



11.1 Legal responsibility for the child prior to making an adoption order

11.1.1 Current law and practice

Under section 27 of the *Adoption of Children Act 1964*, the Chief Executive may accept or decline guardianship of a child whose parents have given consent to his/her adoption or whose parents' consent has been dispensed with. The Chief Executive generally declines to accept guardianship where the child is to be adopted by a step-parent. This provision does not apply to children who are in the custody or guardianship of the Chief Executive under the *Child Protection Act 1999*.

The child generally remains in the Chief Executive's guardianship until consent is revoked or an adoption order is made or a Court makes other provision for the child's guardianship.

Section 27 enables the Chief Executive to provide benefits and services to a child in his/her guardianship under the Act, as if the child were in care under the *Child Protection Act 1999*. This enables foster allowance and other costs related to the child's care to be paid to the child's foster carers.

Children born overseas who enter Australia as non-citizen children for the purpose of adoption are in the guardianship of the Commonwealth Minister for Immigration under the *Immigration (Guardianship of Children) Act 1946* (Cth). Under that Act, guardianship responsibilities of non-citizen children residing in Queensland are delegated to the Chief Executive of the Department of Families.

These children generally enter Australia with their prospective adoptive parents and remain in their care. An interim order granting custody of the child to the prospective adoptive parents is made upon the child entering Queensland. Interim orders are usually for a period of 12 months during which time the Chief Executive retains guardianship of the child and is obligated under the relevant agreement with the child's country of origin to supervise the placement of the child. Interim orders are discussed below.

The effect of this transfer of guardianship is that the Department has sole responsibility for decisions about the child in the period between giving consent and making an adoption order or revoking the consent. The Department decides in whose care the child should be placed in the interim - a birth parent or family member, a foster carer or prospective adoptive parents.

A child in Queensland requiring adoption is usually placed with pre-adoptive foster carers until prospective adoptive parents are selected. An adoption order in favour of the prospective adoptive parents is made within a few days of the child's placement unless an interim order is made.

The Department as guardian also makes decisions about medical treatment and whether there should be any contact between the child and a birth parent during the revocation period and, if so, how and when this contact should occur. The transfer of guardianship ensures the Department can respond flexibly to the particular needs of children requiring adoptive families.

11.1.2 Issues and options

Current legislation provides no guidelines for the Chief Executive in exercising guardianship during this period and there is no external scrutiny or supervision of the care arrangements.

The only requirement is contained in section 27A(3) of the Act, which provides that if an adoption order has not been made within three months of the child's parents giving consent, the Chief Executive must notify each person who gave consent of that fact (unless the person has indicated that he/she does not wish to receive the notification or his/her whereabouts is unknown). This means that a child for whom an adoptive family has not been found can remain under the guardianship of the Chief Executive under section 27 indefinitely.

Victoria, Western Australia and Tasmania provide for similar notices to be given as well as notices about the placement of the child with prospective adoptive parents, the termination of those placements and the death of the child.

New South Wales, Tasmania and the Australian Capital Territory also require the adoption authority to report to the Court if a child has not been placed for adoption within a specified period and the Court may then make orders about guardianship. This enables some Court supervision of case work prior to making an adoption order and ensures children do not remain in guardianship under adoption legislation where other appropriate orders could be made to ensure their welfare and care.

Legislation in Tasmania and the Australian Capital Territory explicitly authorises contact between the child and birth parents during the revocation period and enables the Chief Executive to restrict contact only if it is not in the best interests of the child.

Should future legislation:

- *require the Chief Executive to report to the Court where an adoptive family has not been found for a child within a prescribed time;*
- *provide for notice to be given to birth parents about matters like placements and the death of the child, where birth parents wish to be notified; and/or*
- *provide any other guidelines for the Chief Executive in exercising guardianship responsibilities during the period before a child is adopted?*

11.2 Which body should make adoption orders?

An adoption order permanently changes the legal relationship between a child and his/her birth parents and between a child and his/her adoptive parents. It is essential that the process for obtaining the order is characterised by independence and procedural fairness and that the decision-maker is informed by clear evidence that adoption is in the child's best interests.

11.2.1 The current approach

The *Adoption of Children Act 1964* provides that a child may be adopted by means of an adoption order made by the Chief Executive of the Department of Families. In all other Australian jurisdictions, the United Kingdom and New Zealand, adoption orders are made by a Court. Administrative adoption orders were a feature of most States' legislation prior to the 1960s but Queensland is the only state to retain them.

The Department currently makes all administrative, case planning and legal decisions relating to adoption, other than determinations of applications for dispensation of consent which are made by the Children's Court or the Supreme Court and discharge of adoption orders which are made by the Supreme Court.



Decisions made by the Department include those related to taking and determining the validity of consents, determining the eligibility and suitability of adoption applicants, matching children with adoptive parents and making interim orders and adoption orders. Decisions about eligibility and suitability are currently subject to external merits review by the Children's Services Tribunal. The efficacy and appropriateness of administrative review in relation to these and other decisions is considered in sections 10.9 and 10.10 of this consultation paper.

There are significant advantages in the current system. Orders are made expeditiously and are based on the advice of the Department's Adoption Services Unit, which is the sole provider of adoption services in Queensland and has accumulated expertise in adoption practice. Decision-making occurs close to practice which means decisions are more likely to reflect the needs and interests of children and other persons affected by adoption. It is inexpensive for both applicants and the Department and does not expose adults and children to the impersonal and adversarial processes of a Court.

However, because the Department's Chief Executive makes adoption orders, there is no external oversight, prior to making the order, of:

- whether the proposed adoption is in the best interests of the child;
- whether consents have been validly obtained; or
- the decision relating to the particular adoptive parents selected for the child.

The Court considers these matters when determining an application for an adoption order in other jurisdictions.

Section 15 of the Act empowers (but does not require) the Chief Executive to give notice of the intention to make an adoption order to a person with whom the child resides or has the care or custody of the child and to any other person where it appears to the Chief Executive that it is desirable to do so. The Act does not state what a person receiving such a notice may do if they object to the order and there is no allowance under the Act to oppose the making of the order.

A person may apply to the Family Court for parenting orders. However, because of jurisdictional limitations, the Family Court won't proceed unless the Department indicates that it would comply with the outcome of the Family Court proceedings and not proceed with an adoption order if the Court makes an order in favour of the applicant. In practice, this has happened on a number of occasions where grandparents have indicated a willingness to care for a child for whom adoption consents have been given and have sought and obtained Family Court orders. In these instances the child's adoption has not proceeded and the child is cared for by his/her grandparents in accordance with the Family Court order.

The Supreme Court may discharge adoption orders if the adopted person is under 18 and a required consent or the order itself was obtained by fraud, duress or other improper means, or if there is an exceptional reason why the order should be discharged. However, only the Chief Executive may apply for discharge of an order.

Clearly, the current legislative arrangements do not contain sufficient checks and balances to ensure compliance with the requirements of the Act and the protection and promotion of the child's best interests.

Some of the current system's problems could be overcome by establishing advisory panels comprising departmental officers and persons external to the Department to advise the Director-General about suitability assessment, matching and placement. This would provide access to a broader range of expertise/advice and enable some external scrutiny. Similar panels exist in the United Kingdom, Western Australia and Tasmania, however, because they are advisory only, they would not be and would not be seen to be independent.

11.2.2 The Courts

Courts are generally characterised by their independence from executive government and by their focus on procedural fairness. In other jurisdictions, they provide independent oversight of taking consents and decisions to place a child with prospective adoptive parents. The legal consequences of an adoption order make it an appropriate subject for judicial decision-making.

Another advantage in transferring jurisdiction to make adoption orders to the Court is that the infrastructure already exists. There would not be great financial implications for government in extending jurisdiction to make adoption orders to the Court, although there would be additional costs associated with preparing applications and reports and appearance and witness costs.

However, it could be argued that Courts lack expertise in child welfare matters generally and in adoption practice specifically. Because of the adversarial nature of the judicial system, Courts generally do not have the capacity to inquire into the matter before them and to be informed by evidence other than that presented by the parties. In other jurisdictions, most applications for adoption orders are unopposed and parties rarely participate in the proceedings, so the only evidence before the Court are reports produced by the adoption agency. This could lead to the Court acting merely as a ‘rubber stamp’ for agency decisions.

In adversarial proceedings where the adult parties are present and represented, it is possible the child will become ‘invisible’ and consideration of the adoption issues will be from the perspective of adult needs and views, not from the perspective of the child’s best interests. This problem is addressed in some Courts with a welfare jurisdiction (e.g., the Family Court and Courts which have a child protection jurisdiction), by providing the Court with a power to appoint a separate representative for the child. The role of the child’s representative is either to act on the child’s instructions or in the child’s best interests.

Another problem associated with the Courts, particularly higher Courts, is the often lengthy delay between the commencement of an action and the final decision. It is generally accepted that delays in decision-making about the care and welfare of children can be harmful to children and are not in their best interests.

If it is decided that it is appropriate for a Court to make adoption orders, a decision needs to be made regarding which Court should perform this role. Currently the Children’s Court and the Supreme Court can determine applications for dispensation of consent.

Only the Supreme Court can determine applications for discharge of an adoption order. In New South Wales and the Australian Capital Territory, the Supreme Court only deals with adoption matters. In others, a lower Court, equivalent to the Magistrates or Children’s Court (South Australia, Northern Territory and Tasmania) or both the Supreme Court and a lower Court (Victoria) have jurisdiction to make adoption orders.

The Children’s Court is more accessible than the Supreme Court; it sits in more rural centres and has fewer delays and lower costs. However, the Children’s Court is a lower Court and it may be considered more appropriate for orders that effect such a permanent change in the legal relationships of families to be made by a higher Court. The Children’s Court is experienced in dealing with child welfare matters, however, because of its child protection jurisdiction. While the Supreme Court has an inherent welfare jurisdiction, it is not often called upon to exercise this jurisdiction.



11.2.3 A tribunal

Because of the problems associated with the use of the adversarial Court system in child welfare matters, a tribunal with original jurisdiction to make adoption orders may be an appropriate alternative.

A tribunal model would be characterised by:

- inquisitorial powers with a focus on making the best possible decision in the interests of the child (rather than deciding between competing parties).
- a multi-disciplinary panel of decision-makers;
- a commitment to procedural fairness; and
- responsive and timely processes.

A tribunal could include professional officers of the Department of Families, child welfare experts external to the Department and legal professionals.

Such a specialist body with expertise in adoption practice and principles and in child welfare and development would be better placed than Courts to question information provided to the tribunal, to ensure all relevant information is available and to make a fully informed evaluation of whether adoption is in the child's best interests.

An adequately resourced tribunal would minimise delays and could also deal with applications for dispensation of consent and for discharge of adoption orders. It could also supervise pre-adoptive care of children, adoption plans and placements, scrutinise the validity of consents and make interim orders. It could be less formal and less intimidating than a Court; procedures can be simplified and rules of evidence relaxed, making the tribunal more accessible.

Although there are no precedents for this system applying to adoption of children in jurisdictions similar to Australia, there are precedents for determinations of guardianship of adults who have impaired decision-making capacity. In Queensland, the *Guardianship and Administration Act 2000* established a tribunal to appoint guardians and administrators for adults with impaired decision-making capacity.

Unlike a Court, tribunals are not independent from executive government and are more vulnerable than Courts to criticism that they are 'captured' by a particular theory or approach. The legally permanent and virtually irrevocable nature of adoption orders suggest that the most appropriate decision-making body would be a Court appropriately informed by expert advice about the interests, needs and views of the child. Provision for appeal to a Court of a tribunal's decisions may be required and the cost of establishing a tribunal for the benefit of a comparatively small number of cases may not be warranted.

Should Queensland retain the current arrangements whereby the Chief Executive of the Department of Families makes adoption orders?

If yes, why and what processes or requirements should be legislated to ensure greater openness and accountability?

If no, which body should make adoption orders:

- *the Supreme Court;*
- *the Children's Court;*
- *a tribunal; or*
- *other?*

If you support a body other than the Chief Executive having jurisdiction to make adoption orders, what other functions or powers should that body have? Should it be able to:

- *deal with applications for dispensation of consent;*
- *deal with applications for discharge of adoption orders;*
- *make interim orders; and/or*
- *approve adoption plans etc.?*

11.4 Who should be able to apply for adoption orders and who should be parties?

Currently, the Chief Executive makes an adoption order once applicants have been assessed and a child has been matched with those applicants. If another body, such as a Court or tribunal, were to make adoption orders, then who should have standing to apply to the Court or tribunal for orders must be considered.

Other Australian jurisdictions have a variety of arrangements. South Australia and Tasmania provide that only the Chief Executive of the child welfare department or the principal officer of the licensed adoption agency may apply. New South Wales legislation enables prospective adoptive parents to apply with the consent of the Chief Executive or the principal officer. Other States' legislation provides that prospective adoptive parents may apply.

All States require notice of an application to be given to people whose consent is required but has not been given (except for the Northern Territory which requires notice to be given even where consent has been provided) and to persons who have guardianship or custody of the child, or parental responsibility for the child or with whom the child resides. Only the Northern Territory provides that the child is a party.

Who should be able to apply for adoption orders:

- *the Chief Executive;*
- *prospective adoptive parents,*
- *a child;*
- *both prospective adoptive parents and children; and/or*
- *prospective adoptive parents with the consent of the Chief Executive?*

Who should be parties to an application for an adoption order:

- *a person whose consent is required but who has not given consent;*
- *a person whose consent is required and who has given consent;*
- *the child;*
- *a person who has guardianship or custody of the child or parental responsibility for the child or with whom the child resides; and/or*
- *other?*



11.5 Interim orders

11.5.1 Current law and practice

The Chief Executive may make an interim order granting custody of a child to the prospective adoptive parents instead of making an adoption order. The Chief Executive retains guardianship of the child under an interim order. An interim order may be made subject to conditions relating to the maintenance, education and welfare of the child. It may be made for a period of up to 12 months and may be extended by the Chief Executive to a total of two years.

Currently, interim orders are usually only made in relation to children from overseas who enter Queensland with their prospective adoptive parents. These orders are usually made for 12 months to enable the Department to prepare post-placement reports as required by the child's country of origin and to support the prospective adoptive parents and the child. Under the Act, interim orders are the only means by which the Department can be legally assured of access to the child for the purpose of preparing reports and complying with its obligations to the child's country of origin.

In the past, interim orders were often made in relation to children with special needs who required adoption. Their purpose was to enable a period of placement supervision to ensure there were appropriate supports to enable the prospective adoptive parents to meet the child's needs. The capacity to make interim orders recognises the State has a duty of care to the child and the adoptive family after the placement, however, interim orders are rarely used in relation to Queensland children placed with adoptive parents.

11.5.2 Issues and options

The question of whether or not interim orders should be made in all cases raises fundamental questions about the ongoing role and responsibilities of the State to children who have been placed with adoptive families and to adoptive parents. Currently, adoption orders are made upon placement of Queensland children with prospective adoptive parents. The State's legal responsibilities end when the adoption order is made.

Children are not placed and interim orders are not made where there are doubts about the appropriateness of the placement. Assessment and matching processes should ensure as far as possible that the placement will best meet the child's needs and interim orders should not be used to 'test-run' the placement. The purpose of interim orders is to enable support to be provided to children and prospective adoptive parents by the Department and the interim order may be extended if further support is required.

Although research indicates the vast majority of adoption arrangements are successful for children and their adoptive families⁷⁸, adoption placement breakdown does occur. The highest number of disruptions occur in placements where adoptive parents of children from overseas are not members of parents' support groups, do not participate in a preparatory course, have little support from other adoptive parents and receive little follow-up from the local adoption authority after the child's placement.⁷⁹ It also indicates that post-placement support for children positively influences adoption outcomes.⁸⁰

⁷⁸ J.Triseliotis, J.Shireman and M.Hundleby, *Adoption theory, policy and practice*, Cassell, United Kingdom, 1997.

⁷⁹ R.Hoksbergen, *Understanding and preventing failing adoptions*, in E.Hibbs (ed) *Adoption International Perspectives*, International University Press, United States of America, 1991

⁸⁰ Triseliotis, op cit; R.Barth and M.Barry, *Adoption and Disruption Rates, Risks and Responses*, Aldine De Gruyter Inc, United States of America, 1988.

Using interim orders for all placements may be an appropriate means of ensuring post-placement support and fulfilling obligations to the child's country of origin. However, interim orders themselves do not assist children and adoptive families and appropriate post-placement services must be provided during the period of the interim order. Post-placement services are considered in Chapter 12.

Adoption legislation in all other States and Territories except South Australia and Western Australia enable the Court to make interim orders for custody of the child in favour of prospective adoptive parents.

Should there be a requirement for:

- *the placement of children from Queensland with prospective adoptive parents to be supervised for a period prior to the adoption order being made; and/or*
- *the placement of overseas children with prospective adoptive parents to be supervised for a period prior to an adoption order being made?*

Should supervision and support of placements be facilitated by:

- *interim orders granting custody to prospective adoptive parents; or*
- *a legislative requirement for a period of supervision prior to and adoption order being made; or*
- *other?*

11.6 Child's participation

There is a growing recognition of the importance of taking the views of children into account when decisions are made about them, and enabling them to participate in decision-making processes.

Article 12 of the United Nations Convention on the Rights of the Child states:

- *state parties shall assure to the child who is capable of forming his/her own views 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, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

Children's rights to be heard in legal proceedings are being increasingly recognised. The *Family Law Act 1975* requires the wishes of children to be taken into account by the Court and given appropriate weight. The Family Court has the power to appoint a representative for the child and children's wishes are usually presented to the Court in a family report prepared by a Court Counsellor or by an independent social worker contracted by the Child Representative. The Child Representative rarely meets directly with the child.

The *Child Protection Act 1999* also requires the views of a child who is able to form and express views about his/her care to be taken into account. That Act also enables the Children's Court to appoint a representative for the child in child protection proceedings. Legal Aid Queensland funds the separate representative. The child is a party to a child protection application and may be represented by his/her own lawyer.

The National Minimum Principles in Adoption agreed to by Social Welfare Ministers in 1993 recognises the right of the child to independent representation throughout the adoption process. (see Appendix 1).



How children are involved in decision-making and participate in legal proceedings varies among jurisdictions. The issue of how children of differing ages and capacities can be appropriately involved is complex and difficult.

It is uncontested that children should have a say in their future care and should not be required to be adopted if they do not want to be. However, children may not have the emotional and psychological capacity to make such decisions and should not be forced to do so.

Both the *Family Law Act 1975* and the *Child Protection Act 1999* explicitly state that a child should not be required to express views and wishes. Neither Act requires their involvement in legal proceedings because of the harm that the burden of decision-making can cause to children, especially when it involves choosing between adult carers. For this reason, both jurisdictions provide the Court with a discretionary power to appoint a Child Representative whose role is to act in the child's best interests rather than on instructions which would require the child to direct the conduct of the litigation.

11.6.1 Current law and practice

The *Adoption of Children Act 1964* makes no provision for the involvement of children in decision-making or for their wishes to be taken into account, apart from the requirement for the consent of a child aged 12 or more. There are no provisions for the appointment of an independent representative to obtain the child's views and present them to the Chief Executive prior to making an adoption order. All other jurisdictions, except Tasmania, provide for the child's representation.

It is the practice of the Department to seek the views of children regarding their proposed adoption by a step-parent and to talk to children as part of post-placement follow-up where an interim order is in place regarding a child adopted from overseas.

11.6.2 Options

One option to enable children's participation is to replicate the arrangements in the Family Court and in child protection proceedings, i.e., to enable the body which makes adoption orders to appoint a separate legal representative for the child to present the child's views and act in the child's best interests. Because lawyers generally do not have the professional skills to communicate with children, particularly young children, they generally engage a social worker to meet with the child and prepare a report.

The advantage of this model is that it enables children's views, where they have formed views, to be independently presented. It also provides the decision-maker with independent advice about what is in the child's best interests. This model does not burden the child with decision-making but it ensures presentation of the views of younger children who are not capable of giving legal instructions.

However, the child's views may not always accord with the separate representative's assessment of what is in the child's best interests. There is an argument that it is the role of the Department to act in the child's best interests and what is required is a mechanism for ensuring that the child's own voice can be heard.

Experience in family law and child protection jurisdictions indicates that appointments of separate legal representatives for children are usually only made in contested matters when it is often in uncontested matters that independent oversight is required.

To overcome problems with the exercise of discretion, legislation could require the appointment of a Child Representative for all children, however, this would have cost implications.

Another option is the appointment of a person (perhaps a social worker) to provide independent advice to the decision-maker about the child's views and needs (a 'guardian *ad litem*'). The guardian *ad litem* acts as a "friend of the Court" but is not able to legally represent the child in the proceedings and therefore could not subpoena or cross-examine witnesses.

Yet another option combines the above two models and has been adopted in the New South Wales legislation. It involves the appointment by the Court of a guardian *ad litem* whose functions are to safeguard and represent the child's interests and instruct the lawyer representing the child. The guardian *ad litem* is usually a social worker skilled in working with children. The Court may also appoint a lawyer for the child whose role is to ensure the child's views are placed before the Court and all relevant evidence is adduced and tested, and to act on the instructions of the child or, if the child is incapable of instructing, to act as a separate representative for the child or on the instructions of the guardian *ad litem*.

Western Australia's legislation similarly enables the Court to appoint a legal representative for the child. However, it also enables the Director-General of the Department to appoint a suitable person to represent a child in a range of matters prior to proceedings for an adoption order. These are where:

- the child's consent is required and the Director-General thinks that the child requires assistance in considering or articulating his/her wishes;
- the Director-General thinks the child needs separate representation in the negotiation of an adoption plan; and/or
- the child is involved or is likely to be involved in proceedings and the Director-General thinks consideration should be given to instructing a lawyer to represent the child in the proceedings. A person appointed may instruct a lawyer on behalf of the child.

Western Australia's model is similar to New South Wales, but enables the appointment of a guardian *ad litem* by the Director-General earlier in the adoption process, i.e., prior to an application for an order being made to the Court.

Should there be an independent child advocate to inform the body making adoption orders of the child's views and needs and to enable the child to participate, if he/she chooses?

Should the independent child advocate be:

- a lawyer;
- a social worker; or
- both a lawyer and social worker working together?

Should the independent child advocate be involved in all adoption proceedings?

What should the role of a child advocate be:

- to act in the child's best interests;
- or to act on instructions from the child; and/or
- other?

Should an independent child advocate be involved in any/all of the following decisions made prior to making an adoption order:

- taking a child's consent;
- dispensing with parental consent;
- overlooking pre-adoptive care;
- selecting adoptive parents;
- negotiation of adoption plans; and/or
- other?



11.7 Child's name

11.7.1 Current law and practice

Section 30 of the *Adoption of Children Act 1964* provides that an adopted child will have the same surname as his/her adoptive parents once an adoption order is made. The adoptive parents may nominate the first name by which the child will be known and, if approved by the Chief Executive, the child will have that name when the adoption order is made. The section of the Act also gives the Chief Executive discretion to enable a child to retain his/her original surname if he/she has been generally known by that surname.

Adoptive parents are encouraged to retain the first name/s by which the child has been known since birth. Because of the secrecy framework for adoptions in the Act, infants awaiting adoption and placed with pre-adoptive foster carers are only known by their given names. Their surnames are not disclosed to the carer or anyone else and are not used. Foster carers register children under their own name for the purpose of Medicare and Centrelink benefits.

11.7.2 Issues

The United Nations Convention on the Rights of the Child provides that a child shall have a right to a name from birth and that a child has a right to preserve his/her identity, including nationality, name and family relations.⁸¹

The issue of the child's given name/s is significant for all children requiring adoptive families, but it is particularly significant for older children and children adopted from another country. A child's surname is also particularly important for older children.

Research does not indicate a definitive age at which a child comprehends their name as part of who they are. Children under six months will respond to their name and children's original names certainly form a crucial part of the identity of older children who have been known by that name since birth. The child's name is a tangible link to the child's family of origin and to the child's culture and country of origin. Children adopted from overseas are removed from their familiar environment, carers, culture and language and their name is often the only remaining connection with their birth culture.

Many adoptive parents are sensitive to this issue and do not change the child's given name/s, while others feel strongly that a name change will help secure the child's identity within his/her adoptive family. Some adoptive parents argue that the name has a negative connotation in English or is difficult to pronounce and this will create hardship for the child in the broader community.

However, in an increasingly culturally diverse society, many people have non-Anglo-Saxon names, some of which are difficult to pronounce and this would not be a sufficient reason to change a child's name. Obviously, if there is any real risk that retention of the child's original name will cause difficulties for the child, then consideration should be given to a change.

It is also argued that children are often given their names by the institutions in which they were cared for, not by their birth parents, so the names are not as significant. This view ignores the point that children identify themselves with the name by which they are addressed and the fact that the name remains a link with their country of origin.

⁸¹ Articles 7 and 8

The New South Wales Law Reform Commission recommended in its review of the New South Wales adoption legislation that:

- the first name of a child over the age of 12 months should not be changed on the making of an adoption order unless the Court is satisfied there are special reasons for the change relating to the child's best interests;
- a child who is 12 (and whose consent is required) must consent to any change in his/her first name; and
- before the Court approves a change in a child's first names or surname, it must ascertain and give due consideration to the child's wishes and feelings.⁸²

New legislation in New South Wales implements these recommendations and includes as a principle, that the child's given name/s should be preserved. In some other States, the child's consent to any change to their first name is also required where a child's consent to his/her adoption is required. A number of States' legislation requires the Court to consider the child's wishes in relation to any proposed name change.

Should future legislation:

- *contain a statement of principle that a child's given name/s should be retained as far as possible?*
- *require any change to the child's name to be approved by the body that makes the adoption order at the time the order is made?*
- *require the body making the adoption order to give due consideration to the child's wishes about the name by which he/she shall be known?*
- *require the consent of older children to any proposed change to their names?*

Are there any circumstances that would justify a change to the child's given name/s?

11.8 Birth certificates

11.8.1 Current law and practice

The *Adoption of Children Act 1964* requires the Registrar-General of the Registry of Births Deaths and Marriages to maintain an Adopted Children Register. When an adoption order is made, the Chief Executive must send a memorandum of it to the Registrar-General who must then register it in the Adopted Children Register and, if the child was born in Queensland, make alterations to the register of births. An amended 'certificate of birth' is then issued. The amended certificate of birth is almost indistinguishable from the birth certificate of people who have not been adopted. It sets out the name of the child as it appears on the adoption order, the true date and place of birth and the details of the adoptive parents under the headings of "mother" and "father". The child's original birth certificate is not destroyed, but is sealed in the Registry and cannot be released, except with the authorisation of the Chief Executive under section 39C of the Act or under an order of the Supreme Court¹. Authorisation can be given by the Chief Executive under section 39C only where the person has received identifying information under section 39B.

Section 59 (3) of the Act makes it an offence for a person engaged in giving effect to the Act to release information likely to lead to the identification of the adopted person and the adoptive parents by the birth parents, or the identification of the birth parents by the adopted person or the adoptive parents. Consequently, birth parents cannot access the child's amended certificate of birth and adoptive parents and adopted persons cannot obtain a copy of the original birth certificate.

⁸² Review of the *Adoption of Children Act 1965* (NSW), Report No. 81, NSW Law Reform Commission, Sydney, 1996, page 179



Amendments to the Act in 1991 entitle all persons adopted after 1 June 1991, birth parents and eligible relatives in certain circumstances to access identifying information about each other and to obtain a copy of the adopted person's birth certificate once he/she turns 18.⁸³ This means that, once the adopted child turns 18, the adopted person can obtain his/her original birth certificate and the birth parents can obtain the adopted person's certificate of birth. The original birth certificate is endorsed 'not to be used for official purposes'.

For persons adopted before 1 June 1991, the Act enables objections to the provision of identifying information and contact to be lodged by adopted persons and birth parents. Where an objection to the provision of identifying information has been lodged by either an adopted person or a birth parent, the adopted person and adoptive parents cannot obtain the original birth certificate, nor can the birth parent and relatives obtain the amended certificate of birth.

11.8.2 Birth parents' access to original Birth certificates

Where an objection is lodged, birth parents are also prevented from obtaining the original birth certificate, although it does not contain any information which would identify the adopted child or the adoptive parents. Birth parents can only apply for and receive a copy of the child's original birth certificate prior to the adoption order being made. Once an adoption order is made, they cannot obtain the birth certificate until the adopted child turns 18 and, in the case of persons adopted prior to June 1991, only where no objection to the provision of identifying information has been lodged by the adopted person.

Many birth parents have complained about this restriction, as it does not serve any purpose related to protecting the adoptive identity of the child or the identity of the adoptive parents. For many birth parents, the original birth certificate is the only official confirmation that they actually had a child and their only tangible link to the child. It is evidence of a very important event in their life that cannot be forgotten or treated as if it never happened. A number of birth mothers who have contacted the Department have described acquiring the original birth certificate as critical to their healing process. The restriction on birth parents accessing original birth certificates contained in the *Adoption of Children Regulation 1999*⁸⁴ appears to be a vestige of past practices which denied the reality of birth mothers' experiences and encouraged them to proceed with their lives as if they had never given birth to the child.

Should birth parents be entitled to receive a certified copy of the child's original Birth certificate?

11.8.3 The form of birth records

The information provided in birth certificates is important to all persons concerned in an adoption and is a key issue in discussions about open adoption.

There are many benefits to the current system. The amended certificate of birth ensures the person's adoptive status is not disclosed each time the certificate is used to prove identity which ensures their privacy and enables them to control when and to whom they disclose information about their adoption. Given the increasing use of birth certificates as a means of proving legal identity, the current system also ensures birth certificates cannot be used by adopted persons to establish more than one legal identity. However, adopted persons may also feel that the certificate of birth misrepresents the truth about their lives as it is not a true record of their birth and that it creates a falsity by implying that the child has only one set of parents.

⁸³ *Adoption of Children Regulation 1999*, section 27(4)

⁸⁴ Review of the Adoption of Children Act 1965 (NSW), Report No. 81, NSW Law Reform Commission, Sydney, 1996, page 179

When reviewing the New South Wales legislation, the New South Wales Law Reform Commission presented a range of options for dealing with this issue. They included:

- (1) retain the current system;
- (2) supplement the current system by enabling the registration of a third document which would include pre- and post-adoption information, that is a record of the person's birth parents, the adoption order and the person's adoptive parents. This document would provide a complete record of the child's birth and adoption but could not be used as identification. It would be available once the adopted person reached 18 years of age or before that time with the person's adoptive parent/s and birth parent/s consent;
- (3) enable adopted persons to choose which certificate to use;
- (4) combine birth and adoption information so adopted persons would have only one birth certificate; and
- (5) provide that no new certificate be issued upon adoption so that the adopted person only has the original birth certificate.

The Commission recommended the second option as the best balance between opposing views, while still enabling adopted persons to obtain an official document which contains complete and truthful information.

It was considered that the first option did not promote openness, the third did not meet requirements for a person to have only one legal identity, the fourth did not provide adopted persons with choice about disclosing their adoptive status and the fifth did not encompass any recognition of the adopted person's new legal identity.⁸⁵

The Commission's recommendation was incorporated into the new adoption legislation in New South Wales.

Should future adoption legislation in Queensland include a similar provision to the Adoption Act 2000 (NSW) which requires the registration of a third document setting out a complete record of a person's birth and adoption which may be released to adopted persons, birth parents and adoptive parents?

11.9 Discharge of adoption orders

Under the Act, the Supreme Court may discharge an adoption order on the application of the Chief Executive if it is satisfied that:

- the adopted person is under 18; and
- the adoption order or any consent given was obtained by fraud, duress or other improper means; or
- there is an exceptional reason, subject to the welfare and interests of the child, for the order to be discharged.

Discharge of adoption orders is extremely rare because the fundamental premise of adoption is that it provides a permanent legal family for a child and that it is not in the best interests of children for that permanency to be readily removed.

⁸⁵ Review of the *Adoption of Children Act 1965* (NSW), Report No. 81, NSW Law Reform Commission, Sydney, 1996, pages 278 to 283



Relationship breakdowns may occur or child protection concerns may arise in adoptive families as in all families. When this occurs, the appropriate remedy is the general law rather than discharging the adoption order. Disputes over parental responsibilities between separated adoptive parents should be settled in the Family Court and child protection concerns relating to adopted children should be addressed through the child protection system.

There may be exceptional circumstances where discharge may be appropriate but discharge of the order should not occur where it would be contrary to the best interests of the adopted person.

All other jurisdictions enable the discharge of an order after the adopted person turns 18. There appears to be no reason why, if exceptional circumstances exist, that an order should not be able to be discharged after the adopted person turns 18.

All other jurisdictions, except Western Australia and the Northern Territory, enable the adopted child or adopted adult, the adoptive parents and birth parents to apply to the Court and the Chief Executive to discharge the adoption order. The Attorney-General also has standing to apply for discharge in New South Wales and Western Australia.

In what circumstances would discharge of an adoption order be appropriate?

Should an order for discharge be able to be made after the adopted person turns 18?

Who should be able to apply for discharge of the adoption order:

- *the adopted person;*
- *birth parent;*
- *adoptive parent;*
- *the Chief Executive; and/or*
- *other.*