for an 18-year-old to adopt.[91] This, surely, is far too low. The recommendation of the Western Australian Review Committee[92] should be extended to all jurisdictions, viz that adopters must be at least 25 years old and the age difference between the adopters and the child must not exceed 40 years. It should again be noted that all States allow waiver of age restrictions for relative adoptions, and that some States also relax them for special needs and overseas children. The Australian Capital Territory has not fixed a maximum age limit, but has specified 'age' among the criteria of suitability to be taken into account by the court.[93]

The other condition of an adopter which is generally legislated for is that of religion; but there is no specific requirement that an adopter be of the same religion as the child or the child's natural parents. Nor is there any requirement that the adoptive parents bring up the child in a particular religion. The tenor of the legislation is that the relinquishing parent

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[88] See *infra*, p. 77.

[89] Relevant provisions: ACT, s. 19; NSW, s. 20; NT, s. 16; Qld, s. 13; SA, Regulations 1988, Regs 8 and 20; Tas., s. 14; Vic., s. 13; WA, s. 52.

[90] Vic., s. 13.

[91] Tas., s. 14; Vic., s. 13; WA, s. 39(1).

[92] WA Review Committee Recommendation 92; in Boss, *supra* n. 6 at 407. But the WA Parliament did not accept the recommendation of the Review Committee. The age in WA is 18 (WA, s. 39(1)). Joint applicants, however, must have lived together for three years.

[93] ACT, s. 19(1)(c)(ii).

has the right to express a *wish* regarding the child's religious upbringing. In most States, the court is specifically enjoined to consider that wish.[94]

In one NSW case, *Re E*,[95] the relinquishing parent simply expressed the wish that the child not be brought up by parents who belonged to a 'strict or unusual' religion. The applicants in fact had no religious beliefs, but were prepared to allow the child to attend a Sunday School. Larkins J made the adoption order. However, in another NSW case, Myers J in *Re M*[96] refused to make an order in favour of Anglican parents, chosen by a Church of England agency, contrary to the wish of the mother. And the same judge, in *Re JAD*[97] also refused to make an adoption order in favour of applicants who were, respectively, Roman Catholic and Anglican, when the mother had expressed a wish that the child be brought up either as a Methodist or an Anglican. Myers J took the view that the wishes of the mother were determinative. If adopters of a suitable religion could not be found, the child could not be adopted. This view is difficult to sustain in the light of the wording of the legislation.

Victoria permits the natural parent to express a wish as to the nationality or ethnicity of the adopter.[98] And Western Australia allows the natural parent to express wishes relating to any aspects of the child's upbringing. It even permits the natural parent the opportunity to select the prospective adopter from a list supplied by the Director-General.[99]

Victoria has, seemingly, a unique provision. The court must satisfy itself that consideration has been given to any wish expressed by the relinquishing parent regarding access to the child and information about the child.[100]

It is difficult to reconcile these provisions and precepts with the philosophy that consent to adoption is intended to be general. Once more, however, it emphasises the changing nature of adoption, which sometimes seems to bend over backwards to protect relinquishing parents, rather than promote the interests of the children. This is exemplified by the new Western Australian provisions.

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[94] Relevant provisions: ACT, s. 19(2)(b); NSW, ss. 21 and 21A (Note: NSW Regulations 1965, Reg. 31 requires the Director-General to make a reasonable effort to place the child with an applicant whose intention complies with the relinquishing parent's wishes); Qld, Regulations 1988, First Schedule, Regs 2, 3 and 4; SA, Regulations 1988, Reg. 20(c) (no specific mention of religion); Tas., s. 15(1)(a), Regulations 1988, Reg. 24(1); Vic., s. 15 and Regulations 1987, Reg. 29. The Northern Territory, which previously had a similar provision, has omitted it from the 1994 legislation. Likewise, Western Australia has omitted a specific reference to religion in its new legislation (WA, s. 45).

[95] [1974] 1 NSWLR 739.

[96] [1968] 1 NSWR 730

[97] *Id.* 781.

[98] Vic., s. 15.

[99] WA, s. 45.

[100] Vic., s. 15. See also ss. 59 and 59A and *infra*, p. 77.

CONSENTS TO ADOPTION

The Father

Australian law has always insisted that adoption should not take place without the consent of the appropriate parent. Baby-snatching and baby-buying have always been criminal. The law has traditionally drawn a clear distinction between legitimate and illegitimate children. In the former case, both father and mother have had to consent. However, most adoptions concern children born outside marriage. Until recently, the mother was the sole legal parent and only her consent was required.

It is typical of the fragmented, uncoordinated nature of Australian law relating to children that the reforms to the status of ex-nuptial children were effected in the early 1970s by separate legislation that bore no reference to adoption.[101] These reforms sought to abolish the status of illegitimacy. It was easier said than done. In this writer's opinion it was, and remains, a chimerical objective. Because ex-nuptial children are conceived in a variety of circumstances, from a rape through a one-night stand to a stable *de facto* relationship, it is impossible to treat them, for legal purposes, in like manner.[102] Nevertheless, the central feature of the status of children legislation is that an ex-nuptial child is entitled to a full relationship with his or her father — and a putative father is to enjoy the same rights and privileges and be subject to the same duties and responsibilities as if his child had been conceived or born in marriage.

This noble and just concept, however, is severely put to the challenge when the question of an ex-nuptial child's adoption is in issue. Taken to its logical extreme, it demands that the father's consent to the adoption be required, just as if the child had been born in marriage.

While the latest round of adoption legislation seeks to grapple with the problem of the unmarried father, jurisdictions differ in many important particulars. Victoria led the way by providing that the father's consent was not necessary in all circumstances, but only in the following situations:

(a) where his name is on the birth certificate;
(b) where there is a declaration of paternity; [NB This is advisable in every

[101] Relevant provisions: ACT: *Birth (Equality of Status) Act 1988*; NSW: *Children (Equality of Status) Act 1972*; NT: *Status of Children Act 1978*; Qld: *Status of Children Act 1978*; SA: *Family Relationships Act 1975*; Tas.: *Status of Children Act 1974*; Vic.: *Status of Children Act 1974*. Western Australia did not pass legislation of this nature.

[102] See J.N. Turner, *Improving the Lot of Children Born Outside Marriage* (London: National Council for One-Parent Families, 1973). This view seems to have been confirmed by the English Law Commission's Report on Illegitimacy, Law Comm. No. 118 (1990). See also S. Charlesworth, 'The Impact of the Status of Children Act 1974 (Vic) on the Legal and Social Rights of Children Born to Unmarried Parents' (1985) 8 *Tasmania Law Review* 195; C. Sachs, 'The Unmarried Father' (1991) 21 *Family Law* 538.

instance of ex-nuptial birth, but it may be contested, and, even if not, must be sought in the Supreme Court, which makes it an expensive process.]

(c) where there is a maintenance order against the father; [NB This is unlikely where the child is newly-born.]
(d) where the father has acknowledged paternity; [NB Again, this is justiciable in the Supreme Court.]
(e) where there is a non-Victorian court order naming him as father;
(f) where there is a Family Court order against him; [NB Presumably, now, this includes an order under the Child Support Scheme.]
(g) where he has been granted custody or access.[103]

Tasmania has identical provisions.[104]

In the situation where none of the above provisions applies, a reasonable effort to locate the father must be made by the Director-General. He has the option of seeking a Declaration of Paternity if he is located. In the situation where a declaration is sought, his consent to the adoption will be required.

The situation of the father of a child born outside marriage has thus been considerably strengthened, although his position is in practice not likely to be as formidable as that of a legitimate father, who virtually has a right of veto. This development is to be applauded, in that it emphasises the right of the *child* to a true relationship with his or her father. It is, however, yet another new provision which militates against adoption.

The new Western Australian provisions, passed on the recommendation of the Adoption Review Committee, represent the most detailed and sophisticated attempt to deal with this issue. A man is 'taken' to be the father of a child if his name is entered in the birth register; or he has acknowledged paternity by statutory declaration, which has also been endorsed by the mother; or he is 'treated as being the father' by operation of law. It is provided that this presumption only applies in the absence of evidence to the contrary.[105] In the situation that those provisions do not apply, on receipt of the birth mother's consent, the Director-General is required to notify any man who was married to the mother during 11 months prior to the child's birth and any man who has been named as or has claimed to be the child's father.[106] This, however, does not apply to a man who has been convicted of an offence which resulted in the conception of the child, or has been required to pay crimes compensation to the mother in connection with an alleged offence leading to the child's conception.[107]

[103] Vic., s. 33(3).
[104] Tas., s. 29.
[105] WA, s. 4(3).
[106] WA, s. 2(1).
[107] WA, s. 21(3).

South Australia's provisions are simpler. They provide that consent of the birth father of a child born outside marriage is not required unless his paternity is recognised under South Australian law. In any event, consent is not required of a man whose paternity arises from unlawful sexual intercourse.[108]

New South Wales provides that men who are living in a bona fide *de facto* relationship must consent. Moreover, the potential adoptive parents are given the responsibility of enquiring whether there is any putative father who has acknowledged paternity or whose paternity has been declared under the *Children (Equality of Status) Act 1976*. The putative father has 14 days in which to apply for 'care, custody or guardianship' of the child.[109]

It would therefore appear that in New South Wales, save in the case of a *de facto* relationship, a father of a child born outside marriage has a right to refuse to consent to the adoption of his child only if he is willing himself to *take* custody or guardianship of the child. It is to be doubted whether the drafters of this provision fully appreciated the legal distinction between 'guardianship' and 'custody' now established in Australian law by the *Family Law Amendment Act 1983*.[110] However, it has been argued that other putative fathers may be caught by the NSW section that requires consent of a 'guardian'.[111] In practice, however, the Department seeks consent only from fathers in a *de facto* relationship.[112]

The Australian Capital Territory has conferred the right to consent on a man who is presumed to be the father of an ex-nuptial child under the terms of the *Births (Equality of Status) Act 1988*.[113] The Northern Territory grants the right to a birth father provided his paternity is recognised before the end of the birth mother's revocation period, or before the day when the adoption order is made.[114]

The legislation is thus framed differently in every jurisdiction. The differences, on paper, seem significant. Whether they make much difference in practice from State to State requires empirical research. Such evidence as there is suggests that few fathers have taken advantage of their new rights. Those who have been given the opportunity to consent have generally done so.[115] But even where a father of an ex-nuptial child

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[108] SA, s. 15 (cf Boss, *op cit.*, 261).

[109] NSW, ss. 31A and 31D. See Boss, *supra* n. 6 at 141.

[110] The NSW provisions are fully discussed, and a 'suggested principle' enunciated, in the Review of the *Adoption of Children Act 1965* (NSW), Law Reform Commission, Discussion Paper No. 34 (1994), 162–8.

[111] NSW Review, p. 163. See *C v Director-General of Department of Youth and Community Services* (1982) 7 *Family Law Reports* 816. See also *Hoye and Neely* (1992) 15 *Family Law Reports* 578.

[112] NSW Review, p. 163.

[113] ACT, s. 27(3). See Boss, *supra* n. 6 at 79.

[114] NT, s. 21.

[115] See R. Nicholls and M. Levy, 'Relinquishing Counselling of Birth Fathers', in P. and S. Swain, *supra* n. 3 at Chapter 6.

is granted a right to consent, it would seem that his position may be less powerful than that of a father of a child born in marriage. In *A v Director-General of Child Welfare*,[116] McCall J of the Family Court of Western Australia was confronted with an adoption that had already taken place, despite the fact that the father's consent had not been obtained. A child had been born within a *de facto* relationship. A year later, the father left the mother, who surrendered the child for adoption. The father contacted the Department who advised him that his consent was not required. In the meantime, the father entered into a new relationship with a married woman. The child was living with the potential adopters. The father sought custody and guardianship of the child. McCall J held that, because of the father's history of unstable relationships and instability at work, it was in the best interest of the child to be adopted. He expressed the view that the father of an ex-nuptial child was in a less favourable position than the father of a child born within marriage, who had, in effect, a right to veto the adoption. McCall J took into account the respective merits of the potential adopters and the father, deciding that the facts of the blood relationship of the father and child were overridden by the positive merits of the adopters.

Likewise, in *C v Director General Department of Youth and Community Services*,[117] Waddell J rejected the putative father's argument that his consent as a 'guardian' was required. While it was conceded that he was, jointly with the Director, a guardian by virtue of the *Children (Equality of Status) Act 1976*, the word, 'guardian', in the *Adoption of Children Act 1965*, was interpreted by Waddell J to refer only to non-parental guardians. Therefore only the Director's consent was necessary.

These cases are a salutary reminder that children born to *de facto* couples are not in practice always treated equally with children born in marriage.

The Mother

The mother's consent has always been required. The tenor of the new legislation, however, is to make it more difficult to obtain this consent, and, once it has been given, to make it more readily revocable. Once again, the provisions vary from State to State without any good reason.[118]

The rationale behind provisions relating to consent lies in the well-known syndrome, post-natal depression. That mothers are apt to vacillate is well illustrated in the sad Queensland case, *R v Clarke*.[119] A child

[116] (1988) 1 SR(WA) 180.
[117] [1982] 1 NSWR 65.
[118] Relevant provisions: ACT, ss. 27–34; NSW, s. 31; NT, ss. 26–33; Qld, s. 24; SA, s. 15; Tas., s. 26; Vic., s. 42(3); WA, s. 18.
[119] [1971] Qd R 462.

was born on 27 March 1971. The unmarried mother signed a consent form on 2 April 1971, but nine days later telephoned the Department to obtain a form of revocation of that consent. On 30 April 1971, following counselling, she destroyed this form. But she still vacillated, and was counselled further. On 13 May 1971, the Director of Child Services formed the view that the mother had finally decided on adoption, and, in accordance with his prerogative in Queensland, made an adoption order. The mother again changed her mind and sought to recover the child by a writ of *habeas corpus*. Wanstall ACJ held, however, that she had no *locus standi*, as the child had already become the child of the adopters.[120] He found that there had been no fraud or improper conduct inducing her to revoke her consent.

All States provide that a consent signed before the birth of the child is not valid. A consent signed after the birth is only valid if it is signed after:

(a) three days (NSW);
(b) five days (ACT, SA, Qld);
(c) seven days (Tas.);
(d) 14 days (Vic.).

The Northern Territory has recently enacted that such a consent is not valid if signed within one month of the birth.[121] Similarly, the Western Australian period has been increased from seven to 28 days.[122]

It should be noted that some States permit a registered medical practitioner to certify that the mother was in a fit condition to make a valid consent even within the specified period. On the other hand, South Australia provides that a consent given between five and 14 days after the child's birth will be valid only if the court is satisfied that there were special circumstances and that the mother was able to exercise a rational judgment.

The trend of the new legislation is thus to postpone the date so as to give the birth mother more time to consider keeping the baby, and more time to bond with the child.

Generally, the new legislation also provides a longer revocation period than did previous legislation. South Australia, for instance, provides that a birth parent may revoke consent within 25 days of the date of giving consent and this period may be extended by the Director-General to 39 days.[123]

Some States, notably Western Australia, Victoria and South Australia, have enacted that counselling of a birth parent is required before she (or he) can sign a valid consent, and that this counselling should include

[120] Under Qld, s. 28(1).
[121] NT, s. 34(2)(b).
[122] WA, s. 18(1)(a).
[123] SA, s. 15.

information on alternatives to adoption. Victoria and Western Australia even require that the birth parent be supplied with the names and addresses of agencies providing family support.

It is difficult to resist the impression that these legislative changes are designed to discourage adoption. One wonders whether, in practice, they induce strong guilt-feelings in women who would otherwise have relinquished their child in that child's best interest.

Indeed, the enactment of legislation of this kind raises a query as to whether the interest of the child is truly paramount in the adoption process. There may be cases where the child would be better off financially and emotionally if it were adopted by loving, well-trained parents. When such an adoption has been vetoed or substantially delayed by a mother swayed by counselling which has such a clear emphasis on the benefits of non-relinquishment, one wonders whether the interests of the child have been regarded as paramount.[124]

The Child

A welcome tendency of new legislation is to give the adopted child a voice.[125] The legislation, however, varies in one very important particular. Victoria has given *all* children a right to express a wish, and enjoins the court to give such weight to that wish as is appropriate to that child's age and maturity.[126] Other States, however, confine the right to a child of a particular age (usually 12 and over), and require that that child *must* consent to the adoption save in special circumstances. It should be noted that South Australia has provided for mandatory counselling of children. In that State, the child must be interviewed in private by a specially constituted court.[127]

Victoria is to be commended for extending the legislation to children of all ages. This is in accord with Article 12 of the *UN Convention on the Rights of the Child*, which requires that every child has the right to express a view on a matter affecting him or her, such view being given due weight in accordance with the age and maturity of the child.

Following the recommendations of the Western Australian Review Committee, that State has provided that a child of two years or more must have the nature of adoption explained to him or her.[128] New South Wales contains a unique provision: where the child is over 12 and is sought

[124] But different considerations apply when the consent of the mother has once been given, but is now alleged to be invalid. Here, the mother carries a heavy onus: *Re B* [1979] 2 NSWLR 915.

[125] Relevant provisions: ACT, s. 19; NSW, s. 33; NT, s. 10; Qld, s. 26; SA, s. 16; Tas., s. 28; Vic., s. 14; WA, s. 17(1)(c).

[126] Vic., s. 14.

[127] SA, s. 16.

[128] WA, s. 52(1)(b).

to be adopted by his or her foster parents, the child's consent is necessary, to the exclusion of that of any guardian or biological parent.[129]

Victoria has also accorded two other important rights: the right of mandatory separate representation (unfortunately, however, the right applies only to contested cases); and the right to a say in the choice of his or her forename and surname.[130] In Western Australia, a child of any age may express a wish as to the names by which he or she is to be known.[131] The court may not change the name of any child over 12 without that child's consent.[132] In Western Australia, the child is entitled to legal representation in the following circumstances:

(a) where the child requires assistance in considering the adoption;
(b) in connection with an adoption plan;
(c) in disputed proceedings.[133]

It is perhaps unfortunate that the Western Australian legislation as to names provides merely that the wishes and feelings of the child shall be 'taken into consideration' rather than be determinative. The question of names is of vital importance to the identity of a child, and its significance has been greatly underrated in common law countries.

DISPENSATION OF CONSENT[134]

While it is normally not permissible to make an adoption order without the consent of the birth parents, there are circumstances in which they may be considered to have forfeited their right of veto.

The 1960s legislation set out a number of specific situations in which consent might be dispensed with, dependent on some defect, fault or neglect of the birth parent, followed by a general phrase, 'or there are other special circumstances'.

Unfortunately, courts have tended to interpret this last phrase *ejusdem generis* with the preceding instances.[135] Australian courts have obtained a reputation for being reluctant to dispense with parental consent, even when this is clearly in the best interest of a child.[136] The English view,

[129] NSW, s. 26(4A).
[130] Vic., ss. 56 and 106.
[131] WA, s. 74(2)(b).
[132] WA, s. 74(3).
[133] WA, s. 134(1).
[134] Relevant provisions: ACT, s. 35; NSW, s. 32; NT, s. 35; Qld, s. 25; SA, s. 18; Tas., s. 27; Vic., s. 43; WA, s. 24.
[135] See *Re X* (1984) 53 ACTR 21, where Blackburn J expressly stated that the court had not been given a general discretion to dispense with parental consent whenever it was in the best interest of the child: See also *Re S* (1976) 9 ACTR 27.
[136] *Mace v Murray* (1955) 92 CLR 370. This case suggested that adoption was a very last resort. A horrific example of the application of this case is noted *In the Matter of CB (No. 1)* [1982] VR 657; *In the Matter of CB (No. 2)* [1982] VR 681.

expressed in a House of Lords case, *Re W*,[137] was different in that the term 'special circumstances' included situations where the birth parent had been in no way blameworthy, but where it was clear that the best interest of the child favoured adoption. Perhaps a trend in this direction has been heralded by the WA case, *A v Director-General of Child Welfare, (in) Re S*,[138] where McCall J expressed the view that the overriding consideration was the best interest of the child, and not the blood tie between the parent and the child. In *Re MJF*, Powell J expressed the view that the correct judicial approach was to seek to compare and evaluate the respective advantages and disadvantages to the child of the adoption.[139]

The new Victorian legislation has extended the grounds for dispensing consent to include this radical departure from previous thinking by adding the ground: 'that, for any reason the child is unlikely to be accepted into, or to accept, a family relationship with [the birth parent]'. Queensland has introduced an imaginative ground, 'that the [birth parent] has failed to reasonably plan for the resumption of the care of the child whereby integration of the child in its family is unlikely in the foreseeable future'. Tasmania has also expanded the grounds for dispensation of consent, adding a set of provisions on the means to be used for tracing an appropriate person for consent, and including the Victorian provision set out above. New South Wales has now specifically provided that consent may be dispensed with where the welfare and interest of the child would be so promoted.

It is to be hoped that these changes result in a greater readiness of Directors-General to seek an adoption order for wards of state, other children in foster care or institutional care, abused children, and all children who have little hope of ever resuming a happy relationship with their natural parents. The path is open to courts to be more realistic and less reluctant to give credence to sentimentality about the ties of blood. If the interest of the child is truly to be the corner-stone of adoption practice, courts must be ready to give effect to the central provision of the *UN Convention on the Rights of the Child*, the right of a child to be cared for in a loving family.[140]

It is pleasing to note that one jurisdiction, Western Australia, has introduced legislation specifically directed at children who have been fostered or cared for by adults other than natural parents. Such 'carers' are defined to mean persons who have had the daily care and control of a child, and the responsibility for making decisions concerning the care and control of that child, for a period of at least three years.[141] Carers are

[137] [1971] AC 682.
[138] (1988) 1 SR(WA) 80; but cf *R v R* [1974] VR 291 (Harris J).
[139] (1981) 7 Fam LR 133; but cf *Re EW* [1980] 1 NSWLR 89 (Powell J).
[140] *UN Convention on the Rights of the Child*, Article 9 states: 'Parties shall ensure that a child shall not be separated from his or her parents against their will, except when ... such separation is necessary for the best interests of the child.'
[141] WA, s. 4(1).

given a specific right to adopt that particular child.[142] This provision is to be highly recommended as a solution to the scandal of 'children in limbo'.

DISCHARGE OF ADOPTION ORDER[143]

Save in a few jurisdictions, and in very exceptional circumstances, the parents or guardians of children can never relinquish their children, or evade the responsibility for their upbringing. If adoption is regarded as equating the relationship of adopter and adoptee with that of a parent and child born in marriage, as the legislation of all States proclaims, surely the same principle should apply to adoption. Indeed, this is the case in England, where an adoption order is never revocable.

Yet the 'uniform' legislation of the 1960s in Australia permitted the discharge of an adoption order in certain circumstances.[144] It is to be regretted that Victoria has extended the conditions for a discharge to 'the irretrievable breakdown of the relationship between the adopted child and the adoptive parents'.[145] Such a provision must be classed as 'anti-adoption', especially as one of the parties who can apply for such an order is the natural parent. Tasmania echoes the Victorian provision in its 1988 legislation. Western Australia permits an adoption order to be discharged on broad, general grounds.[146] On the other hand, the Northern Territory and South Australia limit the circumstances of discharge to the obtaining of the order by fraud, duress or other improper means[147] — in other words, the rescission of an order wrongly made initially. This approach is commendable.

It is submitted that the circumstances under which an adoption order might be discharged should be limited to the rescission of an order wrongfully made, and that the only people who might apply should be the Director-General or the relevant Minister. The Australian Capital Territory specifically provides that the irretrievable breakdown of the relationship between the adoptee and his or her adopted family should not be a ground for a discharge.[148]

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[142] WA, ss. 67(1)(b) and 68(2)(b). This reform was perhaps prompted by the criticisms by Barblett J of the Department of Community Services (WA) in *In the Adoption of WGS* (1984) 25 SR(WA) 193, where a handicapped child had been fostered from the age of eight to 18.

[143] Relevant provisions: ACT, s. 26; NSW, s. 25; NT, s. 44; Qld, s. 16; SA, s. 14; Tas., s. 19; Vic., s. 19; WA, s. 77.

[144] See *Re S* [1969] VR 490, where a child with cerebral palsy was adopted, without the adoptive parents being made aware of this. This was held to be sufficient reason for discharging the adoption order.

[145] Vic., s. 19.

[146] WA, s. 77(2).

[147] NT, s. 44(1); SA, s. 14.

[148] ACT, s. 26(2).

The inclusion of extensive grounds for discharge gives the potential for malicious litigation. If an adoption order is discharged, the original consent to adoption should be revived and the child placed in an alternative adoptive family. This is, unfortunately, not the case in current legislation.[149]

ACCESS TO INFORMATION AND CONTACT[150]

The most significant changes in recent adoption legislation relate to the encouragement of the resumption of a relationship between the birth parent and the adoptee. This concept, which is a radical departure from the traditional perception of adoption as a complete severance of the ties between birth parent and child, involves two elements: *access to information* and *contact*.

Victoria took the lead in legislating in this area. All States and Territories have now followed suit. This fundamental change may be said to be predicated on the conviction that every human being has a need to establish his or her genetic origins. It is, however, clear that a great deal of pressure for the change emanated from the lobbying of groups comprising mothers who had relinquished their child. They claimed that the mothers suffered unassuaged grief as a result of loss of all contact.[151]

While the arguments for change have been accepted throughout Australia, the legislation differs in many important particulars from State to State. None of the legislation, however, makes provision for professional support services for the relinquishing parent after the adoption order is made. The absence of this thrusts the burden of grief resolution on to the child through the medium of open adoption arrangements.

The statutory provisions are complex and detailed. The reader is referred to *Adoption Australia*[152] for a comprehensive analysis of them. Here, it is proposed to set out the main features of the legislation, and to comment on significant differences.

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[149] Cases on discharge are rare. For a particularly interesting one where it was held that a wife and her former husband had 'exceptional reasons' for discharging an adoption order made in favour of the wife and her second husband, which had since broken down, see *Re Adoption Application 58/1984* (1986) 11 Fam LR 518 (ACT, Kelly J).

[150] Relevant provisions: ACT, Part V; NSW, *Adoption Information Act 1990*; NT, Part 6; Qld, Adoption Legislation Amendment Acts 1990–91; SA, ss. 27–41; Tas., Part VI; Vic., ss. 117–127; WA, ss. 79–109.

[151] This argument was forcibly made by R. Winkler and M. Van Keppel, *Relinquishing Mothers in Adoption — Their Long Term Adjustment* (Melbourne: Australian Institute of Family Studies, 1984).

[152] Boss, *supra* n. 6. Heading 13 deals with access to information and open adoption for each jurisdiction.

Adoptees

The Victorian legislation draws a distinction between relative and non-relative adoptions. With relative adoptions, there is an absolute right for all parties to obtain a copy of the original birth certificate, even before the adoptee is 18. The right exists without any need for any other person's consent. The Australian Capital Territory also makes more liberal provision for relative adoptees. In other States, however, it does not appear that any such privilege is conferred on parties to relative adoptions.

The general rule applicable to *all* adoptions in most States, and non-relative adoptions in Victoria and the Australian Capital Territory, is that access to information is not an absolute right, but is qualified in several particulars. A comparative analysis of this complex legislation reveals considerable disparities, and disaccord on several fundamental issues:

(a) whether to distinguish between relative and non-relative adoptions;
(b) in what circumstances to give birth parents and adoptive parents an absolute veto;
(c) whether to give 18-year-olds greater rights, or to fix a lower age;
(d) whether to apply the access to information provisions retrospectively as well as prospectively.

An adoptee under 18 years

In all jurisdictions, an adoptee under age 18 has a right to *non-identifying* information about himself or herself only with the consent of each adoptive parent.

He or she may obtain *identifying* information only with the consent of each adoptive parent *and* that of the birth parent or relative.

In some jurisdictions (e.g. Victoria), the adoptive and birth parents have an absolute right of veto. In other jurisdictions (e.g. New South Wales), the Director-General may dispense with their consent, if there is sufficient reason to do so.

It is difficult to reconcile this differentiation between adoptees under and over age 18 with the philosophy of the *UN Convention on the Rights of the Child*, which presupposes that children mature at different ages and accords a 'right of identity' to all children. The individual maturity of the child could be taken into account if it were enacted that the adoptee had a right of appeal to the Director against the exercise of the parental veto. It is noteworthy that the Northern Territory has lowered the age from 18 to 16 years.[153]

[153] NT, s. 64(2).

The 1988 South Australian legislation is unique in distinguishing between adoptions that took place before the Act commenced and those that take place after. For the former, the birth parent has a *veto*, which lasts for five years, but may be renewed.[154]

An adoptee over 18 years

In most States, an adoptee over age 18 has a right to apply for non-identifying and identifying information about himself or herself. In Victoria, this information *must* be supplied by the Director-General if he holds it. If it is not in his possession, he must seek the permission of the birth parents before it may be disclosed.[155] In this instance, the birth parents do have an absolute veto.

The NSW legislation is more carefully and specifically drafted. An adult adoptee is entitled to receive his or her birth certificate, as of right. On production of the birth certificate, he or she is entitled to receive further information, giving a more complete personal profile, such as the nature and relationship of the birth parents, their names and date of birth. All this information must be supplied by the appropriate 'information source', defined in the Act to include the Department of Family and Community Services, the Department of Health, a private adoption agency, a hospital, the office of the Principal Registrar and the Supreme Court.[156]

South Australia is unique in providing that, in the case of adoptions before the 1988 Act commenced, identifying information must not be disclosed to the adoptee without the consent of both the adoptee and the birth parents. Nor may the Director-General arrange or assist any non-consensual meeting of adoptee and birth parent. This embargo lasts for five years, but is renewable.[157]

Queensland would appear to give the adoptee the right to apply for both non-identifying and identifying information, but to accord the Director-General an absolute discretion as to whether to supply it.[158]

The ACT *Adoption Act 1993* is the most detailed legislation yet passed. In essence, it provides that an adopted child of any age is entitled to non-identifying information, but that (except for relative adoptees) an adopted child under 18 must have the approval of birth parents and adoptive parents before identifying information may be released.[159] It would seem that

[154] SA, s. 41(5).
[155] Vic., s. 92(2).
[156] *Adoption Information Act 1990* (NSW), s. 6(1) and (3). This Act was reviewed by the NSW Law Reform Commission in 1992, Report No. 69, Sydney (1992). For a critique of this Review, see J.N. Turner, 'Review of *the Adoption Information Act* 1990 (NSW)' (1994) 19 *Monash University Law Review* 343.
[157] SA, s. 27.
[158] *Adoption of Children Amendment Act 1990* (Qld), s. 18.
[159] ACT, s. 68.

they have an absolute veto, as there are no grounds for dispensation of consent unless the appropriate person is dead or cannot be found.

Natural Parents

The Victorian legislation classifies information into identifying and non-identifying, and again distinguishes between adopted children under and over age 18,[160] a distinction that may offend the spirit, if not the letter, of the *UN Convention on the Rights of the Child*.

A birth parent of an adult adoptee is entitled to receive non-identifying information about the adoptee, as of right. It is, however, difficult to imagine circumstances where the birth parent would be satisfied with this type of information. Identifying information is only available with the prior written agreement of the adoptee. In the case of adoptees under age 18, the relevant authority (usually the Director-General) may only supply identifying information with the consent of the adoptive parents, and must also take account of any wishes expressed by the adoptee.

The Victorian Act does not specifically distinguish between the birth mother and the birth father. The NSW legislation is to be commended for addressing this issue. It provides that a man who claims to be the birth parent is not entitled to information unless he is shown on the original birth certificate as the father or he is presumed to be the father under the *Children (Equality of Status) Act 1976* (NSW).[161] It is to be noted that this is a different definition from that which classifies those men whose consent to the adoption is necessary.

The NSW Act provides that the birth parent is entitled to the amended birth certificate of the adoptee and any appropriate information relating to the adoptee or adoptive parents that is possessed by the 'information source'.[162] New South Wales, however, permits the Director-General to supply any birth certificate or information before an entitlement arises, if it would promote the interest of either the adoptee or another of the parties involved.[163] It would be interesting to know how frequently and in what circumstances this discretion is exercised. On the face of it, it is possible for this provision to be interpreted in a manner contrary to the *paramount* interest of the child.

In Western Australia, a birth parent has the right to obtain access to all information relating to a child, subject to any information veto, or unless the Director-General thinks there is good reason for it not to be supplied.[164] Tasmania's legislation is far more cautious. It in effect accords the adult

[160] Vic., ss. 92–94.
[161] *Adoption Information Act 1990* (NSW), s. 8(2).
[162] *Adoption Information Act 1990* (NSW), s. 7.
[163] *Adoption Information Act 1990* (NSW), s. 12.
[164] WA, ss. 82(2) and 84(1).

adoptee and the adoptive parents of a child adoptee a right of veto over supplying information. The wishes of the child under age 18 must also be considered.[165]

South Australia does not distinguish between 'identifying' and 'non-identifying' information, but specifically requires the Director-General to disclose to the birth parent of an adult adoptee:

(a) the adoptee's name;
(b) the adoptive parents' names;
(c) any other information that relates to the adopted person but does not 'enable that person to be traced'.[166]

It is difficult to see how the disclosure of the names itself would not be sufficient information to enable them to be traced.

As has been mentioned, South Australia, alone of Australian jurisdictions, protects adoptees from disclosure if the adoption took place before the commencement of the 1988 Act. This is fundamentally contrary to the spirit of other legislation that is based on the idea that all parties to the adoption process have a right to the truth, whether or not secrecy was promised at the time of the adoption.

The Queensland legislation, as amended in 1991, adopts a less peremptory attitude. It provides that a birth parent is entitled to all identifying information on an adult adoptee, unless there is a *contact objection* in force.[167] This legislation therefore clearly deviates from the philosophy that information is a basic human right, and gives interested parties a right of veto.

The new ACT legislation has a most imaginative clause that permits the Director to withhold information from a birth parent who has, in the belief of the Director, sexually or physically abused the child.[168] It would be interesting to learn the motive for this unique provision. It may perhaps have been inserted following a specific instance of such a case.

Other Persons

The Acts deal variously with the rights of other persons to information, e.g. adoptive parents, siblings, other relatives and descendants of adoptees. The Acts are extremely varied in their attention to these persons. Victoria even has a blanket provision: 'A person who is not otherwise entitled to obtain information under the Act may apply to the County Court for information about an adopted person.'[169]

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[165] Tas., ss. 83 and 84.
[166] SA, s. 41(5).
[167] *Adoption of Children Amendment Act 1990* (Qld), s. 18. See Boss, *supra* n. 6 at 243.
[168] ACT, s. 68(7). See Boss, *supra* n. 6 at 115.
[169] Vic., s. 100.

It is apparent that there are considerable divergences in the legislative provisions of the States and Territories. It would be desirable to ascertain whether this has led to differing practices.[170]

INFORMATION EXCHANGE AND CONTACT SYSTEMS

Despite the claims of many advocates of open adoption that it should not be threatening to any of the parties, the legislatures have not accepted that access to information is an absolute right, to be relentlessly pursued. Most States have provided safeguards in the form of counselling and contact systems, and some have set up a system of contact vetoing. Moreover, specific provisions in some States relate to the disclosure of medical or psychological information that might be prejudicial to the health of the applicant. In these instances, the information may be conveyed to the applicant's medical practitioner.

Victoria provided the prototype of an information service. It was rather slow to be established, however, and there was a considerable backlog of applications prior to its commencement. Under the legislation, the Department of Health and Community Services and any licensed non-government adoption agency must operate a service to advise persons about information and assist persons to obtain it, as well as to make arrangements for counselling.[171] Mandatory counselling is built into the Victorian scheme. Every person seeking information or a document must have counselling unless identifying information has already been exchanged (presumably, with the consent of all parties).[172] Victoria has also established an Information Register, which contains all relevant names and addresses and their wishes with regard to obtaining or providing information, and to contact.[173]

New South Wales has established a Reunion Information Register. Adoptees, birth parents and 'any other person with an interest in an adoptee or birth parent' may have their names entered in the Register. Adoptees between the ages of 12 and 18 must have the consent of their adoptive parents, unless the Director-General considers that there are special circumstances making it desirable to permit the child's name to be entered. Reunions, arranged by the Director-General, may take place only between parties on the Register. In particular, the Director-General

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[170] An informative analysis of the use to which an information system of a Victorian non-government agency has been made is included in P. Swain, 'Adoption Information Services — Myths and Realities', in P. and S. Swain, *supra* n. 3 at Chapter 3. It is interesting to note that far more adopted females than males seek information. See also G. McPhee, 'Testing Adoption Assumptions Through Legislation', Chapter 4 of the same book, which examines the operation of the Victorian government service.

[171] Vic., s. 102. See *supra* n. 169.

[172] Vic., s. 87.

[173] Vic., s. 103.

may not arrange a reunion of a child adoptee with the birth parent without the adoptive parents' consent. The Director-General may, however, give 90 days' notice to the adoptive parents of his intention to arrange a reunion, so that, presumably, the adoptive parents' refusal to consent may be overridden.[174]

In New South Wales, contrary to Victoria, the Director-General is charged with the duty of facilitating the reunions. Even though a person may not have registered his or her name on the Register, the Director-General may seek to locate that person if he considers that it is in the best interests of the parties.[175] It is apparent, therefore, that the NSW Department of Community Services has been given the mandate to play a principal part in arranging reunions of adopted persons.

New South Wales permits a person who was adopted before the *Adoption Information Act 1990* was assented to, or his or her birth parents, to lodge a veto to contact. The adoptee may only lodge this veto if he or she has reached the age of 17 years and six months. The veto may be waived, and indeed the Director-General may approach the objector to see if he or she wishes to cancel or vary the veto.[176] It seems surprising that adoptive parents have no right of veto, and that their consent to the veto of their adopted child is not necessary. It is thus apparent that New South Wales has been troubled by the issue of retrospectivity of the legislation. It would appear that a substantial number of parties to adoptions made under previous legislation, which guaranteed secrecy, have availed themselves of these provisions and placed their names on the Contact Veto. The desire for 'honesty' in adoptions is not so unequivocal or universal as some of the proponents of open adoption would suppose.[177]

Other States have enacted similar provisions, but there are subtle variations in law and, no doubt, in practice. Western Australia has set up an Adoption Information Service, with provisions for contact and non-contact vetos. This Service is charged with facilitating exchange of information and the co-ordination of counselling. Counselling is not mandatory under this scheme, and it is possible for any parties to the adoption to register a wish for non-contact. Counselling and mediation services are provided.[178] Counselling is mandatory in Tasmania, save where identifying information has already been exchanged.[179] Tasmania goes further than other jurisdictions by permitting a person whose interest may be affected by an adoption to apply to a judge in Chambers if he or she is unable to obtain information to which he or she is otherwise not entitled, or because agreement cannot be reached with the adoptee.[180] It could be

[174] *Adoption Information Act 1990* (NSW), ss. 32–33. See Turner, *supra* n. 156 at 347.
[175] *Adoption Information Act 1990* (NSW), s. 33.
[176] *Adoption Information Act 1990* (NSW), ss. 16–29.
[177] For a full discussion of the impact of this legislation on adoptive parents, and the wisdom of its philosophy, see Turner, *supra* n. 156 at 352–4.
[178] WA, s. 79.
[179] Tas., s. 74.
[180] Tas., s. 87.

argued that this provision is an infringement of privacy in that it compels a reluctant person to reveal information against his or her wish. The Australian Capital Territory has established both an Adoption Information Service and an Adoption Information Register, as well as a Reunion Information Register and a Contact Veto Register. The extremely detailed provisions relating to the operation of these registers testify to the concern over the effect of open adoption in the Australian Capital Territory.[181] There is no provision for Information Exchange or Contact Systems in Queensland, South Australia or, at present, in the Northern Territory.

It is abundantly clear that the laws, practices and procedures, as well as the safeguards and rights of parties who are unhappy about exchange of information and, especially, reunion, vary enormously from State to State.[182] The ramifications of information exchange and the implementation of contact systems make uniformity paramount.

ACCESS TO ADOPTED CHILDREN — THE EPITOME OF OPEN ADOPTION

Several States have now legislated for the possibility that the natural parent or parents maintain 'access' to the child after his or her adoption. Victoria pioneered this approach. Indeed, the Victorian legislation seems to suggest that this should be the norm. Relinquishing mothers must not only be counselled about the possibility; they must also formally indicate their wishes in the instrument of consent. The Victorian legislation requires that the court, before making an adoption order, be satisfied that consideration has been given to any wish for access. It presupposes that negotiations might take place between the birth parent and the proposed adoptive parents, when it requires that the court consider any 'arrangements agreed upon' by them.[183] The Tasmanian legislation is couched in similar terms.[184]

The Western Australian Review Committee considered this aspect of adoption in some depth. It did not recommend compulsory open adoption, but rather a mechanism to allow parties to select from a wide range of options, and negotiate an agreement. The new legislation has established a startling innovation, an 'Adoption Plan', which encourages negotiated contact and exchange of information.[185]

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[181] ACT, ss. 77–80. See Boss, *supra* n. 6 at 116–23.

[182] Individual experiences of access to adoption information are documented in P. and S. Swain, *supra* n. 3. A moving personal account of an adoptee's search is to be found in F. McKinnon, *A Question of Identity* (Sydney: Allen & Unwin, 1992). The search of a relinquishing mother is eloquently documented by M. Meggitt, 'To Know One's Child', in P. and S. Swain, *supra* n. 3 at Chapter 5.

[183] Vic., s. 15. See also Vic., ss. 59 and 59A.

[184] Tas., s. 24.

[185] WA, ss. 46 and 73.

In contrast to these States, there appears to be no provision for natural parents' access to the adopted child in the Australian Capital Territory, the Northern Territory, New South Wales, South Australia or Queensland. In view of the very carefully drafted legislation in New South Wales relating to access to information (the *Adoption Information Act 1990*), it can hardly be argued that this omission was an oversight.

Open adoption seems to be enthusiastically embraced in most parts of Australia, although the mechanisms for contact and the backup systems for access have not been refined in some States. This diversity of approach is hardly to be regarded as satisfactory. Because adoption applications are heard in camera, not reported in the press and very rarely reported in the law reports, it is difficult to get an accurate picture of any aspect of adoption practice. On the question of how often adoption orders permit access by birth parents, and on what terms, it would be interesting to ascertain how often, if at all, birth fathers seek access.

A recent photograph on the front page of the Melbourne *Age* showed a happy meeting of a birth mother and an adoptive-mother, with a radiant child, who, it was reported, indiscriminately called each of these women 'Mum'.[186] It is rather extraordinary that newspapers, which for the most part report unpleasant and unhappy incidents, invariably highlight instances of unusual human relationships that have turned out to be happy. In reality, it would be more valuable to canvass views of older children who discover the origin of their birth. Likewise, the feelings of older children subject to access orders should be tested. Further information is also needed on the frequency with which access arrangements are maintained.[187]

There are two further problems with 'open adoption' — one legal, the other psychological. Open adoption would seem to raise delicate questions of succession law. It is difficult to reconcile it with the prescription that the child legally becomes the child of the adoptive parents and that former legal ties between the child and the birth parents are severed. Difficulties may arise: (1) on construction of a will; (2) on intestacy; and (3) in connection with Testators' Family Maintenance.

Let us suppose that a birth mother, Freda, has two children, Anne and Brian. Anne, aged seven, was born ex-nuptially, but was given up for adoption on an open adoption arrangement with frequent access. Brian, aged four, is her child by marriage, and has always lived with Freda and her husband, George.

Freda is killed in a road accident.

(1) If she has made a will leaving property to Anne and Brian in equal shares, specifically naming Anne, then Anne of course will receive a

[186] See *The Age*, 28 September 1984.

[187] This issue is sensitively canvassed in C. O'Neill, *The Dilemmas of Openness* (Victoria: Vanish Adoption Agency, 1990).

half-share. If Freda has left a will leaving her property 'to my children' in equal shares, a question of construction will arise on whether Anne can be considered to be 'her child'. This difficulty is even more likely to be encountered if one of Freda's parents had left a will by which property was left to 'my grandchildren' or 'to the children of my daughter'.

(2) If Freda dies intestate, it would seem indisputable that Anne would not qualify for a share for Anne would be treated in law as a 'child of the adoptive parents'.[188] This outcome may not do justice to the child, Anne, and may not have accorded with Freda's wishes. One wonders whether birth parents in Freda's position are being counselled on this issue.

(3) In either event, could Anne make an application to the court for Testators' Family Maintenance — that is, provision that was reasonable in the circumstances? This question involves the construction of the various State Acts giving specific relatives' rights to apply.[189]

Most probably, the court would reject Anne's claim. This, most probably, would be contrary to Freda's wishes, had her attention been adverted to it.

The object of this illustration is to show that the succession ramifications of 'open adoption' have not been given due attention, and that it sits uncomfortably with the statutory effect of an adoption order, as set out in all the legislation. It is true that these problems would be avoided if birth parents set out their wishes in a will, but one wonders whether the pre-consent counselling of birth parents includes advice on such matters.

The second problem with access arrangements is a psychological one. Do such arrangements cause children an identity crisis? There is little empirical research to show how children cope with two mothers. It is arguable that 'open adoption' is not adoption at all, but a totally new concept, akin to long-term foster care. It must be queried whether the children affected can cope with the identity confusion that may result.[190] As for adoptive parents, it is suspected that strong pressure is being put on applicants by social workers to accept an 'open adoption' arrangement that they may find threatening. Again, one wonders whether such equivocation operates for the benefit of the child.

It is worthy of note that the Tasmanian legislation allows the birth parent access to the child during the period when revocation of consent

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[188] See, e.g., Vic., s. 53.

[189] Testators' Family Maintenance is a reasonable provision granted to disappointed relatives who have been unreasonably cut out of a will, or in some cases, are unreasonably disadvantaged by the laws of intestacy. The details vary considerably from State to State. But they have it in common that provision is in the discretion of the court. For a full discussion, see F. Bates and J.N. Turner, *supra* n. 39 at 445–447.

[190] C.F.J. Tugendhat, *The Adoption Triangle* (London: Bloomsbury, 1992).

is permitted, albeit that this provision has not yet been proclaimed.[191] A similar clause is contained in the ACT Act.[192] The inclusion of these provisions gives rise to some concern. Is the potential thus provided for vacillation of the mother likely to be in the best interest of the child?[193]

CONCLUSION

The survey of current and imminent laws relating to adoption conducted in *Adoption Australia* reveals many disparities, and some fundamental divergences of policy. This article has concentrated on several major issues and is by no means comprehensive.[194] Research is needed to ascertain how, in practice, the face of adoption has changed in various parts of Australia.

The concept of 'open adoption' has been implemented in different ways. Victoria has embraced the concept most enthusiastically. In that State, access of the birth parent to the adopted child and access to information appear to be accepted as absolute rights whether or not the adoption took place before or after the commencement of new legislation. Tasmania has followed Victoria's lead. South Australian legislation differs from that of other States in that its provisions are less detailed, leaving adoption to be governed more by practitioners' discretion than by legislative prescription. While South Australia embraces open adoption, it manifests a greater sensitivity to the issue of retrospectivity of access to information and contact provisions. New South Wales and the Australian Capital Territory, by providing for contact vetoes, seem to have resiled from the concept that openness is an absolute right. The new provisions of Western Australia on open adoption may represent the fairest and most realistic approach of all, by recognising that full open adoption is not appropriate in all cases. No State has enacted or has proposed the ideal adoption legislation. While some aspects of every Act are to be commended, the diversities are disturbing.

Society maintains an equivocal attitude to adoption. The *UN Convention on the Rights of the Child* strongly endorses adoption as a stable form of child upbringing.[195] Australian adoption legislation, however, while

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[191] Tas., s. 45.

[192] ACT, s. 33.

[193] Further literature on open adoption includes: M. Clare, 'Family Systems Thinking and Adoption Practice' (1991) 44(3) *Australian Social Work* 3; M. Mallows, *Open Adoption — Closed Minds* (Vanished Adoption Agency, 1991); R.G. McRoy *et al.*, *Openness in Adoption* (London: Praeger, 1988). [NB Vanish is an acronym for Victorian Adoption Network for Information and Self-Help, a support group.]

[194] In the interests of length, for instance, this article has not sought to deal with intercountry adoption and recognition of foreign adoption, topics which justify separate treatment.

[195] Article 21. See J.N. Turner, 'The Rights of the Child Under the UN Convention' (1991) 66 *Law Institute Journal* 44.

formally endorsing the principle that the interest of the child is paramount, seems to have moved away from that principle in practice. The legislation is open to the criticism that it favours the interests of birth parents over those of children. Stronger critics may condemn the statutes as anti-adoption Acts. Many adoptive parents and prospective adoptive parents feel threatened by the new approach, and consider that their legitimate concerns have been ignored.[196]

There is no doubt that the tenor of the recent legislation of all States is to avoid the clean break that characterised previous adoption theory. The new trend is quite contrary to the influential view of Goldstein, Freud and Solnit,[197] which held sway in the 1960s and in 1970s, that it was in the best interest of a child to have a couple of psychological parents to the exclusion of all others. This view is now *passé*. One wonders whether the new legislation has gone too far the other way.

Every possible step has been taken to discourage birth parents from giving up their child for adoption. Consents are now necessary from most birth fathers. The consent of a mother is not valid within the first few days of birth, and the tendency is to increase that period. Consents are more easily revocable, and the periods of revocation have been extended. Counselling of birth mothers is necessary. There is little doubt that in practice the nature of this counselling emphasises the alternatives to adoption, and will in many instances amount to a discouragement of it. Birth parents are being encouraged to maintain contact with their child after the adoption. There is little doubt that potential adoptees are being pressed into agreeing to this contact, and indeed most States specify acquiescence in this as a precondition of acceptance as potential adopters.

Even for adoptions that took place under previous legislation guaranteeing secrecy, most States have decreed that access to information and mutual contact is a right, not merely of the child but also of the birth parent.

While there have been reports of happy and successful 'open adoptions', it is not unequivocally clear that they are in the majority. Certainly, the new policies have protected the rights of birth parents. Have they done so at the expense of children's best interests?

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[196] See J. Hale, 'Supports for Adoptive Parents', in P. and S. Swain, *supra* n. 3 at Chapter 7, who also document some of the traumas suffered by adopted children when they meet their birth parent or parents.

[197] J. Goldstein, A.J. Solnit and A. Freud, *Beyond the Best Interest of the Child* (New York: Free Press, 1993).