AUSTRALIAN INSTITUTE aifs OF FAMILY STUDIES

ADOPTION LAW IN AUSTRALIA

Compiled by Belinda Stonehouse

BACKGROUND

The adoption scene in Australia has changed dramatically over the past 20 years, with a sharp decline in the number of children adopted.

There are several and diverse reasons for the decline. During the 1970s, fewer Australian babies were put up for adoption due to the wider availability of abortion and reliable contraception, and the establishment of family planning centres. Negative attitudes towards single mothers relaxed and the introduction in 1973 of income support for sole parents made it easier for parents to keep their children.

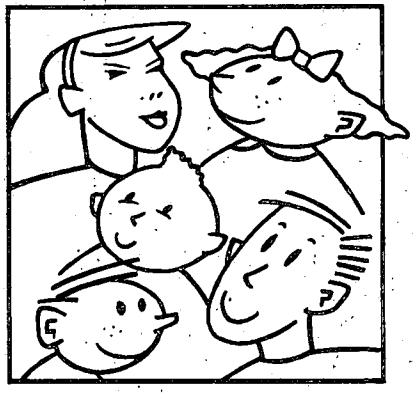
By 1980, adoption was no longer primarily concerned with placing infants. The emphasis shifted to providing homes for older, often disabled, children, negotiating adoptions from overseas countries, and responding to demands for information about past adoptions.

Inter-country adoption became firmly established as a major source of children during the 1980s. However, by the end of the decade, a number of countries had closed their programs while others had tightened their criteria and imposed stricter controls. The prospect for the 1990s is that only small numbers of children will be available from overseas for Australians to adopt, and that this type of adoption will become increasingly restricted.

The emphasis of adoption has also shifted from being a service for couples wishing to adopt a child to being a service for children; the top priority is now the welfare of the child. There is also a much broader recognition of the information and other rights and needs of the various parties.

Adoption severs the legal relationship between biological parents and child, and replaces one set of parents with another. In the past, adoption also extinguished any existing or potential personal relationship between children and their biological parents. Many children were brought up not knowing that they had been adopted, and it was felt that secrecy protected the various parties.

But attitudes have changed, and legislation has followed suit. In Victoria, for example, the Adoption Act of 1928 provided for the secrecy of all parties. Under the Adoption Act of 1964, secrecy still prevailed, but adopting parents were counselled to tell children of their adoption. The Adoption Act of 1984 recognises the right of people to information about themselves, and the desirability of 'open adoption' by allowing several different types of contact between birth parents and their children.



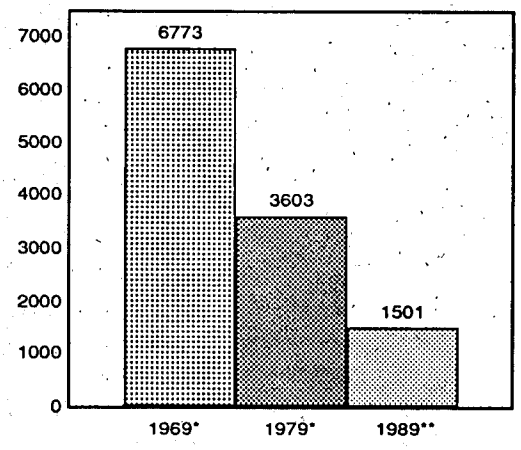
REGULATION

In Australia, the states and territories are responsible for adoption legislation, resulting in eight different systems across the country.

There was an attempt to enact uniform laws in the 1960s, when all Australian jurisdictions modelled their legislation on the Adoption of Children Ordinance (1965) of the Australian Capital Territory. Since then, however, many jurisdictions have revised their legislation, particularly in relation to access to information.

This paper gives an overview of Australian adoption laws as at 1 January 1992, with reference also to reforms proposed by Western Australia's Adoption Legislative Review Committee, which aim to take a new approach to adoption and to provide 'laws that suit the times'.

Adoptions in Australia 1969 to 1989



* Source: Adoptions Australia 1979-80 ABS Cat. no.4406.0.
**Source: WELSTAT Data Collection.

AUTHORITY TO ARRANGE ADOPTIONS

In all states and territories, the authority to arrange adoptions, except adoption by relatives, is restricted to the director of the government department or division responsible for child or social welfare, or to approved private agencies. In Victoria, for example, Community Services Victoria and seven private agencies are authorised to arrange adoptions. Private arrangements, except through an approved agency, are illegal, and criminal charges apply.

IN WHOSE INTERESTS?

All states and territories require that the top priority is the welfare and interests of the child. All jurisdictions except South Australia further require that the welfare and interests of the child be actively advanced by the adoption.

CONSENT

In the case of adopting a child born within a marriage, the consent of both natural parents is required before an adoption order can be made.

For an ex-nuptial child, generally only the consent of the mother is required. However, the involvement of the natural father varies between jurisdictions.

In New South Wales, the consent of the child's natural father will be required if he has lived in a de facto relationship with the mother.

In South Australia and the Northern Territory, the consent of the natural father is required if his paternity is recognised under state or territory law. In Tasmania and Victoria, the consent of the father of an ex-nuptial child is required if he has been registered as the father.

In Western Australia, it is proposed that the rights of the natural father be recognised in adoption legislation, irrespective of his marital status in relation to the birth mother.

In some jurisdictions, the father may also seek leave of the court to oppose an application for his child to be put up for adoption. The position of the natural father of an ex-nuptial child was further strengthened last year by federal legislative amendments affecting adoption by stepparents (see section on adoption by relatives).

There are restrictions on mothers giving consent soon after the birth of a child, ranging from three days in New South Wales to 14 days in South Australia and Victoria. In some jurisdictions, consent given even within the restriction period is valid if it can be proved that the mother is in a fit condition to give consent.

In Western Australia, it is recommended that the minimum period before accepting consent for a newborn baby should be 28 days after the birth, and that a further 28 days should be allowed for reconsideration and revocation if desired.

Elsewhere, mothers must consent to the adoption in writing, and can revoke their consent only by notice in writing within 30 days (normally 25 days in South Australia, and 28 days in Victoria).

All jurisdictions enable a court to authorise an adoption without the consent of a parent or guardian. There are five common grounds for dispensing with consent:

If a parent or guardian cannot, after a reasonable inquiry, be found or identified, or;

If the parent or guardian is in a physical or mental condition that renders them incapable of properly considering the question of whether to give consent, or;

If the child has been abandoned, neglected or ill-treated, or;

If the parent or guardian has failed for more than a year to meet parental obligations (defined in the widest sense to include care and affection as well as financial maintenance), or;

If the court, at its discretion, decides an adoption is warranted due to other special circumstances.

With the exception of Victoria and Tasmania, once the child to be adopted has reached the age of 12, then his or her consent is also required. In Victoria and Tasmania, the wishes and feelings of the child are given 'due consideration' before an adoption order is made.

If a court in any jurisdiction determines that, for special reasons, the welfare and interests of a child would be better served by the adoption, the child's consent may be dispensed with.

BIRTH PARENTS

Nowadays birth parents play an increasing role in adoption processes and in the lives of the children they have put up for adoption.

Except in South Australia, the wishes of the natural parents with respect to the religious upbringing of their child are taken into consideration before an adoption order is made. In Tasmania and Victoria, wishes in relation to the racial and ethnic background of the proposed adoptive parents are also considered.

Birth parents in New South Wales have the opportunity to attend a confidential meeting with adoptive parents at the time of placement. Ongoing contact with birth family members is part of the adoption contract for older children.

Victorian birth parents are actively involved in selecting adoptive parents for their child from an approved list of applicants. They can specify the type of ongoing contact they may wish to maintain with the child, and the court can make an adoption order subject to a condition that either or both natural parents, or specified relatives, have a right of access to the child.

Adoption laws in the other states and territories do not provide for access to an adopted child as part of an adoption order. Throughout Australia, however, access to an adopted child can be ordered at any time after the adoption under the federal Family Law Act 1975 (or, in Western Australia, the Family Court Act 1975). The welfare of the child is the paramount consideration.

ADOPTIVE PARENTS

Generally, only married couples are permitted to adopt, although in South Australia and New South Wales this is extended, with some qualifications, to de facto couples. Victorian, Tasmanian and South Australian laws require a minimum period of cohabitation between adoptive spouses, ranging from two years in Victoria to five years in South Australia. Adoptions by single people are permitted only in very exceptional circumstances.

Laws in all jurisdictions except South Australia attempt to ensure that adoptive parents are of an appropriate age. Minimum age is specified, usually 18 years old, with 21 being the minimum age in New South Wales, Queensland and the ACT.

A male adopter must generally be at least 18 years older and a female adopter at least 16 years older than the child being adopted (18

years in Tasmania and Victoria). In Victoria, there are also maximum age limits: neither adoptive parent may be over 40 if the child is under 10 years old, or 45 if the child is older.

Reforms proposed in Western Australia stipulate that adoptive parents be not less than 25 years of age and no more than 40 years older than the child.

Age difference is one issue that may be taken into consideration when grandparents apply to adopt.

All jurisdictions allow age requirements to be waived if one applicant is a parent of the child, or if there are exceptional circumstances.

In addition to legal requirements, people wishing to adopt have to satisfy the particular government department or approved agency that they will be suitable parents. Various factors are assessed, including motivation, reputation, personal and marital stability, and state of health.

ADOPTION BY RELATIVES

Until recently, half the adoptions of Australian children have been by relatives, mostly stepparents; adoption has often been used to officially incorporate children into a parent's new marriage.

However, because the normal adoption order severs all existing legal kin relationships between children and their natural parents, this is no longer considered to be in the child's best interests and laws have been changed to discourage adoption by relatives. A Guardianship and Custody Order through the Family Court is now preferred. Guardianship lacks the finality of adoption, and does not necessarily sever other family relationships.

Legislative provisions in New South Wales, Queensland, Tasmania, South Australia and Victoria now state that adoption by relatives is appropriate only in exceptional circumstances when a Guardianship and Custody Order would not adequately provide for the welfare and interests of the child.

Recent amendments to the federal Family Law Act 1975 clarify the effect which a stepparent adoption has on the custody, guardianship or access rights of the child's natural parents under the Act.

Under the Family Law Amendment Act, which came into effect on 24 April 1991, adoption by a stepparent will not extinguish rights and obligations in existence before the adoption, unless the Family Court considers that adoption is in the best interests of the child and grants leave for the adoption proceedings to be commenced. If the adoption takes place without such leave, the child does not cease to be a child of the earlier marriage, and existing rights of custody, guardianship and access are not altered.

The Amendment Act also introduces provisions which ensure that consent orders and child agreements are not used to transfer custody or guardianship of a child to non-parents unless a court has determined that such a transfer of responsibility is in the interests of the child.

In Western Australia, the Adoption Legislative Review Committee recommends in its final report that a new adoption order be introduced for stepparent adoptions. The proposed 'Negotiated Adoption Agreement' will 'offer children permanent, secure families, whilst also giving them opportunities to continue significant relationships with other family members'. The Committee opposes adoption of children by other family members (for example, grandparents, aunts and uncles), and proposes the use of Custody and Guardianship Orders instead.

State Legislation - January 1992

Australian Capital Territory
Adoption of Children Act 1965 (under review)
New South Wales
Adoption of Children Act 1965, Adoption Information Act 1990, Adoption Information Regulations 1991
Northern Territory
Adoption of Children Act 1964 (as amended; currently under review)
Queensland
Adoption of Children Act 1964, Adoption of Children Regulations 1988, Adoption of Children Amendment Act 1990
South Australia
Adoption Act 1988
Tasmania
Adoption Act 1988
Victoria
Adoption Act 1984, Adoption Regulations 1987, Adoption (Amendment) Act 1991
Western Australia
Adoption of Children Act 1896 (as amended; new Adoption Act being considered by Parliament), Adoption of Children Regulations 1986

ABORIGINAL CHILDREN

The final report of the Western Australian Adoption Legislative Review Committee states: 'It is commonly recognised by the community that the adoption of Aboriginal children is alien to traditional Aboriginal child-rearing practices.'

The Committee has recommended that 'in the few instances when adoption is appropriate for an Aboriginal child, it should only be by persons from the child's community who have the correct kinship relationship or, when this is not possible, by other appropriate Aboriginal person(s)'.

Queensland, South Australia and Victoria already have restrictive eligibility criteria for adoptive parents for Aboriginal children. In Victoria, for example, the parent of an Aboriginal child can place conditions on a consent to adoption. An Aboriginal parent can request that their child go to an Aboriginal family, or that a right of access to the child be granted to the natural parents, other relatives and members of the Aboriginal community.

In the Northern Territory, it is proposed that the new Adoption Act will ensure that every effort be made to place Aboriginal children with an appropriate Aboriginal family.

Western Australia's Adoption Legislative Review Committee has recommended that Aboriginal tribal marriages and long-term de facto relationships should be recognised in law for adoption purposes. This is in keeping with legislation in Victoria, South Australia and New South Wales, and with legislation proposed in the Northern Territory.

ACCESS TO INFORMATION

Lifting the veil of secrecy that has so often surrounded adoptions has profoundly changed the adoption scene. Victoria led the way in 1984, and all states have now legislated to grant rights to information to adopted people over 18 years old, and to their birth parents. There are, however, variations between states in the extent of these rights and the protection of privacy.

Reviews of the relevant Acts in the Northern Territory and the ACT are expected to lead to records being opened up for all parties involved in adoption in those jurisdictions, bringing the territories into line with the states.

While people affected by the release of identifying information are able to veto this information in most states, recent New South Wales legislation grants both adult adoptees and birth parents the right to identifying information. This right is only revoked if someone seeking information is unwilling to sign an undertaking not to contact a person who has lodged a contact veto.

The NSW legislation is retrospective. This controversial decision was based on what the NSW Legislative Council Standing Commmittee on Social Issues described as the 'fundamental human right to origins information', which would otherwise be denied to people involved in adoptions before the new legislation came into force.

This right to information is identified in the United Nations' International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

In Western Australia, the Adoption Legislative Review Committee has proposed legislation that would allow information rights similar to those in New South Wales, and which would also be retrospective.

The Committee states in its final report that 'a person's right to information does not include the right to make contact with another party should that party decline such an attempt'. This view is in line with all other jurisdictions. A contact veto can be registered and parties are expected to respect each other's wishes. In New South Wales, for example, a fine of $2500 and/or six months' imprisonment may be incurred if one party breaches an undertaking not to make contact.

All states have established an adoption information service and some form of register to assist adopted children and their natural relatives to contact one another. Victoria, Tasmania, South Australia and Western Australia require mandatory counselling before information is released. South Australia has a special Aboriginal Link-Up Service to help Aboriginal people separated from their families in the past by adoption or foster care.

INTERCOUNTRY ADOPTION

At the end of the Vietnam War, there were large numbers of orphans and displaced children in Vietnam. In 1975, Australia received an airlift of these children. Officially organised intercountry adoption in Australia thus began as a humanitarian act.

The primary purpose of the subsequent program was, however, to arrange adoptions, and this was reaffirmed by the 1989 review of intercountry adoption services undertaken by the Family and Children's Services Council, chaired by Mr Justice Fogarty. The review stressed that intercountry adoption was not a humanitarian program, nor a service for infertile couples.

The federal Immigration (Guardianship of Children) Act 1946 strictly controls the entry of foreign children into Australia for the purpose of adoption. Agreement was reached in 1986 between federal, state and territory ministers on uniform guidelines for intercountry adoptions.

Since then procedures have been further tightened. In Victoria, for example, foreign children adopted without Community Services Victoria's agreement cannot obtain an entry visa into Australia.

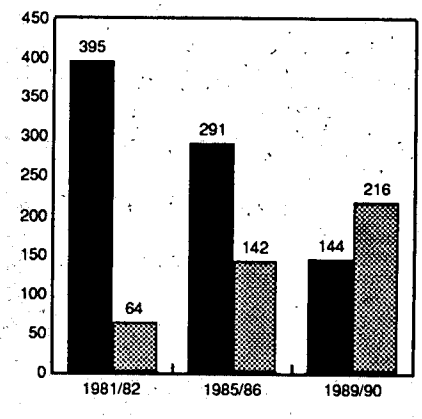
Fierce competition for children, plus changing attitudes and the development of domestic adoption programs within source countries, have led to a decline in the number of foreign children available through Australia's Intercountry Adoption Program.

For example, Korea was a foremost source country which in 1988-89 accounted for more than 65 per cent of Australian adoptions from overseas. It is, however, no longer accepting new applications. In another instance, the Philippines will accept only applications from couples with a Filipino background, or from those who have previously adopted from that country.

Australia's Intercountry Adoption Program has been closed to new applicants for some time, and it is unlikely to be reopened until children have been allocated to those already on the waiting list.

It is often asked why it is not possible to turn to new source countries, especially those where children have lost their families through war, poverty, political upheaval or other social and natural disasters.

Children adopted by non-relatives by birthplace New South Wales



Source: Research and Data Analysis Unit, N.S.W. Department of Family and Community Services. Annual Report 1989-90.

Unfortunately, the Western demand for children to adopt has led, in some instances, to a black market in babies from developing countries, with some mediators taking advantange of poverty and social disruption to obtain children. At worst, there have been reports of children being abducted and adopted overseas without their parents' knowledge or consent.

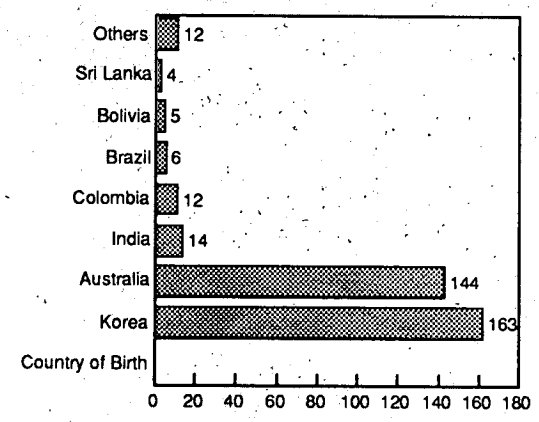
Against such a background, the Australian Government is responsible for investigating and approving overseas programs, with every effort made to ensure that Australia is not party to illicit baby trading.

The Government requires that there be a central authority in the overseas country, with the power to establish a legislative framework for overseas adoption.

Thus in Romania, for example, any adoption agreement is dependent on whether the recently established Committee of Adoption can introduce procedures that are compatible with Australian standards.

The United Nations' Convention on the Rights of the Child recommends intercountry adoption only if the child cannot be adopted, fostered or cared for in a suitable manner in his or her country of origin.

Country of persons adopted by non-relatives year ended 30th June 1990



Source: Research and Data Analysis unit, N.S.W. Department of Family & Community Services. Annual Report 1989-90

The issue of the rights and welfare of the child in intercountry adoption will be further considered in the next few years as Australia participates in the drafting of a United Nations' Convention on the Adoption of Children coming from Abroad.

In the meanwhile, some sections of the community have already spoken out against intercountry adoption.

In September 1991, a discussion paper by a working party of the Australian Catholic Social Welfare Commission called for foreign adoptions to be banned. The paper refers to the high costs to the Australian taxpayer, and the psychological cost of removing a child from its natural cultural and ethnic environment.

It also states that intercountry adoption contravenes sections of the United Nations' Convention on the Rights of the Child, and that Australia's acceptance of overseas adoptions sanctions the oppression of relinquishing parents in source countries while reducing the need for such countries to develop appropriate social services.

Western Australia's Adoption Legislative Review Committee has taken the stand that arrangements should only be made for foreign children to be adopted by Australians when the prospective adoptive parents share the same broad ethnic and cultural background as the child, 'thus ensuring the child's cultural and ethnic identity is not lost as a consequence of the adoption'.

The Committee has also recommended that foreign adoption orders only be recognised when adoptive parents have at least 12 months' genuine residence or domicile in the country in which the order was made. Organisations such as the Adoptive Parents Association in Canberra argue that banning cross-cultural adoption will effectively end intercountry adoption.

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