SOME ASPECTS OF ADOPTION LEGISLATION AND ADMINISTRATION IN VICTORIA

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The process of adoption involves a conflict of vital interests, the resolution of which may have permanent effects on the lives of the parties concerned. In this article, Miss Wimpole examines the aims behind the Victorian adoption legislation, before proceeding to an analysis of two central aspects of the Act. She firstly assesses the adequacy of the 'consent provisions' in the light of the mother's interest, the various economic considerations, and the interests of the child and the prospective adopters. The second part of the analysis involves an examination of the provisions of the Act concerned with the arrangement of adoptions.

I INTRODUCTION

> [O]f all social contracts except marriage adoption probably has the most far-reaching consequences; . . . orders which are irrevocable are made when those most affected have least control over their destiny.[1]

Adoption involves the extinction and creation of the most fundamental human relationship of our civilization, that of parent and child. Whether, why, how and when this may be done raises very controversial issues some of which are now subject to legal regulation.

Adoption is an ancient practice, sanctioned by all the ancient peoples. In earlier periods of man's history it frequently served the needs of adults; indeed until recently very many adoptions were arranged more out of a desire to assist anxious adopters or to relieve distressed parents than to provide for the child's welfare.

Evaluations of adoption are greatly restricted by the 'abyssmal ignorance which clouds almost every issue'.[2] Though research has been gaining momentum over the last twenty years, little definite data is available in regard to adoption outcomes in general, and more particular aspects of the process. Both research and practice are severely hindered by the emotion, prejudice and vested interests surrounding adoption, but the law and child-care programmes must in the meantime proceed on the most reasonable hypothesis from what information there is.

Despite all the uncertainty and difficulty, certain legal regulations of adoption have been attempted. There is no body of common law relating to adoption: England introduced its first adoption statute in 1926,[3] all the American states had passed adoption legislation by 1929, whilst the first

* LL.B. (Hons). This article was originally submitted as a Final Honours Research Paper in the Law School in the University of Melbourne.

[1] Goodacre, *Adoption Policy and Practice* (1966) 17-8; U.N. Department of Economic and Social Affairs, *Comparative Analysis of Adoption Laws* (1956) 1.

[2] Pringle, *Adoption—Facts and Fallacies* (1967) 28.

[3] Adoption of Children Act 1926 (U.K.).

Adoption Act in Victoria came in 1928.[4] Legislative changes over the last forty years indicate a progressive shift from emphasis on the purely legal aspects of the transfer of the child to a growing appreciation of the human elements of adoption, particularly the need to safeguard the welfare of the defenceless child. In most Australian states this notion now has specific legislative expression.[5]

However, the law alone cannot directly control attitudes and prejudices which will in fact be the most decisive factors at the various stages of the adoption process. A United Nations investigation[6] into adoption stressed in particular the importance of looking at adoption practice in order to gauge the current trends, for it is *administrators* who exercise the greatest control over adoption through their contact with the natural parents and their selection of parents and children. In altering the course of a child's destiny and re-allocating parental rights they are taking momentous decisions.

With these general considerations in mind it is proposed to look briefly at the underlying philosophy of the Victorian adoption legislation and then examine and evaluate two important aspects of the Act:

(a) the consent provisions, primarily in their application to mothers of illegitimate children;

(b) the placing of adoption arrangements largely under official control.

II THE UNDERLYING PHILOSOPHY OF THE ACT

The basic philosophy underlying the Victorian adoption legislation is clearly stated:[7]

> For all purposes of this Part, the welfare and interests of the child concerned shall be regarded as the paramount consideration.

This guiding principle of the paramountcy of the child's welfare is familiar in the law of custody and guardianship, but it has been strongly criticized[8] as an 'inappropriate' basis for adoption law. In attempting to answer such allegations two inquiries are relevant:

(a) does the specific inclusion of this principle in fact introduce a substantial change into the law as applied by courts and administrators;

[4] Adoption of Children Act 1928.

[5] Adoption of Children Act 1964 (Vic.), s. 8; Adoption of Children Act 1965-66 (N.S.W.), s. 17; Adoption of Children Acts 1964-67 (Qld), s. 10; Adoption of Children Act 1966-67 (S.A.), s. 9; Adoption of Children Ordinance 1965 (A.C.T.), s. 15; Adoption of Children Ordinance 1964-67 (N.T.), s. 10; Adoption of Children Act 1968 (Tas.), s. 11. Note that the Adoption of Children Amendment Act 1964 (W.A.) has no such specific provision.

[6] U.N. Department of Social Affairs, *Study on Adoption of Children* (1953).

[7] Adoption of Children Act 1964, s. 8.

[8] United Kingdom, *Report of the Departmental Committee on the Adoption of Children* (1954) Cmnd 9248, para. 119; Hambly, 'Adoption of Children: An Appraisal of the Uniform Acts' (1968) 8 *University of Western Australia Law Review* 281.

(b) does the principle unjustly prejudice the other interests involved in the adoption process?

In assessing the significance of the specific paramountcy provision a number of observations deserve consideration.

First, this section may be intended primarily as a broad legislative expression of the modern *leit motif* of the adoption process, recognizing and reflecting the recent orientation of sociological, medical and psychological studies towards the interests and needs of children. These developments have necessarily had their impact on legal policy and they are particularly important in the field of adoption. A United Nations report[9] is one of many emphasizing that the main purpose of adoption now is the safeguarding of the child, which contrasts sharply with views of adoption as a means of 'getting rid of children' or assisting frustrated childless couples. The legislation emphasizes this point.

Second, it is also interesting to note there are statements in a number of cases[10] that the child's welfare is the paramount consideration, though no specific reference to this appeared in the relevant legislation. Though it must be admitted that not all courts have taken this view,[11] there has been a marked shift in emphasis in favour of considering the child's welfare, frequently on the basis of medical evidence as to the dangers of a change in parentage and/or environment.[12] Decisions under different legislation would not necessarily be decided differently in Victoria today.

Third, obviously the crucial issue is one of definition—what is for the 'welfare and interests' of the child? This can be answered in numerous ways, depending on the general views of the judge or administrator and the particular circumstances involved. Any conclusion involves broad value judgments, and this is particularly so where illegitimate children are concerned. Attitudes and opinions on such broad issues as the stigma of illegitimacy on both mother and child, the strength of the 'rights' of natural parents, the importance of ties of blood and/or affection or the importance of upbringing in a normal family unit will be very influential on any decision. Whilst judicial opinion has varied[13] on the relative

[9] U.N. Department of Social Affairs, *op. cit.* 14.

[10] *E.g. In Re O. (an Infant)* [1964] 1 All E.R. 786, 789-90 *per* Harman L.J.; *In Re D. (an Infant)* [1959] 1 Q.B. 229, 237 *per* Hodson L.J.; *In Re C. (M.A.) (an Infant)* [1966] 1 All E.R. 838; *Re D. and E.* (1924) 24 S.R. (N.S.W.) 508.

[11] *E.g. Hitchcock v. W. B. and F. E. B. and Others* [1952] 2 Q.B. 561; *Re K.* [1953] 1 Q.B. 117; *In the Matter of M.F.S. and the Child Welfare Act* [1964] N.S.W.R. 244.

[12] *E.g. In Re C. (L.) (an Infant)* [1965] 2 Q.B. 449; *Re L. (an Infant)* (1962) 106 S.J. 611; *Re W. (Infants)* [1965] 1 W.L.R. 1259. Michaels, 'Dangers of a Change of Parentage in Custody and Adoption Cases' 83 *Law Quarterly Review* 547; Hopkins, 'Medical Evidence in Adoption and Custody Cases' 9 *Medicine, Science and the Law* No. 1, 31.

[13] *Re E. (P.) (an Infant)* [1963] 1 W.L.R. 1913; *In Re D. (an Infant)* [1959] 1 Q.B. 229; *In Re A. (an Infant)* [1963] 1 W.L.R. 231; *A. v. C. S. (No. 1)* [1955] V.L.R. 340; *Mace v. Murray* (1955) 92 C.L.R. 370; *Re C. (M.A.) (an Infant)* [1966] 1 All E.R. 838; *Re S.* [1969] V.R. 490.

importance of factors of this kind, one of the most telling features in the adoption process will be the views of individual social workers on these matters. The magnitude of the assessment required by a judge or administrator has been well described by two Victorian judges:

> [welfare] does not of course mean only material advantages but includes affection, peace of mind and every other circumstance which could or might affect the child's happiness . . .[14]
>
> One is on the other hand concerned with the question of how far it can be said to be in the interests of the welfare of a particular child that as far as the law can do it, it should cease to be the child of its natural parents finally and irrevocably and forever, and instead become the child of those who seek to adopt it.[15]

When the gravity of the issue involved is stated in these terms it is not objectionable to have the welfare of the child as the basis of adoption proceedings.

Fourth, on the fundamental issue of whether it is better for a child to be brought up by its natural parents or parent rather than by outsiders, even where some of the circumstances in the natural parents' home are adverse, opinions are sharply divided. The Hurst Committee[16] considered that it was generally best for the child to be brought up by his natural parents or parent because of the value of the blood tie, and as a means of preserving parental responsibility. In 1955, the Victorian Full Court[17] considered that adopters could rarely show the same measure of devotion as would a natural parent. However, in the last fifteen years the notion of adoption has become much more widely accepted and less frequently regarded as totally artificial, so that today more agreement would probably be found with the view that opinions of the above type often represent no more than 'maudlin sentimentality', particularly where illegitimate children are concerned.

Fifth, objection to the specific inclusion of the paramountcy provision presupposes that the interests of the child as against those of other parties are antagonistic. Even were this so, the provision can well be justified as a legitimate direction to courts and administrators to protect the interests of defenceless children on behalf of the state. But once again it becomes apparent that the interests of all parties are closely intermingled rather than sharply at odds. The terms of reference of the Hurst Committee described its duty as being 'to consider the present law relating to the adoption of children and to report whether any and, if so, what changes in policy or procedure are desirable in the interest of the welfare of the children'.[18] This Committee concluded that it would be in the interests of

[14] *A. v. C. S. (No. 1)* [1955] V.L.R. 340.
[15] *Ibid.* 347 *per* Herron C.J.
[16] United Kingdom, *loc. cit.*
[17] *A. v. C. S. (No. 1)* [1955] V.L.R. 340.
[18] United Kingdom, *op. cit.* para. 1.

children to place very strong emphasis on the rights of the natural parent or parents. The Committee also pointed out that:

> The primary object at which all should aim in the arrangement of adoptions is the welfare of the child . . . In the interests of children the aim should be to protect the *three* parties concerned, children, natural parents and adopters, from risks which might lead to unhappiness.[19]

This need to protect all parties has been emphasized by text writers, social workers and a United Nations Report. Social workers are keenly aware of the importance of achieving a careful balance between the interests of the parties involved so as to ensure the acceptability and desirability of adoption as a social institution, which in turn has long-term beneficial consequences for individual participants in the process.

Finally, reference should also be made to the difference of judicial opinion regarding the interpretation of 'paramount' as a matter of semantics: does it exclude consideration of other interests, and if not then what comparative weight is to be accorded to each of these?[20] *Re an Infant T.L.R. and the Adoption of Children Act*[21] is the only case to date in which significant attention has been given to this issue in the adoption context. Myers J. concluded that the welfare and interests of the child would overcome all competing interests. However, Australian courts have in fact expressed differing views on the meaning of paramountcy provisions in other legislative enactments derived from the Guardianship of Infants Act 1925 (U.K.), so that the interpretation which Myers J. accepted by analogy with such legislation is at least open to argument.[22] However, as indicated earlier, the crucial inquiry will always be 'what is for the welfare and interest of the child' in the given circumstances, and thus a court working with such a broad concept is extremely unlikely to allow its decision to be dictated by pure semantics as to the priority of interests.

In conclusion, therefore, it is suggested that the principle of 'the welfare of the child' is not a startling innovation or an unwarranted basis for adoption legislation and administration. Furthermore, it is not necessarily an exclusionary principle but rather includes the interests of all parties. As a consequence of the cardinal principle, some curbs on the freedom of natural parents and prospective adopters have been introduced, but these restrictions also offer certain protections and benefits, as will be indicated in the discussions below. Potentially, the Victorian legislation has achieved a satisfactory balance between the various interests involved in the adoption process, though certain administrative shortcomings (some remediable, others inherent) seriously hamper the effectiveness of the legislation.

[19] *Ibid.* para. 19.
[20] The various authorities are discussed in Finlay, 'First or Paramount? — The Interests of the Child in Matrimonial Proceedings' (1968) 42 *Australian Law Journal* 96.
[21] (1967) 87 W.N. (Pt 1) (N.S.W.) 40, 41.
[22] Hambly, *op. cit.*; Finlay, *op. cit.*

III THE CONSENT PROVISIONS

(a) *The Interest of the Mother*

In Victoria it has been estimated that approximately eighty-five per cent of adoptions concern illegitimate children.[23] Though an unknown number of these may not have been made available for adoption until sometime after birth, it seems reasonable to assume that the vast majority would be children surrendered in the immediate post-natal period. Do the provisions as to consent sufficiently protect the interests of

(i) those children surrendered;
(ii) those kept by their mothers, and
(iii) the mothers themselves?

Under the present legislation a valid consent cannot be taken less than five days after the birth unless adequate evidence of the mother's fitness is produced.[24] She then has thirty days[25] in which to revoke if she so chooses. Victoria has in fact had a thirty day limit on revocation since 1954, and this was considered sufficiently distinctive to be cited by the authors of a leading American textbook[26] as an illustration of the view that 'the law should not encourage the tendency of single mothers to procrastinate on the adoption question'. It has been asserted that these provisions treat the unmarried mother with intolerable harshness and reduce her interest almost to vanishing point. However, an investigation of the needs of all parties indicates that these criticisms may not be justified.

The Victorian Act provides a stark contrast to the English adoption legislation under which no binding consent can be initially given less than six weeks[27] after the birth, and can be revoked at any time up until the making of the order.[28] These requirements were prompted by the Hurst Committee recommendation that '[a] mother needs about six weeks to recover physically and psychologically from the effects of confinement'.[29]

As an isolated observation few doctors and social workers would dispute this finding, but in the adoption context the mother's needs have to be balanced with those of the child and the prospective adopters. These needs will be discussed in more detail below, but at present it should be noted that the English-type provisions may not in fact serve the best interests of the mother herself and consequently recommendations for alteration have been made.[30] The whole tenor of the Hurst Committee report was strongly in favour of children being kept by their natural parent or parents at all

[23] Deductions made from *Survey of Child Care in Victoria 1962-64* (being the findings of a committee appointed by the Chief Secretary of Victoria in 1964).
[24] Adoptions of Children Act 1964, s. 28.
[25] *Ibid.* s. 26.
[26] Foote, Levy and Sanders, *Cases and Materials on Family Law* (1966) 480-1.
[27] Adoption Act 1958 (U.K.), s. 6(2)(a).
[28] *Re Hollyman* [1945] 1 All E.R. 290.
[29] United Kingdom, *op. cit.* para. 56.
[30] The recommendations by the Standing Conference of Societies Registered for Adoption for alteration of the consent provisions are reported in 9 *Medicine, Science and the Law* No. 1, 37.

costs. If a mother had her baby for six weeks, clearly this was more likely to be the result. Similar basic ideas are evident in the sympathetic support given to the English-type provisions by a Victorian court ten years ago.[31]

The crux of the consent issue is whether the mother has sufficient opportunity to make a wise and emotionally satisfying decision. Time of itself is not a vital factor in assessing such opportunity. It has been pointed out by many authorities very familiar with the position of the mother of an illegitimate child that it may be no kindness to give her the child and/or prolong a decision: to surrender a child is never easy and a quick clean break may be desirable. The mother's most essential need is for impartial, independent advice in order to reach a decision, to accept that decision as final and to plan for her future accordingly.

During parliamentary debate[32] on the Adoption Bill repeated concern was voiced as to the adequacy of the five day minimum before a valid consent could normally be obtained, and the matter was referred to hospital and welfare authorities on a number of occasions. The difficulty of tracing the mother was one of the principle justifications for allowing consents after five days.

As the mother frequently leaves hospital after five days it is very desirable to know her wishes for the child's future so that definite placement arrangements can be made. Thus the Victorian Act places the onus on the mother to notify the County Court within thirty days if she has a change of heart.[33] Though consents generally are taken on the fifth day after the birth of the child, this is only the *minimum* post-natal period which must elapse before a binding consent can be given and thus the attitude and practice of particular hospitals, homes and agencies will be very significant. Social workers reported conflicting attitudes amongst hospitals in Melbourne: apparently some show a very sympathetic and patient attitude with the unmarried mother whilst others may refuse to discharge her until she makes a definite decision. The current Victorian provisions are in some respects an improvement on the situation in the previous ten years when there was no specification of a minimum period within which a valid consent could not be taken, and consents were frequently given only one or two days after the birth. In addition the Act clearly spells out circumstances which will invalidate a consent.[34] The previous legislation contained no minimum time provision and its inclusion in 1964 was most probably inspired by the situation and judgment

[31] *R.* v. *B.* [1960] V.R. 407, 410.
[32] Victoria, *Parliamentary Debates*, Legislative Council, 24 March 1964, 3287-8; 14 April 1964, 3647 8; 22 April 1964, 3826-7.
[33] Adoption of Children Act 1964, s. 26.
[34] *Ibid.* s. 28.

in *R. v. B.*[35] The respondent to the adoption application in that case represents the typical distressed unmarried mother uncertain of her legal rights at the time of giving consent, whose infrequent appearance in formal court proceedings may unfortunately not be a true reflection of the extent of hardship actually suffered. However, the Victorian County Court has shown itself very zealous in protecting the legal rights of the natural mother: even when a revocation is received after the expiration of thirty days the judge will require the agency arranging the adoption to produce the mother in order to make certain that she fully understood her legal situation at the time she signed a consent. But the mother still may lose the child since the agency, on behalf of the prospective adopters, will then seek to have the mother's consent dispensed with under the provision that:

> The court may, by order, dispense with the consent of a person (other than the child) to the adoption of a child where the court is satisfied that . . . there are other special circumstances by reason of which the consent may properly be dispensed with.[36]

The Family Welfare Department reported that in the handful of these applications which they have sponsored, the judge has compared the prospects which the mother offers for the child with those offered by the potential adopters. The adopters have the benefit of a favourable agency report and the fact that the child has been with them for some months. This interest of the prospective adopters was clearly recognized by the High Court in *Mace v. Murray*[37] in sharp contrast to the view of the New South Wales Full Court.[38] In the former case the term 'special circumstances' was used by the High Court and it is interesting to note its inclusion in the present Victorian Act in place of the previous clause 'in all the circumstances of the case'.[39] The case of *M.F.S. and the Child Welfare Act*[40] may be cited as an example of a mother recovering her baby from prospective adopters after a considerable length of time because the court was not constrained by a specific paramountcy provision. However, it should be noted that in that case the mother approached the court with a husband, thus presenting a picture of the stable family unit of which society and courts are so enamoured. The Family Welfare Department expressed interest in the possible outcome of such a factual situation if presented in Victoria today: would the court conclude that in fact it was for the welfare and interests of the child to return it to its mother and her husband? The possibility of a mother later marrying and so being able to offer some security to the child was one of the reasons why the Hurst Committee rejected a suggestion that the mother's consent become

[35] [1960] V.R. 407.
[36] Adoption of Children Act 1964, s. 29(1)(e).
[37] (1955) 92 C.L.R. 370.
[38] *In Re Murray* (1954) 55 S.R. (N.S.W.) 88.
[39] Adoption of Children Act 1958, s. 5(3)(v).
[40] [1964] N.S.W.R. 244.

irrevocable even after three months.[41] However, as noted previously, the Committee proceeded on the questionable basis that the natural parents or parent should have the children where at all possible.

As noted previously, Victoria has limited the right of revocation to a thirty day period since 1954. Whilst the current English view is that consent may be revoked at any time before the adoption order is made, it has been pointed out that the best approach lies in achieving finality on the consent question well in advance of the application for the adoption order. Protracted negotiations between the natural parent and prospective adopters can be very distressing for both. Many mothers derive hardship rather than benefit from a system which prolongs their ties with the child and requires them to reconsider their consent on a number of occasions. Further, the English approach which maintains uncertainty until the last minute may seriously impede the development of the relationship between the prospective adopters and the child, and makes them highly susceptible to harm from an indecisive parent. Two striking Australian cases[42] raising these very points provided the impetus for the Victorian legislation in 1954 after consultation with social welfare authorities. Though the outcome of both cases was in fact favourable to the prospective adopters the shattering possibility that children could be snatched back after long periods was felt to be so serious a threat to the security of adopters as to warrant legislative restriction on the right of revocation. It has been recommended in England that consents given not less than six weeks after the birth be irrevocable. If this were done, the time within which a consent becomes final would differ by only a few days in England and Victoria. This being so, it is strongly arguable that the Victorian approach is preferable since the initial signing of a consent will bring home to the mother the implications of the step she is taking whilst still leaving her a month to reconsider. Once again, particular administrative attitudes could play a very important role in ensuring against hardship for the individual mother by extending or re-running the thirty day period. Further support for the Victorian-type revocation provision may perhaps be drawn from the fact that no adverse comments were made on this aspect of the legislation in a survey of various facets of child welfare conducted in 1963[43] (though of course agencies would be unwilling to admit to cases of possible hardship since this might reflect badly on their administration). In addition, all the other Australian states were prepared to adopt the thirty day revocation period presumably on the basis of Victorian experience in the previous ten years, though once again it may be commented that any injustice very probably goes undetected. It is somewhat surprising to learn that only three *per cent*[44]

[41] United Kingdom, *op. cit.* para. 118.
[42] *Mace v. Murray* (1955) 92 C.L.R. 370; *R. v. Biggin, ex parte Fry* [1955] V.L.R. 36.
[43] *Survey of Child Care in Victoria 1962-64.*
[44] Deductions made from *Survey of Child Care in Victoria 1962-64.*

of consents given in 1963 were revoked within the thirty day period, and the Family Welfare Department reported a similar ratio in recent years.

The foregoing discussion of the fairness of different legislative time limits on the giving and revoking of consent may tend to obscure one of the key considerations in any evaluation of the protection given to the mother's interest, *i.e.* what opportunity she has to seek competent and independent advice which has a twofold function for '[i]t is clearly of the greatest importance not only that the right decision be reached but also that it should be reached by her in a way which *leaves her convinced that she has decided wisely.*'[45]

A commentary on the English legislation disallowing consents until at least six weeks after the birth aptly observes that:

> Where parents have little opportunity to discuss their plans for the child with a competent person, the value of this safeguard is reduced . . . Carefully considered decisions require *competent and timely assistance.*[46]

Assistance given to unmarried mothers is important because the decision they must make will affect both their lives and the lives of their children. The counsellor's task is not an easy one for he should point out to the mother her social and economic position as well as take account of her individual emotional and psychological factors. Some social workers acknowledged the difficulty of trying to be wholly objective when advising mothers of illegitimate children. Bias towards adoption is not necessarily objectionable: rather it may be a justifiable reflection of the generally unfavourable social and economic climate facing such mothers and their children. The question of how far objective realities should be allowed to interfere with basic maternal instincts is a delicate one indeed. One wonders what would be the outcome of similar scrutiny of the circumstances and financial situation of many parents of legitimate children. However, despite the difficulties of objectivity in assisting the mother make her choice, social workers can always serve a very important function by reassuring and supporting the mother once a decision is made. Social workers emphasized this aspect of their work with unmarried mothers.

What then is the likelihood in Victoria of a mother receiving such valuable counselling services? Notwithstanding the 1964 legislation[47] and regulations[48] thereunder, which require, *inter alia,* the provision of counselling facilities for all parties in the adoption process, the situation is largely similar to that reported in 1963. It was found then that the type,

[45] Bowlby, *Maternal Care and Mental Health* (1952) 102 (my italics).
[46] Goodacre, *op. cit.* 40 (my italics).
[47] Adoption of Children Act 1964.
[48] Adoption of Children Regulations 1965, Pt II, reg. 13.

number, quality and training of staff in private agencies was very diverse and frequently very limited. Very strong recommendations for reform were consequently submitted at that time.[49]

Nevertheless, there is some encouraging information regarding the current activities of the three largest adoption agencies[50] in Victoria who annually arrange one third of the State's adoptions. At the outset there is always the problem of communication with the mother: ideally she should be seen at about the fifth month of pregnancy, but unless she comes forward this is not possible. When she does seek assistance she is seen on a number of occasions prior to the birth and as far as possible a personal relationship is established between the caseworker and the mother. Generally the same caseworker will take the mother's consent if she decides on adoption for the child. After leaving hospital the mother is encouraged to maintain contact with the caseworker during the following thirty days. Extensive use is made of telephone contact. The Family Welfare Department, despite a critical staff shortage, is determined to maintain this telephone service as long as possible. Generalizations as to the services offered by private organizations arranging the other two-thirds of the annual adoptions are very difficult because of the variety of institutions authorized to conduct the arrangements. However, there is considerable evidence of strong pressure being exerted on a mother to surrender her baby by many private agencies: a mother may be admitted for pre-natal care only if she agrees to have the baby adopted; alternatively the organization may make it very difficult for her to leave until a consent is signed.

However, though these pressures may be undesirable it may be that girls approaching private agencies do in fact want to have their babies adopted. Even if this is so, counselling to meet the mother's own personality needs is important, particularly as a safeguard against later self-recriminations and feelings of guilt.[51] More widespread and better provision of counselling services would probably be the surest method of protecting the mother's interest.

(b) *Economic Considerations*

How influential are economic factors in a mother's 'decision'? This inquiry serves a twofold purpose:

(a) It may indicate whether there is likely to be a significant decrease

[49] *Survey of Child Care in Victoria 1962-64*, paras 44, 69.
[50] *I.e.* Royal Women's Hospital, Family Welfare Division, Catholic Family Welfare Bureau.
[51] Graveson, *A Century of Family Law* (1957); Bowlby, *op. cit.*

in the number of children available for adoption in Victoria, as the result of the 1970 extension of social welfare benefits to unmarried mothers.[52]

(b) If such factors were very significant, then it is unnecessary to give a mother a lengthy period in which to make a final choice about her child's future.

Unfortunately at present no positive conclusions can be drawn on either matter.

None of the published surveys which indicate factors affecting the mother's decision directly refer to the role of economic considerations. However the matter would clearly arise indirectly, *e.g.* in connection with the possibility of parental assistance, with the establishment of a stable *de facto* relationship or with problems concerning the commitments of the father. Certain Commonwealth and State welfare assistance is available,[53] particularly in the immediate pre- and post-natal period, but the long-term picture shows a grim struggle for the lone mother who keeps her child. The major difficulty in attempting to estimate the force of economic considerations is the lack of data on how many mothers keeping their babies are dependent on their own resources or on social welfare benefits.

It has been estimated[54] that approximately thirty *per cent* of illegitimate children are adopted. The whereabouts and circumstances of the remaining seventy *per cent* are uncertain: some may be with their mothers or with relatives, or in the care of others or in institutions, or in *de facto* family situations. Research is urgently needed in this area.

Social workers pointed out the need for a mother to fully and realistically assess her likely economic position in future years, since a number of mothers after initially keeping the child later find that they cannot cope and are then forced to hand over the care of the child to someone else. This can be a tragedy for both the child, who loses its mother and whose chances of adoption are now greatly reduced, and for the mother, whose feelings of failure and grief can be very destructive.

Whilst prior to the 1970 increase in welfare assistance a number of mothers would have been forced by economic considerations to surrender their children, they may now be prepared to 'give it a go'. It is unlikely that the introduction of benefits for unmarried mothers reflects a conscious reversal of governmental attitudes to illegitimacy and the desirability or

[52] In April 1970, Victoria became a 'participating state' for the purposes of the Grants (Deserted Wives) Act 1968 (Cth). Thus unmarried mothers are now amongst those who can receive $25 p.w. (approximately) if they have the care and custody of a child and are without means of private support or a pension or benefit under the Social Services Consolidation Act 1947-70 (Cth).

[53] Social Services Consolidation Act 1947-70 (Cth), ss 87, 112, 124, 125; Children's Welfare Act 1930, s. 30.

[54] Sackville and Lanteri, 'The Disabilities of Illegitimate Children in Australia: A Preliminary Analysis' (1970) 44 *Australian Law Journal* 5, 10.

otherwise of mothers keeping their children. However, broad issues of this kind will be of considerable concern to social workers counselling mothers whose decisions are not now automatically foreclosed by financial problems, despite the strongest maternal feelings. Should mothers be allowed to 'give it a go' in marginal economic circumstances amidst a generally unfavourable social climate? It would be difficult to justify the compulsory surrender of illegitimate babies on economic grounds alone since many legitimate children face a life in deprived economic circumstances, yet it is unlikely that the community would sanction any interference with their parents' rights. But investigation into the development of the illegitimate child might reveal serious disturbances and deprivations resulting from his non-typical social position in a family oriented society. If this was shown to be so then it would be necessary to consider whether the mother should be forced to surrender a child if this would definitely be to its future advantage.

(c) *Further Considerations Related to the Time and Basis of a Mother's Decision*

Criticism of the Victorian consent provisions when compared with the English legislation rests to some extent on the assumption that it is only after the birth that the mother can make plans and decisions to which she can fairly be held. The English legislation is derived from the Hurst Committee conclusion that a mother needs six weeks to recover physically and psychologically from the experience of childbirth. This finding should be connected with the basic philosophy of the 1954 Report, that wherever at all possible the natural mother should keep the baby. Clearly, nursing her child for six weeks would help achieve this aim. But as the general attitude to adoption has become much more favourable over the last fifteen years increasing recognition has been given to the interests of the adopters and to the fact that adoption frequently does offer a better future for the child. Thus one of the underlying reasons for the English six week prohibition on the giving of consents has been seriously undermined. The Victorian Act does allow the mother a total of at least five weeks to reach a final decision. Furthermore, it is not correct to assume that no reasonable decision can be reached prior to, or shortly after the birth. Surveys[55] suggesting the most significant factors in an adoption decision (*e.g.* the attitude of and the possibility of assistance from the mother's parents and the situation of the putative father) indicate that they could often be assessed well in advance of the birth. There is no survey evidence to suggest that a decision reached prior to the birth is more susceptible to change than one given later.[56] This being so, and if adequate counselling services are available, then a delicate issue arises: should 'emotional

[55] *E.g.* Bowlby, *op. cit.* 102; Vincent, *Unmarried Mothers* (1961) Pt 4; Costigan, 'The Unmarried Mother: Her Decision regarding Adoption' 39 *Social Service Review* 346; Yelloly, 'Factors relating to an Adoption Decision by Mothers of Illegitimate Infants' 13 *Sociological Review* 5.

[56] Kadushin, *Child Welfare Services* (1967) 503.

turmoil' following the experience of childbirth override a decision based on objective circumstances? Whatever the answer to this broad question, social workers considered that five days generally was sufficient to assess the impact of the actual birth on the mother's attitude. Some maternity institutions may refuse to allow the mother to see her baby in case she decides to keep it, whilst others think it important that the reality of the birth be brought home to the mother by showing her the baby.

Counselling services, particularly before the baby's birth are the best safeguard against a wrong or unsatisfactory decision made shortly after the birth.

(d) *The Interests of the Child and the Prospective Adopters*

An evaluation of the Victorian consent provisions must include investigation of the needs of the baby whose future is at stake. Over the last twenty years an enormous body of psychological evidence has emerged regarding the needs of children and the importance of continuity and quality in the care of infants. Consequently in the adoption context there has been increasing emphasis on the value of an early and permanent placement. In addition to the fairly imprecise psychological evidence it is necessary to note prevailing placement practices which are frequently controlled by the practical realities of accommodation facilities. Closely interwoven with the interest of the child in an early placement is the interest of the prospective adopter.

> [A]n early adoption tends to provide the child with that all important, consistent, uninterrupted, continuous mothering experience that lays the essential foundation for a sound mind and body.[57]
>
> What is believed to be essential for mental health is that the infant should experience a warm, intimate and continuous relationship with his mother (or permanent mother-substitute) in which both find satisfaction and enjoyment.[58]

Statements of this kind have provided a basis for more detailed research into the significance of age at placement which may prove to be a more significant factor than research has so far assumed. The present unfortunately cloudy state of knowledge in this area has been summarized as follows:

> [though] there is a consensus on the desirability of early placement [there is] no agreement as yet as to what is an early or optimal age . . . Nor is it clear whether it is primarily the child's age at placement which is crucial; or whether the determining factor is the diminished likelihood of prolonged early deprivation and separation trauma; the younger the baby the less time there has been for discontinuity in mothering, multiple placements or other 'depriving' experiences.[59]

[57] Littner, 'Discussion of a Program of Adoptive Placements for Infants under Three Months', extracted in Goldstein and Katz, *The Family and the Law* (1965) 1060-1.

[58] Bowlby, *op. cit.* 103. Note also Foote, Levy and Sanders, *op. cit.* 146.

[59] Pringle, *op. cit.* 22.

Three available studies[60] suggest that adoption after six weeks may possibly be related to later maladjustment, and in general[61] researchers are pointing out the value of placement as early as possible in the first critical weeks. But as noted earlier in the context of the consent provisions, here also time of itself may not be the crucial factor; investigators repeatedly query the possible influence of pre-natal harm caused by the stress of an illegitimate pregnancy, pre-placement experiences and the type of adoptive home.

Since the value of delaying adoptive placement in order to carry out predictive tests on the child has been discounted,[62] the only substantial reason for delay is to protect the mother's interest. At present she has a total of approximately five weeks before consent is irrevocable and it seems that much longer periods may well be very harmful for the child. This may be particularly so in places like Victoria where the mother does not generally keep the baby pending her decision. Therefore as a corollary to the 'when' observations on placement, it is necessary to see 'where' a child will be placed while the mother is deliberating. Whilst in England the critical question will usually be as to the possible detrimental effect of any change in a specific mother figure, in Victoria there is the strong possibility that many babies will be committed to institutional care. The disadvantages of institutional care have received much attention and criticism over the past twenty years. A recent assessment of the learning on this subject[63] concluded that, while it is impossible to state that *all* institutionalized children develop significant disorders in personality or behaviour, institutional care has at least two limitations which are difficult to overcome. These are the lessened contact with mother figures and the limited quality of emotional interchange.

Social workers were clearly very concerned by factors such as these, particularly in the critical first few weeks of a baby's life and therefore institutional care was regarded as very undesirable unless absolutely necessary. Foster-care may provide a partial solution for babies awaiting adoption, but as this form of care is generally only intended to be temporary, the necessary break should be made before strong attachments are made. Foster-care homes are often useful for children with defects which may make them harder to place immediately, either because they need medical treatment or suitable adopters have to be found. A further

[60] Wittner, Herzog, Weinstein and Sullivan, *Independent Adoptions—A Follow-Up Study* (1963); Goldman, 'A Critical and Historical Survey of the Methods of Child Adoption in the United Kingdom and the United States' (1964) 34 *Child Adoptions* 13-6, 35 *Child Adoptions* 9-13, 36 *Child Adoptions* 15-20; Brown, 'The Adjustment of Adopted Children within their Families and in their School Environment', noted in Pringle, *op. cit.* 65-8.

[61] *E.g.* Yarrow, 'Separation from Parents during Early Childhood', in Hoffman and Hoffman (eds) *Review of Child Development Research* Vol 1 (1964) 89, 129.

[62] Bowlby, *op. cit.* 103; Kadushin, *op. cit.* 502.

[63] See Yarrow, *op. cit.*

consideration relevant to the child's interest is that adopters naturally want children as young as possible and therefore a baby's chances of being adopted lessen as he gets older.

Placement practices vary in Victoria. Maternity hospitals generally placed the baby within the first two weeks. The governing factor in this policy appeared to be the limited nursery accommodation. Also, since a very small percentage of consents are revoked, they felt justified in making a placement on the faith of the initial consent. By way of contrast, the Family Welfare Department does not place babies until the revocation period has elapsed. Social workers in this Department were very concerned that adopters should only receive the baby when they could take it with the security that consent would not be revoked. This important security would reflect in confident handling of the child. The smaller private agencies are fairly evenly divided between placement in the first two weeks and placement when consent has become irrevocable. In 1963, approximately only three *per cent* of children placed were returned due to revocation of consent within the thirty day period.[64]

The welfare of the child requires that it be placed with security in its future home as soon as possible after birth and not removed after a lengthy period. Consequently the mother's right of revocation must be limited. A further interest to be balanced with that of the mother is that of the prospective adopters which has already been referred to incidentally. Most prospective adopters wish to get a child as young as possible since it more nearly simulates the natural birth situation and gives the satisfaction of contact and influence on the child's development from as early a time after birth as possible. Adopters should not be regarded merely as the fortunate recipients of a child, for their willingness to adopt and provide a secure future for the child is a great source of comfort to mothers unable to care for the child themselves. They have a right to protection from interference by the mother after lengthy periods and this general principle has been clearly recognized by Australian courts.[65] Social workers repeatedly pointed out what a shattering experience it can be for adopters to have a child snatched back after their investment of affection. Frequently they are already very emotionally sensitive as a result of their inability to have a natural family and such an experience may ruin their potential for satisfactory parenthood.

(e) *Conclusion*

The striking of a fair balance between the host of interests at stake in the adoption situation presents a very delicate task. The compromise

[64] Deductions from *Survey of Child Care in Victoria 1962-64*.
[65] *Mace v. Murray* (1955) 92 C.L.R. 370; *R. v. Biggin, Ex parte Fry* [1955] V.L.R. 36.

established by the Victorian legislation appears justifiable and commendable, though administrative shortcomings may hinder the effectiveness of its potentially adequate protection of all parties.

IV THE ARRANGEMENT OF ADOPTIONS

The most significant manifestations of the overriding principle that the welfare and interests of the child are to be the paramount considerations are the restrictions[66] on who can arrange adoptions. The basic idea is that in future adoptions are to be conducted by approved organizations[67] and thus the risks of third-party and direct placements are abated. Though many private adoptions were arranged with all goodwill, primary consideration was frequently not given to the defenceless child, who cannot be regarded as an expendable item in satisfying the wishes of adopters. Agency procedures may not be infallible but the risk of an unsuitable placement can be greatly reduced. An unsuitable placement can be as disastrous for the adopters as for the child.

Henceforth, I will be concerned, firstly, with a discussion of the justification or otherwise of the provisions regarding the arrangement of adoptions and, secondly, to indicate that in fact the administration of adoptions in Victoria does not adequately reflect the assumptions and aims of the legislation. In order to achieve the goals of the Act considerable action is necessary by governmental authorities in two respects:

(a) more wholehearted implementation and enforcement of the Act, Rules and Regulations[68]

(b) financial assistance in order to make the type of services envisaged possible.

(a) *Justification of the Legislation*

Were the legislators justified in restricting the freedom of parents, third parties and prospective adopters to give and take children as they please? Was the policy choice a reasonable concession to the vested interests and confidence of professional social workers? Comparative research into the relative 'success' of independent and agency adoptions is very limited. Furthermore, apart from the inconclusiveness of the evidence it is probably unreal to attempt to assess the 'success' rate of adoptions. This question is rarely asked about biological families nor, indeed, do generally acceptable criteria exist according to which judgments could be made. It has been asserted[69] that it is no more than an assumption that agency place-

[66] Adoption of Children Act 1964, ss 17, 50.
[67] *Ibid.* ss 18-21; Adoption of Children Regulations 1965, regs 4-9.
[68] Adoption of Children Act 1964; Adoption of Children Regulations 1965; Adoption of Children Rules 1965.
[69] Goodacre, *op. cit.* 16.

ments are preferable and social workers[70] themselves have reached conflicting conclusions as to the weight of the evidence. Clearly opinions differ as to the ability of agencies to achieve greater positive success in the adoptions they arrange, but certainly they can at least serve an important negative function by preventing obviously undesirable placements.

In England the Hurst Committee in 1954 did not feel warranted in recommending the restriction of independent adoptions, being unwilling to interfere with all the 'neighbourly goodwill' and 'highest motives' of parties participating in independent placements.[71] Increased emphasis over the last fifteen years on the welfare of the child as the primary consideration in any adoption might well lead today to the conclusion that 'goodwill' can justifiably be interfered with. The Committee itself acknowledged[72] that many witnesses had recommended restrictions on private adoptions but this was outweighed by 'the complexity of the problem and the interference with individual liberty which the suggestions would entail'.[73] Since over one-third of the adoptions then being arranged in England annually were independent, the financial and administrative 'complexity' may well have seemed too overwhelming. By comparison, in Victoria just prior to the 1964 Act, less than ten *per cent*[74] of adoptions were private. Though the Victorian legislation has theoretically rejected the Hurst Committee's ultimate conclusion, in practice it has presumably appeared too costly and complex to properly implement the legislative scheme.

Defenders of civil liberties may baulk at the current restrictions on the right of a natural parent to dispose of a child as she wishes to willing adopters without bureaucratic approval. Should a mother be allowed the satisfaction of knowing her child is in a home she considers desirable? In fact, one of the effects of a good agency system should be to give her the security of knowing the adoptive home has been assessed as suitable whilst at the same time ensuring the welfare of the child. Myers J. in *Re T.L.R.*[75] deplored the abolition of specific consents, thus preventing a child from benefiting from a private adoption which would promote his welfare and give expression to the mutual desires of his parents and the adopters to make their own decisions for his welfare. A number of observations on remarks of this nature seem important. First, the interest of the helpless child must be protected, for it is his destiny for the next fifteen to twenty years which is being decided. Consequently, the state has

[70] *E.g.* O'Collins, 'Some Aspects of Research in the Field of Adoption' 19 *Australian Journal of Social Workers* No. 1, 5; Dewdney, 'A Brief Review of Adoption Research in the United States, Canada and United Kingdom 1948-65' 20 *Australian Journal of Social Workers* No. 2, 13.

[71] United Kingdom, *op. cit.* para. 45.

[72] *Ibid.* para. 46.

[73] *Ibid.* para. 44.

[74] Deductions from *Survey of Child Care in Victoria 1962-64.*

[75] *Re an Infant T.L.R. and the Adoption of Children Act* (1967) 87 W.N. (Pt 1) N.S.W. 40, 41.

a right to intervene as an independent arbitrator on his behalf, even if this means overriding the wishes and/or goodwill of the parents and adopters. Second, the Act has not in fact imposed a blanket prohibition on private placements: there is provision for a person to effect the placement of a child for adoption if he has received the written permission of the Director of Social Welfare.[76] Assuming that the state does have some right and obligation to ensure the welfare of the child by checking on the suitability of a proposed home, this compromise seems an admirable method of balancing the legitimate interests of all parties.

However, investigation into current practice in Victoria revealed that very little use has been made of this procedure particularly at the appropriate stage, *i.e.* before a placement is made. Rather, unsupervised private placements, supposedly outlawed by the Act, do continue. If such a placement is made and the potential adopters later wish to have the adoption legalized by the court, an approach will be made to the Family Welfare Division. This Department then faces the serious dilemma of whether to express its disapproval of the method of placement by removing the child from its familiar environment, or refusing to sponsor an adoption application, or to support the adoption application and furnish a favourable report on the home unless a very serious defect is apparent. The latter course will generally (though not always) be taken, since it would be detrimental to uproot the child and, also, it may be very difficult to find another adoptive home for an older child. Adoptions arranged in this way were typified by a case handled by the Family Welfare Department in 1969. The initial placement was made by a prominent Melbourne solicitor. No prosecution[77] was made and this precedent is regarded by the Department as a serious blow to the principles of the Act. Without necessarily condoning this breach of the Act, this situation highlights a dilemma which the lawyer faces: he may see the opportunity to help childless clients and/or relieve a distressed mother. The best approach would be to seek at the outset the approval of the Director-General under section 50(2) which is designed to cater for circumstances of this nature.

The Act has also been criticized in its application to a not uncommon situation, that of a mother who leaves her child in the care of a married couple when she becomes unable to look after it herself or wishes to move elsewhere. This couple may later seek to adopt the child. Presuming that a consent has been obtained from the mother or else her consent has been dispensed with,[78] the provisions[79] of the Act and Regulations relating to the keeping of lists of selected adoptive applicants by agencies might at first suggest that the couple will face a serious risk of losing the child.

[76] Adoption of Children Act 1964, ss 17(2), 50(1).
[77] Under Adoption of Children Act 1964, ss 50(1), 56.
[78] *Ibid.* s. 29.
[79] *Ibid.* s. 67(j); Adoption of Children Regulations 1965, regs 29, 31.

In fact the risk would be slight, for although *prima facie* the applicants must submit to an investigation to determine whether they are 'fit and proper persons to adopt a child'[80] and *prima facie* they might not meet an eligibility requirement such as age, nevertheless, in the circumstances, they still generally are the most suitable adopters for the child in question: the length of time the child has been with them, the psychological risks to the child of a change in environment, the ties of affection and the difficulty of finding another suitable adoptive home for the older child are all factors lending very strong support to the applicants' claim.

The Hurst Committee was concerned that restrictions on private adoptions might lead to an increase in *de facto* adoptions. There does not appear to be any research into the question of the number of *de facto* adoptions in England or Australia, indeed it would be extremely difficult to collect such statistics. It has been said that:

> independent placement involves dangers and disadvantages to each of the three principals in the adoptive triangle—the child, the adoptive parents and the natural parents. Any danger to any one of the principals represents a danger to the fourth party concerned in the adoption process—the community which is, in effect, the parent of all children.[81]

What then are the alleged advantages of placing adoption primarily in the hands of agencies? Are their ideal functions in fact severely restricted by inherent limitations on 'professional expertise'?

(i) THE CHILD

As far as the child is concerned the agency endeavours to ensure the best possible home. The right of the child to a good home may not be as securely guaranteed in independent placement oriented to the needs and desires of the adoptive couple rather than the needs of the child. The adopters' motives may be highly reprehensible or very well-meaning but, nevertheless, the adoption would not be primarily arranged in the best interests of the child. The agency makes the best effort, however fallible, to find a good set of parents for the child. The couple with whom the child is placed independently have been subject to no assessment process. Confidence in the value of the assessment process involves certain assumptions about selection and matching skills which will be considered below. Further, some independent placements involve actual falsification of the records of births so that the child may be denied the protection of his legal rights. The Family Welfare Department in 1969 came across such a case: the unmarried mother entered a country maternity hospital in the name of the prospective adoptive mother and the adopters later had a false birth entry made in their favour. They were prosecuted for this offence.

[80] Adoption of Children Act 1964, s. 12(1)(a).
[81] Kadushin, *op. cit.* 466.

The most frequent objection to agency control of adoptions is the delay in placing a child. This may be partly a problem of inadequate resources and staff shortages, but in any case agencies apparently feel justified in delaying placement for a few weeks if this means that the child is more likely to enter a suitable environment with the most appropriate parents available.

(ii) THE ADOPTIVE PARENTS

Agency control of adoptions has been criticized as an undue interference with the rights of those who wish to establish or increase a family by adopting a child. The independent adoption involves no red tape, no elaborate interviews, no need to meet with agency eligibility requirements. However the agency's interviews with prospective adopters are designed as much to help the applicant clarify for himself his decision about parenthood as it is to satisfy the agency that the applicant's home will be a good one for the child. Frequently, on the basis of the exploration in which the agency procedure involves the adoptive couple, they decide they do not really want to adopt a baby. Also, the process of application, study and evaluation required in agency adoption gives the adoptive parent a feeling of being entitled to the child, and the expenditure of time, emotional energy and anxiety may simulate pregnancy. Confidentiality is more assured in agency placements, though the degree of risk of contact with natural parents after an independent adoption may have been greatly exaggerated. A recent Victorian case[82] points out what should be one of the important safeguards in agency adoptions: that any detectable physical and mental irregularities or defects in the child can be freely disclosed to the parents before they agree to adopt it.

(iii) THE NATURAL PARENT

The natural parent also benefits from agency adoptions. *Prima facie,* the independent adoption route may seem advantageous for the unwed mother by allowing her to dispose of the child quickly and secretly but very often the mother will have had no help in making a decision with which she will feel comfortable and she is deprived of the opportunity for help with the personal and/or social difficulties that resulted in the pregnancy.

Kadushin has summed up the problem as follows:

> [P]roviding families for parentless children is too important to the community, too expensive to the community if mistakes are made, to be left unregulated and to chance. Some agency discharging the will of the community and accountable to the community must be given responsibility for so significant a procedure.[83]

[82] *Re S. (an Infant)* [1969] V.R. 490.
[83] Kadushin, *op. cit.* 475.

(b) *Adoption by Relatives*

Arrangements for adoptions by relatives are expressly exempted from the general provisions of the Act.[84] Provision is also made for adoption by husband and wife where one of them is a natural parent of the child.[85]

> The special treatment of adoption by relatives evidently proceeds from the view that the state ought not to interfere at the outset with attempts to care for a child within the family circle. There is certainly no basis for it in an assumption that the adoption of a child by a relative never involves risk for the child. Indeed, it can be strongly argued that applications by relatives for an adoption order should be subjected to special scrutiny, as such adoptions are peculiarly capable of endangering the child's welfare.[86]

In the Victorian Parliament very favourable opinions were expressed on this type of adoption.[87] However, the grave problems that can arise from a complicated pattern of family relationships, and the impact of this type of adoption on family unity has given concern to both local authorities and the courts in England. Whilst in some instances the need to maintain distance between affected parties had led to the erection of barriers, in other cases the security and privacy of the adoption was threatened by the presence of natural parents. Often the adopters found great happiness in being able to help one of their kith and kin and an adoption order gave them legal security and legal rights. But the possible confusion, emotional disturbance and conflict of loyalty for the child, in addition to wider family problems, makes the automatic exemption of these adoptions from the supervisory provisions of the Act questionable. In 1963 seventy *per cent* of private adoptions were by relatives, though of these fifty *per cent* were by the mother and stepfather.[88]

(c) *Selection of Adopters in Victoria*

The Victorian Act[89] directs that the Director-General of Social Welfare and the principal officers of approved private agencies shall keep a list or register of persons who have applied to be approved as fit and proper persons to adopt a child and who after investigation have been so approved. Therefore in dealing with these applications the Director-General and principal officers control the selection of prospective adopters. There is no provision in the Act for some appeal procedure against exclusion from the register though this has been provided for in the comparable New South Wales and South Australia Legislation.[90]

What are the criteria applied to those seeking approval as adopters, and are they justified? Do they reflect middle-class standards and penalize

[84] Adoption of Children Act 1964, ss 17(3), 50(2).
[85] *Ibid.* s. 10(4).
[86] Hambly, *op. cit.* See also *Re X.* [1964-5] N.S.W.R. 468, 469-70.
[87] Victoria, *Parliamentary Debates,* Legislative Council, 22 April 1964, 3832.
[88] Deductions from *Survey of Child Care in Victoria 1962-64.*
[89] Adoption of Children Act 1964, s. 67(f), Adoption of Children Regulations 1965, reg. 29.
[90] See Adoption of Children Act 1965-66 (N.S.W.), s. 73(1)(e); Adoption of Children Regulations (N.S.W.) 1965, reg. 20; Adoption of Children Act 1966-67 (S.A.), s. 72(e); Adoption of Children Regulations 1967 (S.A.), regs 25, 26.

the individuality which is often considered to be one of the important benefits of family life? The Victorian Adoption Regulations set out a very broad list of factors regarded as relevant:

> The Director-General or the principal officer as the case may be, shall determine the suitability of applicants to adopt having regard to their age, marital status, state of health, educational background, religious upbringing or convictions (if any), personality, physical and racial characteristics, reason for seeking to adopt a child, general stability of character and employment, financial position and the accommodation they have available.[91]

Not surprisingly, similar criteria are proposed in America and England. Though the criteria cover almost every aspect of the couple's background, it is difficult to envisage how the regulation could have been more specific. The degree of actual adherence to any or all of these requirements will obviously differ with the agency, caseworker and circumstances involved. Probably the most frequent criticism of agency 'expertise' is that it will be the personal attitudes, prejudices and emotions of the individual social worker rather than any objective standards which will determine whether a couple will be selected or rejected. It is extremely difficult to evaluate the validity of this scepticism.

So long as the majority of the private agencies have particular religious affiliations, religious requirements will be common. However the Victorian Family Welfare Department *prima facie* requires no religious adherence and social workers there strongly denied any discrimination on this basis. How far, in fact, religious leanings, albeit nominal, boost or detract from the wholesome home image is open to speculation. There is specific provision[92] for the natural parent to specify in the consent to adoption any particular wishes regarding the religious upbringing of the child and where this is done the Director-General is under a duty to comply with this preference if possible. In New South Wales at least two adoption orders have recently been refused because this requirement had not been satisfactorily met.[93] However, prospective adopters are presumably aware of the religious requirements of the denominational agencies and indeed this common bond may increase the confidence and security of the adopters.

Age limits are imposed by almost all adoption agencies: since the aim of adoption is to create a situation as near as possible to that of a biological family, the age ratio between parents and child is considered important. Therefore children are not usually placed with parents more than forty years older than themselves. As the Family Welfare Department brochure explains:

[91] Adoption of Children Regulations 1965, reg. 31.

[92] Goodacre, *op. cit.* 29. Adoption Regulations 1965, Third Schedule, Pt A sets out the form of consent with provision for a religious preference. See also Adoption of Children Act 1964, s. 12(1)(b).

[93] *Re an Infant J.A.D. and the Adoption of Children Act* (1967) 87 W.N. (Pt 1) (N.S.W.) 51; *Re an Infant M. and the Adoption of Children Act* (1967) 87 W.N. (Pt 1) (N.S.W.) 48.

> These age differences are sought not because of any suggestion that an older couple might not be able to care adequately for an infant, but because they are required to be parents to a growing, developing, active, young person over a period which spans a further fifteen to twenty years.

The age requirements also offer some safeguard against the child losing another parent early in life. But an older couple will not be debarred from adopting an older child and in the situation discussed earlier where they seek a formal adoption after a child has been in their care for some time, there is usually little difficulty in obtaining the approval of the Family Welfare Department. Financial position is relevant as an indication of the future security and stability of the family; an additional child may place a strain on existing family relationships. Adequate income and housing were common specifications, though social workers emphasized that home ownership was not essential by any means.

The relative significance of any or all of these factors as between different agencies or particular social workers is very difficult to assess but *prima facie* they appear valid guidelines for assessing prospective adopters, particularly where demand exceeds supply and therefore some selection is inevitable unless a 'first come first served' approach is taken. However, at least two recent reviews[94] of adoption research suggest that the age, income and social class of adopters are not as important as had sometimes been assumed in the past—rather the critical factors in seeking good adopters are far more subtle, *i.e.* the personal qualities of the adopting parents:

> Included here are attitudes not only to the child itself but also feelings about adoption in general, about illegitimacy and about the reasons for not having a child of their own, be those infertility, impotence or any other circumstance.[95]

A major cause of adoption failure is rejection of the child, and this rejection often springs from deep seated attitudes of the adopters on the matters mentioned above. Social workers considered that it was possible to assess these attitudes with reasonable satisfaction after a few interviews before and after placement. If this confidence is justified, then there is a very strong argument for entrusting adoptions to competently staffed agencies. Social workers do not claim infallibility in the matter of selection or its more dubious corollary 'matching', which has been the subject of scathing criticism[96] as a matter of principle and as a realistic possibility. Though the influence of personal prejudices and emotions cannot be disregarded, nevertheless, trained social workers are in a position to assess attitudes and personality traits with some degree of objectivity and reliability and to appreciate the increasing body of research into various facets of adoption. At the very least they can prevent obviously undesirable placements.

[94] Pringle, *op. cit.* 24; Kadushin, *op. cit.* 439-47.
[95] Pringle, *op. cit.* 23.
[96] Goodacre, *op. cit.* 55; Mills, 'Who is the Unadoptable Child?' (1967) 20 *Australian Journal of Social Workers* No. 1, 18-9.

It may be concluded that legislative policy placing the arrangement of adoptions largely under agency control or at least making private placements subject to official approval is justifiable primarily in the interests of the child, though it is not without benefits for the natural parent and adopters also. However, this writer recognizes that this conclusion is probably based on an acceptance of middle-class standards and the *status quo* which many find most unsatisfactory.

V VICTORIA ADOPTION ADMINISTRATION

Any arguments in favour of agency-controlled adoptions presuppose a competently run organization with adequate facilities and capable staff. An investigation of the present agency situation in Victoria suggests that in many instances the administration far from meets the ideals envisaged by the drafters of the current legislation.

An examination of the evolution of the provisions for the approval of private adoption agencies is instructive.[97] It appears that, at first, Victoria was the only state which proposed to enact them. When the Bill was introduced in Parliament, Government spokesmen stated that the Government had decided that approved charitable organizations ought to be allowed to continue arranging adoptions.[98] One may justifiably speculate that the motives behind this proposal were primarily financial. In view of the fact that three quarters of adoptions in Victoria are arranged by private organizations, the financial outlay required in order to centrally supervise all adoptions would be considerable.

Perhaps even more startling was the rejection by the Government of proposals for at least some governmental supervision of placements made by private agencies. Considerable staff resources would clearly be required if such a scheme was included in the Act. In comparison it may be noted that prospective foster-care homes require approval and registration. Is it that the Government is only prepared to insist on protective standards when it is making financial expenditure on the home? In contrast to the governmental impetus in Victoria to preserve the private agencies, in New South Wales it was the private agencies who persuaded[99] their Government to include similar provisions allowing for the registration of private agencies. It is probably significant to find that the New South Wales regulations[1] outlining the necessary qualifications and requirements for agencies seeking registration are very detailed, and the number of registered agencies is only seven (compared with twenty-two in Victoria).

[97] Hambly, *op. cit.* draws together this information.
[98] Victoria, *Parliamentary Debates*, Legislative Council, 24 March 1964, 3286 *per* Mr Hamer; 14 April 1964, 3647.
[99] New South Wales, *Parliamentary Debates* (1965) 42 (3rd series) 3008-9 *per* Mr McCaw.
[1] Adoption of Children Regulations 1965 (N.S.W.), regs 6-8.

Pursuant to the Victorian Adoption Act 1964, regulations were drafted in 1965 laying down certain specifications regarding agency services and facilities, the supervision of placements and the experience and qualifications of persons engaged in arranging adopters.[2]

But despite these requirements, approval of applicant agencies became almost a rubber stamp operation. Application forms[3] for registration as an approved agency require details of the abovementioned specifications. On receipt of an application for approval the Director-General shall cause such inquiries to be made in relation thereto as he thinks proper, and shall submit the application to the Minister. The Minister may by endorsement on the application approve the charitable organization as a private adoption agency.[4] In Victoria twenty-two private agencies are currently registered. These include hospitals, church missions and homes, and welfare organizations. Apparently approval was almost a rubber stamp procedure until at least one social worker objected strongly to the suitability and competence of some applicant agencies. As a result she was allowed to interview representatives of the organizations applying for registration and she succeeded in persuading the Minister to refuse approval to two or three particularly unqualified bodies. But there are still other approved agencies whose capacity and competence to provide the supposed advantages of agency placements might well be seriously questioned: one home is being run by a committee of middle-aged women whose good intentions may be above reproach, but one of the important reasons for restricting private placements was that good adoptions often require more than goodwill. The desirability of hospitals carrying out adoption arrangements as a sideline activity has been queried: social workers pointed out the possibility of children being treated as remedial devices for a patient who had just had a miscarriage or other illness. The background to a recent Victorian case[5] concerning the discharge[6] of an adoption order when the child was found to be permanently retarded highlights the grave deficiencies in the practices of some agencies. The adoptive parents had had no personal contact with the principal officer of the agency until they came to collect the baby supposedly so carefully 'matched' for them after their 'selection'. Their suitability had been assessed on the basis of recommendations by a mutual acquaintance of the couple and the principal officer. There was no supervision after placement. More adequate medical examination of the child and an investigation of the difficult circumstances surrounding the birth would, in all probability, have revealed the baby's poor medical condition shortly after birth. These are some of the dangers which the restrictions on private adoptions were intended to prevent. Agency services

[2] Adoption of Children Regulations 1965, Pt II, regs 13, 18, 19; Pt III, regs 21, 22.
[3] As set out in the 1st schedule to the Adoption of Children Regulations 1965.
[4] Adoption of Children Regulations 1965, Pt 1, regs 4, 6, 7.
[5] *Re S. (an Infant)* [1969] V.R. 490.
[6] Adoption of Children Act 1964, s. 16.

of this standard are certainly not in keeping with the philosophy of the Act that the welfare of the child is to be paramount. A very distressing feature of the *Re S.*[7] episode is that no measures have been taken to deregister this agency and the judgment of McInerney J. contains no reprimand of the agency methods and procedure. Though it would be grossly unfair to suggest that the standards of this agency are typical of all private agencies, it is clear that a number of approved agencies cannot or do not offer the advantages to all parties, particularly the child, which justify restrictions on private placements. As indicated above, proposals for government supervision of private agency placements were rejected and private agencies frequently sponsor adoption applications within a period which the Family Welfare Department considers insufficient to really assess the compatibility of the adopters and the child as required by the Adoption Regulations.[8]

The financial plight of many agencies may cause some to close down unless assistance is forthcoming. The Government has been trading on the goodwill of the agencies to obtain adoption services at a cheap cost to the state, and in some cases probably at the expense of the future happiness of the child. Private voluntary agencies annually arrange over three-quarters of the adoption placements. This being so, financial assistance is imperative in order to ensure that the anticipated high standards of service are in fact attained, since the future well-being of so many children is in the hands of private unsupervised agencies.

The financial crisis for both private agencies and the Social Welfare Department is largely responsible for a further very distressing feature of the adoption situation in Victoria. Because of inadequate staff to interview, select and assess appropriate and willing adoptive applicants, a considerable number of children (frequently those with genetic defects or of mixed racial origin) remain in institutions for undesirably long periods. Though the practice is widespread in America,[9] suggestions[10] that agencies should charge a fee to adopters in order to cover costs were vehemently criticized as a matter of principle. The Victorian Government has, however, recently granted a small subsidy to adoption agencies.

Rather than an automatic payment of these benefits to all the presently approved agencies, what is most urgently required is a thorough reappraisal of the existing agencies with a view to centralizing adoption arrangements in the hands of a smaller number of agencies able to provide the services and safeguards envisaged by the legislation. Subsidies should then be allotted to these organizations.

[7] [1969] V.R. 490.
[8] Adoption of Children Regulations 1965, reg. 19.
[9] Kadushin, *op. cit.* 504.
[10] Melbourne *Herald,* 25 February 1970 *per* the then Chief Secretary, Sir Arthur Rylah.

VI CONCLUSION

A basic problem for the maker or administrator of laws which regulate the adoption of children is to protect and reconcile the competing interests of the natural parents, the child, and the adoptive parents:

> Children must be protected from adoption by people who are unsuited to the responsibility of bringing them up or want a child for a wrong motive. When they have settled satisfactorily in their adoptive home they must not be interfered with. The natural parents must be protected from hurried or panic decisions to give up their children and from being persuaded to place them unsuitably. The adopters must be protected from undertaking responsibilities for which they are not fitted or which they have not appreciated, and from interference after a child has been legally transferred to them.[11]

Potentially the Victorian Adoption Act 1964 provides a commendable compromise between the interests at stake. In 1964 optimistic views were expressed about the benefits for all parties:

> Thus, the State of Victoria has produced a piece of legislation which should lead to a new era in adoption service. Many haphazard arrangements will be eliminated, and greater protection afforded to children whose hope for the future lies with a family other than the one into which they were born. Better counselling of natural parents and more comprehensive services to adopting parents should also result.[12]

Unfortunately, in some areas such hopes for a 'new era' have been frustrated by a lack of wholehearted implementation of the policy and requirements of the legislation and by financial problems hampering satisfactory administration.

[11] United Kingdom, *op. cit.* para. 19.
[12] Phillipps, 'Victorian Adoption of Children Act 1964' 18 *Australian Journal of Social Workers* No. 3, 8.