

CHAPTER 9 CONSENT TO ADOPTION

9.1 Making sure consent is informed and voluntary

The way in which a birth parent's consent to the adoption of his/her child is obtained is fundamental to ensuring the child's best interests are promoted through adoption and birth parents' rights and interests are protected.

Many criticisms of past adoption practices relate to the way in which adoption consents were obtained from parents. The impact of past practices has been well documented in *Releasing the Past*, the report of the Inquiry into Past Adoption Practices by the New South Wales Standing Committee on Social Issues, published in 2000. Past experience indicates it is essential for consents to be given voluntarily and for parents to fully understand the consequences of the decision being made when consents are signed.

The *Adoption of Children Act 1964* sets out whose consents are required, and the requirements for giving consents. These requirements are designed to ensure consents are given freely and relate to the timing of consent, the form of consent, witnessing consents and withdrawing and dispensing with consents.

The Act does not specifically require counselling of birth parents or providing them with information on the consent's meaning, other than that implied by the requirement that the person understands the nature of the consent to be provided. These issues are considered below.

The *United Nations Convention on the Rights of the Child* and the Hague Convention set out a range of principles and obligations that are relevant to adoption consents. They are:

- the principle that the child's best interests are paramount;
- the States' responsibility for taking appropriate measures to enable the child to remain in the care of his/her family of origin;
- the right of a child to know and be cared for by his/her parents as possible;
- the States' obligation to ensure a child is not separated from his/her parents against their will; and
- the States' obligation to ensure persons whose consent is required for adoption have been counselled and duly informed of the effects of their consent, that they have given their consent freely, their consent has not been induced by payment or compensation, their consent has not been withdrawn and the consent of the mother has been given only after the birth of the child.

9.2 The timing of consent

9.2.1 Current law and practice

The *Adoption of Children Act 1964* states an adoption order cannot be made if the birth mother signed the consent documents within five days of giving birth, unless the Director-General is satisfied that the mother was in a fit condition to give the consent. In current practice, this provision is never used and consents are not taken during that five day period. Most consents are usually signed between 10 and 14 days following the child's birth.

The Act also prohibits the Director-General from making an adoption order if it appears that the person giving the consent was not in a fit condition to give the consent or did not understand the meaning of the consent.



9.2.2 Discussion

Any legislative time period that specifies how soon after a child's birth a parent may consent to the child's adoption must attempt to balance a number of competing interests and considerations.

These are:

- the rights of parents to information and support to enable them to make an informed and voluntary decision;
- the rights and interests of the child to be cared for by his/her parents and family if possible; and
- the child's need to be placed with a permanent family as quickly as possible.

Past experience and research indicates birth mothers are particularly vulnerable immediately after the birth and time is needed for them to consider all the care options.

Another argument is that a longer period of time may merely extend the period of indecision for birth parents and could result in the child either being in temporary care for longer or further delaying the placement of the child with an adoptive family. This may have negative effects on the child's psychological well-being and on future emotional attachments, although research on bonding and attachment indicates that early positive experience of attachment enables a child to adjust and re-attach to another carer.

If a child has a positive experience in pre-adoptive foster care, this should assist him/her to re-attach to the adoptive or birth parents.⁶⁰ Research is limited in relation to very young infants and it is difficult to say definitively that a child under six months would be negatively affected by remaining in a pre-adoptive placement for a longer period after birth during which consent cannot be given.⁶¹

The period after birth during which parents cannot give consent is longer in all other Australian jurisdictions than it is in Queensland. The most recent legislation, the *Adoption Act 2000* (NSW), states that parents' consent to a child's adoption cannot be given until 30 days after the birth of the child and 14 days after the person is given the consent documents and mandatory written information. The New South Wales Law Reform Commission in its Report on the Review of the *Adoption of Children Act 1965* (NSW) considered that:

*a 30 day hiatus after the birth of the child will mean that birth parents are truly able to experience the impact of separation from their babies, and ultimately to make a more informed and realistic decision.*⁶²

Should the time period after a child's birth during which parental consent to the child's adoption cannot be given be longer than the current period of five days?

Should this period be 30 days after the child's birth and 14 days after parents are given consent documents and information?

9.3 Counselling and the provision of information

The *Adoption of Children Act 1964* does not require a birth parent to receive counselling before giving consent, although counselling is always provided in practice, usually by the departmental officer who witnesses the consent.

⁶⁰ Kirk, H.D., *Adoptive Kinship. A Modern Institution in Need of Reform*, Butterworths, Toronto, 1981.

⁶¹ Bowlby J., *Separation: Anxiety and Anger Attachment and Loss* Vol 2, Hogarth Press and Institute of Psycho-Analysis, 1985.

⁶² Review of the *Adoption of Children Act 1965* (NSW), Report No. 81, NSW Law Reform Commission, Sydney, 1996, page 142

Legislation in most other Australian jurisdictions requires birth parents to be counselled and given specified written information before giving consent. These requirements ensure parents receive all relevant information and have an opportunity to explore all the issues with a qualified counsellor. Other State legislation specifies birth parents should be provided with information about:

- the social and emotional implications of adoption for the parties involved;
- the legal effects of adoption;
- alternatives to adoption;
- counselling and other family support services;
- the legal process, including the effect of consents, procedures and time limits for revocation of consent, the selection procedure, the role of adoption plans, the role of the Court, review and appeals;
- the duties and responsibilities of the Department in placing the child; and
- the rights and responsibilities of other parties, including access to information or contact.

Should Queensland legislation require pre-consent counselling to be provided to parents considering adoption for their child and specify the information that must be provided to the birth parent/s prior to them signing the consent?

9.4 Consent of birth parents who are under 18 years of age or have a decision-making incapacity

Young people and people with impaired decision-making capacity are particularly vulnerable. Section 24(1) of the *Adoption of Children Act 1964* requires that for a parent's consent to be valid, the person must be in a fit condition to give consent and must understand the nature of the consent.

Current practice in receiving consents from young people and people with an impaired decision-making capacity is firstly to obtain an assessment of their capacity to give informed and voluntary consent. Where the assessment indicates that the person is not capable of properly considering the consent and the person wishes to proceed with adoption, dispensation of their consent is sought from the Court.

The New South Wales Act requires parents under 18 who are considering adoption for their child to receive independent legal advice.

In Western Australia, the consent of the parents of a parent under 18 is also required before the young parents' child may be adopted (except in the case where the child is conceived as a result of incest or there is a breakdown in the relationship between the young parent and his/her parents).

Other States' legislation does not mention the issue of consent being given by persons with a decision-making incapacity. As in Queensland, dispensation of consent is sought from the Court.

A decision to consent to the adoption of a child is very personal and is therefore specifically excluded from the decisions that can be made by another person - "a substituted decision maker" - under the *Guardianship and Administration Act 2000* (Qld).

Should safeguards be included in legislation to ensure the rights of young people and people with decision-making incapacity are protected during the consent process, such as:

- a report from an appropriate expert stating that, in the opinion of the expert, the person is capable of understanding the consent;
- a requirement that the person has received legal advice; and/or
- a requirement that, in addition to the consent of parents aged under 18 years, the consent of the parents of a person under 18 who is consenting to a child's adoption be sought in some circumstances?



9.5 Witnessing consents

9.5.1 Current law and practice

The *Adoption of Children Act 1964* states that consent is not valid unless it is witnessed by a person authorised in writing by the Chief Executive. Departmental Adoptions Officers and Family Services Officers are authorised under the Act to witness consents. Specific authorisation is given to an appropriately qualified person to witness a parent's consent where a consent is being signed in another State or overseas.

The Act states that the witness must be satisfied that the person signing the consent understands what the consent means and was in a fit condition to give consent. The Regulation requires the witness to explain those parts of the Act that relate to giving consent. The witness must also certify on the consent documents that it appeared to him/her that the person signing the consent was a parent or guardian of the child and that the consent was dated on the day the person signed.

9.5.2 Key issues

It is crucial that the witness does not have a conflict of interest that may result in any undue influence, however unintended, being brought to bear on the parent considering consenting to a child's adoption. This excludes caseworkers, lawyers or any other professionals working with adoption applicants from witnessing birth parents' consents. It is also preferable that the witness is not the person providing pre-adoption counselling to the birth parents.

Accurately assessing a parent's understanding of the effect of signing an adoption consent requires specific expertise. Other States require the accredited counsellor for the parent to provide a sworn statement certifying that he or she has given the parent the required information, has counselled the parent and is of the opinion that the parent understands the effect of consenting to the child's adoption.

The person who witnesses a parent's consent must be someone other than the counsellor. This ensures greater accountability and reduces the risks and possible role conflict associated with the counsellor also being the person who witnesses the parent's consent to the child's adoption.

Should pre-adoption counselling of birth parents be provided by:

- departmental officers;
- independent social workers or psychologists accredited by the Department; or
- both departmental officers and independent social workers or psychologists accredited by the Department; and/or
- other/s?

Should there be a requirement for a person other than the person who has counselled a parent considering adoption to witness the parent's consents?

Should the role of a person responsible for witnessing a parent's consent be to ensure:

- the parent has received information and counselling;
- a counsellor has provided a statement indicating that it is his/her opinion that the parent who has been counselled understands the effect of consenting to the adoption; and
- documentation establishing the identity of the person giving consent to the adoption of a child?

Who should be authorised to witness parents' consents to the adoption of a child?

- departmental officers; and/or
- other authorised persons?

9.6 Revocation of consent

It is important for there to be a period of time after the consent is signed during which the parent can withdraw it, so the parent can resume the care of the child or identify alternative options for the child's care within the family if circumstances change and such options become available. This period also enables a birth parent to test his/her decision.

The Act states that a parent's consent to their child's adoption may be withdrawn within 30 days from the date it was signed or before the adoption order is made, whichever is earlier. The Act does not require notice of intention to make an adoption order to be given to the birth parent before the order is made which means an adoption order can be made during the revocation period without the birth parent being advised.

Currently, adoption orders are never made during the 30 day revocation period. However, in the 1960s and 70s, some adoption orders were made before the revocation period expired and some birth mothers who wished to revoke their consent within the 30 day period were told that an adoption order had already been made. All other jurisdictions removed the provision for adoption orders to be made prior to the expiry of the revocation period during previous reviews of their legislation.

All other Australian jurisdictions have a 25, 28 or 30 day (as in Queensland) revocation period. Some jurisdictions allow an extension of this period for 14 days if requested by the parent.

Should the current legislative provision enabling adoption orders to be made prior to the expiration of the revocation period be removed?

What is the appropriate time period to allow for revocation of consent:

- 30 days;
- less than 30 days; or
- more than 30 days?

Should the legislation enable an extension of the revocation period by the parent?

Also related to this issue is the question of whether a parent can re-sign a consent once they have withdrawn it. In the past, a very small number of birth parents have used the consent and revocation processes to extend the decision-making time. This can lead to a child being in pre-adoptive foster care for extended periods and is contrary to the child's best interests.

Legislation could limit the number of times a parent can revoke their consent. However, past experience shows that the very small minority of parents who give and withdraw consent a number of times do so because they have not received adequate counselling and their consent was obtained when they were ambivalent and had not made an informed decision.

Good practice would dictate that where a parent is unsure, their consent should not be obtained and further time should be provided to fully explore all the issues and options for the child's care. If proper counselling services are provided and parents fully understand the effects of their decisions, it should be rare for a parent to revoke consent to their child's adoption only to sign another consent at a later time.

Should legislation limit the number of times consent can be revoked?



During the revocation period, the child remains in the guardianship of the Chief Executive of the Department and is usually placed in pre-adoptive foster care. The Department facilitates contact between birth parents and the child during this time. Contact during the revocation period gives the parent the opportunity to know the child as a real person which may assist in grieving and adjustment if the adoption proceeds. It also helps establish the bond between parent and child if the parent revokes consent and decides to care for the child.

Should birth parents be able to have ongoing contact with their child during the revocation period?

9.7 Consent of Birth Fathers

9.7.1 Unmarried birth fathers

Under the *Adoption of Children Act 1964*, it is clear that a man who is married to the child's birth mother is a parent of the child and his consent to the adoption is required, even if he is not the father of the child. However, it is currently unclear whether the consent of an unmarried father is required.

Section 19(3) of the Act provides: *In the case of a child-*

- *whose parents were not married to each other at the time of the child's conception and have not since married each other; and*
- *who has not previously been adopted; the appropriate person (to give consent to the adoption of the child) is every person who is the mother or the guardian of the child.*

The Act was drafted at a time when adoption was regarded as a preferable option for illegitimate children. Until recently, the consent of unmarried birth fathers was not sought as it was regarded that their consent was not required, although their views were sought wherever possible.

Social views of the role and responsibilities of parents have changed since 1964 and a large proportion of the population now choose to live in long term domestic relationships without marrying. Many children are born into these relationships without social stigma and it is now generally accepted that the legal nature of the parents' relationship is of little relevance in determining what is in the best interests of a child.

The *Family Law Act 1975* states that both parents, regardless of their marital status, have parental responsibility for their child, subject to any Court order. Therefore, under Commonwealth law, parents, regardless of their marital status, have parental responsibility that includes all common law incidents of guardianship.

Section 6 of the *Adoption of Children Act 1964* defines "guardian" to include:

a person who is or is deemed to be the guardian of the child ... under a law of the Commonwealth or of a State or Territory of the Commonwealth.

It could be argued, therefore, that an unmarried birth father's consent, as a guardian of the child, is required under section 19(3) of the *Adoption of Children Act 1964*.

The *Status of Children Act 1978* removed the legal distinction between the status of children born to married and unmarried parents. This Act amended the *Adoption of Children Act 1964* to remove references to legitimate and illegitimate children but did not remove the distinction between married and unmarried fathers in relation to the consent requirement.

Because of these changes to the law and changing social views about parenting and the rights of children, the current practice of the Department is to seek the consent of a child's father before making an adoption order. If the father cannot be identified or located, an application is made to the Court for dispensation of his consent.

The current provisions of the *Adoption of Children Act 1964* are unclear and could validly be interpreted in a way which is inconsistent with the rights of children as set out in the UNCROC and in the *Family Law Act 1975*.

Legislation enabling differential treatment of persons on the basis of their marital status is also contrary to the provisions of the *Anti-Discrimination Act 1991* (Qld).

Another implication of not obtaining or dispensing with the consent of unmarried birth fathers is that, under section 39A of the Act, adopted persons and birth fathers whose consents were not given are unable to obtain identifying information about each other. The Act was amended in 1991 to enable the release of identifying information to birth parents who consented to a child's adoption and to adopted persons after the adopted person turned 18. Since then, many adopted people and some birth fathers have sought information which could not be released to them, causing great distress.

The legal nature of the relationship between the mother and father does not necessarily determine the nature of the father's feelings for the child or of the potential relationship between the father and the child. In the interests of the child, the option of a birth father parenting the child should not be discounted.

All other Australian jurisdictions require the consent of the father to be obtained or dispensed with by the Court either where paternity is presumed or established.

Should legislation require the consent of all birth fathers to be obtained or dispensed with by the court, regardless of the legal relationship between the birth father and the birth mother?

Should legislation enable adopted persons and unmarried birth fathers whose consent was not obtained prior to the adoption to obtain identifying information about each other?

9.7.2 Establishing paternity

The *Status of Children Act 1978* sets out the presumptions in relation to parentage. (The Act was amended recently although the amendments are not yet in force). The presumptions include:

- presumptions arising out of marriage – if a child's mother is married, it is presumed that her husband is the child's father;
- presumption arising from registering the person's name as a parent on the birth register;
- presumption arising from a Court finding that a person is a child's parent;
- presumption of paternity, if a man signs a document acknowledging he is the father; and
- presumption of paternity if the man and woman live together, but are not married, during the period starting 44 weeks and ending 20 weeks before the birth.

Paternity can now be established with almost 100 per cent certainty through DNA testing. A man may seek to establish paternity by applying to the Family Court for a parenting order and an order declaring parentage or by applying to the Supreme Court for a declaration of parentage under section 10 of the *Status of Children Act 1978*. If the man named as the father by the mother does not acknowledge paternity, the mother or the Department may apply to the Supreme Court for a declaration of parentage.



9.7.3 Identifying, locating and notifying birth fathers

There are many practical difficulties obtaining consent from birth fathers. The identity of the father may be unknown or mothers, for many reasons, may not wish to reveal the identity of their child's father, e.g., the child may have been conceived as a result of a casual encounter or as a result of rape or incest or the father may be violent and abusive. The mother may fear for her and her child's safety if the father is contacted.

Where the mother does identify the child's father, the person named may refuse to acknowledge paternity. Under the law, a person may be presumed to be the father, but the presumption may be disproved.

The responsibility of the State in these circumstances needs to be clearly defined. While it is in children's interests generally for fathers to be involved in decision-making about their care, it may not be in their interests to withhold the option of a permanent adoptive family because the father cannot be identified or located or is withholding consent, but does not wish to care for the child himself.

Victoria, South Australia, Tasmania and the Australian Capital Territory simply require the consent of the man who is presumed by law to be the father and enable dispensation where the person cannot be found after reasonable inquiry.

New South Wales, Western Australia and the Northern Territory require the adoption agency to make reasonable inquiries to identify and locate the birth father and to give him reasonable opportunity to establish parentage or to make an application for custody of the child. These jurisdictions require consent once parentage is established.

When determining what is a "reasonable inquiry" to establish the identity and location of the father and what is a "reasonable opportunity" for a person to establish paternity, it is important to consider the interests of the child and avoid undue delay in placement caused by lengthy searches for a birth father.

A "reasonable inquiry" should not involve coercion or undue pressure being placed on the birth mother to disclose information which she believes is contrary to her own interests and those of her child. Pre-consent counselling should canvass with the mother issues around children's rights to know their birth parents and to be raised within their families wherever possible, but she should not be coerced into naming the father.

If a birth father's name is known but his address is not, the Department uses publicly available means of tracing people like electoral rolls and telephone listings, departmental records or via Centrelink.

There are a number of options regarding the Department's obligations. Where the Department is aware of the identity of the man whose paternity is presumed under the *Status of Children Act 1978*, legislation could require the Department to make all reasonable inquiries to locate the man, notify him of the mother's consent and provide him with the opportunity to consent or consider other options for the child's care.

This approach places less obligation on the Department. The Department is only required to make reasonable efforts to locate the birth father where a presumption of paternity exists (e.g., the person's name is on the child's birth certificate or the person was married to or lived with the child's mother during the relevant period). It does not require the Department to locate a person who is merely claimed or named as the father unless one of the presumptions applies.

This option will ensure a more expeditious resolution of consent issues and ensure a child's placement is not delayed by lengthy searches for the birth father. However, it could deny a birth father to whom a legal presumption does not apply and who is unaware of the pregnancy, birth or adoption consent, the opportunity to participate in decision-making about the child's care. This may be contrary to the child's right to be cared for by his/her own family and to know his/her parents.

Alternatively, the Department could be required to notify a man who is reasonably believed to be the birth father because:

- there is a presumption of paternity, or
- the mother or another person is claiming the man is the father; or
- the man claims to be the father.

This would enable him to consent to the child's adoption or consider other options for the child's care or to establish paternity.

This option places a broader obligation on the Department to attempt to find a person who is not presumed at law to be the father but who is named as the father, and to provide him with notice of his rights and information about how to establish paternity if no presumption applies.

Limitations would need to be placed around the time in which the person must act to establish paternity. The timeframe would need to balance:

- the child's rights to know and have contact with the father;
- the father's rights to participate in decision-making about his child's care; and
- the child's interests in not having a suitable adoptive placement unduly delayed.

The new legislation in New South Wales simply requires a person who is reasonably believed to be the birth father to be given a "reasonable opportunity" to establish paternity. South Australia has similar requirements.

In Victoria, if the name and address of the man believed to be the birth father are known, he must be notified within two days of the mother's consent. He must then commence proceedings for a declaration of parentage before the end of the revocation period. The Northern Territory has similar requirements.

In Western Australia, the man must apply for parenting orders in the Family Court or for a determination of parentage within 21 days of receiving notice of the mother's consent.

Should Queensland legislation require the Department to take all reasonable steps to notify birth fathers:

- *whose paternity is presumed; or*
- *where no presumption of paternity exists, but the mother, father or another person is claiming him to be the father?*

What period of time should be allowed to enable a father to take action to establish paternity:

- *a 'reasonable' period of time;*
- *before the end of the revocation period; or*
- *within 21 days of receiving notice of the mother's consent?*



9.7.4 When should consent of a father not be required?

There can be circumstances in which it may be appropriate not to require a birth father to be contacted and for the Court to dispense with his consent, e.g., where the child was conceived as a result of an unlawful sexual act such as rape or incest or where the father cannot be identified or found.

All Australian jurisdictions enable the Court to dispense with consent in certain circumstances including where a person whose consent is required cannot be found after reasonable inquiry. All jurisdictions also include a 'catch-all' category where consent can be dispensed with if it is in the interests of the child.

In Western Australia, the Court may also dispense with the consent of a father where he does not have the responsibility for the day-to-day care of the child or a parental relationship with the child and is unreasonably withholding his consent. This does not apply in the case of a step-parent adoption.

If the father's notification could place the mother's or child's safety at risk or where the child was conceived as the result of a sexual offence, the question is:

- whether the legislation should state that the Department is not required to notify the father; or
- whether it should state that the Court should make this decision when considering an application for dispensation of consent.

If legislation enables the Department to determine this issue, a prescriptive list of circumstances in which the Department could make this decision is required. Review of the decision would not be available because of its nature, so it may be more appropriate for the Court to determine whether or not a birth father should be notified.

Should a birth father's consent not be required where:

- *the child was conceived as a result of an unlawful sexual act such as rape or incest;*
- *where the father cannot be identified or found; and/or*
- *where it is in the interests of a child?*

In those circumstances, should the decision not to notify the birth father be made by:

- *the Department; or*
- *the Court by way of considering an application for dispensation of the birth father's consent?*

9.8 Children's Consent

9.8.1 Should children's consent to adoption be required?

Since the *Adoption of Children Act 1964* was drafted, there has been a growing recognition of the right of children to participate in decision-making that affects them. This is reflected in legislative changes, in the common law and in international conventions.

Article 12 of the UNROC provides that a child who is capable of forming his/her own views has the right to freely express those views and to have them considered and given due weight in accordance with the child's age and maturity. It also requires the child to be given the opportunity to participate in judicial and administrative proceedings affecting him/her, either directly or through a representative.

Section 26 of the *Adoption of Children Act 1964* provides that an adoption order cannot be made in relation to a child aged 12 years or more unless he/she consents to the adoption. The Court can dispense with the child's consent if it is satisfied there are special reasons related to the child's welfare and interests for the adoption order to be made.

Adoption of older children is generally by persons known to the child, e.g., step-parents, relatives and carers. Across Australia, 28 per cent of adopted children were adopted by these kinds of people in 1999-00 and, of these children, 71 per cent were aged five to 14 years.

Where children were adopted by persons previously unknown to them, 83 per cent were aged under five years.⁶³ In Queensland, 21 children were adopted by persons known to them in 1999-00 and, of these, 10 were aged 12 or more.

A child's right to participate in decision-making affecting him/her must be balanced with ensuring he/she does not feel responsible for the decision-making, particularly where the decision involves choosing between a birth parent and the person who is caring for the child.

Children may be able to participate in decision-making by ensuring they have appropriate and safe opportunities to express their views without burdening them with the responsibility of providing formal consents. On the other hand, children and young people may wish to be involved in decision-making at this level and may feel that their views should be given equal weight to that of adults and, therefore, they should have the opportunity to participate at the same level. Mechanisms for involving children and young people should be flexible enough to meet their individual needs in each case.

The law recognises the growing capacity of young people to participate in and determine a range of decisions for themselves, e.g., common law considers young people competent to make decisions about medical treatment without reference to their parents if they are mature enough to understand the consequences of the decision.⁶⁴

Statutes set age limits at which children can be held responsible for their actions and can consent to various activities, e.g., 10 year old children in Queensland can be held criminally responsible; at 12 their consent is required for a name change; at 15 they can leave school; and at 16 they can consent to sexual relations and apply for a driver's licence or passport.

Legislation in New South Wales, South Australia and Western Australia, like Queensland, requires the consent of a child aged 12 or more for an adoption order to be made in relation to the child. Other Australian jurisdictions have no requirement for a child's consent, however, the child's views and wishes must be considered. In the most recent legislation, the *Adoption Act 2000* (NSW), the Court cannot make an adoption order in relation to a child who is 12 or more and who is capable of giving consent unless:

- the child has been counselled in accordance with the Act;
- if the child is less than 16, an expert report states that the child is capable of understanding the effect of giving consent; and
- the child consents to his/her adoption by the prospective adoptive parents.

Specifying an age at which a child's consent to adoption is required recognises that at that age children can generally be regarded as capable of understanding the effect of giving consent. It recognises that a young person should have formal involvement in decision-making about their care at some point, however, selecting a particular age will always be arbitrary because children develop and mature at differing rates.

⁶³ Australian Institute of Health and Welfare 2001 Adoptions Australia 1999-00. AIHW cat. no. CWS 12. Canberra: AIHW (Child Welfare Series no. 26) P3

⁶⁴ Secretary, Department of Health and Community Services v JWB and SMB ("Re Marion") (1992) 15 Fam LR 392



If no age limit is specified, the consent of all children would be required for an adoption order to be made. The majority of children are adopted as infants or under the age of five; requiring their consent would be meaningless and involve additional, unnecessary expense in obtaining dispensations of their consent. However, this does not reduce the need to ensure children are prepared for and kept informed during planning for their proposed adoption.

If the lower age limit for adoption consent remains 12 years of age, there is a risk that younger children who are capable of giving consent will not be able to participate in the process at this level.

Should legislation require:

- *a child's views and wishes about his/her proposed adoption to be obtained and considered?*
- *a child to consent to his/her proposed adoption?*
- *counselling and mandated information to be provided to children whose consent is required?*
- *the same provisions relating to the validity and witnessing of adoption consents that apply to adults to also apply to children?*

If a child's consent is to be required, should an age limit be specified?

What is an appropriate age at which a child could be presumed to have the capacity to consent:

- *over 10 years of age;*
- *over 12 years of age;*
- *over 14 years of age; or*
- *over 16 years of age?*

9.8.2 Ensuring informed and voluntary consent of a child

If the consent of children is required, safeguards must be implemented to ensure their consent is informed and voluntary. The Act contains no current requirement for counselling and providing information for the child, however, current practice for obtaining taking consents from young people is to provide them with information about the effect of giving consent in a manner they can understand. The child's views in relation to a proposed adoption are examined as part of the adoption assessment process.

Given that most adoptions of older children are by step-parents or others involved in the care of the child and who are in a position of influence over him/her, counselling would need to be sensitive to family dynamics and the child's place in the family. It is possible that young people will consent to step-parent adoption because they know their parent and step-parent want it. The child in these circumstances may find it difficult to express any concerns he/she may have about the adoption or severing their legal relationship with their other birth parent and with that parent's extended family.

As for adults required to give consent, legislation could also require counselling and information provision for children required to give consent, and it should be provided in a manner the child can understand. Mandated information should include information about the effect of giving consent, the effect of an adoption order, alternatives to adoption and information about how to withdraw consent.

What other processes would help ensure the child's consent to his/her proposed adoption is voluntary?

9.8.3 Validity of consents given by children and withdrawal of consent

Under the current Act, children cannot withdraw their consent nor can the validity of their consent be challenged. Unlike the consent of parents and guardians, the child's consent cannot be considered defective under section 24. This means the consent remains valid where it is shown:

- that a child's consent was obtained by fraud or duress;
- the consent documents had been altered without authority; or
- the child was not in a fit condition to give consent.

The requirements relating to parents and guardians giving consent do not apply to children giving consent but the rationale for this is unclear.

Safeguards to ensure the child's consent to the proposed adoption is fully informed and voluntary should be at least as stringent as those required when taking a birth parent's consent and include the opportunity for the child to withdraw his/her consent.

Under new adoption legislation in New South Wales, a child can withdraw his/her consent at any time before the adoption order is made (unlike the 30 day revocation period for parents). In South Australia, the Court cannot make an adoption order until 25 days have elapsed since the child gave his/her consent and the Court is satisfied, after interviewing the child in private, that his/her consent is genuine and he/she does not wish to withdraw it. In Western Australia, a child can withdraw his/her consent within the same time period applicable to birth parents.

Should children be able to revoke their consents:

- *at any time prior to an adoption order being made; or*
- *the same period as that which applies to adults, within 30 days of signing the consent?*

9.8.4 Dispensation of a child's consent

Under section 26 of the Act, the Court may dispense with the child's consent where It is satisfied there are special reasons related to the child's welfare and interests for making an adoption order, regardless of whether the child has refused to consent or whether the child's consent had been sought. These guidelines are far less stringent than the circumstances in which the Court can dispense with an adult's consent.

Under the new legislation in New South Wales, the Court may only dispense with the consent of a child if it is satisfied he/she is not capable of properly considering the question of consent. The position is similar in South Australia and Western Australia.

What guidelines should legislation provide for the Court when considering dispensing with the consent of a child?

9.9 Dispensing With Consent

The power to dispense with a parent's consent to adoption raises fundamental issues about the role of adoption, the rights of parents and the rights and interests of children. All parents have the right and responsibility at law to make decisions for their children and this right and responsibility lies with them from the moment the child is born. There is a basic assumption in this society that parents are in a better position than anyone else to make decisions for their children.



The State's child welfare role is based on this primary assumption. The State should only intervene where parents are unable or unwilling to act in their children's interests.

In this context, the right of a parent to consent or refuse to consent to his/her child's adoption is fundamental. Adoption is generally an option that parents choose for the care of their child. Because it involves the permanent severing of the parent and child relationship, the exercise of any power of the State to dispense with a parent's consent should only occur in strictly prescribed circumstances.

9.9.1 Current law and practice

Under section 25 (1) of the Act, the Supreme Court or Children's Court may dispense with the consent of a birth parent or guardian in the following circumstances where the person ...

- cannot be found after reasonable inquiry;
- is in such a physical or mental condition as not to be capable of properly considering whether or not to give his/her consent;
- has abandoned, deserted or persistently neglected or ill-treated the child;
- has failed without reasonable cause to discharge his/her obligations as a parent or guardian for a period of not less than one year;
- has failed to reasonably plan for resumption of care of the child whereby integration of the child in the child's family is unlikely in the foreseeable future; or
- that there are any other special circumstances that in the court's opinion make it desirable that an order be made;
- and the Court is satisfied that the welfare and best interests of the child will be promoted if the order is made. The order may be made subject to favourable assessment of the prospective adoptive parents.

An application for dispensation of consent may be made by the Chief Executive or by the prospective adoptive parent/s for a child who is a relative or step-child.

In practice, dispensation of consent is usually sought where:

- the birth parent or guardian is unknown or cannot be found;
- has an intellectual disability which affects his/her capacity to give consent;
- where the child was conceived as a result of rape or incest; and/or
- where domestic violence by the father has been such that the mother is fearful for the physical, psychological and emotional safety of herself and her child.

Dispensation may also be sought where one parent (usually the father) is unreasonably withholding his consent to frustrate the mother's wishes in circumstances where he has no intention of arranging for the child's care himself.

9.9.2 Other jurisdictions

Most other Australian legislation is similar in this area; these sections appear to be remnants of the model adoption legislation passed by most jurisdictions in the 1960s.

Additional grounds for dispensing with consent are included the Western Australian Act:

- where the birth father has been convicted of an offence which resulted in the child's conception; or
- where criminal compensation has been awarded to the child's mother in relation to an offence or alleged offence committed by the father that resulted in the child's conception; or
- where the father is a lineal relative of the child's mother; or
- where the birth parent does not have a parent and child relationship with the child and is unreasonably withholding consent (this does not apply to adoption by a step-parent).

New adoption legislation in New South Wales provides for only three grounds for dispensing with consent:

- (a) the person cannot, after reasonable inquiry, be found or identified; or
- (b) the person is in such a physical or mental condition as to be incapable of properly considering the question of whether he/she should give consent; or
- (c) there is serious cause for concern for the welfare of the child and it is in the best interests of the child to override the wishes of the parent or guardian.

9.9.3 Proposals for the future

The grounds set out in section 25 (1) (d) and (e) of the Act (see section 9.9.1 of this consultation paper) are uncontroversial and consideration should be given for them to be retained.

The grounds set out in section 25 (1) (f) to (h) (see section 9.9.1 of this consultation paper) focus on actions by parents which have resulted in harm to children.

The ground set out in section 25 (1) (i) (see 9.9.1 of this consultation paper) is a ‘catch-all’ ground that enables the Court to dispense with consent in special circumstances where the Court considers it desirable to do so. It is quite broad and does not focus on the child’s needs.

When developing proposals for the new legislation, the New South Wales Law Reform Commission considered that grounds similar to those contained in section 25 (1) (f)-(h) (see 9.9.1 of this consultation paper) focused on the fault of the parents rather than the needs and interests of the child. It proposed that the single ground contained in (c) (see section 9.9.2 above) replace these grounds. The Commission believed that the new ground gave proper parameters for deciding whether adoption was in the best interests of the child and whether consent should be dispensed with.

Under the *Child Protection Act 1999*, a child is considered to be in need of protection where he/she has suffered harm or is at unacceptable risk of suffering harm and does not have a parent able and willing to protect him/her. “Harm” is defined as:

any detrimental effect of a significant nature on the child’s physical, psychological or emotional well-being. It is immaterial how the harm is caused.

The review of earlier child protection legislation which resulted in this Act indicated that the grounds for State intervention should focus on the child’s protective needs rather than parental fault. The grounds for determining an application to dispense with a parent’s consent should also reflect the needs of the child rather than parental fault.

Adoption is only one in a range of options for the alternative care of children. The *Child Protection Act 1999* provides a comprehensive framework of child protection orders and alternative care arrangements. If assessment determines a child is unlikely to be returned to his/her parents’ care in the foreseeable future, the Act has a range of long term guardianship orders including orders in favour of relatives or other suitable persons such as foster carers.

From 23 March 2000 (when the *Child Protection Act 1999* came into effect) until 31 August 2001, 19 child protection orders giving long term guardianship to relatives were made, as well as 12 child protection orders giving long term guardianship to other suitable persons (10 of which favoured foster carers). Long term guardianship orders are the most appropriate orders for most children with child protection needs who cannot safely return to the care of their parents because many children continue to have contact with their parents, siblings and members of their extended family and continue to identify with their family. The complete legal change to their identity that adoption provides would not meet their needs in these cases.



Should the Court be able to dispense with the consent of a parent or guardian to a child's adoption if:

- *the parent cannot be found after reasonable inquiry;*
- *the parent is in such a physical or mental condition as to be incapable of properly considering whether or not to give his/her consent;*
- *there is serious cause for concern for the welfare for the child and it is in the best interests of the child to override the wishes of the parent or guardian; or*
- *never?*