



Government of **Western Australia**
Department of **Communities**

Statutory review of the *Adoption Act 1994*

November 2018

Acknowledgement of country and peoples

The Department of Communities acknowledges the Aboriginal and Torres Strait Islander peoples as traditional custodians of this land. It pays respect to their Elders past, present, and future.

It recognises the long history of Aboriginal and Torres Strait Islander peoples on this land and acknowledges that the past is not just the past. The past, the present and the future are, as they always are, part of each other – bound together.

Acknowledgement of past forced adoption practices

The significant and lifelong impact past forced adoption has had on the lives of people who experienced these practices is acknowledged.

The apologies of both the Western Australian Government in 2010¹ and the Commonwealth Government in 2013², to mothers, fathers, children and families who were adversely affected by past forced adoption practices are acknowledged and reconfirmed.

It is also acknowledged that using certain terms and language when referring to adoption may continue to negatively affect people who have experienced past forced adoption practices. While efforts have been made to sensitively use terms and language within this report, there are instances, for the purposes of clarity, where terms such as birth mother, birth father, adoptive parent(s) and adoptee are used.

¹ Parliament of Western Australia, Extract from Hansard [ASSEMBLY - Tuesday, 19 October 2010] p7881a-7889a.

² Department of the Prime Minister and Cabinet, National Apology for Forced Adoptions speech transcript 19165 <https://pmtranscripts.pmc.gov.au/release/transcript-19165> accessed 21/09/2018.

Executive summary

The number of children being adopted is declining globally. This is a trend across both local and intercountry adoptions. There are a range of factors influencing this decline including changing societal attitudes to parenthood, such as the acceptance of child birth outside of marriage and single parenthood. Increasing supports for women, contraceptive options, divorce and blended families have all had an influence, leading to fewer children being placed for adoption. There has also been a shift in attitudes to adoption, whereby it is seen less as a way of providing children for couples unable to have a child, and more as a service for a child whose wellbeing and best interests is the paramount consideration. Intercountry adoption has also declined due to the changing economic and social prosperity of countries, leading to better social support systems that have enabled children to be placed within their families or country of origin.

The 2018 review (the Review) of the *Adoption Act 1994 (WA)* (the Act) is undertaken in accordance with section 146 of the Act, which requires a review of the operation and effectiveness of the Act as soon as is practicable five years after the commencement of the *Adoption Amendment Act 2012 (WA)*.

This is the third review of the Act, which was proclaimed on 1 January 1995. This Act brought about significant change in adoption practices with the introduction of open adoption that removed the secrecy around adoption and was the beginning of facilitating access to identifying information for parties to an adoption.

The Review commenced by calling for public submissions, which was advertised in The West Australian newspaper and on the Department of Communities (the Department) website. The Department also wrote to key stakeholders and interest groups inviting submissions to the review. A reference group chaired by the Department was established to support the operation of the Review and comprised representation from the Youth Affairs Council of Western Australia, Aboriginal Family Law Service, Department of Justice and the Department. Overall, the review received 39 written submissions from stakeholders, interest groups and members of the public with an interest in adoption.

The Review has considered a range of issues informed by matters raised in submissions and factors associated with the practical application of the Act. Significant aspects included examination of guiding principles and paramount considerations, consent to adoption and dispensation of consent, adoption plans and the representation of children in adoption processes.

Other matters relating to adoption included consideration of the Adoption Applications Committee (AAC), the need for contact and mediation licences, access to information and record keeping. The Review included a significant focus on adoption in relation to Aboriginal and Torres Strait Islander children. It also considered adoption from out-of-home-care in the context of the Act.

The Review has made 31 recommendations, most of which propose legislative amendments, however, there are some practice and procedure recommendations.

Overall the Act is functioning well and the recommendations focus on continuing to ensure the wellbeing and best interests of the child is the primary consideration in all adoptions, strengthening aspects of the adoption process, providing improved guidance for decision makers and ensuring the legislation delivers adoption functions effectively in today's contemporary society.

Adoption processes

Paramount considerations, guiding principles and best interests of the child

While the Act incorporates paramount considerations it does not currently contain guiding principles. The review examined the current paramount considerations and considered whether a set of guiding principles should be introduced. It concluded that there should be one paramount consideration, that being the wellbeing and best interests of the child. It is also proposed that the Act include guiding principles which will better support the operation and administration of the Act. Introduction of guiding principles will also bring the Act into line with other key legislation such as the *Children and Community Services Act 2004* (WA) (CCS Act) and *Working with Children (Criminal Record Checking) Act 2004*.

Currently, the Act does not provide any guidance around determining the best interests of the child. The review proposes the introduction of a range of factors to be taken into account when determining the best interests of the child to better support decision makers in the administration of the Act.

Consent to adoption

A number of areas relating to consent were examined, including mandatory counselling for children aged 12 years and over consenting to their own adoption, consent to adoption when the birth parents are under 18 years of age and timeframes in relation to notification of consent to adoption.

The Act requires that a child's mother and father or person with parental responsibility consent to the adoption. For adoptions where a child is 12 years of age or over the child's consent to the adoption is also required. In view of the lifelong impacts of adoption and the importance of taking the child's views into account when considering adoption, the review has recommended that any child over 12 years of age consenting to their adoption must be provided with counselling prior to providing consent.

Currently, counselling is not required prior to providing consent to the adoption of a child, irrespective of the age of the person providing that consent. Given the significance of the decision to place a child for adoption and the age at which that decision could be made, the review has recommended that counselling should be mandatory for a person under the age of 16 years providing consent to the adoption of their child. In coming to this conclusion the provisions regarding pre-consent counselling in other Australian jurisdictions were considered and it was noted that a number of other States require pre-consent counselling regardless of the age of the person.

The Act requires that a man who may be a prospective adoptee's biological father must be notified of the consent to adoption within seven days of receiving the first completed form of

consent. This timeframe is incredibly tight, particularly when reasonable efforts need to be made to identify and locate the person. Whilst an extension of time can be granted, the application for extension must be lodged within seven days of receiving the first completed consent. Having considered the practical implementation of this timeframe in context of the best interests of the child and the need to progress an adoption without undue delay, the Review has recommended that the period of time in which to either notify a man who may be the father, or to seek further time for notification, be extended by seven days to no later than 14 days.

Dispensing with consent to adoption

As consent is such a vital part of the adoption process the operation of the dispensation of consent provisions were examined. Particular regard was given to dispensation of consent in cases where there may be a risk to the child or mother respect of adoption. Dispensation of consent provisions were also examined in respect of adoption of an Aboriginal or Torres Strait Islander child.

The review considered circumstances where a final family violence restraining order is in place as a basis on which the Court should be able to consider dispensing with consent and has recommended that the dispensation of consent provisions be amended to enable this to occur.

In view of past practices of forced removal of Aboriginal and Torres Strait Islander children from their families, coupled with the high numbers of Aboriginal children in care, there was concern that dispensation of parental consent could occur more readily in adoption of Aboriginal and Torres Strait Islander children. The review has recommended that further safeguards be put in place regarding dispensation of consent provisions when the adoption involves an Aboriginal or Torres Strait Islander child. This would require the Court to seek a report from the Department, which must include consultation with an Aboriginal person or Torres Strait Islander or agency that is from the area, region or country of the Aboriginal or Torres Strait Islander person, as to whether it would be appropriate to dispense with parental consent and any implications that may arise from such a dispensation.

Adoption plans

Adoption plans are important in facilitating openness around adoption and preventing the secrecy that surrounded past adoptions. The adoption plan may include the way any contact or exchange of information may be facilitated between the birth parents, adoptive parents and the child. Currently only adoptive parents, birth parents and the child's representative are automatically included as a party to an adoption plan.

Developing a strong sense of identity is vitally important for any adopted child, but for children from different cultural backgrounds the development of their cultural connection and identity requires specific attention and action. Adoption plans can help provide the opportunity for a child to develop a strong sense of identity and facilitate a connection with their birth family's culture and traditions.

Particular consideration was given to adoption plans for children adopted from overseas through intercountry arrangements or adoption of an Aboriginal or Torres Strait Islander child, due to these children's specific needs in respect of developing or maintaining a strong sense of cultural connection and identity. The review proposes amendments so that an adoption plan cannot be dispensed with in the adoption of an Aboriginal or Torres Strait Islander child; that an Aboriginal

or Torres Strait Islander child must have separate representation for the purposes of negotiating an adoption plan and the adoption plan must specify how the child's cultural identity and connection will be developed, preserved and maintained. The situation is more complex with intercountry adoptees and it is often not possible to implement an adoption plan in these cases. Nonetheless, it is intended that in the adoption of any culturally diverse child they should be supported to develop and maintain their cultural identity and connection.

Opportunities to strengthen and promote cultural considerations in the adoption process were also considered. The review recommends that the Act be amended to include specific requirements that consider a prospective adoptive parents ability to promote a child's cultural identity and connection as part of the assessment requirements and when the Court is considering making an adoption order.

Being able to develop and maintain contact with siblings can also be important for adopted children. Therefore, the review has recommended this become a specific matter that is considered and addressed in adoption plans.

A number of submissions suggested that there was limited adherence to adoption plans and no avenues for enforcement of these. To improve understanding and strengthen practice in relation to adoption plans, the review has proposed a practice recommendation that again makes parties to an adoption plan aware of the options for review, variation and enforcement of adoption plans at the time the adoption plan is negotiated and when an adoption order is made.

Consideration was also given to the CEO's capacity to seek enforcement of an adoption plan where it is apparent that implementation of the plan may not be occurring as intended. The review has proposed the CEO be provided with specific capacity to refer a breach or potential breach of an adoption plan to the Court for enforcement under section 72 of the Act, despite not being a party to the plan.

The review has also recommended that Schedule 2, which sets out the rights and responsibilities to be balanced in adoption plans, be reviewed to have an increased focus on the child's rights and needs, consistent with the proposed paramount consideration and guiding principles of the Act.

Representation of children in adoption processes

Ensuring that children's views and wishes are taken into account in the adoption process is particularly important. In addition to mandatory counselling for children 12 years and over consenting to their own adoption, the review also proposes that children over 12 years of age that are required to consent to their adoption be provided with separate legal representation at all relevant stages of the adoption process. Separate legal representation for any child being adopted by a step-parent is also recommended due to the impact that emotional coercion and/or family relationships and obligations may have in these circumstances. Separate legal representation will also ensure the child's views and wishes are adequately considered and heard in the adoption process.

Other matters relating to adoption

The Adoption Applications Committee (AAC) is established under the Act to make determinations on the suitability of people to be prospective adoptive parents. The review has considered the composition and tenure of the AAC and its appointment processes. It is recommended that the Act incorporate additional requirements to facilitate diversity across age, gender, cultural background and experience within the AAC and that clear procedures for the recruitment and selection of AAC members be developed.

The review examined the provisions of the Act regarding contact and mediation licences. Currently, the Act provides for licensing of individuals to facilitate or negotiate contact between parties to an adoption. These provisions were introduced in 1994 when the practice of closed adoption was brought to an end. The past secrecy surrounding adoption and potential restrictions around contacting other parties to an adoption meant that a process for facilitating and negotiating contact was required. Additionally, because information had been tightly controlled and restricted it could be difficult to locate and contact parties to an adoption. Given open adoption has now been practised for more than 20 years, coupled with the range of social media and other search options available to people, the need for such provisions has lessened and there are many instances now where contact and mediation licensees are not used. It is also noted that Western Australia is the only jurisdiction which has legislative provisions in this regard. The Review has recommended requirements relating to contact and mediation licences be repealed.

While court records of adoption must be preserved indefinitely, other records are only required to be kept for 100 years. Given the significance and lifelong impacts of adoption the review has recommended that all adoption records be kept indefinitely.

The Review also gave specific consideration to the adoption of Aboriginal and Torres Strait Islander children and the placement for adoption principle in the Act which currently mirrors the child placement principle in the CCS Act. The recent Review of the CCS Act recommended changes to the Aboriginal child placement principle under that Act. Whilst consistency with the CCS Act in this regard is desirable, any amendment to the placement for adoption principle in the Act requires careful consideration because of the fundamental differences between placement following child protection intervention and placement for adoption. The review proposes that after the amendments to the CCS Act are implemented further consideration is given to the appropriateness of amending the principles in the Act.

Whilst the Review has considered adoption from out-of-home care it was not a primary focus of the Review. Adoption from out-of-home care is a matter that cannot be considered purely from a legislative perspective or in isolation from the Department's permanency planning policies and approaches. Moreover, as the Act currently enables carer adoption it is considered that the Act sufficiently provides for adoption in this context.

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Recommendations summary

Recommendation 1

The wellbeing and best interests of a person who is an adoptee or a prospective adoptee should be the sole paramount consideration in the administration of the Act.

Recommendation 2

A new section of the Act should be created which acknowledges Aboriginal and Torres Strait Islander child rearing practices and indicates that adoption as expressed within the Act is not recognised as part of their traditions and culture.

Recommendation 3

A set of guiding principles should be developed and included in the Act.

Recommendation 4

The Act should include a range of factors that must be taken into account by decision makers when determining what is in a child's best interests.

Recommendation 5

Children 12 years of age or more who are required to consent to their adoption must be provided with relevant counselling prior to providing consent.

The Court should be able to dispense with the requirement for counselling in exceptional circumstances.

Recommendation 6

Birth parents under 16 years of age who are considering adoption for their child must be provided with counselling.

The Court should be able to dispense with the requirement for pre-consent counselling in exceptional circumstances.

Recommendation 7

The timeframe in which to notify a man who may be the prospective adoptee's father should be extended from seven days to no later than 14 days.

Recommendation 8

The Act should be amended to remove the 28 day revocation of consent period after an order for dispensation of consent is made, provided each party who has provided consent has a 28 day revocation period.

Recommendation 9

An additional ground for dispensing with consent in circumstances where a final Family Violence Restraining Order is in place to protect the mother and/or child against the father should be included.

Recommendation 10

Section 24 of the Act should be amended to require the Court to seek a report from the Department before an order for dispensation of consent can be made in respect of an adoption involving an Aboriginal or Torres Strait Islander child.

In the preparation of such a report the Department must undertake the consultation requirements set out in section 16A of the Act, to provide the Court with information and feedback specifically from an Aboriginal or Torres Strait Islander person or agency from the area, region or country where the child is from, regarding dispensing with parental consent in that particular case and any implications that could arise from such a dispensation.

Recommendation 11

The way in which a child's cultural identity can be promoted and developed is a matter that should be specifically referred to in section 46(2)

Recommendation 12

The Act should be amended to provide that the requirement to have an adoption plan cannot be dispensed with in the case of an adoption of an Aboriginal or Torres Strait Islander child.

Recommendation 13

Every Aboriginal or Torres Strait Islander child must have separate representation for the purposes of negotiating an adoption plan.

Recommendation 14

An adoption plan for an Aboriginal or Torres Strait Islander child, must specify how the child's cultural identity and connection will be developed, preserved and maintained (including the child's language, family, community, connection to country and culture).

Recommendation 15

The Act should be amended to include specific requirements for consideration of a prospective adoptive parent's (or parents') ability to promote a child's cultural identity and connection at the time the assessment report under section 40 is prepared and when the Court is considering making an adoption order under section 68.

Recommendation 16

The way in which contact with a child's current (and future) siblings can be facilitated or maintained is a matter that should be specifically referred to in section 46(2).

Recommendation 17

Birth parents, adoptive parents and adoptees (of an appropriate age) are provided with information in writing regarding the review, variation and enforcement of adoption plans when the plan is being negotiated and at the time the adoption order is finalised.

Recommendation 18

The Act should be amended to provide the CEO with the capacity to refer a breach or potential breach of an adoption plan to the Court for enforcement under section 72, despite the CEO not being a party to the plan.

Recommendation 19

Schedule 2 should be reviewed and updated to have an increased focus on the child's rights and needs.

Recommendation 20

Birth parents, adoptive parents and adoptees are provided with information in writing regarding accessing adoption support services when the adoption placement supervision is concluding and the adoption order is finalised.

Recommendation 21

The Act should be amended to require that a child over 12 years of age consenting to their own adoption must be provided with separate legal representation at all relevant stages of the adoption process, including the consent and adoption plan phases.

Any child proposed to be adopted by a step-parent must have separate legal representation at all stages of the adoption process, including consent and adoption plan phases.

Recommendation 22

In step-parent adoptions the cost of legal representation for a child is to be met by the applicants unless otherwise determined by the Court.

Recommendation 23

The Act should be amended to define the term "*child representative*" to mean a legal practitioner with relevant experience representing the child in all proceedings in relation to the adoption or under the Act.

A person representing a child should be a legal practitioner and references in section 134 should be amended to reflect this.

In section 134, references "*to appoint*" should be replaced with "*arrange*".

Recommendation 24

Practice guidance should be developed to help facilitate consideration of matters that may constitute special circumstances under section 80 of the Act.

Recommendation 25

Consideration should be given to amending the *Adoption Regulations 1995 (WA)* to incorporate requirements that facilitate and support diversity of membership for the Adoption Applications Committee.

Recommendation 26

The Department should develop and document clear procedures for the recruitment of members for the Adoption Applications Committee.

Recommendation 27

The provisions relating to contact and mediation licences in the Act should be repealed.

Recommendation 28

Guidance and information on the Department's website should be reviewed and updated to encourage parties to past adoptions to contact the Department prior to initiating any contact with another party.

Recommendation 29

The Act should be amended to enable an adoptee, who is 16 or more years of age, to make a request for information under section 86.

Recommendation 30

Section 94(3) should be amended to require that all adoption records be kept indefinitely.

Recommendation 31

Consideration should be given to the appropriateness of amending the Act's Aboriginal and Torres Strait Islander placement for adoption principle (Schedule 2A) subject to any amendments to the *Children and Community Services Act 2004* Aboriginal and Torres Strait Islander child placement principle.

Glossary

adoption: The process by which a person legally becomes a child of the adoptive parent(s) and legally ceases to be a child of his/her existing parent(s).

Adoption Act 1994 (the Act): References to the *Adoption Act 1994* (WA) or 'the Act' are specifically referring to the Western Australian Adoption Act.

adoption order: A judicial order, made by a competent authority under adoption legislation, by which the adoptive parent(s) become the legal parent(s) of the child.

Adoption plan: Is a plan developed between the parents of the child that have provided consent to the adoption, the prospective adoptive parent(s) and if the CEO considers it appropriate, the child's representative. It may provide for exchange of information between the parties in relation to the child's medical background or condition, development and important events in the child's life, contact between the parties to the plan and the child or any other matters relating to the child.

adoptive parent: A person who has become the parent of a child or adult as the result of an adoption order.

adult adoption: The adoption of an adult by a person who was their carer or step-parent immediately before they became 18 years of age.

blended family: A family consisting of a couple, their children from previous relationships and any children they may have had together.

breakdown, also disruption: Refers to when an adoption breaks down, at any stage pre or post the making of an adoption order.

carer (known child adoption): Foster parent or other non-relative who has been caring for the child and has had responsibility for making decisions about the daily care and control of the child for the relevant period (as specified by the relevant State/Territory department) before the adoption.

Children and Community Services Act 2004 (CCS Act): References to the *Children and Community Services Act 2004* or 'the CCS Act' are specifically referring to the *Children and Community Services Act 2004* (WA).

Country: In Aboriginal English, a person's land, sea, sky, rivers, sites, season, plants and animals; place of heritage, belonging and spirituality; is called 'Country'.³

court: The Family Court of Western Australia, unless otherwise specified or, when referred to in the context of legislation from another State or Territory, the relevant court that deals with adoption proceedings in that jurisdiction.

closed adoption: Prior to 1995 in Western Australia adoption records were sealed or 'closed'. Closed adoption refers to the practice of sealing an adopted child's original birth certificate and issuing a new birth certificate when the child was adopted. This new certificate included the name of the child and his or her adoptive parents. The identity of the adopted child's original parents was hidden and adoption plans did not exist.

³ Australian Museum, <https://australianmuseum.net.au/glossary-indigenous-australia-terms> - accessed 1 October 2018.

This practice meant that many people were unaware they had been adopted as children. The intention was to help the child settle into the adoptive family.

(Source: <https://www.findandconnect.gov.au/guide/wa/WE00663> - accessed 26 June 2018)

country of origin: The usual country of residence of the child being adopted. This is generally the country of birth of a child.

de facto relationship (adoptive parents): An arrangement where two adoptive parents, who are not legally married, live together in a de facto relationship as defined by the State or Territory in which they live.

dispensation of consent: A legal process by which a court may declare that the consent of a parent is not required for an adoption to proceed. Grounds for dispensation applications are set out under individual State and Territory legislation.

family violence restraining order (FVRO): is an order made under the *Restraining Orders Act 1997* (WA) that imposes restraints on the lawful activities and behaviour of the respondent named in the FVRO to prevent further family violence against the person protected by the FVRO. A FVRO may also include protecting a child from exposure to family violence committed by the respondent.

Hague Convention (intercountry adoption): The *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993), which establishes standards and procedures for adoptions between countries. The Hague Convention includes legally binding safeguards and a system of supervision, and establishes channels of communication between countries. It came into force in Australia on 1 December 1998 and is set out in Schedule 2B of the Act. An intercountry adoption is classified as a **Hague adoption** or **non-Hague adoption**.

intercountry adoption: An adoption of a child/children from countries other than Australia who may legally be placed for adoption, but who generally have had no previous contact with the adoptive parent(s).

known child adoption: An adoption of a child (or children) who was born or permanently residing in Australia before the adoption, that has a pre-existing relationship with the adoptive parent(s) who also reside in Australia. These types of adoptions are broken down into the following categories, depending on the child's relationship to the adoptive parent(s): **step-parent, relative(s), carer** and **other**.

local adoption: An adoption of a child/children born or permanently residing in Australia before the adoption who are legally able to be placed for adoption but who generally have had no previous contact or relationship with the adoptive parent(s).

open adoption: Refers to the practice of sharing information about the adoption between the birth parents, adoptive parents and the adopted child. Parties to an adoption are able to access identifying information about one another.

partner country: A country with which Australia has a current intercountry adoption program.

placement: The act of placing a child/children with their adoptive family (that is, the child enters the home) regardless of the stage in the adoption process.

special guardianship order (SGO): An order under the CCS Act whereby an individual or two individuals jointly have parental responsibility for a child until the child reaches 18 years of age. When an SGO is in force the special guardian(s) has parental responsibility for the child to the exclusion of any other person.

step-parent (known adoption): A category of known adoption by a person who is the spouse of the child's birth parent or previously adoptive parent. Foster parents are not included in this category.

unknown adoption: Involves the adoption of a child who is not known to the prospective adoptive parents.

List of abbreviations

the Committee or AAC	Adoption Applications Committee
ABS	Australian Bureau of Statistics
Adoption Services	The Adoption Service Unit within the Department of Communities (formerly known as the Department for Child Protection and Family Support or CPFS)
AFLS	Aboriginal Family Law Service
AIHW	Australian Institute of Health and Welfare
ARMS	Association Representing Mothers Separated from their Children by Adoption Inc.
ARCS	Adoption Research and Counselling Service Inc.
ASFC	Adoption Support for Families and Children Inc.
CCYP	Commissioner for Children and Young People
CEO	Chief Executive Officer of the Department of Communities
Communities or "the Department"	The newly-established Department of Communities (formerly known as the Department for Child Protection and Family Support or CPFS)
Hague Convention	Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoptions (1993)
Jigsaw	Adoption Jigsaw of WA Inc.
SGO	Special Guardianship Order
UNCROC	United Nations Convention on the Rights of the Child
VLRC	Victorian Law Reform Commission
YACWA	Youth Affairs Council of Western Australia

1 Introduction

1.1 Terms of reference of the review

The 2018 Review of the *Adoption Act 1994* (WA) (the Act) is undertaken in accordance with section 146 of the Act, which requires the Minister to carry out a review of the operation and effectiveness of the Act as soon as is practicable five years after the commencement of the *Adoption Amendment Act 2012* (WA).

The requirements for the review are outlined in section 146(1) of the Act, which sets out the review is to have regard for the following:

- the implementation and administration of the Act;
- the extent to which members of the public are aware of the effects of the Act;
- the effect of the Act on birth parents, adoptees and prospective adoptive parents and the relatives of parties to adoptions; and
- such other matters as appear to the Minister to be relevant to the operation and effectiveness of this Act.

1.2 Reference group

To support the review of the Act a reference group was established. The purpose of the reference group was to share relevant expertise, information and knowledge that would assist in exploring matters raised during the course of the review.

The reference group comprised the following membership:

- Tara Gupta – General Counsel, Department of Communities (Chairperson)
- Ross Wortham – CEO, Youth Affairs Council of Western Australia
- Corina Martin – CEO, Aboriginal Family Law Service
- Amy Roberts – Mediation Case Officer, Aboriginal Mediation Service, Department of Justice
- Stephen Cohen – Chief Psychologist, Department of Communities.

The reference group was supported by Department of Communities officers:

- Andrea Walsh, Project Director Adoption Act Review, and
- Sandi Friedlos, Administrative Officer.

The Department acknowledges and gratefully appreciates the time and contributions of all members of the reference group in undertaking the review of the Act.

1.3 Review process

The Review commenced by calling for submissions on the Review's terms of reference. An advertisement was placed in the West Australian newspaper on 16 March 2018 inviting submissions from interested individuals, government, community services agencies and community groups. The Department also wrote to a range of key stakeholders advising of the review and extended an invitation to make a submission to the review. Information about the Review and how to make a submission was also promoted on the Department's Child Protection and Family Support website. The period for submissions closed on 18 May 2018, with an extension to 1 June 2018 provided for stakeholders or individuals who sought additional time.

The review received 39 written submissions from interested individuals, adoptive parents, relinquishing mothers, adoptees, professionals, community services agencies, community groups and government or statutory bodies or services. A list of submissions is included at Appendix A.

The reference group reviewed all written submissions and met with adoption service providers – Adoption Research and Counselling Services (ARCS), Jigsaw and Relationships Australia. The Association for Relinquishing Mothers (ARMS) and Adoption Support for Families and Children also met with the reference group. These meetings provided an opportunity for key services, groups and individuals to directly engage with the reference group regarding their experience and knowledge of adoption. It gave the reference group an opportunity to ask questions and better understand matters identified in submissions to the review. The reference group also met with the Department's Adoption Services to clarify adoption information or processes during the review process.

In endeavours to hear from adoptees directly invitations were also extended to the Intercountry Adoptee Voices support group and to adoptees through ARCS' networks; however, no adoptees accepted an invitation to meet with the reference group. Through ARCS, one 13 year old adoptee gave permission for a presentation she had provided to be circulated to the reference group on her experience of adoption.

A range of information, research, adoption legislation in other states and other relevant information was shared with the reference group to assist in understanding and exploring the matters raised in submissions.

1.4 Review themes and considerations

The broad overarching themes and matters for consideration identified through the submissions and review process are outlined below. These will be examined in more detail in this report.

Consent to adoption – matters included counselling, timeframes for providing, revoking and dispensing with consent.

Adoption support – how adoptions are supported beyond the immediate adoption event, including supporting Adoption Plans and providing mechanisms to review or change these subject to the needs of parties to adoptions.

Terminology and language used in the Act – general matters regarding clarification and definition of terminology used in the Act and the impact of terms such as birth mother and father on people who have been adopted or have placed a child for adoption, particularly those who have been affected by forced adoption.

Licensing of contact and mediation agencies – the role of these services was raised in the context of contemporary social media platforms and other websites that enable people to identify and research family connections and backgrounds.

Adoption from out-of-home-care – this consideration was raised in many of the submissions. There are divergent views on this matter and whilst not a primary matter for consideration in the review of the Act it has been explored within the review.

During the review the significant lifelong impact of adoption on children, parents (both birth and adoptive) and families was highlighted. Whilst there have been shifts in adoption practices to move away from secrecy to more open adoption, where information is shared between parties to adoption and contact can be facilitated with birth families, the significant effect adoption has on a person's life is undeniable. The ongoing impact that permanently severing the legal ties between children and their birth families continues to have is highlighted through research and submissions.

Even when adoption is a positive experience, identity and trauma continue to be significant factors for people who have experienced adoption. Adoptees can struggle with the loss of family relationships, which may mean opportunities to forge relationships with birth parents, siblings, grandparents and other extended family members are never fully realised. Adopted people have a natural desire to want to understand who they are, why they may be different from their adoptive families and why they were adopted.

1.5 Adoption in Australia

Overall adoption as a practice is declining in Australia, which has seen a 60 percent reduction in the number of adoptions over the past 25 years⁴. Across Australia 315 adoptions were finalised in 2016-17; of these, 22 percent were intercountry adoptions and 78 percent were local adoptions (Australian children).⁵

In Western Australia in 2016-17 there were 44 adoption orders made.⁶ These comprised of 28 known adoptions and 16 unknown adoptions (of which 5 were local and 11 were intercountry). The largest proportion of known adoptions in 2016-17 was adult adoptions with 17 orders made, followed by step-parent adoptions with nine orders made. Carer adoption in Western Australia is low, with two carer adoptions occurring in 2016-17.

Over the years adoption practice has changed significantly, moving from closed adoptions to open adoptions, which were introduced in Western Australia in 1995. Many factors have influenced changes in adoption over the years, not least of which have been changing societal and community attitudes. The acceptance of having children outside of marriage, divorce, single parent and blended families, along with increased contraceptive options and accessibility for women have all impacted on the number of children being placed for adoption. The purpose and focus for adoption has also changed from being seen as providing children for people who were perhaps otherwise unable to have a child, to adoption being a service for a child whose wellbeing and best interests is the paramount consideration.

As with declining local adoptions, there are also fewer intercountry adoptions occurring and this is a global trend. This is primarily due to improvements in local adoption practices in the country of origin which make it easier for children to remain with their families or within their country of birth⁷. The focus for intercountry adoption is also on the best interests of the child. This accords with the Hague Convention to which Australia became a signatory in 1998⁸, rather than a previously held view of finding homes for children in need.

⁴ Australian Institute of Health and Welfare 2017, *Adoptions Australia 2016-17*, Child welfare series no.67 Cat. No. CWS61, Canberra: AIHW.

⁵ Ibid.

⁶ Government of Western Australia, Department for Child Protection and Family Support, *Final Report 2016-17*, p 50.

⁷ Australian Government, intercountry adoption Australia, <https://www.intercountryadoption.gov.au/countries-and-considerations/considerations/> - accessed 27 June 2018.

⁸ Hilferty, F and Katz, I. (2015). *Literature review on factors influencing intercountry adoption rates*. Sydney: Social Policy Research Centre, UNSW Australia, p 14.

1.6 Previous reviews of the Adoption Act

The 1994 Act introduced wide ranging changes to the adoption process, including open adoption and enabling access to identifying information. These shifts were significant as they lifted the past secrecy surrounding adoption and acknowledged *“the reality that adoptees have two sets of parents, adoptive and birth, with two sets of family backgrounds.”*⁹

The first statutory legislative review of the Act was undertaken in 1997. It was the first comprehensive assessment of the operation of the Act since its enactment. The 1997 review introduced the concept that adoption is a service for the child, brought about the inclusion of the Aboriginal and Torres Strait Islander child placement principle, refined processes around adoption plans, recommended the preservation of adoption records for a minimum of 100 years and promoted that an adoptee’s first name be maintained by preventing changes to it, except with the approval of the Family Court. Overall, the 1997 review made 86 recommendations to improve adoption laws, practices and procedures.

In 2007, the Act was reviewed again, five years from the implementation of the recommendations from the 1997 review. It made 43 recommendations to improve the application and operation of the Act.

Recommendations from the 2007 review included:

- improving the transparency of Adoption Applications Committee procedures and decision making;
- providing assistance to people seeking a review of the operation of an adoption plan;
- enabling siblings to have access to identifying information;
- strengthening carer adoption provisions; and
- acknowledging adoption as part of a continuum of care for children in the care of the CEO of the Department of Communities under the CCS Act in instances where there were no other appropriate alternatives for the child.

This report presents the findings of the third statutory review of the Act.

⁹ Government of Western Australia, Family and Children’s Services, *Adoption legislative review, Adoption Act (1994)*, Final Report, p ii (Adoption Act Review 1997).

2 Adoption processes

2.1 Paramount considerations, guiding principles and best interests of the child

Adoption is a highly complex and emotive process that has lifelong impacts for all parties involved. Whilst there can be great benefits and outcomes from adoption it must always focus on the wellbeing and best interests of the child.

The review of the Act has examined the paramount considerations to ensure they continue to be the right considerations and effectively support the operation of the Act.

2.1.1 Current legislation

Section 3 of the Act sets out the paramount considerations as follows:

- (1) *The paramount considerations to be taken into account in the administration of this Act are -*
 - (a) *The welfare and best interests of a child who is an adoptee or a prospective adoptee; and*
 - (b) *The principle that adoption is a service for a child who is an adoptee or a prospective adoptee; and*
 - (c) *The adoption of a child should occur only in circumstances where there is no other appropriate alternative for the child.*
- (2) *It is acknowledged that adoption is not part of Aboriginal or Torres Strait Island culture and that therefore the adoption of a child who is an Aboriginal person or a Torres Strait Islander should occur only in circumstances where there is no other appropriate alternative for that child.*

2.1.1.1 **Paramount considerations**

Although submissions did not raise any matters relating to the paramount considerations in the Act, the reference group has considered these and also looked at how this is managed in the CCS Act and other Australian jurisdictions. It is noted that most other States adoption legislation include objects and principles, many of which are similar.

The reference group were of the view that given the nature and effect of adoption processes, inclusion of guiding principles could enhance the operation and administration of the Act. It would also increase the Act's consistency with other legislation, such as the CCS Act.

In reviewing the paramount considerations the reference group felt that there should be only one paramount consideration; that being, *the wellbeing and best interests of a person who is an adoptee or prospective adoptee*. This principle would then continue to apply in circumstances where the adoptee or prospective adoptee is a child or adult.

This was seen as the most important aspect of any adoption and should stand alone as the paramount consideration, with other considerations becoming part of a set of guiding principles in the Act. This is consistent with the CCS Act and the *Working with Children (Criminal Record Checking) Act 2004*.

Recommendation 1

The wellbeing and best interests of a person who is an adoptee or a prospective adoptee should be the sole paramount consideration in the administration of the Act.

2.1.1.2 Adoption and Aboriginal people

The paramount considerations when administering the Act currently acknowledge that adoption is not part of Aboriginal or Torres Strait Islander culture and the adoption of a child who is an Aboriginal person or Torres Strait Islander should only occur when there are no other appropriate alternatives for that child.

The reference group were of the view that incorporation of this acknowledgment within the paramount considerations is not ideal and also noted that the current wording of the acknowledgement is not entirely accurate. There are customary practices within Torres Strait Islander culture that are similar to the concepts of adoption as expressed under the Act.

According to the Secretariat of National Aboriginal and Islander Child Care (SNAICC), *“child rearing...is literally a family and community concern and is not confined solely to the parents of the child.”*¹⁰ SNAICC also highlights that *“one of the most significant differences in terms of child rearing practices between Torres Strait Islanders and Aboriginal peoples is customary ‘adoption’, which is a feature of Torres Strait Islander communities. ‘Adoption’ takes place between relatives and close friends where bonds of trust have already been established.”*¹¹

Queensland’s adoption legislation incorporates a section on additional principles concerning Aboriginal and Torres Strait Islander persons, which includes an acknowledgement that adoption as provided for in the *Adoption Act 2009* (Qld) is not a part of Aboriginal or Torres Strait Islander custom. This section also notes that *“Island custom includes a customary child-rearing practice that is similar to adoption in so far as parental responsibility for a child is permanently transferred to someone other than the child’s parents. This practice is sometimes referred to as either ‘customary adoption’ or ‘traditional adoption.’”*¹²

The *Adoption Act 2000* (NSW) also incorporates a division of the Act pertaining to Aboriginal children. This division has a brief acknowledgement that adoption *“is a concept that is absent in customary Aboriginal child care arrangements.”*¹³ Also included in this division are matters regarding participation of Aboriginal people in decision making and Aboriginal child placement principles.

¹⁰ SNAICC, supporting carers to care for our children, www.supportingcarers.snaicc.org.au/caring-for-kids/child-rearing-practices/, accessed 17 August 2018.

¹¹ Ibid.

¹² *Adoption Act 2009* (Qld), s 7(1)(a).

¹³ *Adoption Act 2000* (NSW), s 35(1).

In view of the proposed amendment to the paramount considerations and the introduction of guiding principles, the reference group considered that this acknowledgment should be separate from the paramount consideration and incorporated as a separate section. Taking account of feedback and information that suggests the current acknowledgement is not entirely accurate, this should also be amended to make reference to Aboriginal and Torres Strait Islander customary practices that are similar to adoption.

Recommendation 2

A new section of the Act should be created that acknowledges Aboriginal and Torres Strait Islander child rearing practices and indicates that adoption as expressed within the Act is not recognised as part of their traditions and culture.

2.1.1.3 Guiding principles

When examining guiding principles for adoption, the reference group gave particular consideration to Queensland's adoption legislation as the guiding principles in the *Adoption Act 2009* (Qld) are the most detailed of all the states. The Victorian Law Reform Commission's¹⁴ recommendation to introduce a set of guiding principles into Victoria's adoption legislation was also noted.

After examining the various guiding principles that are in operation in other jurisdictions, and being closely informed by the guiding principles outlined in the CCS Act (given their child focus), the reference group were of the view that the following matters should form the basis of a set of guiding principles for the Act:

- Adoption is a service for a child;¹⁵
- The adoption of a child should only occur in circumstances where there is no other appropriate alternative for the child;¹⁶
- The child's views regarding the adoption should be taken into account;
- Each of the parties to an adoption or proposed adoption should be given the information the party reasonably needs to participate effectively in processes under the Act;¹⁷ and
- The lifelong impact of the adoption for the adoptee or prospective adoptee must be considered.

Recommendation 3

A set of guiding principles should be developed and included in the Act.

¹⁴ In 2017 the Victorian Law Reform Commission, at the request of the Victorian Attorney-General, undertook a review of the *Adoption Act 1984* (Vic) with a focus on modernisation of the Act and Regulations. Part of the terms of reference of that review included ensuring that the best interests of the child are paramount.

¹⁵ A current paramount consideration in the *Adoption Act 1994* (WA).

¹⁶ Ibid.

¹⁷ *Adoption Act 2009* (Qld), s 6(2)(c)

2.1.1.4 *Best interests of the child*

The Act does not provide any guidance about matters to be considered when determining best interests of the child. This is in contrast to another piece of significant child-focused legislation in WA, the CCS Act, which provides guidance around matters to consider when determining the best interests of the child. Given the best interests of the child is central to all adoptions the reference group were of the view that the Act should provide guidance around the best interests of the child.

The reference group considered guidance provided in other legislation, including the CCS Act, the *Adoption Act 2000* (NSW) and Commonwealth and State family law legislation. It was also noted the Victorian Law Reform Commission recommended that the *Adoption Act 1984* (Vic) should specify a set of factors that are to be considered in guiding decisions about the best interests of a child.¹⁸

After considering the way this is managed in other jurisdictions and legislation, the reference group is of the view that the following factors should be taken into account by decision makers when considering the best interests of the child. The elements outlined below are also consistent with other aspects of the Act that have regard for some of these factors, such as the prerequisites for placement of a child in section 52 of the Act:

- Any wishes or views expressed by the child, having regard to the child's age and level of understanding in determining the weight to be given to those wishes or views;¹⁹
- Any wishes expressed by either or both of the child's parents;²⁰
- The child's age, maturity, sex, sexuality, background and language;²¹
- Any disability the child has;²²
- The child's physical, emotional, intellectual, educational, spiritual and developmental needs;²³
- The child's cultural, ethnic or religious identity (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal people or Torres Strait Islanders);²⁴
- The need for the child to maintain contact with the child's parents, siblings and other relatives and with any other people who are significant in the child's life;²⁵ and
- Any other relevant characteristics of the child.²⁶

Recommendation 4

The Act should include a range of factors that must be taken into account by decision makers when determining what is in a child's best interests.

¹⁸ Victorian Law Reform Commission, Report February 2017, *Review of the Adoption Act 1984*, p 93 (VLRC Review of the Adoption Act 1984).

¹⁹ *Children and Community Services Act 2004* (WA), s 8(1) (CCS Act).

²⁰ *Adoption Act 2000* (NSW), s 8(2).

²¹ *CCS Act*, s 8(1).

²² *Adoption Act 2000* (NSW), s 8(2).

²³ *CCS Act*, s 8(1).

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

2.2 Consent to adoption

Consent is a vital part of the adoption process. Ensuring that it is given appropriately and in accordance with the requirements of the legislation is crucial. It lays the foundations for the adoption to proceed and plays an important role in preventing past practices of forced adoptions. Well informed consents help support parents placing their child for adoption to make decisions that are best for their child and themselves and enable the adoption to be facilitated as smoothly and expeditiously as possible.

Submissions to the Review raised a number of areas for consideration regarding consent to adoption. The following areas were specifically considered by the reference group:

- whether children over the age of 12 years consenting to their adoption should be required to have mandatory counselling; and
- consent to an adoption where the parents are under 18 years of age.

2.2.1 Mandatory counselling prior to consent for children aged 12 years and over

2.2.1.1 *Current legislation*

Section 17 of the Act sets out the persons whose effective consent is required for an adoption. In addition to the consent of the child's mother and father, the Act requires that a child over 12 years of age consent to their adoption.²⁷

2.2.1.2 *Submissions*

Across a number of the submissions received there was a general sentiment expressed that the voice of the child needs to be adequately heard within the adoption process. The submission from the Department's Adoption Services unit suggested that mandatory counselling for children required to consent to their own adoption should be introduced to better support children and safeguard them from pressure from adults in their life.

2.2.1.3 *Analysis*

In considering mandatory counselling for children consenting to their adoption other Australian adoption legislation was examined. In NSW the legislation requires counselling to be given to a child who is required to consent to their own adoption.²⁸ In Queensland and Victoria a child being adopted must be given counselling about the adoption and the Court must be satisfied that the child's views and wishes about the adoption have been taken into account.

Drawing on submissions, discussions with key stakeholders and other information, the reference group noted the significant psychological effects and the lifelong impact of adoption for children. The notion of providing mandatory counselling was also explored, particularly whether mandatory counselling would provide any benefits.

Whilst not in the context of adoption, mandated counselling outcomes in the areas of drugs, alcohol and family and domestic violence were raised, noting that they can

²⁷ *Adoption Act 1994* (WA), s 17(1)(c)(ii).

²⁸ It should be noted that in NSW a child over the age of 12 years can give sole consent to their adoption if they are of sufficient maturity to understand the effect of giving consent and if the child has been cared for by the proposed adoptive parent or parents for at least two years. *Adoption Act 2000* (NSW) s 54(1)(c) and (2).

deliver similar benefits to non-mandated counselling outcomes. However, there does not appear to be any similar readily available research into the outcomes of mandated counselling in family settings. Nonetheless, studies on mandated counselling conclude that it still offers therapeutic benefits. An analysis of mandatory counselling, undertaken by a student at the University of Nebraska – Lincoln, considered a range of research and noted *“Overall the recent studies on the efficacy of mandated treatment for a variety of problems (e.g., Collins, 2005; Buttell & Carney, 2006, Miller and Flaherty, 2000) conclude that coercion can be a therapeutic step in initiating treatment as well as it can result in improved psychosocial status for clients and reduce costs for criminal, health and employment consequences. The described research findings suggest that treatment of clients mandated for counselling works.”*²⁹

While considering this matter the reference group continued to share the view that children need to have a voice in the adoption process and what children are telling us needs to be heard and considered in decisions that will have a significant and far reaching impact in their lives. This is supported by research undertaken in the United Kingdom through the University of Bristol’s School for Policy Studies Hadley Centre for Adoption and Foster Care Studies which highlighted that children and young people felt they did not have a voice in the adoption.³⁰

The reference group were also cognisant of the impact that emotional coercion and/or family relationships and obligations may have on a child in being able to communicate their views about the adoption. Therefore, providing a child with counselling that is independent of parental involvement would facilitate open exploration of the child’s views about the adoption and enable these views to be communicated to the child’s representative (refer to section 2.6) in the adoption process.

The reference group were of the view that a child giving consent should be required to have counselling. In the case of an adoption by a step-parent the cost of counselling for the child should be borne by the applicants.

The way in which the counselling could be facilitated was also briefly examined. In particular, the need to provide counselling in a way that is understood by the child and is culturally appropriate is vital. Where the adoption involves an Aboriginal child there were strong views within the reference group that the counselling should be provided by an Aboriginal agency or person with relevant knowledge of the child’s region and culture; it must also take account of the cultural and language differences for Aboriginal children and trauma the child may have experienced. Consideration should also be given to the need for an interpreter when working with Aboriginal and Torres Strait Islander children, particularly where English may not be their primary language.

The reference group also considered the possibility that a child may refuse counselling. Whilst every effort should be made to ensure the child undergoes the counselling, the reference group were of the view that where counselling is refused this should not

²⁹ Tanya I. Razzhavaikina, Mandatory Counseling: A mixed methods study of factors that contribute to the Development of the working alliance, pp 17-18.

³⁰ Julie Selwyn, Dinithi Wijedasa, Sara Meakings – University of Bristol School for Policy Studies Hadley Centre for Adoption and Foster Care Studies, Beyond the Adoption Order: challenges, interventions and adoption disruption, Research Report, April 2014, p 54 (Beyond the Adoption Order: challenges, interventions and adoption disruption, Research Report).

preclude the adoption proceeding. However, it is a factor that needs to be considered in determining whether or not to make an adoption order and it should be addressed in the Department's report to the Court. The Court should also be able to dispense with the requirement for mandatory counselling in exceptional circumstances.

Recommendation 5

Children 12 years of age or more who are required to consent to their adoption must be provided with relevant counselling prior to providing consent.

The Court should be able to dispense with the requirement for counselling in exceptional circumstances.

2.2.2 Consent to adoption and counselling where the parent is under 18 years of age

2.2.2.1 Current legislation

The meaning of effective consent is dealt with in section 18 of the Act and includes consent requirements where a relinquishing parent is under 18 years of age.

Under section 18(7) if a birth parent has not reached 18 years of age, consent to their child's adoption is not effective unless either:

- a person with parental responsibility for the birth parent also agrees with the adoption; or
- the CEO agrees to the proposed adoption (in situations where there has been a breakdown in the relationship between the birth parent and the person with parental responsibility for him or her, or if the birth parents of the child are lineal relatives).

2.2.2.2 Submissions

Submissions to the review highlighted the need for parents placing a child for adoption to understand the lifelong impacts of adoption for both themselves and their child, with particular submissions advocating the need for mandatory counselling.

2.2.2.3 Analysis

It is noted that both previous reviews of the Act explored mandatory counselling for parents relinquishing children. These reviews did not recommend mandatory counselling, with the 2007 Review of the Act noting "*counselling can never be forced upon a person*" and "*...counselling for relinquishing parents should be promoted, but should remain optional*".

Whilst counselling for parents who are under 18 years of age and considering adoption for their child was not raised as a specific issue in submissions, the reference group heard from ARMS, who are mothers who experienced past forced adoption practices. The profound impact past forced adoption practices have had on these women (and their families) was apparent. These experiences were also considered in context of the significant changes in adoption practices and safeguards that have been included in the legislation to prevent forced adoption.

Given the significance of the decision to place a child for adoption, particularly when a parent under 18 years of age is making that decision, the need for counselling in these circumstances was explored.

Pre-consent counselling is mandatory in other Australian states such as Victoria, Queensland, NSW and South Australia. In these states, consent cannot be given until counselling has been provided. It is also noted that both NSW and Queensland Adoption Acts include requirements to provide information about the possible short and long term psychological effects for the relinquishing parent consenting to the adoption.

It is not a requirement under the Act that a person providing consent to adoption of their child have counselling, rather the Act stipulates information must be provided to a person thinking about relinquishing his or her child and counselling offered.³¹ If a parent does seek counselling as part of making their decision then consent to the adoption cannot be given until the person has received that counselling. These requirements do not differ for a person who is under 18 years of age at the time of making their decision.

In exploring this issue the reference group also considered the potential unintended consequence of mandatory counselling alienating a young parent from supports or that person disengaging with adoption services; which could place their child or themselves at risk. Due to the significant and lifelong impacts of a decision to place a child for adoption, and when looked at in context of the age at which a person could be making such a decision, the reference group were of the view that counselling should be mandatory for parents under 16 years of age who are considering placing their child for adoption. However, the Court should be able to dispense with the requirement for counselling in exceptional circumstances. For parents between 16 and 18 years of age, the reference group felt that counselling should continue to be discretionary but strongly encouraged.

The reference group also noted that any counselling offered to parents considering placing their child for adoption must be trauma-informed and culturally appropriate, including being delivered in a language and way the person is able to relate to and understand.

Recommendation 6

Birth parents under 16 years of age who are considering adoption for their child must be provided with counselling.

The Court should be able to dispense with the requirement for pre-consent counselling in exceptional circumstances.

³¹ *Adoption Act 1994 (WA)*, s 16 and Sch 1.

2.2.3 Notification of consent to adoption

2.2.3.1 *Current legislation*

Section 21 of the Act sets out requirements to notify a man who may be the prospective adoptee's father of the proposed adoption; specifically, subsection 21(2b) requires that the man be advised no later than 7 days after the first completed form of consent to the child's adoption has been received.

2.2.3.2 *Analysis*

The requirement to notify a man who may be a prospective adoptee's father within seven days of the first completed form of consent being received was an issue during a recent adoption case. The reference group explored the difficulties in notifying a prospective adoptee's father within seven days noting the practical issues that arise, including difficulties in identifying and searching for the prospective father when there is limited information and time available to make reasonable efforts in this regard and the need to make the application to court before the seven days expires.

Timeframes applied by other Australian states in this regard were also examined and the Northern Territory is the only other state that has a timeframe in which to notify the other birth parent; which must occur within 14 days of the first consent being received.

The impact of extending this timeframe by seven days was considered by the reference group, in particular whether it would be in a child's best interests to extend the timeframe and the overall effect this would have on current adoption timeframes. It is acknowledged that the adoption proceeding without undue delay is undoubtedly in the child's best interests; however, seeking the appropriate consents is also a vital part of the process. Given that it is proposed to extend the timeframe only by seven days, that any extension of time should not prevent obtaining consents as expeditiously as possible, the option was considered reasonable.

Overall, extending the timeframe in which to notify the prospective father of the consent to adoption from seven days to 14 days was supported by the reference group. The reference group felt this balanced the interests of progressing the adoption without undue delay and being able to meet the practical expectations under the Act.

Recommendation 7

The timeframe in which to notify a man who may be the prospective adoptee's father should be extended from seven days to no later than 14 days.

2.2.4 Timeframe for revoking consent

2.2.4.1 *Current legislation*

Section 22 of the Act makes provision for the timeframe in which a person can revoke their consent to the adoption.

If only one person's consent is required then consent may not be revoked after 28 days from the date on which it was delivered. Where two or more people consent, the persons consenting may not revoke their consent after 28 days from the date the last consent was received or dispensed with.

2.2.4.2 Submissions

The submission provided by Adoption Services asserts that often dispensation of the consent requirement is granted because the biological father is unknown or cannot be found. In these cases Adoption Services consider that this 28 day revocation period after consent has been dispensed with causes an unnecessary delay in placement of a child for adoption.

2.2.4.3 Analysis

In examining this issue adoption legislation in other Australian jurisdictions was considered. All States and Territories have revocation of consent and dispensation of consent provisions, however none appear to have the same 28 day revocation of consent period after dispensation of consent is granted as Western Australia.

In NSW an order for dispensation of consent can be revoked at any time by the Court until the adoption order is made, which means that dispensation of consent is not absolute until the adoption order is made. In Queensland there is a requirement to serve a notification of an application for dispensation of consent on the relevant parent whose consent it is proposed be dispensed. There are also instances where the Court can dispense with the requirement to serve a copy of the application on the relevant parent:

- where the identity of the parent cannot be determined or located;
- if the birth of the child has arisen because of an offence or the father is a lineal relative of the mother; or
- any other special circumstances exist that would warrant dispensation.

Currently, when two or more persons are required to consent to a child's adoption, if a dispensation of consent order is made there is 28 day revocation period in which a person who has previously consented to the adoption may revoke their consent. Because there is more than one person consenting to the adoption, a revocation period under the Act does not commence until all consents have been received or dispensed with.

Simply repealing the 28 day revocation period after an order for dispensation of consent is made would have the effect of extinguishing a revocation period for all parties (when two or more persons are providing consent) who have provided consent to an adoption. Notwithstanding that more than 28 days may have elapsed since their consent was provided and the dispensation of consent order is made. There is also a possibility that when more than two persons are providing consent to an adoption (subject to the timing of the dispensation order and the provision of a party's consent) that, without a revocation period after a dispensation of consent order, a party providing consent may not receive a full 28 day revocation period.

As a general premise, whilst proceeding with an adoption when it is in the child's best interests without undue delay is desirable, it is also critical that parties providing consent to an adoption are each afforded a 28 day revocation period, as currently provided under the Act. On this basis it is proposed that the 28 day revocation period after a dispensation of consent order is made is removed, provided each party who has provided consent to the adoption has a full 28 day revocation period.

Recommendation 8

The Act should be amended to remove the 28 day revocation of consent period after an order for dispensation of consent is made, provided each party who has provided consent has a 28 day revocation period.

2.2.5 Other matters considered in the context of consent

Other matters that were also noted during the examination of consent included:

- how parties to an adoption are informed of the lifelong effects of adoption;
- the 21 day timeframe given to a man under section 21 of the Act after he has received notification(s) of consent to adoption; and
- the timeframe for revocation of consent.

Whilst these matters were briefly examined it was considered that there were no particular issues in the functioning of the Act and an adoption can be effectively facilitated under the provisions as they currently operate.

In considering these issues the reference group sought additional information from the Department's Adoption Services, in particular how consent is facilitated with parents so that they are fully informed about the lifelong effects. The reference group was advised that in most instances it is usually the birth mother who reaches out for information about adoption. Once this occurs a conversation begins with that parent, or prospective parent³², and an information booklet is provided that gives information about options and matters to consider. Throughout the conversations with the parent(s), information about the adoption process, all of the alternatives to adoption and the effect of adoption for the child and for the parents placing their child for adoption are explored.

It was noted that as a result of the information provided throughout the consent process some parents make the decision not to proceed with adoption.

The reference group considered how information is made available to Aboriginal people (especially when English may not be their first language) and those from culturally and linguistically diverse backgrounds. In respect of Aboriginal birth parents, the reference group were advised that the Department always offers another Aboriginal person to provide support; however this is often declined as the parents do not want any other Aboriginal people involved. There are a number of reasons for declining such support; including concealed pregnancy, concerns about how the pregnancy may be received within the community or the nature of the relationship between the birth parents. In other instances interpreters may be used and the written information translated into other languages.

Through discussion with Adoption Services it was clarified that the 21 day timeframe referred to in the Act is not the timeframe in which the father has to provide consent. Rather, this requirement is about a man, who may be the father, having 21 days to notify of his intention to either make an application for a parenting order or determination of parentage in the Family Court of Western Australia. If a man who could be the father

³² Whilst a parent may reach out for adoption information prior to the birth of the baby, the formal provision of information under Schedule 1 of the Act does not occur until after the child is born and consent to an adoption cannot occur until at least 28 days after the child is born.

does not intend to apply for either of these orders, he has generally started to engage with Adoption Services regarding the adoption, in which case the provisions of section 18(1)(b) take effect. This means the father cannot give his consent sooner than 28 days after receiving information as prescribed in the Act.³³

The timeframe for revocation of consent was also explored with the reference group. This discussion was also informed by the recent review of Victoria's Adoption Act by the Victorian Law Reform Commission (VLRC). The VLRC review proposed that consent and revocation period should never be less than 90 days from the birth of the child. When examining the Western Australian adoption timeframes it was noted that current processes and practices are broadly consistent with this timeframe and therefore the Act is considered to be operating appropriately in this regard.

2.3 Dispensing with consent to adoption

2.3.1 Current legislation

The Act enables requirements for consent to an adoption to be dispensed with under section 24.

To dispense with consent, an application must be made to the Court and there are a number of circumstances in which the Court can dispense with consent. These are:

- after sufficient inquiries which the Court thinks fit, the person cannot be found or contacted; or
- where attempts to re-establish a child parent relationship have occurred over a period of not less than one year but the person has seriously ill-treated or persistently neglected the child or has failed to establish or maintain an acceptable relationship with the child; or
- the child is 16 or more years of age and is consenting to their adoption by a step-parent, relative or carer; or
- where a person is unable to give effective consent due to his or her mental condition; or
- if the person is the child's father – he has been convicted of an offence and the Court is satisfied the conception of the child arose from that offence, or criminal injuries compensation has been awarded to the child's mother which related to an offence that the Court is satisfied the child's conception resulted from or where he is a lineal relative of the child's mother; or
- when the person has no day-to-day responsibility for the child, nor a parent and child relationship with the child, and that person is unreasonably withholding consent; or
- in special circumstances where it is appropriate to dispense with the requirement for consent.

Where a birth parent cannot be found, and as a result, consent is dispensed with, there is a further safeguard in the Act under section 59, which requires relatives to be notified of the prospective adoptive parent's intention to apply for an adoption order. Under this

³³ Schedule 1 of the *Adoption Act 1994* (WA) sets out the information that must be given to a person whose consent is required for the adoption of a child.

section at least 30 days notice of the intention to file an application for adoption must be given to as many close relatives of the birth parents as is practicable, or if there are no close relatives³⁴ as defined by the Act, notice must be given to an aunt or uncle of the birth parent. However, section 60 provides the Court with the option of varying or overriding this requirement.

2.3.2 Submissions

Some submissions raised concerns regarding dispensation of consent provisions, which included the length of time this can take, to questioning whether consent should ever be able to be dispensed with. The submission from the Australian Association of Social Workers (AASW) proposed that all required processes should be conducted within six months to enable a newborn to be placed with their adoptive parents no later than six months of age. Nonetheless, the AASW do not advocate removing the requirements to seek parental consent. The Aboriginal Family Law Service submission recommended that the Act should be amended so that consent cannot ever be dispensed with when the adoption involves an Aboriginal child.

2.3.3 Analysis

2.3.3.1 *General dispensation of consent*

In exploring this issue the reference group considered the Australian Institute of Health and Welfare (AIHW) data regarding dispensation of consent. This data shows that of local adoptions finalised in Australia in 2016-17 consent was given only by the mother in 55 percent of adoptions; in 38 percent of adoptions both parents provided consent; and for 7 percent of adoptions both parents consent was dispensed with or not required.³⁵

The reference group also considered the way other states manage dispensation of consent and most states have similar provisions to Western Australia. It is noted that Victoria, like Western Australia, has a provision which requires that consent cannot be dispensed with if, for a period of not less than one year prior to the application for adoption, attempts to establish or re-establish a parent child relationship have not been made; neither Queensland, NSW or South Australia have this type of provision. It is also noted that NSW has specific dispensation of consent provisions in their Act relating to carer adoptions which require the Court to consider:

- if the child has established a stable relationship with the carers;
- if the adoption by the carers will promote the child's wellbeing; and
- for an Aboriginal child, alternatives to placement for adoption have been considered in accordance with section 36.³⁶

The reference group closely examined the dispensation of consent provisions, having regard to the matters raised in the submissions and the general operation of these provisions. The continual need to have the best interests of the child as the paramount consideration in the adoption process remained central in considering this issue.

³⁴ The Act defines a close relative as - the birth parent or adoptive parent of the birth parent, a sibling of the birth parent (either by whole or half blood or by law), s 59(1A).

³⁵ Australian Institute of Health and Welfare 2017, *Adoptions in Australia 2016-17*, Child Welfare Series no. 67, Cat no. CWS61, Canberra: AIHW, p 27.

³⁶ *Adoption Act 2000* (NSW), s 67.

However, there were no particular concerns or issues identified that appeared to warrant amendment in relation to the general application of dispensation of consent provisions.

2.3.3.2 *Dispensation of consent where there may be a risk to the child or mother*

The only jurisdiction in Australia which has a specific provision that enables the court in considering dispensation of consent to take account of *“an unacceptable risk of harm to the child or mother if the relevant parent were made aware of the child’s birth or proposed adoption”*³⁷ is Queensland. This provision relates to the requirement to identify a child’s father, service of a notice of dispensation of consent and a basis on which the Court may consider dispensation of consent.

The introduction of these provisions was specifically considered by the Queensland Scrutiny of Legislation Committee, 53rd Parliament (the Committee), which looked at the effect of making an adoption order without the consent of a parent and whether it was inconsistent with the principles of natural justice. In considering these concepts, the Committee referred to the amendment Bill’s explanatory notes, which stated; *“Dispensing with the requirement to serve the relevant parent with a copy of the application has the effect of not making them a respondent in the proceeding. Consequently, the parent is denied the opportunity to contest the application for the court to make an order dispensing with their consent. However, this is considered necessary and reasonable to protect the interests of the child and the child’s other parent’s right to make decisions about the child’s long-term care in the circumstances stated above. In addition, after the court has made a dispensation order, clause 41 of the Bill enables the relevant parent to apply to the court for a discharge of that order.”*³⁸

While the Committee considered that the explanatory notes did not address the fundamental legislative principle of natural justice by allowing the court to hear and decide an application for dispensation of parental consent in the absence of the relevant parent; it did note that a court could only proceed in the absence of the relevant parent, if the parent has been given reasonable notice of the hearing and failed to attend or continue to attend, or the court dispensed with the requirement to serve a copy of the application of the relevant parent.³⁹

The Act does not have a similar requirement to notify a person when consent has been dispensed with. However, section 59(1)(b) does require a notice to be served upon a close relative⁴⁰ when consent has been dispensed with because the person cannot be found.

Following consideration, the reference group were of the view that the existence of a final Family Violence Restraining Order by the mother against the father should be one of the grounds on which the Court may consider dispensing with consent. This is particularly the case if seeking the father’s consent would present a safety risk to the mother or child and it would be in the child’s best interest to dispense with consent.

³⁷ *Adoption Act 2009* (Qld), ss 33(2)(c), 36(4)(e) and 39(1)(a).

³⁸ Qld Parliament, 53rd Parliament, *Scrutiny of Legislation Committee, Legislation Alert 02/09*, pp 6-7.

³⁹ Qld Parliament, 53rd Parliament, *Scrutiny of Legislation Committee, Legislation Alert 02/09*, pp 6-7.

⁴⁰ Refer to footnote 33.

Recommendation 9

An additional ground for dispensing with consent in circumstances where a final Family Violence Restraining Order is in place to protect the mother and/or child against the father should be included.

2.3.3.3 Dispensation of consent involving the adoption of Aboriginal children

The dispensation of consent provisions were also specifically considered with regard to Aboriginal children and families. In view of past practices of forced removal of Aboriginal and Torres Strait Islander children from their families, coupled with the high numbers of Aboriginal children in care, there is concern that dispensation of parental consent could occur more readily in adoption of Aboriginal and Torres Strait Islander children. For children the subject of a protection order under the CCS Act, this concern may be heightened, particularly given the matters outlined in section 24 2(b)(i) and (ii), that:

“during a period of not less than one year immediately before the application, steps have been taken to establish or re-establish a parent child relationship between the person and the child but –

- (i) the person has seriously ill-treated or persistently neglected the child; or*
- (ii) on the report of a person who the Court thinks is suitably qualified, the first-mentioned person has failed to establish or maintain an acceptable relationship with the child.”⁴¹*

The reference group were generally of the view that there needed to be further safeguards around the use of these provisions in respect of an adoption of an Aboriginal child. The provisions in section 16A of the Act were considered; these set out a range of duties to be undertaken by the CEO in the case of an adoption of an Aboriginal child, which involve consulting with:

- an officer of the Department who is an Aboriginal person or Torres Strait Islander;
- an Aboriginal person or Torres Strait Islander who, in the opinion of the CEO, has relevant knowledge of the child’s family or community; or
- an Aboriginal or Torres Strait Islander agency that, in the opinion of the CEO, has relevant knowledge of the child, the child’s family or the child’s community.

The reference group were of the view that similar safeguards could be established for dispensation of consent where the adoption involves an Aboriginal or Torres Strait Islander child.

It is proposed that section 24 of the Act be amended to require the Court to seek a report from the Department where an application for dispensation of consent is made that involves the adoption of an Aboriginal or Torres Strait Islander child, or in the case of a dispensation application by the Department that a report is provided by the Department. In preparing such a report the Department should be required to undertake the consultation requirements as set out in 16A of the report.

⁴¹ *Adoption Act 1994 (WA), s 24(2)(b)(i) and (ii)*

This would facilitate the provision of information and feedback specifically from an Aboriginal person or agency as to whether it would be appropriate in that particular case to dispense with parental consent and any implications that could arise from such a dispensation.

Recommendation 10

Section 24 of the Act should be amended to require the Court to seek a report from the Department before an order for dispensation of consent can be made in respect of an adoption involving an Aboriginal or Torres Strait Islander child.

In the preparation of such a report the Department must undertake the consultation requirements set out in section 16A of the Act, to provide the Court with information and feedback specifically from an Aboriginal or Torres Strait Islander person or agency from the area, region or country where the child is from, regarding dispensing with parental consent in that particular case and any implications that could arise from such a dispensation.

2.4 Adoption plans

Adoption plans are an important part of the adoption process as they support open adoption practice and provide a basis on which contact between an adopted child and their birth family can be maintained, or ways in which an adoptee can access information about his or her family of origin.

Submissions to the review highlighted several matters relating to adoption plans for consideration. Informed by the matters raised in submissions the reference group looked at several issues in relation to adoption plans including:

- parties to adoption plans;
- contents of plans, including the need for plans to address specific matters;
- avenues for review when adoption plans are not adhered to; and
- adoption plans for Aboriginal and Torres Strait Islander children and children from other diverse cultural backgrounds.

2.4.1 Current legislation

Under the Act an adoption plan is to be negotiated if possible; section 46 sets out negotiation of the adoption plan and provides guidance around its contents. In the case of an adoption by a step-parent, relative or carer, adoption plan requirements are set out in section 55. The adoption plan can be negotiated between the birth parents, prospective adoptive parents and, if the CEO thinks it appropriate, the child's representative.⁴²

The Act provides guidance about the matters that may be provided for within an adoption plan, which can include exchange of information between the parties regarding the child's medical background or condition, development and important events in the

⁴² Under section 134 of the Act a child representative may be appointed. A child representative is not defined in the Act, but is described as a person who the CEO thinks is suitably qualified to represent (this does not currently have to be a legal practitioner) a child or in the event the Court directs a legal practitioner be appointed to represent a child. Also refer to section 2.6 of this report where child representatives are discussed in more detail.

child's life, the means and nature of contact between the parties, any other matters relating to the child and a process for reviewing the plan.

An adoption plan must be agreed within 21 days of selection of the prospective adoptive parents or selection of new prospective adoptive parents may be offered to the person who made the selection of the prospective adoptive parent(s). Selection of prospective adoptive parents and negotiation of an adoption plan cannot occur more than twice.

Section 47 of the Act sets out the CEO's duties in relation to the adoption plan, which requires the CEO to provide assistance and mediation regarding:

- the process of negotiating the plan;
- negotiating variations of an adoption plan; and
- review of adoption plans.

Section 70 of the Act enables the Court to add parties to an adoption plan if they are a party to the proceedings before the Court, or if they are a close relative as defined in section 59(2) of the Act that must be notified of an intention to apply for an adoption order in the event a birth parent is deceased or cannot be found. The Act also has provisions (sections 72 and 76) that enable the Court to enforce or vary provisions under an adoption plan and section 73 enables the Court to dispense with the requirement for an adoption plan.

2.4.2 Submissions

Submissions to the review asserted that there are no, or limited, avenues for recourse when an adoption plan is not adhered to and seemed to suggest that adoptive parents were not complying with adoption plans. However, when the reference group met with adoption stakeholders the alternative view that birth parents withdraw or do not participate in adoption plans was more readily presented.

This scenario was highlighted during the reference group's discussion with ARMS, who articulated that the trauma associated with placing a child for adoption can lead to birth parents withdrawing or finding it difficult to participate in the adoption plan. In these instances ARMS considered that adoptive parents must be required to continue to provide information to the birth parent.

During the reference group meeting with Adoption Support for Families and Children (ASFC), who primarily represent adoptive parents, the impact for both adoptees and adoptive parents of continually providing information to birth parents when there is no engagement was also highlighted. ASFC advised that often adoptive parents continue to facilitate the provision of information to birth parents but there is no response to the information provided. This can have ramifications for the adopted child who may feel an ongoing sense of rejection, or question why they need to provide personal information about their life when there is no response in return. This issue highlights the complexities of adoption and the need to continually to consider the best interests of the child.

2.4.3 Analysis

2.4.3.1 *Parties to adoption plans*

When the reference group met with key stakeholders and support groups, one of the matters raised in connection with the adoption plan was that it can be painful for birth parents to continually be reminded of the child that they have placed for adoption and this may be why they withdraw from active participation in adoption plans. The inclusion in the adoption plan of other significant individuals was suggested, as this person may be able to be a more stable connection for the adoptee. This could be a grandparent, aunt or uncle, or another significant person in the adoptee's culture or community, who can provide that connection to family, community and culture.

A personal submission to the review shared the experience of an adoptee who was able to have *"...some ongoing contact with his biological aunt and cousin as he was growing up. This was a very positive and beneficial link to his biological family. His relationship with his aunt assisted him to reunite with both his biological parents in his 20's [sic]"*.

Currently the Act only provides for the birth parent(s) who has provided consent for the child's adoption, the prospective adoptive parent(s) and if, the CEO thinks it is appropriate, the child's representative, to automatically be included in the negotiation of an adoption plan.⁴³ While under section 70 of the Act, the Court can allow parties to be added to an adoption plan, this may only occur if they are a party to the adoption proceedings before the Court⁴⁴ or have been notified under section 59(2)⁴⁵.

In those cases where a birth parent(s) that provided consent for the adoption is unable or unwilling to participate in the development of the adoption plan, the reference group considered the option of the CEO becoming a party to the plan. However, close examination of the intent of an adoption plan, which includes facilitating open adoption, creating a connection or enabling the exchange of information between birth families and adoptees, raised uncertainties about the practical benefits such a mechanism would provide an adoptee. Consideration was also given to the potential conflict with the role the CEO has in providing assistance and mediation to parties negotiating, varying or seeking a review of an adoption plan⁴⁶ and the effect becoming a party to the plan could have on these functions.

Nonetheless, adoption plans are considered an important part of the adoption process for an adoptee as they can facilitate links or exchange of information between the adoptee and their birth family. Recognising that many adoptees have questions about their identity and may benefit from contact with their birth families, it is considered

⁴³ Section 46 of the Act provides for negotiation of adoption plans in unknown adoption cases, while section 55A provides for the negotiation of an adoption plan in the case of a step-parent, relative or carer.

⁴⁴ Section 63 of the Act allows for intervention by the CEO or others in adoption order proceedings. Under this section any person may apply for leave to intervene in the proceedings and the Court may make an order entitling the person to intervene in the proceedings. If the Court makes such an order then the person is to be treated as a party to the proceedings.

⁴⁵ Section 59 specifies when relatives are to be notified of the intention to apply for an adoption order if the birth parent is deceased or cannot be found.

⁴⁶ Section 47 of the Act sets out the CEO's duties in respect of adoption plans which involve providing assistance and mediation to negotiate, vary or review and adoption plan. Under section 76 (2) the CEO must also provide mediation to parties to an adoption plan who are seeking a variation of the plan through the Court.

preferable to negotiate an adoption plan whenever possible and other mechanisms under the Act should be considered and, where appropriate, used to facilitate this outcome.

In some cases there may be another suitable person who can enter into the plan with the prospective adoptive parents when the birth parent(s) is unable or unwilling to participate in the development of an adoption plan. As noted above, the Act currently enables another party to be added to the adoption plan if they are a party to the proceedings and consideration should be given to pursuing this course of action if it is in the best interests of an adoptee.

Another mechanism under the Act that would enable the development of an adoption plan when the birth parent(s) is unable or unwilling to participate would be appointing a person to represent a child in the negotiation of the adoption plan⁴⁷. Whilst this would mean dispensing with the requirement for a particular birth parent to be a party to the plan, which the Court may do under section 73 of the Act, it would then enable the adoption plan to be developed with the prospective adoptive parents and the child's representative. This option would provide an adoptee with the benefit of an adoption plan that supports open adoption practice and provides a commitment by the prospective adoptive parents to support opportunities for connection between the adoptee and their birth family. For an Aboriginal or Torres Strait Islander child or a culturally diverse child it would also provide the opportunity to identify how the adoptive parent(s) will support the child's cultural identity and connection with their traditions, language, customs and country.

2.4.3.2 Adoption plans for Aboriginal and Torres Strait Islander children and intercountry adoptees

The reference group considered whether the Act should require specific matters to be addressed in adoption plans. The Act currently outlines matters that may be provided for in an adoption plan but does not require any specific matters to be included.

Developing a strong sense of identity is vitally important for any adopted child, but for children from different cultural backgrounds the development of their cultural connection and identity requires specific attention and action. Adoption plans can help provide the opportunity for a child to develop a strong sense of identity and facilitate a connection with their birth family's culture and traditions.

In examining this issue, particular consideration was given to promoting and developing the cultural connection and identity for an Aboriginal and Torres Strait Islander child or a child adopted from overseas through intercountry arrangements.

The way this is managed in Queensland and NSW adoption legislation was examined, noting that Queensland has very similar provisions to Western Australia and NSW contains more guidance about what the adoption plan is to contain in regulations. The reference group noted that both NSW and Queensland adoption legislation contain specific requirements for Aboriginal and Torres Strait Islander children and children from culturally diverse backgrounds.

⁴⁷ Under section 134(1) of the Act *"the CEO may, at any time, appoint a person who, in the CEO's opinion, is suitably qualified to represent a child who is a prospective adoptee or adoptee."*

Queensland is very specific about Aboriginal and Torres Strait Islander children and children from culturally diverse backgrounds being supported to maintain connection with the child's community and language group.⁴⁸ For an Aboriginal child the adoption plan must specify (amongst other things) how the adoptive parents will help the child to develop and maintain a connection with their Aboriginal traditions or Islander customs and how they will preserve and enhance the child's sense of Aboriginal and Torres Strait Islander identity. There are also similar requirements for children from culturally diverse backgrounds to develop and maintain their ethnicity and culture and to preserve and enhance the child's sense of ethnic or cultural identity.

In Western Australia an assessment report is prepared and provided to the Adoption Applications Committee that must detail the applicant's, or joint applicants', suitability for adoptive parenthood as set out in section 40(2) of the Act.⁴⁹ The Committee must take account of this assessment report and any other relevant information.⁵⁰ When deciding the suitability of prospective adoptive parents the Committee may also specify the categories from which prospective adoptive parents are deemed suitable (or not) to adopt. Categories are:

- *“children who are of an age, origin or ethnic background specified by the committee;*
- *children who require medical, behavioural or psychological care specified by the committee;*
- *children who are not of an age, origin or ethnic background specified by the committee;*
- *children who do not require medical, behavioural or psychological care specified by the committee.”⁵¹*

In the case of intercountry adoptions it was also noted that there are often reporting requirements, which involve the Department sending updates on the adoptee to the sending country. These reporting requirements are set by the sending country and vary in duration, whereby the Department can be required to provide a report at 12 months or at 2 years and in some cases extend to providing updates for a period of 5 years.

In most intercountry adoptions it is not possible to develop an adoption plan, because the plan must be developed between the birth parents and adoptive parents, and the child's representative (if a child representative has been appointed, and the CEO considers it appropriate). There are a number of factors that can impact on the ability to develop an adoption plan for an intercountry adoption which can include: birth parents being deceased or unknown; the sending country's legislation does not provide for adoption plans; or language and distance barriers may make it impractical to develop the plan and/or facilitate requirements under it. This means that adoption plans are generally dispensed with for most intercountry adoptions.

⁴⁸ *Adoption Act 2009* (Qld), s 165(2)(c) and (d)

⁴⁹ Section 40(2) of the Act requires the applicant(s) to be able to demonstrate they are physically and mentally capable of caring for a child until 18 years of age, are of good repute, have the desire and ability to provide a suitable family environment for the child, have a stable relationship (if applying jointly) and do not have a criminal history or pending criminal charges. The applicant(s) must also meet the requirements of section 39(1), which relate to being over 18 years of age, an Australian citizen, permanently residing in Western Australia and various relationship requirements if they are married or in a de facto relationship.

⁵⁰ *Adoption Act 1994* (WA), s 41.

⁵¹ *Adoption Act 1994* (WA), s 13(2).

After considering the feedback about adoption plans presented in submissions and having considered how this is managed in other states, the reference group were strongly of the view that any adoptee or prospective adoptee's cultural identity should be preserved and promoted.

Past practices of forced removal of children from their families and the high numbers of Aboriginal and Torres Strait Islander children in care, has had a considerable negative impact on their connection with culture, language, family and country. Therefore being able to develop a strong cultural identity and connection is vital for an Aboriginal or Torres Strait Islander child who may be adopted.

In light of this, it is considered appropriate that the requirement for an adoption plan for an Aboriginal or Torres Strait Islander child must not be dispensed with and the plan must specifically address the need to build and maintain connection to culture, community, language and identity. It is also considered appropriate that every Aboriginal or Torres Strait Islander child have separate representation (preferably from a lawyer who has knowledge and experience working with Aboriginal or Torres Strait Islander people) for the purposes of developing an adoption plan.

The reference group noted the complexities around the development of adoption plans for intercountry adoptees, and whilst of the view that any adoptee's or prospective adoptee's cultural identity should be preserved and maintained, no practical resolutions were able to be identified in relation to the barriers to developing adoption plans for intercountry adoptees.

Recommendation 11

The way in which a child's cultural identity can be promoted and developed is a matter that should be specifically referred to in section 46(2).

Recommendation 12

The Act should be amended to provide that the requirement to have an adoption plan cannot be dispensed with in the case of an adoption of an Aboriginal or Torres Strait Islander child.

Recommendation 13

Every Aboriginal or Torres Strait Islander child must have separate representation for the purposes of negotiating an adoption plan.

Recommendation 14

An adoption plan for an Aboriginal or Torres Strait Islander child, must specify how the child's cultural identity and connection will be developed, preserved and maintained (including the child's language, family, community, connection to country and culture).

2.4.3.3 *Other opportunities to strengthen cultural considerations in the adoption process*

In addition to the specific recommendations pertaining to adoption plans other opportunities to strengthen a prospective adoptive parent(s) ability to promote and develop a child's cultural connection and identity were explored. Section 40 of the Act

sets out the considerations to be addressed in an assessment report for a prospective adoptive parent(s). Currently, these considerations do not specifically provide for consideration of a prospective adoptive parent's capacity to raise an Aboriginal or Torres Strait Islander child or a culturally diverse child in a way that would promote cultural connection and identity. However, the Committee may approve a person as a prospective adoptive parent for "*children who are of an age, origin or ethnic background specified by the committee*".⁵²

Section 52 of the Act sets out the pre-requisites for the CEO placing a child for adoption. These specifically require that the prospective adoptive parent "*recognises the value of, and need for, cultural and ethnic continuity for the child; and shows a desire and ability to continue the child's established cultural, ethnic, religious or educational arrangements*".⁵³ Including general requirements in section 40 similar to those outlined under section 52, would further promote with a prospective adoptive parent(s) the importance of developing and maintaining the cultural identity for a prospective adoptee who is Aboriginal or Torres Strait Islander or from a culturally diverse background.

Additionally, similar requirements to those in section 52(1)(a)(va) and (vb) could also be included under the preconditions for making an adoption order in section 68 of the Act. Including them in under section 68(2)(b)(ii) would mean that the Court would also need to be satisfied of a prospective adoptive parent's ability to promote the child's cultural identity and connection and also require these matters to be addressed in the Department's report to the Court.⁵⁴

Recommendation 15

The Act should be amended to include specific requirements for consideration of a prospective adoptive parent's (or parents') ability to promote a child's cultural identity and connection at the time the assessment report under section 40 is prepared and when the Court is considering making an adoption order under section 68.

2.4.3.4 Adoption plans and sibling relationships

The ability of an adoptee to maintain a connection with their siblings was also considered in context of adoption plans. The Act places significant emphasis on sibling connections, with section 52(1)(d) and (e) requiring the CEO to take all reasonable steps to place siblings relinquished at the same time together or, where a child has a sibling who is already adopted, that all reasonable steps are taken to place the child with the sibling's adoptive parent.

Whilst placement with siblings must be considered in the adoption of a child there is no reference to, or requirement for, connection with siblings in the development of an adoption plan. In the NSW adoption regulations the adoption plan must contain information about the means and nature by which contact between the child and child's family and siblings is to be maintained.⁵⁵

⁵² *Adoption Act 1994* (WA), s 13(2)(a).

⁵³ *Adoption Act 1994* (WA), s 52(1)(a)(va) and (vb).

⁵⁴ Under section 61 of the Act the CEO is to provide a report for the Court, which is to contain information on the matters the Court is to have regard to under section 68(1) and (2).

⁵⁵ *Adoption Regulations 2015* (NSW), cl 75

The reference group considered that connection with siblings is important for an adopted child and can assist with developing the child's identity, connections to other family, culture and community and therefore it should be one of the matters that is identified for inclusion in adoption plans.

Recommendation 16

The way in which contact with a child's current (and future) siblings can be facilitated or maintained is a matter that should be specifically referred to in section 46(2).

2.4.3.5 Review and enforcement of adoption plans

The reference group noted concerns raised by submissions about the perceived limited avenues for recourse when an adoption plan is not being adhered to. This issue was also examined in the last review of the Act and whilst that review considered "...*more should be done to monitor compliance with adoption plans...*"⁵⁶ there were concerns about the practical issues and resource implications of imposing legislative requirements in this regard. The 2007 review recommended amendment of section 47 of the Act, to require the CEO to provide assistance to people seeking a review of the operation of an adoption plan. The Act was amended in accordance with this recommendation and from time to time parties to an adoption plan do contact Adoption Services for assistance in this regard.

The reference group, having considered sections 46, 47, 72 and 76, which provide for negotiation, review, enforcement and variation of adoption plans, were of the view that appropriate avenues are available to seek either a review of the adoption plan or enforcement of the plan. Whilst there is not a need to facilitate legislative change in this regard and information is provided to parties to an adoption plan regarding options for reviewing, varying and enforcing adoption plans, people's experience of adoption could be enhanced by providing information about these options at a range of points in the adoption process.

Although, there are adequate provisions for review variation and enforcement of the adoption plan, consideration was also given to the CEO's capacity to seek enforcement of an adoption plan where it becomes apparent that parties to a plan may not be adhering to the plan as originally agreed or intended.

Section 72 of the Act enables the Court to deal with breaches and enforce the provisions of an adoption plan, but does not specify how these may be brought before the Court. For clarity, it is proposed that the Act be amended to provide the CEO with the specific capacity to refer breaches or potential breaches of the plan for enforcement under section 72 of the Act. This would provide safeguards for an adoptee in cases where the only parties to the plan are the child's representative and the adoptive parent. It would provide a clear independent avenue to seek enforcement of the adoption plan and avoid a situation where an adoptee may potentially need to seek enforcement of provisions of the plan upon their adoptive parent(s).

⁵⁶ Adoption Act Review 2007, p 74

Recommendation 17

Birth parents, adoptive parents and adoptees (of an appropriate age) are provided with information in writing regarding the review, variation and enforcement of adoption plans when the plan is being negotiated and at the time the adoption order is finalised.

Recommendation 18

The Act should be amended to provide the CEO with the capacity to refer a breach or potential breach of an adoption plan to the Court for enforcement under section 72, despite the CEO not being a party to the plan.

2.4.3.6 Schedule 2 – Rights and responsibilities to be balanced in adoption plans

In considering matters associated with adoption plans the reference group also examined the clauses under Schedule 2 pertaining to the rights and responsibilities to be balanced in adoption plans.

The reference group felt that particular features of the Schedule may not have kept pace with changes in adoption practices and appear to be more focussed on the adoptive parents 'rights'. The expression of this Schedule could be seen as contrary to the concept of open adoption and at odds with adoption being a service for the child.

There are a number of occasions where the Schedule refers to adoptive and birth parents rights; for example clauses 4(2) and (3) respectively state:

- *“The birth parents’ right to information about the child increases in importance as the child approaches adulthood.”* and
- *“The adoptive parent’s right to control the exchange of information and any contact between the child and the birth parents lessens as the child approaches adulthood.”*

Consideration could be given to re-examining the expression of various matters in the Schedule so that it emphasises children’s rights and adoptive parents and birth parents responsibilities and obligations.

The reference group were generally of the view that Schedule 2 requires review to ensure it is focussed primarily on the child’s best interests and is consistent with the proposed guiding principles for the Act. A review of these provisions could also provide the opportunity to modernise the language and terminology used in this schedule.

Recommendation 19

Schedule 2 should be reviewed and updated to have an increased focus on the child’s rights and needs.

2.5 Post adoption support

2.5.1 Current legislation

The Act currently sets out the CEO's duties in relation to adoption information services in section 79. These duties include providing information, counselling and mediation to parties to an adoption or adoption plan, facilitating access to adoption information and assisting parties to an adoption to identify and contact the other parties to the adoption.

2.5.2 Analysis

Several submissions raised the need for long term post adoption support that goes beyond just the initial adoption placement and finalisation of the adoption.

The Department currently provides funding to ARCS and Adoption Jigsaw WA to deliver counselling and support services to anyone involved in adoption.

The reference group considered the information presented in submissions and looked at the operation of the legislation in the context of adoption supports and were of the view that nothing in the legislation prevents the provision of post adoption support. Moreover, placing requirements into legislation around ongoing post adoption support could be problematic as it would be difficult to monitor and enforce, thereby offering little benefit. It was also noted that there are a range of government services and supports available to families who may be seeking counselling or support in relation to adoption.

A list of these supports is available on the Department's website at www.dcp.wa.gov.au/FosteringandAdoption/AdoptionAndHomeForLife/Pages/Supportforthoseinvolvedinadoption.aspx.

Whilst there is not a need to facilitate legislative change in this regard, people's experience of adoption could be enhanced by providing information about available supports at a range of points in the adoption process. In view of this, the reference group considers that information about adoption support services should be provided, not just at the outset of the process, but again when adoption post placement supervision is concluding and the adoption order is finalised.

Recommendation 20

Birth parents, adoptive parents and adoptees are provided with information in writing regarding accessing adoption support services when the adoption placement supervision is concluding and the adoption order is finalised.

2.6 Representation for children in adoption processes

2.6.1 Current legislation

The Act currently provides for the representation of children in the adoption process in section 134. Under this section the CEO can at any time appoint a person suitably qualified to represent a child. The appointment of a person to represent a child is at the discretion of the CEO.

There are certain circumstances where the CEO must appoint a person suitably qualified to represent a child, which are:

- where the adoptee or prospective adoptee has a disability that is likely to affect their placement; and
- when a birth parent is under the age of 18 years of age and considering the adoption of his or her child.

In proceedings under or in relation to this Act, the Court may also direct that the child be separately represented by a legal practitioner.⁵⁷

2.6.2 Submissions

Ensuring children have a clear voice throughout the adoption process and that their interests are being represented was raised across a number of submissions. Some submissions made particularly strong representations that all children involved in adoption proceedings should be represented by a legal practitioner. The submission from the Family Inclusion Network WA (FINWA) asserts that *“the voice of the adoptee appears to be absent in legislative, policy and practice reform, and no independent mechanisms exist to represent children in the adoption application process”*. While submissions from the Aboriginal Family Law Service and the Women’s Law Centre of WA both share the concern that *“discretionary representation provided for by the Adoption Act is rarely undertaken.”*⁵⁸

2.6.3 Analysis

The reference group gave particular consideration to a number of areas in which independent legal representation for the child may be required. These included where a child is consenting to their own adoption, step-parent adoptions and adoption from out-of-home care.

In considering this issue the reference group looked at legislation in other Australian States; noting in particular that Queensland’s adoption legislation specifically requires the Court to consider separate legal representation for a child in situations where the adoption application is contested by a birth parent, the child opposes the application, step-parent adoptions or where the adoption is from out-of-home care. The VLRC review of the *Adoption Act 1984* (Vic) also recommended that an independent children’s lawyer

⁵⁷ *Adoption Act 1994* (WA), s 134(3).

⁵⁸ Women’s Law Centre of WA, Submission to the 2018 Review of the Adoption Act.

should be appointed for all children in the adoption process, and this should occur as early as possible, including during the development of the adoption plan.⁵⁹

The Act currently allows for representation of a child at different junctures in the adoption process. The CEO at any point in the process can appoint a person who is suitably qualified to represent a child who is an adoptee or prospective adoptee. The Court may also during proceedings, under or in relation to the Act, direct that the child be represented by a legal practitioner. Although the Court can require a separate legal representative to be appointed for a child, the reference group were of the view that this may be too late in the process, as matters such as consent and the adoption plan have already been given or negotiated.

The 1997 Adoption Legislative Review⁶⁰ also considered this issue and specifically recommended:

- the Director General be given a discretionary power to appoint a representative for a child at any stage during the process;
- a child of sufficient age and maturity be able to instruct a solicitor on his or her wishes;
- a child representative must be appointed in all cases prior to consent being taken where adoption is being considered for a child with a disability;
- the mandatory appointment of a child's representative in all cases for step-parent and carer adoptions; as well as in all cases where the parent is under 18 years and considering adoption of his or her child.

As outlined above, the Act does require a child's representative to be appointed in all cases where the child being considered for adoption has a disability and for a relinquishing parent under 18 years of age.

Separate legal representation for the proposed adoption of children in the CEO's care was also explored. This was considered important given that the CEO has ultimate responsibility for decision-making in relation to children in care and adoption, albeit these functions are managed by separate sections of the Department. In this context, it is acknowledged there are safeguards in place regarding the adoption of children who are in care which serve to promote the best interests of the child. These include:

- the Department's permanency planning policy and practices;
- the requirement for a protection order (special guardianship) under the CCS Act to be considered before adoption, including the requirement that the CEO must be satisfied that adoption would be preferable to such an order; and
- upon application for an adoption order the Court must also be satisfied of this requirement.

Moreover, before adoption would be considered for a child in care the Department will, in most cases (unless there are exceptional reasons not do so), have made significant efforts to re-unify a child with their family before long term care is considered.

On this basis the current processes and protections in place are considered to be functioning appropriately and there does not appear to be a specific need for separate

⁵⁹ VLRC Review of the Adoption Act 1984, p xxii.

⁶⁰ Adoption Act Review 1997, pp 61-62

legal representation to be mandatory in this circumstance. Nonetheless, the provisions in the Act as they are currently drafted do not prevent the CEO being able to appoint a child representative for a child in care, or any other child, at any time during the adoption process and the Court can also give a direction that a legal practitioner be appointed to represent the child.

Having also considered the need for mandatory counselling for children consenting to their adoption (refer to section 2.2.1) the reference group were generally of the view that children over 12 years of age giving consent to their adoption should be legally represented and supported in the negotiation of the adoption plan. This was also considered important for children being adopted by a step-parent due to the potential risk of coercion and the fact that the child may feel they have no other alternative but to agree to the adoption.

When examining step-parent adoptions, discharge of adoption orders was also considered, noting that the largest proportion of adoption discharges occur in step-parent or ex-nuptial⁶¹ adoptions when the person reaches 18 years of age and applies to have the order discharged.

Since the inception of the Act in 1995 there have been a total of 36 enquiries regarding discharge of an adoption order. Of these, 15 related to adoption by a step-parent and nine were in ex-nuptial adoption situations. A total of 17 adoption orders have been discharged since 1995; a breakdown of the family circumstances involved in these adoptions is provided in the table below.

No. of adoption orders discharged	Adoption type
6	Step-parent
6	Ex-nuptial
3	Relative
1	Un-related local adoption
1	Foster Carer

In cases of step-parent adoption, the responsibility and cost of engaging legal representation should rest with the child's parents, as the adoption of the child in these circumstances is essentially a private matter. Step-parent adoptions differ from other adoptions as there is already at least one parent who has ongoing parental responsibility for the child, unlike other adoptions where the purpose is to secure a legal and permanent family for a child who does not have a parent that is able or willing to care for them.

Recommendation 21

The Act should be amended to require that a child over 12 years of age consenting to their own adoption must be provided with separate legal representation at all relevant stages of the adoption process, including the consent and adoption plan phases.

Any child proposed to be adopted by a step-parent must have separate legal representation at all stages of the adoption process, including consent and adoption plan phases.

⁶¹ Ex-nuptial adoption refers to adoption where the adoptive parents are in a relationship but are not married.

Recommendation 22

In step-parent adoptions the cost of legal representation for a child is to be met by the applicants unless otherwise determined by the Court.

In looking at the provisions of section 134 the terms used in parts of this section were considered and the reference group were of the view there should be increased clarity about what is meant by “...a person who, in the CEO’s opinion, is suitably qualified to represent a child...”.⁶² It is considered this term could be replaced with a legal practitioner or representation. The way children are represented in Children’s Court and Family Court proceedings was also considered and in all eventualities the person representing the child is a legal practitioner.

The 2017 review of the CCS Act also examined the issue of legal representation for children in child protection proceedings, endorsing recommendation 25 of the 2012 review, which stated “...a legal practitioner appointed to act on behalf of a child in protection proceedings should be known as a “child representative””.⁶³ Therefore, once amended, it is clear that under the CCS Act the child’s representative during protection proceedings is to be a legal practitioner.

In section 134 there are also a number of references to a requirement for the CEO to “...appoint a person who, in the CEO’s opinion, is suitably qualified...”.⁶⁴ The reference group considered that it would be more appropriate for the Act to require the CEO to “arrange” for a person to represent a child as the meaning of ‘appoint’ can be interpreted in different ways. This allows greater flexibility in that the CEO may arrange representation via Legal Aid WA or a community legal service rather than directly appoint an individual lawyer.

Amending terms in this section will not only increase clarity about who is to represent a child, it will also bring the Act into line with the way children are represented in other types of legal proceedings in the Family Court of Western Australia and the Children’s Court.

Recommendation 23

The Act should be amended to define the term “child representative” to mean a legal practitioner with relevant experience representing the child in all proceedings in relation to the adoption or under the Act.

A person representing a child should be a legal practitioner and references in section 134 should be amended to reflect this.

In section 134, references “to appoint” should be replaced with “arrange”.

⁶² *Adoption Act 1994* (WA), s 134(1).

⁶³ *Statutory review of the Children and Community Services Act 2004*, p 153 (Statutory review of the CCSA 2004).

⁶⁴ *Adoption Act 1994* (WA) s 134.

2.7 Notifications regarding death of a party to adoption

2.7.1 Current legislation

Under section 80 of the Act, if the CEO is informed about the death of an adoptee, the CEO is to inform the adoptee's birth parents of the death if it is reasonably practical and appropriate to do so, having regard to the provisions of the adoption plan.

Additionally, where the CEO receives information that one of the parties to an adoption has died, or a sibling of the adoptee has died (whether a full or half sibling) then the CEO is to inform the other parties to the adoption or the adoptee's siblings (whether they be full or half siblings) of the death so far as it is reasonably practical to do so.

The Act currently allows the CEO some discretion in the application of this provision where a person has already notified that they do not wish to be advised or if there are special circumstances.

2.7.2 Submissions

The submission by the Department's Adoption Services unit raised a specific issue relating to the requirements under section 80 the Act. Adoption Services assert that this provision presents challenges as a result of the secrecy around past adoptions and that extended family or siblings may have no knowledge that they have an adopted relative. It is also understood that there have been instances where a birth father named in court documents had no knowledge of the child until contact from Adoption Services.

This submission proposed that these provisions be amended so that notification is only required where the siblings or parties have had previous contact with the Department.

2.7.3 Analysis

The reference group reviewed the provisions of section 80 of the Act and considered how other States manage these types of notifications.

Western Australia appears to have the most detailed provisions in this regard, with most other States having no specific requirements of this nature. The Northern Territory requires the adoptive parents to notify the Minister if an adopted child dies before attaining the age of 18 years. Following this notification the Minister must advise each relinquishing parent of the child's death.⁶⁵ In NSW provisions relate to accessing information after the death of an adopted person or birth parent. In these circumstances the Secretary can only supply the information if the person had a close personal relationship with the deceased person and the Secretary has taken into account any likely detriment to the wellbeing and best interests of any adopted person, birth parent, relative or spouse of the deceased person, or the other person, if the adoption information is supplied.⁶⁶

⁶⁵ *Adoption of Children Act 2018* (NT), s 66.

⁶⁶ *Adoption Act 2000* (NSW), s 137(2) and (3).

In considering this issue, a person's fundamental right to information that affects them was highlighted and there must be very strong justification to impinge upon this right. After having reviewed the operation of the current provisions, the reference group were of the view that the Act does provide some discretion to the CEO around the requirements to notify certain individuals in the event of a death of a party to an adoption. In view of this, no changes to the legislation are recommended, however the reference group considered there would be merit in providing some increased practice guidance around what may constitute special circumstances under section 80 the Act.

Recommendation 24

Practice guidance should be developed to help facilitate consideration of matters that may constitute special circumstances under section 80 of the Act.

3 Other adoption matters

3.1 Adoption and equal opportunity requirements

The *Equal Opportunity Act 1984* (EO Act) currently excludes parts of the adoption from being subject to equal opportunity legislation. The definition of services under section 4 of the EO Act includes, “*services of the kind provided by a government (other than the assessment of an application for suitability for adoptive parenthood, or the placement of a child for adoption or with a view to the child’s adoption under the Adoption Act 1994) a government or public authority or a local government body.*”⁶⁷

The *Adoption Act 1994* (WA) does not include any references to equal opportunity.

3.1.1 Submissions

The Acting Equal Opportunity Commissioner (Acting Commissioner) provided a submission asserting that the EO Act provisions are an arbitrary exclusion of prospective adoptive parents to complain about unlawful discrimination in the adoption process which is out of proportion to the aim of protecting children from harm. The Acting Commissioner requested that consideration be given to removing the reference to adoption within the definition of services under the EO Act.

3.1.2 Analysis

In considering this issue the reference group referred to the paramount considerations in the Act, which are that the wellbeing and best interests of the child must always be paramount and that adoption is a service for the child. The reference group also noted that when considering the suitability of prospective adoptive parents the Committee needs to take into account the ability of the parents to be able to provide lifelong care for the child, and therefore must consider a range of matters such as the health, income and any disabilities of prospective adoptive parents.

There are a number of circumstances where restrictions are imposed by the Act or other associated aspects of the adoption process. Moreover, in any adoption a child’s best interests must always be a paramount consideration.

For intercountry adoptions, sending countries may have requirements in relation to the placement of a child, which can include matters such as the ethnicity, cultural and religious beliefs, gender and marital status of prospective adoptive parents. Western Australia does not have the ability to disregard the requirements of sending countries. If Western Australia were to disregard these requirements the likely outcome is that sending countries would simply not select prospective adoptive parents from Western Australia.

⁶⁷ *Equal Opportunity Act 1984* (WA), s 4.

Additionally, in local adoptions, selection of the prospective adoptive parent(s) is made by the person (or persons) that provided consent for the child's adoption. Profiles of different prospective adoptive parents are presented to the person (or persons) that provided consent, which are matched, as closely as possible, to the attributes and qualities they are seeking in a prospective adoptive parent(s) for their child.

Whilst the concerns raised by the Acting Commissioner are acknowledged, the reference group were of the view that removing the reference to adoption in the EO Act could have significant unintended consequences for the adoption process. On this basis it is not considered appropriate to propose that the Attorney General consider amending the definition in the EO Act.

3.2 Adoption Applications Committee

The Adoption Applications Committee (the Committee) is established under the Act to determine the suitability of persons applying to become prospective adoptive parents. The review of the Act has considered the operation of the legislative provisions in respect of the Committee.

3.2.1 Current legislation

Sections 12 to 15 of the Act deal with the appointment, functions, membership and operation of the Committee. These sections of the Act are also supported by a number of regulations⁶⁸ that set out further details about membership, appointment of a Deputy Chairperson, length of appointment terms, vacancies, remuneration of members and other procedural matters relating to the convening and minuting of Committee meetings.

The Committee may not have more than eight members, the majority of the members must be independent of the Department and the Chairperson is also to be independent of the Department. Committee membership must include a lawyer, members can be appointed for a period not exceeding three years and are eligible for re-appointment.

3.2.2 Analysis

The reference group considered the current membership of the Committee, taking account of the terms of appointment, length of service, diversity and composition of members.

The Committee currently comprises five members who are independent of the Department and three Department members. All members have professional qualifications relevant to adoption, with one member being a lawyer as required by the Act. Membership of the Committee currently includes two adoptive parents, one of whom is the chairperson (and also a lawyer), an intercountry adoptee and a male member from a culturally diverse background.

Membership of the current Committee has been relatively static with the length of service for current external members ranging from 10 years to 23 years. The Chairperson is the shortest serving external member (10 years), with other external members having served approximately 10, 13, 14 and 23 years.

The reference group considered that the membership of the Committee needs to be representative of a range of perspectives, including diversity across age, gender and cultural backgrounds. The reference group were of the view that consideration should be given to the Committee including the following membership requirements:

- a young person;
- a person with a diverse cultural background;
- an Aboriginal person or Torres Strait Islander; and
- a person who is an AHPRA⁶⁹ registered psychologist.

⁶⁸ *Adoption Regulations 1995 (WA)*, pt 3.

⁶⁹ AHPRA – Australian Health Practitioner Regulation Agency.

Consideration was given to the definition of a young person. Although the generally accepted age range for the development of youth policies and programs within the Western Australian community is 12 to 25 years, a young person for the purposes of appointment to the Committee and decision making under the Act is considered to be 18 to 30 years of age. Given the legal nature of adoption and the Committee's role in determining the eligibility of people to become prospective adoptive parents, the reference group were in agreement that the young person needed to be at least 18 years of age. An upper age limit of 30 years was considered appropriate so that a sufficient range of individuals will be able to be considered for appointment to the Committee and that the individual's age does not unduly restrict the term of appointment.

Recommendation 25

Consideration should be given to amending the *Adoption Regulations 1995 (WA)* to incorporate requirements that facilitate and support diversity of membership for the Adoption Applications Committee.

The reference group also took into account the recruitment of members to the Committee over recent years, noting that there are no formalised processes around this. Whilst the reference group did not consider a need for this to be specified in legislation, there should be transparent processes that provide an opportunity for individuals with knowledge, experience and qualifications relevant to adoption to express an interest in being considered for appointment as a member of the Committee.

The processes should have regard to the composition of the Committee including the length of service, experience, requirements of the Act and any other factors considered relevant in the nomination and appointment of Committee members.

Recommendation 26

The Department should develop and document clear procedures for the recruitment of members for the Adoption Applications Committee.

3.3 Contact and mediation licences

3.3.1 Current legislation

Section 106 of the Act provides for contact and mediation licences to be issued to an individual to facilitate contact with parties to an adoption or to negotiate contact between parties to an adoption.

Section 107 sets out a range of matters to be prescribed in regulations for contact and mediation licensees. Section 108 requires licensees to observe any contact vetoes in place and a licensee must make contact with the Department (to determine if a contact veto is in place) prior to contacting a person in relation to an adoption.

3.3.2 Submissions

Two submissions to the review, one from an adoptive parent and the other from the Department, suggested that the use of contact and mediation licensees is now redundant given the range of avenues that people can access to locate people, such as Facebook, Google searches and ancestry.com. The perception is that legislation has not kept pace with modern society and technology and that these provisions are regularly being breached.

3.3.3 Analysis

Adoption practices and processes have changed and evolved over the years, with a significant change being the introduction of open adoption, where adoptees are now entitled to information about their birth family and identity and ongoing contact can be facilitated through adoption plans.

At the time the original contact and mediation licensee provisions were drafted (in 1994), this also brought closed adoption to an end. Given the secrecy and sealed records of adoptions prior to the introduction of the Act and the limited avenues for accessing information, there was a role for contact and mediation licensees. These provisions supported adoptees to locate their birth families, ensured that an individual who could act on behalf of an adoptee was authorised, had the appropriate skills to do so and could offer supports to the parties, particularly where, for some people, contact from an adopted child could be a shock and have significant ramifications.

The use of contact and mediation providers in other States was considered, noting that Western Australia is the only jurisdiction to have legislative provisions in this regard. Most other relevant State and Territory government departments appear to manage contact.

In examining this issue, the reference group considered that these provisions were unnecessarily restrictive of a person's right to information under the Act. The reference group also took account of section 126 of the Act, which provides protection against

harassment⁷⁰ and considered other legislation that is available to protect individuals, such as the *Restraining Order's Act 1997* (WA).

The reference group also noted that there are only three current contact and mediation licensees in Western Australia, two of whom work for ARCS and Jigsaw respectively. Issues associated with repealing requirements for contact and mediation licences were also explored, particularly the view that any individual (including people without expertise or experience in adoption) may be able to represent or act on behalf of another individual in contacting parties to an adoption. It would appear that this is already informally occurring, as noted in one submission: “...it has been possible for my oldest child to act on behalf of her younger siblings and easily locate the names and the schools or sporting clubs that her younger siblings’ biological siblings attend”. Once again, the reference group referred to the fact that individuals have a right to information and noted that the spirit and intention of the Act is about open adoption and removing the historical secrecy in relation to adoption.

Introducing a provision that requires individuals to contact the Department prior to contacting a party to an adoption was also considered; this is similar to section 108, which requires a contact and mediation licensee to contact the Department prior to contacting a party to an adoption to ascertain whether there is a contact veto registered in relation to the person the licensee is proposing to contact. However, given that no penalty for failing to contact the Department would be attached, it would make a legislative provision in this regard redundant. To attach an offence was also viewed as criminalising something that ought not to be an offence. In this regard the reference group considered that the Department’s website should provide information that strongly encourages parties to an adoption who are seeking to contact one another, to contact the Department prior to initiating any contact. The Department can then offer or refer to counselling and advise of historical contact veto information or other information that may be important to initiating contact.

On balance it was considered that contact and mediation licences are no longer necessary.

Recommendation 27

The provisions relating to contact and mediation licences in the Act should be repealed.

Recommendation 28

Guidance and information on the Department’s website should be reviewed and updated to encourage parties to past adoptions to contact the Department prior to initiating any contact with another party.

⁷⁰ Section 126 of the Act provides that a person must not do any act intended or likely to harass, intimidate, embarrass or ridicule another person by virtue of that person being a party or relative of a party to an adoption or proposed adoption.

3.4 Access to information

In most instances under the Act there is no restriction on the age at which an adopted person can access information about their adoption. However, section 86 only enables the Registrar (the Registrar), Births, Deaths and Marriages, to issue a certified copy of the portion of the registration of birth not referring to the adoption, to an adoptee's adoptive parent, if the adoptee is less than 18 years of age or the adoptee, if the adoptee is 18 or more years of age.

The reference group were of the view that restricting the Registrar's ability to issue information to an adoptee when they are under 18 years of age unduly impinges on an adoptee's right to be able to access information.

It would appear there is no practical reason why an adoptee under 18 years of age could not meet identity requirements of Births, Deaths and Marriages if they are able to provide an Australian Learner's Permit, debit or credit card, student identity document or statement of enrolment, financial institution statement or a school or other educational report or certificate (less than 12 months old).

In examining this issue the reference group particularly took account of the importance of access to information for Aboriginal and Torres Strait Islander people who may be adopted. Being able to connect with their family and community is vital in developing their cultural identity and establishing their standing within the Aboriginal or Torres Strait Islander community. The reference group also gave consideration to the age at which an Aboriginal or Torres Strait Islander person may go through Aboriginal or Torres Strait Islander Law, which is generally 12 years of age.

The reference group is of the view that the Registrar should be able to issue information as set out in section 86 at the request of an adoptee once they are 16 or more years of age. The reference group generally felt that an adopted person at 16 or 17 years has sufficient maturity to be able to apply for and use information appropriately.

Recommendation 29

The Act should be amended to enable an adoptee, who is 16 or more years of age, to make a request for information under section 86.

3.5 Record keeping

3.5.1 Current legislation

Section 94 of the Act outlines requirements in relation to keeping records of adoption. Records of proceedings in a court related to adoption must be preserved indefinitely, in so far as is practicable. Court records can only be destroyed after consultation with the CEO and upon the authority of the registrar of the Court or other similar officer.

Records that are not court records and are held by people or agencies (this includes records of hospitals, hostels or any other association or body of persons) which have conducted adoption services (whether before or after the commencement of the Act) must preserve all documentation pertaining to an adoption for not less than 100 years. Where an organisation or person ceases to provide adoption services, the Act requires that any records held by that person or organisation must be transferred to the CEO, or the CEO must be satisfied that provisions have been made for the access and safe keeping of the records in accordance with the requirements of the Act.

3.5.2 Analysis

The reference group considered the provisions of the Act relating to keeping records of adoption and were of the view that as information and records are vitally important to parties to an adoption, but particularly for an adoptee (and even more so for an Aboriginal or Torres Strait Islander adoptee) endeavouring to understand their background and family history they should be kept indefinitely.

Most other Australian adoption legislation is either silent on maintenance of records of adoption or does not prescribe timeframes.

The way in which the Department currently manages adoption records was also considered. Advice provided by the Department's Corporate Information Branch indicated that adoption records of individuals are considered to be of long term archival value and classified as never to be destroyed; these are eventually transferred to the State Records Office of Western Australia as state archives. Access to the records once transferred to State Records Office is restricted for 75 years with any requests for access first having to be considered by the Department.

In view of the importance of access to information and records for adoptees, and other people affected by adoption, along with the Department's current position regarding adoption records management, all records should be kept indefinitely. Adoption records should be maintained in a format that complies with requirements under the Act and any other records management requirements that may apply.

Recommendation 30

Section 94(3) should be amended to require that all adoption records be kept indefinitely.

3.6 Adoption of Aboriginal children

The reference group gave particular consideration to adoption of Aboriginal children, including whether they should be able to be adopted and whether the current protections and safeguards in the Act are sufficient.

Given the legal framework of adoption, which severs a child's ties with their birth parents, it is acknowledged that adoption, other than "customary adoption", is not generally recognised in Aboriginal culture. The review of the Act in 1997 also considered this issue noting: *"the concept of legal transfer of 'ownership' of a child is contrary to Aboriginal culture as a child is always 'owned' by the community or family they are born into. Where the birth parents cannot or do not provide for their own children's care, the maintenance of care is guaranteed through the community and extended family structure. It should also be noted that in Aboriginal culture it is appropriate that a child be 'given' to another family member or someone in the community to take on the primary responsibility of raising that child. This may occur for a number of reasons and is not always done because the parents/family are unable to care for the child. It may be for a community reason such as ensuring that a woman who cannot have children is given this responsibility."*⁷²

Consequently, adoption of Aboriginal and Torres Strait Islander children under the Act continues to present unique considerations, because connection with family, community, culture and country is essential in establishing a strong cultural identity and sense of belonging for Aboriginal people and Torres Strait Islanders. It is also critically important to their acceptance within their family and community.

Particular regard also needs to be given to history and the past practices of forced removal of Aboriginal people. It was suggested to the Review that perhaps the adoption of Aboriginal and Torres Strait Islander children should not be permitted under any circumstances. Whilst the reference group considered this view, there was also a strong sentiment that adoption of Aboriginal and Torres Strait Islander children should not be prevented as a matter of course, as this could unfairly disadvantage a child where there is no alternative to adoption. It is also acknowledged that there are few adoptions involving Aboriginal and Torres Strait Islander children, with only two Aboriginal and children being adopted in the past five years.

Whilst standards and safeguards need to be rigorous for all adoptees, cultural sensitivities require additional consideration in the adoption of Aboriginal and Torres Strait Islander children.

The reference group looked at a range of matters that could enhance and support Aboriginal and Torres Strait Islander children who are adopted in building and maintaining their cultural identity and connection. These included access to information, adoption plans, dispensation of consent and the application of Schedule 2A – Aboriginal and Torres Strait Islander children – placement for adoption principle.

⁷² Adoption Act Review 1997, p 64.

3.6.1 Current legislation

The Act makes specific reference to the adoption of Aboriginal children, primarily in section 16A, which requires the CEO to undertake consultation with Aboriginal people or agencies regarding the prospective adoption of an Aboriginal child and in section 52(1)(ab) and Schedule 2A, which outlines the application of the Aboriginal and Torres Strait Islander child placement for adoption principle.

3.6.2 Submissions

The Aboriginal Family Law Service (AFLS) submission raised a number of specific considerations in relation to adoption of Aboriginal children including:

- preventing adoption of Aboriginal children from out-of-home care;
- excluding adoptions involving Aboriginal children from dispensation of consent provisions;
- recognition of Aboriginal attachment to extended family as different to that of Western families; and
- strengthening the requirements for siblings to be placed together except where there are exceptional circumstances.

3.6.3 Dispensation of consent and adoption plans

Dispensation of consent and adoption plans have been addressed in this report under sections 2.3 and 2.4 respectively. These sections consider how these provisions are specifically applied in respect of the adoption of Aboriginal and Torres Strait Islander children.

The Review recommends (see recommendation 10) that in respect of an Aboriginal or Torres Strait Islander child, an order for dispensation of parental consent to adoption cannot be made without the Court having first received a report from the Department that requires consultation with an Aboriginal person or an Aboriginal agency with relevant knowledge of the child, the child's family or community.

It is also recommended (see recommendations 12, 13 and 14) that Aboriginal or Torres Strait Islander children must have an adoption plan that specifically takes account of building and maintaining their cultural identity, including connection with family, community, culture and country.

3.6.4 Access to information

The reference group considered access to information for an adopted Aboriginal or Torres Strait Islander person particularly important, as this is a significant aspect of being able to develop a cultural identity, as well as connection and acceptance within their family and community. It may also have implications in respect of Native Title entitlements, a matter which may warrant separate consideration.

There are often challenges in gathering information from birth parents at the time of placing their child for adoption. This can include a reluctance to provide information

about family due to concerns about confidentiality, concealment of pregnancy or in some circumstances it may not be clear who is the father of the child.

3.6.5 Native Title and adoption

One of the submissions to the review raised the issue of Native Title and the impact of adoption on these entitlements. Given the complexity of adoption, which changes a person's legal relationship, their parentage and inheritance rights, this may well affect Native Title entitlements.

Native Title is a matter that will require further exploration outside of this review. Nonetheless, any adoption of an Aboriginal or Torres Strait Islander child should have regard for any implications an adoption could have in this context.

3.6.6 Schedule 2A – Aboriginal or Torres Strait Islander child placement principles

Following the review of the Act in 1997, it was a recommendation that the *“current Family and Children’s Services Aboriginal Child Placement Principles be included in the Adoption Regulations”*. This recommendation resulted in amendment of the Act to include Schedule 2A.

The Aboriginal and Torres Strait Islander children placement for adoption principle was incorporated in the act to *“maintain a connection with family and culture for children who are Aboriginal persons or Torres Strait Islanders and who are to be placed with a person or persons with a view to the adoption by the persons or persons”*.⁷³

The principle states:

If there is no appropriate alternative to adoption for the child, the placement of the child for adoption is to be considered in the following order of priority.

- 1. The child be placed with a person who is an Aboriginal person or Torres Strait Islander in the child’s community in accordance with local customary practice.*
- 2. The child be placed with a person who is an Aboriginal person or a Torres Strait Islander.*
- 3. The child be placed with a person who is not an Aboriginal person or a Torres Strait Islander but who is sensitive to the needs of the child and capable of promoting the child’s ongoing affiliation with the child’s culture, and where possible, family.*⁷⁴

The practical application of these provisions in an adoption context is difficult. As the Department generally has not intervened due to child protection concerns, there is not the same latitude to contact family to seek a placement with the child's extended family or in their community. Nonetheless, during the consent phase of the adoption process all options are explored with a person considering placing their child for adoption, which could include placement with family or other people who may be able to care for their child.

⁷³ *Adoption Act 1994 (WA)*, sch 2A

⁷⁴ *Ibid.*

If the pregnancy has been concealed and the parent(s) does not wish to involve family in decisions regarding the adoption of the child, the Department has very limited ability to go beyond the wishes of the parent(s) and must also balance the risk of the parent(s) disengaging from the adoption process due to confidentiality concerns, which could unintentionally place the child at risk. Further complicating factors also arise where a parent(s) does not identify as an Aboriginal person, as this may mean limited information is provided by the parent(s) regarding the family background and history for the child.

There is also tension between the application of this placement principle and a range of requirements under the act, which are set out in sections 45, 46 and 52.

Section 45 requires the CEO to seek the wishes of the person(s) consenting to the adoption in respect of the attributes of the prospective adoptive parents and type of upbringing being sought for the child. Profiles of prospective adoptive parents are provided to the birth parent(s) that match, as closely as possible, the attributes and upbringing sought the child.

Section 46 sets out requirements regarding negotiation of the adoption plan which is only to occur between the birth and the prospective adoptive parents selected under section 45, and if the CEO thinks it is appropriate, the child's representative. An adoption plan can only be negotiated between the birth parents and the prospective adoptive parents that have been selected, unless the court has added parties to the adoption plan⁷⁵, which is currently restricted to persons notified under section 59(2)⁷⁶ of the Act or a person who is a party to the proceedings.

Section 52 sets out the prerequisites for the CEO placing a child for adoption, which along with a number of other requirements includes meeting, as far as practicable, the wishes expressed under section 45, as well as the child's wishes. As part of these requirements the CEO must take account of whether the prospective adoptive parent recognises the value of, and need for, cultural and ethnic continuity for the child and shows a desire and ability to continue the child's established cultural, ethnic, religious or educational requirements. Section 52 (1)(ab) also requires the CEO to place the child in accordance with the Aboriginal or Torres Strait Islander children – placement for adoption principle as set out in Schedule 2A.

Placement of a child for adoption is complex and must comply with the requirements as set out in the Act. Consequently, the Aboriginal and Torres Strait Islander children - placement for adoption principle is not the sole consideration when placing an Aboriginal or Torres Strait Islander child for adoption.

⁷⁵ Section 70 of the Act sets out the circumstances under which a court may allow parties to be added to an adoption plan, which can only occur if a person is a party to the proceedings or is a person notified under section 59 (2).

⁷⁶ Section 59(2) of the Act requires that written notice of the intention to file an application for an adoption order in relation to the child is given to as many close relatives (means a birth parent or adoptive parent or a sibling of the birth parent) of the birth parents who have attained the age of 18 years as is practicable or in there are no close relatives to an aunt or uncle of the birth parent who has attained the age of 18 years and is reasonably available at the relevant time.

This review also considered a recommendation of the 2017 review of the CCS Act⁷⁷ to amend the Aboriginal child placement principle. Whilst the reference group considered that the Act should, in so far as is practicable, remain consistent with the CCS Act in respect of the Aboriginal and Torres Strait Islander child placement principle, any proposal to amend the Act in this regard would require careful consideration and must take account of the fundamental differences between placement due to child protection intervention as opposed to placement arising from adoption.

Recommendation 31

Consideration should be given to the appropriateness of amending the Act's Aboriginal and Torres Strait Islander placement for adoption principle (Schedule 2A) subject to any amendments to the *Children and Community Services Act 2004* Aboriginal and Torres Strait Islander child placement principle.

3.7 Adoption from out-of-home-care

Over the past couple of years in Australia there has been an increasing dialogue about adoption of children from out-of-home-care. In 2014 NSW introduced legislative reforms under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to require consideration of adoption of non-Aboriginal children in out-of-home-care ahead of long term foster care. There are divergent views across child protection systems in Australia regarding adoption from out-of-home-care and it is an issue that requires careful consideration. Whilst this issue is not the primary focus of the review, a number of submissions received did refer to it.

3.7.1 Current legislation

The Act currently enables carer adoption by any type of carer, not just a foster carer. The meaning of carer within the Act is “*a person with whom the child lives, and who, either alone or jointly with another person, has the daily care of the child.*” This means that any person who has the care of a child in accordance with this meaning and sections 55A⁷⁸ and 55C⁷⁹ can apply to adopt the child.

Whilst adoption from out-of-home-care (that is a child subject to a protection order, either time limited or until 18 order under the CCS Act) can be facilitated under the Act, it is a requirement that the CEO must be satisfied that the child's adoption would be preferable to making a protection order (special guardianship) under the CCS Act⁸⁰ before the CEO can approve the placement of a child with a view to adoption. Once the adoption application is made, the Court must also be satisfied of this requirement⁸¹.

An application to the Court for a carer adoption can only be made if the child has been in the care of the person for at least two years immediately preceding the application and

⁷⁷ Statutory review of the CCSA 2004, pp 42-43.

⁷⁸ Section 55A sets out the approval for placement of a child with a relative or carer with a view to adoption of the child by that person.

⁷⁹ Section 55C requires that the child has been in the care of the person making the application for adoption for a period of at least 2 years and that the placement of the child was approved in accordance with s 55A.

⁸⁰ *Adoption Act 1994* (WA), s 55A(5)

⁸¹ *Adoption Act 1994* (WA), s 68(1)(fc)

the child's placement with the carer has been approved by the CEO for the purpose of adoption under section 55A of the Act.

3.7.2 Submissions

Of the 39 submissions to the review, 10 were identical proforma submissions which advocated for adoption from out-of-home-care. Adopt Change⁸² also provided a detailed submission primarily focussed on simplifying adoption procedures and processes to better facilitate adoption from out-of-home-care. A submission from an individual residing in NSW also advocated for adoption from out-of-home-care, but focussed on the concept of simple adoption,⁸³ which does not sever all legal relationships with a child's birth family.⁸⁴

The submission from FINWA also addressed adoption from out-of-home-care but did not support it, asserting that *"children in the care system have families and carer focus needs to be supporting reunification, relational permanency and family inclusion."*

The AFLS submission outlined concerns about practices that facilitate adoption from out-of-home-care and further alienate Aboriginal children from their community, family and culture. AFLS suggested *"instead of adoption and long term care for these children, there should be wider resources put into helping families recover and reunify, and to fostering greater community ownership where Aboriginal people play a role in the safety of their own children."*

3.7.3 Analysis

Adoption has lifelong and far reaching impacts for all parties involved. Whilst adoption from out-of-home-care has been briefly examined as part of this review, it has not been a principal focus of the review. It is an issue that cannot be considered purely from a legislative perspective or in isolation from the Department's permanency planning policies and approaches.

The primary focus for any decision regarding a child in out-of-home-care must be on assessing what is in the best interests of each individual child, identifying and meeting the child's long term needs and the options that are available to achieve this. Once a decision for long term out-of-home-care is made, the long term placement options need to be reviewed and fully considered, which could include long term foster care (many children in out-of-home-care are in placements in which they will remain until they reach 18 years of age), a protection order (special guardianship) or adoption.

⁸² Adopt Change is a NSW based organisation founded by Deborah-Lee Furness and has a focus on ensuring *"all children have access to a safe, nurturing and permanent family home and that families are well supported."*

⁸³ Simple adoption was first introduced in the 1800's as a way of enabling inheritance so that estates of deceased people did not pass to the State. Originally, it was only applicable to people aged older than 50 years, with no biological children and the adoptee had to be an adult. Simple adoption is practised in some overseas countries, most notably France.

⁸⁴ Notaires de France; www.notaires.fr/en/couple-family/adoption/simple-adoption, accessed 15 August 2018. Simple adoption creates a new parent-child relationship between the adopter and the adoptee. However, unlike full adoption, it does not sever the links between the adoptee and their family of origin. Once the adoption has been formalised, the two parent-child relationships coexist, so the adoptee has two families.

Adoption from out-of-home-care may seem like a simple solution for providing stable permanent homes for children who are unable to return to live safely with their family. However, there are many complexities that must be taken into account before deciding that adoption is in the best interests of a child.

When considering adoption of children in out-of-home-care in Western Australia, the Act requires both the CEO and the Court to consider whether a protection order (special guardianship) under the CCS Act is “preferable” to adoption.⁸⁵ Further, the Court must also be satisfied that an adoption order is preferable to a parenting order.⁸⁶

A protection order (special guardianship), known as a special guardianship order (SGO), provides a meaningful way to provide long term stable placements for children in out-of-home-care. SGOs give an individual, or two individuals jointly, parental responsibility for a child until the child reaches 18 years of age. When an SGO is in force the special guardian(s) has full parental responsibility for the child to the exclusion of any other person and the child ceases to be in the care of the CEO.

In considering SGOs, the reference group noted that between July 2012 and June 2017 there were 469 SGOs granted and during this same period 25 SGO’s were revoked and/or replaced. Of the orders made, 344 were with relative carers and 125 were with general carers.

Unlike adoption, an SGO does not sever a child’s legal relationship with their family, result in changes to the child’s birth certificate or affect inheritance or other entitlements available to the child because of their parentage or family heritage. Importantly, SGOs can provide stability and belonging for a child in out-of-home-care and enable the child to make a choice about their adoption. Whilst this would most often be once the child reaches 18 years of age, the Act also enables a person of 16 years or more to apply to the Court for dispensation of parental consent when the prospective adoptive parent is a carer (or relative or step-parent).

In exploring adoption from out-of-home-care the reference group considered Western Australia’s children in care population, noting that as more than half of all children in care are Aboriginal, adoption would not generally be a suitable option. Consideration was also given to the number of children on a protection order (time limited) under the CCS Act and whether they are placed with relative carers. For a child subject to a protection order (time limited), re-unification with family is usually the goal and therefore consideration of adoption at that juncture may not be in the best interests of the child. For children in care placed with relative carers, although the Act enables adoption by a relative, the Court before making an adoption order must be satisfied that *“there are good reasons to redefine relationships within the child’s family in the way the order would do.”*⁸⁷

The reference group also noted that the most frequently adopted age group is between one to four years of age, with all local adoptees in Australia in 2016-17 aged under

⁸⁵ *Adoption Act 1994* (WA), s 68(1)(fc).

⁸⁶ *Adoption Act 1994* (WA), s 68(1)(fa).

⁸⁷ *Adoption Act 1994* (WA), s 68(1)(fb).

five years.⁸⁸ Research also suggests that adoptions are most likely to breakdown when the child is aged over four at the time of placement.⁸⁹ Consequently, this means that for many children in out-of-home-care adoption may not be a viable option.

Whilst NSW has introduced 'unknown' adoption from care, this approach has not been embraced more broadly in Australia. Countries such as the United Kingdom have enabled adoption from out-of-home-care for many years. However, there is still limited information known about adoption disruption rates.

The VLRC review of the Victoria's adoption legislation also considered adoption from out-of-home-care and recommended *"the creation of a pathway to adoption from permanent care in strictly limited circumstances"* and that *"eligibility should be limited to people applying to adopt a child who has been placed with the applicant under a permanent care order for at least two years. The two-year requirement ensures that children will not be quickly moved from permanent care to adoption."*⁹⁰ These recommendations are consistent with existing provisions in the Act.

A research report undertaken through the University of Bristol School for Policy Studies Hadley Centre for Adoption and Foster Care Studies focussed on the challenges beyond adoption, including adoption disruption. This report estimated that in Britain 4 percent of children return to care every year after an Adoption Order is granted.⁹¹ This research also presented the perspectives of young people who had experienced an adoption disruption and their feedback included:

"Young people not being listened to and not being believed. This was in relation to children not having a voice in adoption and the young people thought that any child over four years should have to agree to adoption. Young people also thought that there should be more investigation if they made a complaint about a social worker."

"Most of the young people said that at the time they were adopted nobody had really asked them if they wanted to be adopted. They stated that they had not wanted adoption and some had wanted to stay with their birth mothers. After they had left, their adoptive families' four young people had traced their birth families but found that the reality did not match their fantasy and were rejected again."

"Young people wanted more support for their adoptive parents and for themselves. They would have liked their own social worker when relationships had been difficult at home."

"Half of the young people had been bullied at school because of their adoptive status."⁹²

Adoption should not be seen as a panacea to the rising number of children in care; the reality is there are a range of complex matters that must be considered in determining whether adoption is in the best interests of a child in care.

⁸⁸ Australian Institute of Health and Welfare, *Adoptions in Australia 2016-17*, p 24.

⁸⁹ *Beyond the Adoption Order: challenges, interventions and adoption disruption*, Research Report, p 54.

⁹⁰ VLRC Review of the Adoption Act 1984, p 20.

⁹¹ *Beyond the Adoption Order: challenges, interventions and adoption disruption*, Research Report, p 18.

⁹² *Beyond the Adoption Order: challenges, interventions and adoption disruption*, Research Report, p 249-251.

Decisions regarding policy settings and approaches to permanency planning for children in care must be determined in the context of child protection practices and frameworks. In Western Australia, adoption is available in a continuum of care options for a child in out-of-home-care. However, it must be considered on an individualised basis taking account of all the relevant information available, including the views and wishes of the child. In view of this, and given the Act currently enables carer adoption (which includes adoption of children by their foster carer), it is considered the Act sufficiently provides for adoption from out-of-home-care.

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5 Appendix A: List of submissions received

Total number of submissions received: 39

Professional Submissions Received

1. Aboriginal Family Law Service
2. Adopt Change
3. Adoption Applications Committee
4. ARMS WA
5. Australian Association of Social Workers
6. Department of Communities
7. Department of Communities
8. Equal Opportunity Commission
9. The Family Inclusion Network of WA
10. The Society of Professional Social Workers
11. Women's Law Centre of WA

Personal Submissions Received

12. Ms Jennifer Adley
13. Ms Amanda Anscombe
14. Ms Shannon Jade Burns
15. Ms Natalie Calleja
16. Ms Nicola Carson
17. Mr Martin Dearlove
18. Ms Lynne Devine
19. Mr Herman Driesen
20. Mrs Helen Driesen
21. Mr Benjamin Driesen
22. Mr Daniel Driesen
23. Ms Tiffany English
24. Ms Laura Espinoza-Nazzari
25. Ms Alex Kopp
26. Ms Suzanne MacDonald
27. Ms Bev Shipway
28. Ms Kathleen Smith
29. Ms Melanie Thompson
30. Ms Karen White

The Review also received nine submissions that requested anonymity of the author for reasons of privacy and confidentiality.