

CHAPTER 3 THE CONCEPT OF ADOPTION AND GENERAL PRINCIPLES

3.1 What is adoption?

Adoption has affected the lives of hundreds of thousands Queenslanders and, as a result, the concept and legal process of adoption are familiar to many. A person's understanding of adoption is often informed by his/her own experience of adoption or a family member's or friend's experience.

Perceptions of adoption are often based on the legislation and practices that applied at the time of a person's experience, rather than on current legislation and practice. For example, many people may still see adoption as a means of providing illegitimate children with two legally married parents as this was the primary purpose of adoption in the early and mid-1900s. Others may see adoption as a way for infertile couples to have children. In earlier times, adoption was regarded as a means to ensure the continuation of a family name, property or title. Adoption has served different purposes in different societies at different times.

In Queensland, as in other places, adoption practice and legislation has changed with increasing understanding of the needs and interests of children and in response to social changes at a local, national and international level:

Adoption mirrors the social changes taking place in the society in which it is practiced. It evolves to reflect changes as the ethical systems and the usual ways of caring for children in the community change.⁴

In the contemporary Queensland context, adoption can be broadly defined as:

- a service for children requiring a permanent family;
- an option parents can choose to secure a permanent family for their child;
- an option adoption authorities in some overseas countries can choose to secure a permanent family in Queensland for a child born overseas;
- a legal process that transfers parental rights and responsibilities from a child's birth parents to his/her adoptive parents;
- a social process which promotes responsible parenthood, provides permanent families for children and which requires the resources of prospective adoptive parents with the capacity to provide high quality families for children; and
- an arrangement that can be authorised, in accordance with provisions of the *Adoption of Children Act 1964* and *Adoption of Children Regulation 1999*, only by the Department of Families on behalf of the Queensland Government.

⁴ J. Triseloitis, J. Shireman and M. Hundleby, *Adoption Theory, Policy and Practice*, Cassell, United Kingdom, 1997.



3.2 Public regulation of adoption

Australia's ratification of the *United Nations Convention on the Rights of the Child* (UNCROC) became effective in 1991. In accordance with the UNCROC, the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993* specify that the adoption of children must be subject to comprehensive legal regulation. Australia's ratification of the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (the Hague Convention) came into effect in 1998. The Hague Convention takes into account principles set forth in international instruments, in particular the UNCROC.⁵

Public regulation of adoption commenced in the early twentieth century in response to abuse and exploitation of illegitimate children who could not be cared for by their mothers and who were not cared for by the State. Such abuses included the practice of 'baby farming' where mothers who could not care for their babies paid a fee to persons running commercial establishments to care for children. Many of these children were passed on to other 'adopters' for a lesser fee or were left to die of neglect. There are even recorded cases of children being killed by 'baby farmers'. Regulating adoption practices was regarded as one of a range of strategies for the State to better protect children.⁶

Public regulation of adoption is now widely supported and has provided the foundation for adoption arrangements in Queensland and throughout Australia and similar jurisdictions since the early twentieth century. It also provides the foundation for facilitating Queensland's participation in intercountry adoption.

Public regulation of adoption recognises the need for the State to safeguard children's interests that cannot be adequately protected or consistently safeguarded under private arrangements. Public regulation also recognises the need to safeguard the rights of other parties to adoption. It helps prevent corrupt practices, profiteering and trafficking in children and the need for this was most recently highlighted in the intercountry adoption context by the establishment of the Hague Convention.

3.3 Is there a need for adoption?

As indicated above, the form and purpose of adoption reflects society's cultural and economic values regarding families and the rights and interests of children at different times in history. There have been significant social and economic changes since the *Adoption of Children Act 1964* was enacted, and these have been reflected in changing adoption practices. For example, since the 1960s:

- income support for single parents has been introduced;
- the social stigma and legal disadvantages associated with illegitimacy have been removed and many children are now born to unmarried or single parents;
- the availability and efficacy of contraception has increased significantly;
- there has been a growing recognition of the value of various family structures;
- there has been increasing recognition of the rights of children and a rejection of the view that children are the 'property' of their parents;
- the *Family Law Act 1975* and modern child protection legislation have been enacted to provide a variety of alternative care arrangements to meet children's needs;
- the rights of children and adults to know about their biological and cultural heritage have been recognised, resulting in the development of open adoption practices and adoption practices that emphasise the importance of recognising and valuing children's racial, ethnic and cultural background;
- the rights and responsibilities of birth parents are better recognised and there is much greater sensitivity to the needs of birth parents; and
- divorce, family breakdown and the establishment of second and blended families is much more common.

⁵ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption

⁶ A. Marshall and M. McDonald, *The Many-Sided Triangle*, Melbourne University Press, 2001

These socio-economic and legal changes mean the majority of children now born to young parents and single parents remain in the care of their birth parents or families. Between 1998-99 and 2000-01, approximately 14 per cent of parents who consented to their child's adoption were married or in a defacto relationship. Mothers consenting to their child's adoption in this period were aged between 15 and 41 years with a median age of 23 years and approximately 50 per cent had a child/ren older than the child subject to the adoption consent.⁷

A variety of care arrangements are now available for children whose parents separate or are unable to care for their children. These include Family Court parenting orders or alternative care arrangements made under child protection legislation.

As socio-economic and legal changes mean fewer children born in Queensland require alternative families, people seeking to establish a family have become more interested in intercountry adoption.

The key features of adoption under current Queensland legislation is the provision of a new permanent legal family for a child and the complete severing of the child's relationship with his/her birth family. This involves issuing a new certificate of birth which declares the adoptive parents to be the parents of the child. Details of the child's birth parents are not included on the certificate of birth and, under the secrecy framework of the Act, cannot be disclosed to the child until he/she turns 18.

In reality, practice is sometimes contrary to this secrecy framework and promotes more open adoption arrangements whereby adoptive parents are encouraged to tell children of their adoptive status, and adoptive families and birth families are able to exchange non-identifying correspondence with each other via the Department. Open adoption practices and options are discussed in Chapter 4.

With increasingly open adoption practices and a greater range of legal arrangements available to secure children's places within families, many people question the need for adoption in today's society. There are many arguments both for and against adoption in the contemporary context.

Arguments for adoption can be summarised as follows:

- overall, research indicates that adoption is beneficial for many children – adopted children generally appear to progress as well as non-adopted children according to a range of developmental measures;
- adoption can provide a sense of security and belonging for children that is not provided by any other care arrangement because it provides a final, permanent and exclusive outcome that encourages adoptive parents to treat the child as their own and enhances their sense of commitment to the child;
- adoption practice is flexible and can adapt to changing social conditions; and
- adoption continues to be accepted by the community as a valid and successful permanent care option for children.

Criticisms of adoption can be summarised as follows:

- adoption is fundamentally flawed and contrary to children's rights because it removes a child's biological, social and cultural identity and replaces it with a legally fictitious one;
- children are denied access to information about their birth families and their origins and are denied any relationship with their birth parents;
- adoption treats children as property by transferring rights to them from one adult to another;
- the secrecy framework underpinning the traditional concept of adoption is being undermined by increasingly open adoption practices;

⁷ In the period 1998-99 to 2000-01, there were 63 instances where parents consented to a child's adoption. In six instances the consent was revoked. Department of Families.



- research indicates that, while overall adoption outcomes are positive, this is not the case for all adopted children and that some people face difficulties arising from their adoption; and
- legal mechanisms exist or can be created to ensure that children who cannot be cared for by their parents are provided with permanency and a sense of security with long-term carers without having to deny their birth heritage.

Between 1993 and 1996, the New South Wales Law Reform Commission (NSWLRC) conducted a comprehensive review of adoption legislation and practice in New South Wales. This resulted in new legislation, the *Adoption Act 2000* (NSW), which has recently been enacted.

After canvassing the issue of the continuing validity of adoption in a number of consultation papers, the NSWLRC concluded that adoption should be maintained as one of a range of care alternatives for children. Submissions overwhelmingly supported the Commission's proposal that *adoption be maintained but that its regulation and practice be amended to accommodate relevant criticisms:*

The legal permanency which adoption provides can offer a child stability, continuity of relationships, a sense of belonging and identity, and a defined legal status. However, submissions also cautioned that adoption was not always a suitable long-term alternative care plan for a child. In each case, the system should ensure, as far as possible, that thoughtful and informed decisions are made in relation to the needs of each child. This refers not only to the needs in existence at the time of the adoption order but also to those that may arise later in the child's life. Adoption should only be considered where the circumstances of the particular child dictate that it is the alternative care order that best meets his/her needs.⁸

Should adoption be retained as one of a range of alternative care options for meeting the needs of children?

3.4 Objectives of adoption legislation

The objective of the *Adoption of Children Act 1964* is:

to facilitate securing for children who are available for adoption the best possible placements, having regard to the welfare and interests of the children, and to protect the rights and provide for servicing the needs of all parties to the adoption process.

Although the objective of the *Adoption of Children Act 1964* is still relevant, it does not clearly define adoption as being primarily a service for children; nor does it identify that the interests of the adopted person, both in childhood and adulthood, are paramount in adoption practice and law, as some other States' legislation provides.

The objective of the *Adoption of Children Act 1964*, while still relevant, is ambiguous in part and does not adequately reflect principles drawn from research literature, practice experience and international conventions that inform contemporary, child-focused adoption practice and which are discussed below.

⁸ Review of the *Adoption of Children Act 1965* (NSW), Report No. 81, NSW Law Reform Commission, Sydney, 1996, page 14

In the contemporary context, the objectives of adoption legislation may be:

- to ensure that the best interests of the child requiring an adoptive placement, both in childhood and throughout life, are the paramount consideration in adoption legislation and practice;
- to recognise that adoption is a service for children requiring adoptive placements;
- to ensure appropriate consideration is given to a child's ethnic, religious, cultural and linguistic background in adoption decisions;
- to ensure children have access to information about their family background and cultural heritage and opportunities to maintain or develop their cultural identity;
- to recognise that ongoing information exchange and/or contact with birth parent/s after an adoption order has been made may be in the best interests of a child;
- to ensure Queensland adoption legislation and practice complies with Australia's obligations under relevant bilateral agreements and international conventions; and
- to support child-focused, efficient and accountable adoption services and practices.

*Do these objectives adequately describe the purpose of contemporary adoption legislation?
Please provide comments.*

3.5 Principles guiding adoption practice

A contemporary, child-focused framework for adoption legislation is required to ensure adoption appropriately serves children and families within today's complex social structures and responds to the diverse views and interests of individuals and groups within the community. In developing such a framework, it is necessary to identify principles which will best guide and inform adoption practice now and in the future.

3.5.1 Current legislative provisions

The *Adoption of Children Act 1964* does not provide a comprehensive statement of the principles which guide adoption practice decision-making in Queensland. Only one principle is specifically stated in the Act⁹:

For all purposes of this part (part 3) and part 2, the welfare and interests of the child concerned shall be regarded as the paramount consideration.

Therefore, the welfare and interests of the child are intended to be paramount in the consideration of matters such as who may be adopted, who may adopt children, the assessment of prospective adoptive parents, review processes, the discharge of adoption orders, intercountry adoption, adoption consent requirements and the effect of adoption orders.

⁹ *Adoption of Children Act 1964*, section 10



3.5.2 Nationally and internationally recognised principles in adoption

Principles identified by a range of child welfare authorities and sources guide adoption practice in Queensland and other jurisdictions. They include:

- the *Adoption of Children Act (Qld) 1964*;
- the *United Nations Convention on the Rights of the Child 1989 (Appendix 1)*;
- the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993 (Appendix 1)*; and
- the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*,

Nationally and internationally recognised principles guiding adoption practice are largely consistent and provide a common basis from which to undertake adoption practice, without prescribing specifically how adoption services must be delivered.

The most recent statement of principles informing contemporary Australian practice is contained in the *Adoption Act 2000* (NSW) objects and principles (see Appendix 1). The provisions of the *Adoption Act 2000* (NSW) are of particular interest in the Queensland context in many instances, including the consideration of principles informing practice, because the objects and principles identified in the *Adoption Act 2000* (NSW) reflect the philosophy of current adoption practice and because of the extensive research and consultation undertaken by the NSWLRC in drafting the New South Wales Act.

Northern Territory adoption legislation also contains a set of principles which guide decision-making by the Minister and the Court. As in Queensland, all other State and Territory adoption legislation provides that the welfare and interests of the child must be the paramount consideration.

Should Queensland legislation include a statement which outlines principles to guide and support contemporary, child-focused adoption legislation, as some other States do?

3.6 Primary operating principle - the best interests of the child are paramount

The principle that the best interests of the child must be paramount in adoption is reflected in all Australian adoption legislation, the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993*, the *United Nations Convention on the Rights of the Child 1989*, and the Hague Convention.

The need to ensure that the interests of children requiring adoption are paramount in adoption practice is fundamental and the primary principle on which the operation of adoption legislation and practice is based.

A number of guiding principles are also required to enable the primary principle to be applied, and it is necessary to have a clear and consistently understood definition of this principle. How to define the best interests of children requiring adoptive placements is discussed in section 3.8 of this consultation paper.

3.7 Guiding principles

The following principles (3.7.1 to 3.7.7) provide guidelines for applying the primary operating principle to the development of contemporary, child-focused adoption legislation.

3.7.1 The best interests of the adopted person throughout his/her life

The Adoption Legislation Review's Terms of Reference include a requirement to identify and develop appropriate responses to promote the welfare and best interests of adopted people throughout their lives.

This requirement reflects the contemporary view that adoption is a lifelong experience.¹⁰ The best interests of children include consideration of issues affecting their ongoing quality of life and interests, both at the time an adoption order is made and after the person has been adopted.

This principle recognises that the lifelong interests of the adopted person must come before the interests of other parties to the adoption and is identified in the *Adoption Act 2000* (NSW).

Issues associated with safeguarding the interests of adopted persons throughout their lives is discussed in sections 12.1 and 12.2 of this consultation paper.

3.7.2 Adoption is a service for children

The principle that adoption is a service for children, rather than a service for adults seeking to acquire the care of a child, is reflected in the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993*, the UNROC, the Hague Convention, the *Adoption Act 2000* (NSW), and the *Adoption of Children Act 1964*.

This principle recognises that the primary purpose of adoption is to protect the interests and meet the needs of children requiring adoption within a child welfare framework. It identifies adoption as:

- a service for children who would not otherwise have a permanent, legal family;
- a responsible option parents can choose for securing a family for their child and/or a responsible option that overseas adoption authorities can choose to secure a family for a child with prospective adoptive parents in Queensland in some circumstances; and
- a permanent care option for children which depends on the recruitment and assessment of prospective adoptive parents who can provide a suitable permanent, legal family for a child requiring adoption.

The principle recognises that no person has an automatic right to adopt a child and that adoption is not an arrangement, or direct 'contract', between a child's birth parents and other adults seeking to acquire the care of a child.

¹⁰ D. Brodzinsky and M. Schechter, *The Psychology of Adoption*, Oxford University Press, USA, 1990.;
D. Brodzinsky, M. Schechter, D. Marshall and R. Marantz Henig, *Being Adopted, the Lifelong Search for Self*, Anchor Books, USA, 1993;
Child Welfare League of America, *Standards of Excellence for Adoption Services*, Revised Edition, CWLA, USA, 2000



3.7.3 Child's entitlement to know about his/her family background, cultural heritage and the opportunity to maintain or develop cultural identity

The principle that children requiring adoptive placements are entitled to know and have access to information about their family background and cultural heritage is reflected in the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993*, the UNROC, the Hague Convention, the *Adoption of Children Act 1964*, and the *Adoption Act 2000* (NSW).

The principle recognises that, in accordance with the UNROC, due regard must be given to a child's ethnic, religious, cultural and linguistic background when considering adoption. It also recognises that, in accordance with the Hague Convention, intercountry adoption must respect child's fundamental rights which include the right for his/her ethnic, religious, cultural and linguistic background to be considered in arranging adoption.

This principle is currently reflected in section 18A of the *Adoption of Children Act 1964*, which, in regard to children in Queensland, requires the Chief Executive to:

- ... have regard to the Indigenous or ethnic background and cultural background of the child and approve a prospective adopter who, or prospective adopters one of whom, has a similar Indigenous or ethnic background and cultural background, unless –
- (a) it appears to the Chief Executive that such a prospective adopter or prospective adopters is not or are not available and cannot reasonably be expected to become available promptly; or
 - (b) in the Chief Executive's opinion, the welfare and interests of the child would not be best served by doing so.

This principle is currently reflected in section 11 of the *Adoption of Children Regulation 1999* which requires the Chief Executive to consider the ability and willingness of all prospective adoptive parents to understand the child's cultural background and to develop or maintain the child's Indigenous, ethnic or cultural identity when assessing their suitability to adopt a child from a particular Indigenous, ethnic or cultural background.

The principle is also currently reflected in section 12 of the Regulation. When assessing the suitability of prospective adoptive parents seeking to adopt a child from overseas, the Chief Executive is required to consider their understanding of the child's country of origin, the culture of that country and their willingness to help the child to learn about his/her country of origin and its culture.

3.7.4 Indigenous child placement principle

Applying an Indigenous child placement principle to guide decision-making when determining the best interests of Indigenous children in adoption is consistent with the *Adoption of Children Act 1964*, the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993*, the UNROC, and the *Adoption Act 2000* (NSW).

Apart from section 18A, the *Adoption of Children Act 1964* contains no provisions specifically for the adoption of Indigenous children. The impact of past child welfare and adoption laws on Indigenous people has resulted in recognition of the need to consider a range of issues associated with the placement of Indigenous children, in addition to the issues considered in the placement of all children in Queensland.

The application of an Aboriginal and Torres Strait Islander Child Placement Principle in legislation and practice recognises the effect of removing children from their families, communities and culture by promoting the placement of Indigenous children within their families and communities.

Although not a specific provision of the Act, a Child Placement Principle was implemented in child protection and adoption practice in Queensland in 1986 and has been incorporated into the *Child Protection Act 1999* (Qld). All Australian social welfare ministers have endorsed the Child Placement Principle in the adoption context and the view that adoption of Indigenous children should only occur in the most exceptional circumstances.

This principle recognises that the best interests of Indigenous children are protected by ensuring decisions made about their adoption sufficiently consider their culture.

Adoption of Indigenous children and the Indigenous Child Placement Principle are discussed in detail in Chapter 6.

3.7.5 Birth Parents' entitlement to make decisions about their child's future care

The principle that birth parents (both mother and father) are entitled to make decisions about their child, including consenting to the child's adoption and participating in the selection of approved prospective adoptive parents for the child, is reflected in the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993*, the UNROC and the *Adoption Act 2000* (NSW).

This principle recognises that the interests and wishes of a child's birth parents must be given equal consideration in adoption decisions and arrangements, and that it is in the best interests of the child for the interests of birth and adoptive parents to be given equal respect.

The *Adoption of Children Act 1964* does not specifically provide birth parents with an entitlement to express preferences for their child's upbringing, other than religious upbringing. Neither does the Act make specific provision to allow birth parents to participate in the selection of approved prospective adoptive parents for their child, in a manner which respects the privacy of both birth parents and prospective adoptive parents.

The rights and responsibilities of birth parents are discussed in more detail in Chapter 4 (Open Adoption Practice) and Chapter 9 (Consent to Adoption).

3.7.6 Child's entitlement to be involved in decision-making

The principle that children requiring adoption are entitled to express their views about a proposed adoption (as far as possible considering their age and/or level of maturity), and for their views to be considered in decision-making, is consistent with the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993*, the UNROC, the Hague Convention and the *Adoption Act 2000* (NSW).

To some extent, this principle is also consistent with the *Adoption of Children Act 1964*. It prescribes that an adoption order cannot be made in relation to a child aged 12 or more unless the child consents to the proposed adoption, or unless the Court dispenses with the child's consent.

This principle recognises the Department's responsibility to ensure that, in accordance with the *United Nations Convention on the Rights of the Child 1989* (Article 12):

... the child who is capable of forming his/her views (is given) the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child ...

Children's participation in decision-making is discussed in more detail in Chapter 4 (Open Adoption Practice) and Chapter 9 (Consent to Adoption).



3.7.7 Entitlement of parties to an adoption to negotiate mutually agreed adoption arrangements

The principle that parties to an adoption are, with mutual agreement, entitled to participate in ongoing information exchange and/or contact after an adoption order is made is reflected in the Council of (Australian) Social Welfare Ministers' *National Minimum Principles in Adoption 1993* and the *Adoption Act 2000* (NSW).

The principle that children have a right to know and have information about their birth parents is reflected in the UNROC.

This principle recognises that open adoption arrangements may benefit children as well as their birth and adoptive families. It also recognises that open adoption can provide for varying degrees of information exchange and/or contact between parties to an adoption, while respecting that individuals' involvement in adoption is confidential outside the parties involved and the Department.

Open adoption is discussed in Chapter 4 (Open Adoption Practice).

Should the principle that the best interests of the child are the paramount consideration in adoption be the primary principle on which adoption legislation is based?

Should the following principles guide the way adoption services are delivered in Queensland, as they do in some other States:

- *the best interests of the child include his/her interests both in childhood and throughout life;*
- *adoption is a service for children, rather than a service for adults seeking to acquire the care of a child;*
- *children's interests and the interests of parties to adoption must be safeguarded by legally regulating adoption;*
- *a child is entitled to know and have access to information about his/her family background and cultural heritage, and is entitled to have the opportunity to maintain or develop his/her cultural identity;*
- *an Indigenous Child Placement Principle should be applied to adoption and placement decisions concerning Indigenous children;*
- *a child's birth mother and father are entitled to make decisions about their child;*
- *children are entitled to express their views about a proposed adoption (as far as possible given their age and/or level of maturity) and to have their views considered in adoption arrangements; and*
- *birth parents, children requiring adoptive placements (where they are of an age or have the maturity) and adoptive parents are entitled, subject to the agreement of all parties, to negotiate ongoing information exchange and/or contact after a child has been adopted?*

3.8 Defining the best interests of children requiring adoptive placements

The *Adoption of Children Act 1964* does not specifically guide the Chief Executive on how to fulfil the obligation to ensure the welfare and interests of the child to be adopted are the paramount consideration in the adoption process.

In practice, a range of factors are considered to determine what is in the best interests of children when decisions are being made. These factors include:

- (a) The expressed preferences of the child's birth parents, including:
 - their preferred religious upbringing for the child;
 - characteristics of prospective adoptive parents and the composition of the adoptive family;
 - the desire to participate in a voluntary exchange of non-identifying correspondence via the Department; and
 - other specific preferences which promote the child's best interests.

- (b) The specific needs of the child, including:
 - emotional, physical, educational, recreational and social needs;
 - the child's age, maturity and level of understanding;
 - gender;
 - Indigenous or cultural background,;
 - birth circumstances;
 - medical needs, including known medical conditions, disabilities or potential future health conditions or disabilities;
 - specific educational needs;
 - the requirement for the adopted child to be the youngest child in the family; and
 - any other specific needs.

- (c) The characteristics of the prospective adoptive parents, including:
 - the age and gender of the child for which they have been assessed and approved for having the capacity to parent;
 - whether they have been approved as having the capacity to parent a child from a different cultural background;
 - whether they have been approved as having the capacity to parent siblings;
 - their religion;
 - their Indigenous or cultural background;
 - their willingness to parent a child with known medical conditions, disabilities or potential future health conditions or disabilities;
 - their willingness to parent children from particular social backgrounds;
 - their willingness to participate in exchanging non-identifying correspondence (via the Department) with the child's birth family after an adoption order has been made, if applicable;
 - the age of other children in the prospective adoptive family, if applicable; and
 - other relevant factors.

Similar matters are outlined in the statement in the *Adoption Act 2000 (NSW)* regarding matters to be regarded in determining the best interests of children requiring adoptive placements. The matters outlined above are consistent with the requirements of the UNCROC.¹¹

Are the matters outlined relevant to determining the best interests of children requiring adoptive placements? Should Queensland legislation require these matters to be considered in determining children's best interests, as they are in some other States?

¹¹ *Adoption Act 2000 (NSW)* section 8 (2);

United Nations Convention on the Rights of the Child Articles 5 and 14.



3.9 The legal effect of adoption

Under the *Adoption of Children Act 1964*, the effect of an adoption order is that:

- the adopted child becomes a child of the adopter/s, and they become the parent/s of the child, as if the child had been born to them in lawful wedlock; and
- the adopted child ceases to be a child of any person who was a parent (natural or adoptive) of the child before the adoption order was made, and any such person ceases to be a parent of the child.¹²

In today's social context, this description implies that making an adoption order 'transfers ownership' of the child to his/her adoptive parents and implies that the child's birth parents and the circumstances of the child's birth are eliminated.

Describing the effect of an adoption order as making it "as if the child had been born to the adopter or adopters in lawful wedlock" was considered an appropriate response to safeguard children from the past stigma of illegitimacy. Today, there is generally no stigma attributed to the birth of a child outside marriage, so the use of adoption orders to 'counteract illegitimacy' is no longer relevant.

The current provisions of the Act attempt to make adoptive families exactly the same as other families in the community. When the Act was proclaimed, and at the time the *Family Law Act 1975* came into effect, there was a need to ensure adopted children and their families were afforded the same rights and respect as other families in the community. But in doing this, the unique differences of adoption and adoptive parenthood were not acknowledged.

Acknowledging that difference without accentuating it is now considered to be in the best interests of adopted children:

What at first sight might appear paradoxical – that acknowledging difference promotes integration – makes sense in terms of allowing sensitive, responsive relationships to develop between parents and children. To acknowledge difference is not to give it a negative connotation. It is simply to accept that it is present. It gives children a stronger sense of identity and who they are.¹³

It is possible to affirm that adoptive parents have the same rights and responsibilities as other parents in the community and to value adoptive families and other family formations equally without defining adoptive families as being exactly the same as birth families.

Describing the effect of an adoption order as causing the adopted child to cease to be the child of his/her birth parents and causing the adoptive parents to be the same as the child's birth parents is an inaccurate way to describe a legal relationship resulting from an adoption order. It does not acknowledge the social reality of the circumstances of the child's birth and adoption, and the link, whether acknowledged by the involved parties or not, that is created between birth and adoptive families.

It is possible to affirm that adoption permanently transfers parental responsibilities from a child's birth parents to a child's adoptive parents without attempting to eliminate the circumstances of the child's birth and the existence of the child's birth parents. Other Australian adoption legislation achieves this by describing the effects of an adoption order in law rather than denying the relationship between the child and the birth parents.

¹² *Adoption of Children Act 1964*, section 28

¹³ D. Howe, *Patterns of Adoption*, Blackwell Science, UK, 1998, p. 65.

As in some other States, should Queensland legislation describe the effect of making of an adoption order as being:

- the adopted child is regarded in law as the child of the adoptive parent/s and the adoptive parents are regarded in law as the parents of the adopted child;*
- the adopted child ceases to be regarded in law as the child of the birth parent/s and the birth parent/s cease to be regarded in law as the parents of the adopted child;*
- the adopted child has the same rights in relation to the adoptive parents as a child born to the adoptive parents; and*
- the adoptive parent/s have the same rights and responsibilities in relation to the adopted child as they would have if the child had been born to them?*