



COMMISSION FOR CHILDREN AND YOUNG PEOPLE

23 September 2016
CCYPD/16/703

The Honourable Philip Cummins AM
The Chair
Victorian Law Reform Commission
DX 144 Melbourne

Dear Judge Cummins

Review of the Adoption Act 1984

We refer to previous communications between the Commission for Children and Young People (the Commission) and the Victorian Law Reform Commission (the Law Reform Commission) concerning your review into Victoria's adoption laws (the Review). We are pleased that the Law Reform Commission has been asked to conduct this important reference.

The Commission's objectives in contributing to improvement in policies and practices relating to the safety and wellbeing of children and young people in Victoria underpin our interest in the Review. In addition, as you are already aware, the Commission is currently conducting an Inquiry into the implementation of the *Children Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (the Permanency Amendments Inquiry) at the recommendation of the Minister for Families and Children.

We note the Consultation Paper that the Law Reform Commission has released to assist in its Review. It is clear from consideration of the Consultation Paper that the Review and the Permanency Amendments Inquiry will deal with a number of key underlying concepts in common.

Those concepts include:

1. The history and development of national (and international) law and policy relating to adoption and child protection including the United Nations Convention on the Rights of the Child (the Convention)
2. The application of the principle of the best interests of the child as set out in the Convention generally and in relation to adoption
3. The particular application of the best interests principle to Aboriginal and Torres Strait Islander children including the Aboriginal Child Placement Principle
4. The developing understanding and practice for ensuring the participation of children and young people in decisions affecting them as promoted by the United Nations Committee on the Rights of the Child.

We offer the following general comments in relation to these concepts for your consideration.

National and International Policy Context

We endorse your discussion of the relevance of historical development in understanding the limited use of adoption today particularly in the context of forced adoption and the Stolen Generations. We would also encourage consideration of the ongoing impact of past practices of colonisation, dispossession of land and removal of communities on Aboriginal children and families.



We also call your attention to the National Framework for Protecting Australia's Children 2009-2020 "Protecting Australia's Children is Everyone's Business" (National Framework) with its goals of a coordinated national approach to reform in child protection that gives greater priority to providing support to vulnerable families to prevent child abuse and neglect. These goals will contribute to ensuring that the circumstances where adoption is sought do not include those where sufficient support for vulnerable families could otherwise have been provided.

We believe that greater coordination of effort in legislation and policy development at a state and territory level as mandated by the National Framework would support best practice development in adoption as well as in care and protection for children.

The 'Best Interests' Principle

We note your discussion of the differing interpretation and application of the 'best interests' principle in various legislative and policy settings that relate to and impact on children. Ideally all these settings should be consistent in their application of the principle and this application should be based on the Convention on the Rights of the Child. We note that the Convention proposes the principle as a guide for all decisions concerning children not limited in time or settings.

Article 21 of the Convention raises the bar even higher in adoption in recognition of the more permanent nature of adoption decisions by placing the child's particular interests above all others.

The Convention contemplates consideration of all the relevant rights afforded to children in the determination of the best interests of each child in every relevant decision. Clearly it would also be desirable that the expression of the 'best interest' principle in the *Adoption Act 1884* is consistent with its expression in the *Children, Youth and Families Act 2005*.

As a matter of practice this creates a considerable burden on a decision maker without the necessary skills and experience and access to all pertinent and reliable information concerning each child in every circumstance. We suggest that the best approach to reform may not be to provide a statutory formula but to support the development of the necessary skills and experience and to provide access to the relevant information for decision makers. This may include the use of checklists and guides and the sharing of knowledge based on previous experience in decision making for this child or other children in similar circumstances. Training and education in child rights would also assist skills development.

There will be considerable value in decision makers taking into account the views and knowledge of the child (where appropriate) and those who are familiar with the child and their circumstances. Particularly in the case of infants, this should include those familiar with the family, community and culture of the child. There would also be value in taking into account the balanced views of those in the family and community who are able to reflect on the impact of their own values and interests towards the child.

Aboriginal and Torres Strait Islander Children

We commend the discussion of the historical and current issues in adoption for Aboriginal and Torres Strait Islander children particularly the focus on the use of an Aboriginal Child Placement Principle (in Chapter 6 of the Consultation Paper) as a means to provide for the best interest of Aboriginal and Torres Strait Islander children.

The Commission intends to table two reports in the Victorian Parliament in October 2016 concerning child protection services for Aboriginal and Torres Strait Islander children. We would encourage your Review to consider these reports when available.

Each report has considered the use of the Aboriginal Child Placement Principle and the provision of support in placing Aboriginal and Torres Strait Islander children in out-of-home care. We would argue that the importance of measures such as the Principle to protect the best interests of Aboriginal and Torres Strait Islander children is even greater in the context of decisions in adoption.

The Commissioner for Aboriginal Children and Young People would welcome the opportunity to consult further with the Law Reform Commission on whether and how the policy and practice of adoption in Victoria would be appropriate for Aboriginal and Torres Strait Islander children.

The Participation of Children and Young People

As noted in your Consultation Paper, the right of children and young people to participate in decisions affecting them has been identified by the United Nations Committee on the Rights of the Child as one of the four general principles of the Convention on the Rights of the Child. The Committee has counselled that the right should “be considered in the interpretation and implementation of all other rights”.

Policy, practice and legislation supporting the implementation of this right are still developing. In Australia there has been some valuable experience and insights into the advantages and opportunities offered by children’s participation particularly in health programs and research. Some of this work has offered particularly exciting and challenging insights as to the participation of younger children.

In child protection and family law, development has been sometimes limited by a tendency to exclude or limit children’s involvement as a protective measure rather than through the development of the skills to engage children safely. The Commission is of the view that adoption is an area where the development of policy and practice in participation will offer benefits as well as significantly reduce the risk of future trauma and anxiety from uncertainty and secrecy.

We would also support different approaches for children at each stage of personal development, recognising the differing capabilities and supports required for infants, young children and adolescents. As with the implementation of the best interest principle, the Commission is keen to support the development of more appropriate skills and guidance rather than the imposition of arbitrary rules and requirements. This approach will ground practice that will more capably address issues such as consent, capacity, privacy and representation.

In addition to these comments, we also offer the following thoughts in response to some of the other particular questions raised in your Consultation Paper.

Eligibility

The Commission supports the need to update current adoption eligibility requirements. Eligibility should reflect the diverse familial arrangements that are present in contemporary Australia. The best interests of a child are served when the determination of suitability to adopt is based on holistic, thorough assessment of ability to meet the needs of a child or children, rather than arbitrary relationship status and cohabitation requirements.

Information

The Commission supports the view that the birth certificates of adopted people should include relevant information about the parent or parents to whom they were born. We are mindful of the trauma caused by past adoption practices that hid the birth information of adopted people.

We note the findings and recommendations of the reports of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families and the Commonwealth Contribution to Former Forced Adoption Policies and Practices.

We also draw your attention to the terms of the Convention that provide for the right of the child to preserve their identity, including their name and family relations. We are generally supportive of the introduction of integrated birth certificates that identify the parent or parents to whom an adopted person was born and their adoptive parent or parents. Such certificates should be capable of being used as legal proof of identity.

Once again we thank you for the opportunity to contribute to this Review and for the thoughtful work already undertaken. We look forward to discussing the most appropriate next steps for our two organisations in addressing the issues raised by this Review.

Yours sincerely



Liana Buchanan
Principal Commissioner



Andrew Jackomos PSM
Commissioner for Aboriginal Children and Young People