Review of the Adoption Information Act 1990 (NSW), July 1992

New South Wales Law Reform Commission Report No. 69

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A INTRODUCTION

The current trend towards open adoption in Australia was sparked by a series of three conferences in the late 1970s and early 1980s. At these conferences, several papers were delivered emphasizing the harmful consequences of secrecy, which had been the hallmark of 'uniform' legislation passed in every Australian state in the 1960s.[1]

Following these conferences, strong campaigns were waged throughout Australia to have the legislation passed in the 1960s repealed, and to pass new legislation giving parties to an adoption rights to ascertain the true situation. It was recommended that birth parents be provided with a mechanism by which they could trace the adoptive parents of their relinquished children. Likewise, adopted persons should be permitted, and indeed, encouraged to seek information about the circumstances of their birth.

This new 'open' philosophy was first translated into legislation in 1984 in Victoria,[2] following intensive debate and lobbying by interest groups. Now, it has been legislated for throughout Australia.[3] But the legislation varies substantially from state to state.[4]

It was not until 1990 that New South Wales passed appropriate legislation.[5] Indeed, initially the New South Wales Parliament had rejected the idea of openness. But in 1989 a body called the Willis Committee[6] produced a report entitled, 'Accessing Adoption Information',[7] which recommended the enactment of legislation allowing for access.

A bill was brought before the NSW Parliament, and became law in 1991 (*Adoption Information Act* 1990). But, because of concerns expressed in the

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1 *Proceedings of the First Australian Conference on Adoption* (C Picton, ed, Melbourne 1976); *Proceedings of the Second Australian Conference on Adoption* (C Picton, ed, Melbourne, 1978); *Proceedings of the Third Australian Conference on Adoption: Changing Families* (R Oxenberry, ed, University of Adelaide, 1982).

2 *Adoption Act* 1984 (Vic).

3 *Adoption Act* 1991 (ACT); *Adoption Information Act* 1990 (NSW); *Adoption of Children Act Amendment Act* 1990 (NT); *Adoption Legislation Amendment Act* 1991 (Qld); *Adoption Act* 1988 (SA); *Adoption Act* 1988 (Tas); *Adoption Act* 1984 (Vic); *Adoption of Children Act* 1896–1991 (WA).

4 For a detailed comparative analysis of the legislation throughout Australia, see P Boss, *Adoption Australia* (Notting Hill, Victoria, National Children's Bureau of Australia, 1992).

5 See below.

6 Legislative Council Standing Committee on Social Issues (NSW) (The Hon M Willis, Chairman).

7 *Accessing Adoption Information* (Sydney, 1989).

Parliamentary Debates, it was resolved by the NSW government that the Law Reform Commission of that State should be requested to review this controversial legislation.

Less than 15 months after its coming into operation, the Act has been the subject of an intensive review.[8] The NSW Law Reform Commission's review, however, is not merely of interest to New South Wales readers. For it examined a number of issues on which legislators in other states might require guidance. Indeed it may be that New South Wales' delay in passing legislation permitted that State the leisure that enabled it to provide measures that would have been desirable throughout Australia.

For this reason, this report is of interest to all scholars of adoption, and to legislators throughout Australia.

B THE NEW SOUTH WALES PROVISIONS

In order to appreciate the tenor of the NSW Law Reform Commission's recommendations, the legislative background must first be explained.

The *Adoption Information Act* 1990, which received the Royal Assent on 26 October 1990, came fully into operation on 2 April 1991. Its object was to open adoption records and facilitate reunions between people separated by adoption. The legislation, in essence, provides that adult adoptees have the right to receive copies of their original birth certificates and information which enables them to identify their birth parents. Conversely, birth parents have the right to a copy of the certificate of adoption, and information enabling them to identify the child whom they relinquished.[9]

However — and this is where NSW legislation broke new ground — a register was established, the Contact Veto Register, which enables both adoptees and both parents to register a statement insisting that they *not* be contacted by the recipient of the information.[10]

It is important to note that there is no possibility of vetoing dissemination of the information itself.

In several respects, NSW law differs from that obtaining in Victoria.

(1) In Victoria, there is no machinery for registering a veto on contact.
(2) In Victoria, adult adoptees are required to attend an interview and undertake counselling before they can establish contact with their birth parents.[11] No such requirement exists in NSW.
(3) In Victoria, the birth parents, although they are entitled as of right to *non*-identifying information about the adoptee, must obtain the consent of the adoptee, if he or she is over 18, or that of the adoptive

[8] *Review of the Adoption Information Act* (1990) (New South Wales Law Reform Commission Report No 69, Sydney, 1992), hereinafter referred to as 'The Review'.
[9] *Adoption Information Act* 1991 (hereinafter referred to as *'AIA'*), ss 6–11.
[10] *AIA* ss 16–29.
[11] *Adoption Act* (Vic), s 87.

parents if the adoptee is still a minor, before they can obtain *identifying* information.[12]

So in some respects, Victorian law is more stringent, while in other respects it is more accommodating, than that of NSW. In both NSW and Victoria, the rights accorded to both parents and adoptees are retrospective. They apply to adoption orders made before the new legislation came into operation.

The administration of the NSW Act requires an infrastructure involving two government agencies. The first is the Registry of Births, Deaths and Marriages.[13] It provides original and amended birth certificates, and further assistance in searching records.[14] Indeed, the Act entitles adoptees and birth parents who have received the relevant certificate to require the Registry to search further, so as to enable them to trace the persons required to be known.

Secondly, the Family Information Service of the Department of Community Services maintains the Contact Veto Register and administers the Reunion Information Register.[15] It also provides information and support.

C PUBLIC AWARENESS OF THE LEGISLATION

The Report detailed the machinery which was set up to ensure public awareness of the new legislation, and assessed its effectiveness.[16] A strong and extensive campaign was launched in the media, with paid advertisements in newspapers and the radio not merely in New South Wales, but also in every other Australian state and in New Zealand. Persons were advised of the changes in the law, and were given addresses of places where applications for certificates could be made and contact vetoes lodged.

A survey conducted in April 1992 by the market research agency, Roy Morgan, revealed that, out of an estimated 815,000 adults affected by the legislation, 73% were aware of the changes. This, of course, meant that a substantial minority was still unaware. Statistics showed that there had been 7358 applications for original or amended birth certificates, 70% of which were from adoptees, 30% from birth parents. Only a very few of these were lodged by birth *fathers*. There had been 3432 contact vetoes lodged; 55% were lodged by adoptees, 45% by birth parents. In other words, almost half the applications had been accompanied by a veto on contact. In some cases, however, a veto was withdrawn.

[12] Id s 97.
[13] See below, p 346.
[14] *AIA* ss 10–11.
[15] See below, pp 346–8.
[16] See *The Review*, ch 3: Public Awareness.

D SERVICES PROVIDED UNDER THE ACT

The Report analysed in detail the effectiveness of the services provided under the Act.

(a) Family Information Service[17]

The Family Information Service is the agency with the primary responsibility for administering the Act, and it plays a vital role in all post-adoption activity and outreach. Its performance was analysed in the Report, and favourably commented on, especially for its sensitivity to the needs and emotions of persons caught up in the 'Adoption Triangle'.

The Director-General of the Department of Community Services has considerable responsibilities under the Act. He has been given a large number of discretionary powers — for example to approach a person who has lodged a contact veto. An appeal against his action, or failure to take action, lies to the Community Welfare Appeals Tribunal. Only one appeal has so far been made. The Report commented favourably on the role played in NSW by support groups, which are much rarer in that state than in Victoria. Some adverse comment was, however, made on the lack of support services, both statutory and non-government, in country areas.

(b) Registry of Births, Deaths and Marriages[18]

The smooth operation of the Act depends to a large extent on the facilities provided by the Registry of Births, Deaths and Marriages. The administrative work of this Registry has increased to such an extent that a new section on adoption has been established. An applicant must satisfy the Registrar (or the Clerk of a Magistrates' Court in the country) of his or her identity. A fee of $100 is payable. Then the application is sent to the adoption section for processing. Extensive searches are required before a certificate is released.

The Report commented favourably on the work of this Registry, but was somewhat critical of the performance of some Clerks of Court in the country. The Report also noted that there had been complaints about the $100 fee, but that it might be waived.

(c) Contact Vetoes[19]

The voluntary nature of the contact veto system is the matter on which critics of the Act had been most sceptical. It calls for a unilateral declaration by an applicant that he or she will honour and respect the vetoer's wishes. The applicant must attend the Registry Office and sign an undertaking not to contact the other party. Then a copy of the birth certificate is released.[20]

[17] Id 45ff.
[18] Id 58ff.
[19] Id 93ff.
[20] *AIA* s 18.

The Report commented on the emotional nature of the interviews at which the matters are discussed. On the whole, it would seem that the staff of the Central Registry have been adjudged to be sensitive and professional, but, not surprisingly, accolades were not so freely given to staff of local courts in the country.

The philosophy of the Contact Veto System was minutely examined in the Report. Two criticisms were made to the Commission. The first was that it provides insufficient protection, in that it is entirely based on voluntary compliance. The existence of the veto is revealed to an applicant, at a personal interview by the Department of Community Services' staff, when that applicant applies for a birth certificate. No certificate or information is released without the recipient formally acknowledging the restrictions on his or her right to contact the other person. The Family Information Service, however, allows messages to be lodged, for the vetoing person, and arranges the collection of these. Is this voluntary system effective? Or is the temptation to contact the other party likely to be too strong to resist? The Report stated that there had been a high level of compliance. Indeed no complaints had been received of non-compliance, and the Director of Public Prosecutions had not had cause to initiate any prosecution.

The second criticism was the fundamental one, that the veto's philosophy was wrong in principle. Some birth parents, and many adoptees, indignantly criticised the necessity of having to take action and to pay a fee ($50) in order to protect what they believed was theirs by law, their right to privacy.

The Commission acknowledged that the Act was a form of retrospective legislation. While endorsing its philosophy, the Commission agreed with the critics of the $50 fee, and recommended its abolition.[21]

(d) Reunion Information Register[22]

An Adoptions Persons Contact Register had been established in 1976, on an informal basis. It was given statutory effect in 1980.[23] With the passage of the *Adoption Information Act* 1990, this register was subsumed into the Reunion Information Register.[24] The purpose of the register is to allow birth parents and adoptees to give notice that they are eager to meet their opposite number.

The Report revealed that, up to 1989, approximately 8000 persons had entered their name on the register — 54% adoptees, 37% birth parents, and 70% relatives. The rate of matches was about 14%.

The Commission examined the reasons why so many birth parents had not registered. Their reasons are revealing. Some did not wish to interfere with the adoptee's life. Some had an instinctive belief that their relinquishment was indeed a permanent act. Some expressed the view that it was up to their child to come to seek them out if they wished. Moreover, some birth parents were

[21] See *The Review* 1833ff: Impact of Contact Vetoes.
[22] Id 90ff.
[23] Adoption of Children Regulations (NSW), Part 5A.
[24] *AIA* Part IV.

still unaware of the Register's existence. More sadly, some relinquishing parents revealed that they did not register for fear of rejection or guilt at the surrender of the child.

It is possible for the following persons to register:

(1) Adult adoptees (as of right);
(2) Birth parents (as of right);
(3) Child adoptees (with the consent of the adoptive parents);
(4) Other relatives, including foster-parents (at the discretion of the Director-General).

Registration remains voluntary. Where there are parallel registrations, the Department arranges reunions. The Family Mediation Service usually, after counselling, puts the parties in touch with each other. Each party is still entitled to withdraw.

The Report revealed that in May 1992 there were 15,985 registrations on the Register. Reunions were taking place at the rate of 15 per day. The rate of matching is still only about 15%, but this is expected to increase as more registrations are entered. The Commission concluded that this machinery was far more effective than independent searching would be. But the Department is still largely ineffective at locating persons not on the Register, providing such an 'outreach' service only in exceptional circumstances.[25]

E IMPACT OF THE LEGISLATION[26]

The extensive public consultation process enabled all parties to state their views to the Law Reform Commission.

(a) Birth Mothers[27]

Perhaps not surprisingly, but rather sadly, by far the majority of birth parents who commented were mothers. Often they were married. The evidence was that the majority of relinquishing mothers were in favour of the new legislation, but that a significant minority were opposed to it.

The principal reason given by those who approved of the new openness was that it recognized that the act of relinquishment did not in truth constitute a clean break, as had been supposed by previous legislation. Relinquishment was associated inevitably with enduring grief and pain. Although this pain could never be fully assuaged, the provisions permitting access to information and possible contact represented a major step in the resolution of the issues associated with their grief.

Some mothers expressed anger at the way in which they had been treated. Others expressed the view that the new provisions enabled them to explain to the child the circumstances in which they were obliged to relinquish him or

[25] *The Review* 92.
[26] Id ch 5.
[27] Id 122ff.

her, and to convince the child that he or she was not unloved or unwanted. Other reasons given for the approval of the Act included a simple curiosity to learn how their relinquished child had fared, and a general wish to 'come out of the closet.'

Some mothers, however, stated that they had no strong personal views either for or against contact, but that they would be available if the child wanted it. And others, very poignantly, confessed a deep need to see the child, but would refrain from doing so themselves in case they caused distress.

Contrary views were put by a significant minority of birth parents. Some of them were distressed by the prospect of reunion. Some were afraid of the effect on their husbands or children, who were unaware of the adoption. One woman stated that she lived in fear lest her children should find out about her past, although her husband was aware of it.

Some moving stories of the grief of relinquishing mothers were told. One slept with her daughter's birth certificate under her pillow. Many seemed merely to yearn for their child's forgiveness. But, on the other hand, there was indignation by some of those who did not seek contact. It was felt that the law had betrayed them. 'All of a sudden, my world has been turned upside down', wrote one distressed relinquishing mother. In some cases, a mother had given birth as a result of rape or incest, and was horrified by the remembrance of the event that reunion would cause.

(b) Birth Fathers[28]

Most relinquishing fathers of adopted children do not have their names on the certificate. In the main, they remain far less involved in seeking post-adoption information than do mothers. But some still feel angry that their views were not sought. And some still feel guilty towards the child, and wish to make amends.

The Commission reflected that evidence might suggest that some fathers would welcome contact, but the number of submissions was so small that few general conclusions could be made.

(c) Adoptees[29]

The Commission received submissions from adoptees ranging in ages from 18 to over 70. The majority were in favour of the new legislation, but a substantial majority criticized it, principally on the ground that it gave *birth parents* rights without the child's consent. Many adoptees argued that the legislation was acceptable with the safeguard of a contact veto, but that they would be opposed to it if that right of veto were withdrawn.

The Commission received some disturbing stories from adoptees. Some had never been told that they were adopted, testifying to an awkwardness about the topic displayed by their parents. Most, however, had instinctively guessed that they were adopted.

[28] Id 138ff.
[29] Id 144ff.

Some adoptees stated that they preferred not to know about their origins. The majority, however, appeared to be in favour of the new legislation, claiming that they had 'found their true identity'. There were some complaints that the prescribed information did not go far enough — the lack of detail was frustrating. There were also laments from some adoptees that their original birth certificate did not reveal the name of their father, and that their mother would not inform them of his identity.

The Commission found that there was no link between adoptees' desire to learn about their birth parents and the level of unhappiness suffered in their adoptive family life. Only rarely was the receipt of information and resultant contact regretted. Some adoptees, however, were incensed that information about *them* could be released to birth parents against their wishes. They saw that not merely as a breach of privacy and a threat to their own peace of mind, but also as an unwarranted threat for their adoptive parents. Indeed some adoptees, especially those who were mentally handicapped, had been caused anxiety lest they should be taken out of their adoptive parents' care.

Many adoptees doubted the effectiveness of contact vetoes, and were angry at having to pay $50 to lodge one. Many felt that they should have the absolute right to decide on whether information about them was released.

The Commission found that, while the majority of adoptees were in favour of the legislation, there was a substantial majority who expressed serious concerns.

(d) Adoptive parents[30]

As was perhaps to be expected, the strongest opposition to the legislation came from adoptive parents.

Most of the 250 submissions from them exhibited hostility. The Commission, however, concluded that this attitude was not representative of all adopters. In its opinion, it was the dissatisfied ones who were most likely to make submissions at all!

The main grounds for opposition were that the new provisions constituted a gross breach of privacy and were tantamount to a breach of promise. Adopters had been given an assurance of secrecy. The change of philosophy was too radical, and it was unjust that it should have been applied retrospectively.

Adopters who had not told their child of the adoption were particularly dismayed. While, perhaps, conventional social work theory would unequivocally say that that served the adoptive parents right, the Commission was told that some parents had been expressly advised *not* to reveal the adoption to their children.

Some adopters felt that their efforts as parents had been devalued or depreciated by this legislation. Others argued that 18 was too young an age for an

[30] Id 158ff.

adoptee to have the right to decide on whether to register a veto, and caused unnecessary anxiety to a child likely to be studying for the Higher School Certificate. Some adoptive parents claimed that they had been called upon to act as intermediaries between the child and the birth parents.

As with adoptees themselves, some adoptive parents felt that it was wrong that the rights of the adoptee and those of the birth parents had, as it were, been equated. They argued that while the 'right to identity' might well have justified the legislation from the child's point of view, that rationale did not apply to the birth parent, who already knew his or her identity.

Another strong argument made by adoptive parents was that the new legislation ran counter to the philosophy that adopted children should be treated and brought up exactly as if they were natural children.

There was a 'significant minority' in favour of the legislation. The majority of adoptive parents, however, were opposed to the new provisions, especially insofar as they benefited birth parents.

(e) Members of the Extended Family (eg Grandparents)[31]

The majority of submissions revealed a great deal of irritation, especially from the parents of the birth father, that they had been granted no rights.

F CONTACT AND REUNIONS[32]

The evidence given to the Commission revealed that every situation was different, but that certain generalizations could be made.

The first contact was likely to be highly charged emotionally. The relationship thereafter either developed or dwindled. Almost all parties concerned experienced an initial fear of rejection. The shock of contact was often reduced by the presence of an intermediary. The Commission, however, recommended that intermediaries should not be compulsory, but did criticize the lack of counselling facilities.

The Commission found that the experience of contact was always emotional. Feelings varied from joy to distress. But often, the dominant reaction was one of ambivalence and complexity. Some reunions had been characterized by insensitive behaviour. Occasionally, a reunion had led to a broken marriage and even to death.

The Commission, however, considered that the pain of reunion was simply an inevitable by-product of the nature of adoption, which is not in itself a neat and conclusive solution, but an institution based on loss and grief.

[31] Id 173ff.
[32] Id 176ff.

G THE IMPACT OF THE CONTACT VETO[33]

The Commission found the majority view to be that the veto was a fair compromise between parties.

There was, however, a substantial minority who regarded it as unsatisfactory. For some, opposition was one of principle — identifying information should *never* be revealed without consent. Others, while acknowledging the theoretical fairness of the system, took objection to its practice. Principal criticism related to the requirement of personal attendance and to the imposition of a fee for lodgement of the veto.

The Commission noted that many persons eligible to do so had failed to lodge a veto.

Some respondents expressed the cynical view that recipients of information would usually ignore the veto. But the Commission found that this had not eventuated. Only one breach had been reported (where a mother had had a friend approach her vetoing son), and that had ultimately resulted in a voluntary meeting.

The Commission noted that to encounter a veto caused great stress. But often, even where there was a veto, it was accompanied by a helpful message. And sometimes, the veto was subsequently removed.

The Commission concluded that the Contact Veto System had been successful.

H BASIC PRINCIPLES OF THE ACT[34]

In Chapter VI of the Report, the Commission carefully reviewed the philosophy of the Act.

It noted that the NSW Parliament had supported access to information for three reasons:

(1) It was a human right;
(2) It was necessary for the psychological well-being of an adoptee;
(3) Knowledge of one's genetic inheritance was highly desirable for medical reasons.

The Commission concluded that the Parliament had been well justified in passing this legislation. But it had under-estimated the number of adopted children who would be affected. Many were still unaware of their rights under the Act, and of those who were aware, only a minority exercised them.

The Commission noted that the level of opposition of *adoptees* had probably been under-estimated. And the prediction of the Willis Committee,[35] that adoptive parents would have 'nothing to fear' in the new legislation, had proved incorrect. The extent of their anxiety had been 'perhaps underestimated'. Nevertheless, the Commission found that the fears of adoptive

[33] Id 183ff.
[34] Id ch VI.
[35] Above, fn 6.

parents were in fact unjustified — the contact veto provided a satisfactory mechanism to allay them. The Commission, however, conceded that media presentations had sometimes given too much attention to happy reunions.

The Commission dealt with the major arguments against the legislation:

(1) It should not have been made retrospective;
(2) It was an invasion of privacy;
(3) There should be a veto on information as well as contact. The Commission concluded that none of the above arguments had substance.

In sum, the Commission concluded that basic principles of the Act should not be changed.

I ADDITIONAL PROTECTION FOR PRIVACY[36]

The Commission did, however, make three recommendations designed to provide more protection of privacy.

(1) The establishment of an *Adoptive Information Exchange*, similar to the Reunion Information Register. This would enable any person involved in the adoption process to leave information or messages for any other person. The object of this would be to reduce anxiety. For instance, an adoptive parent could warn the birth parent that the child was studying for the Higher School Certificate.
(2) The setting up of an *Advance Notice System.* By this means, the release of information could be made subject to a delay — so as to ease anxiety in appropriate cases.
(3) The vesting of a *discretionary power* in the Director-General to refuse the issue of a certificate or of information. The Commission recommended, however, that this discretion should be exercisable only in exceptional circumstances, and should be subject to a right of appeal.

J PARTICULAR MATTERS[37]

The Commission made several residual recommendations, the most important being that the current discrimination against birth fathers should be removed. A birth father, even though he had not formally acknowledged paternity, should be granted all the rights under the Act now enjoyed by the birth mother. In particular, he should be permitted to lodge a contact veto. The Commission, however, pointed out the difficulties of equating the position of all fathers of ex-nuptial children — since, of course, the circumstances of ex-nuptial conceptions and births vary from rape to stable *de facto* unions.

The Commission specifically recommended that the age of 18 should remain that at which an adopted child should be given full rights.

[36] *The Review* ch 7.
[37] Id ch 8.

K CONCLUSION

The NSW Law Reform Commission is to be congratulated for having conducted a thorough and well-documented survey into the operation of a most controversial and revolutionary Act, so soon after it came into operation. Clearly, its findings will be of great value and assistance to all other states contemplating reform of their adoption legislation.

Some concern, however, must be expressed at the rather sanguine attitude of the Commission towards the legitimate fears of adopters. The hostility exhibited by many adoptive parents to open adoption is not irrational. The Commission may have taken too cavalier an approach to this opposition. Certainly, this legislation and that of other states that have initiated the new 'open' approach to adoption have caused much distress. The media have tended to overlook this.

Perhaps more significant is the effect that the new philosophy may have on the institution of adoption itself. Open adoption is no more or less than long-term foster-care.

The institution of adoption seems to be in danger of becoming obsolete. It is surely probable that many couples who would otherwise be eligible might baulk at the restrictions and potential conflicts that openness inevitably brings. It may not be too far-fetched to argue that 'adoption' is becoming a dirty word — a most unfashionable thing to do.

If this is so, then it is a most unhappy consequence of the adoption revolution. Adoption has proved quite the most satisfactory form of substitute parenting — not surprisingly, for adoptive parents are the only parents in the community who receive compulsory parental education.

Let us hope that the new openness does not cause adoption to fall into desuetude.