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Adoptions Taskforce
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Adoption Reform: Dispensing with Consent

Thank you for inviting the Australian Catholic University's Institute of Child Protection Studies to make a submission to this consultation process.

The Institute of Child Protection Studies enhances outcomes for children, young people and families through quality research, program evaluation, training and community education, advocacy and policy development. We are recognised for our expertise in child protection, and preventing and responding to the abuse and neglect of children. We promote children's participation, strengthen service systems, inform practice and support child-safe communities.

The key messages which the Institute offers to this Review are that:

- We should recognise and learn from the damaging impacts of past adoption practices upon children.
- We should fully respect a child's right to knowledge and contact with their birth family.
- Adoption should not play a required role in a care and protection system and in particular should not take priority over arrangements that provide care and maintain family and cultural connections.
- For an adoption to proceed, the assessment of the best interests of the child must address all the circumstances of the individual child and their rights (including the right to be heard).
- The child must be the most important person in adoption and their participation must be supported.
- There should generally be a presumption against adoption unless the child has indicated support.
- The consent of the parents should be required for a child of parents who are under the age of 18 years.
- The grounds for dispensing with consent should be narrowed to exclude child protection matters and limited to circumstances where a parent cannot be found or lacks capacity; where the child was conceived as the result of a criminal offence committed by the father, where the father is a lineal relative of the mother, and where seeking consent would present an unacceptable risk of harm to the child or mother.

A more detailed explanation of our position is set in the attached paper. I am happy to elaborate if that is helpful.

Yours sincerely



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Introduction

In 2016, the ACT Government established the Domestic Adoptions Taskforce to identify issues and make recommendations about the adoption process and to support outcomes for children and young people under *A Step Up for Our Kids – One Step Can Make a Lifetime of Difference (Out of Home Care Strategy 2015–2020)*.

In March 2017, the *Final Report: Review of the domestic adoption process in the ACT* (Final Report) was published which made six recommendations. The recommendations were agreed to by the ACT Government and included improving communication (including the availability of information online) and assessment and adoption services; providing for integrated birth certificates; and transitioning permanency support services to the community sector. Most of this work is complete or underway.

One of the final pieces of work to be addressed is the recommendation to investigate and improve the dispensation of consent provisions in the *Adoption Act 1993*.

A discussion paper has been produced and our submission responds to the issues raised in this paper and raises some additional areas for attention.

The Institute's Views and Recent Public Policy Research

The Institute notes the comprehensive and careful consideration of adoption law recently undertaken by the Victorian Law Reform Commission (“the Commission”). The Commission had been asked to provide recommendations for the modernisation of adoption law in Victoria. The Commission undertook community and expert consultation as part of its review. Its report was tabled in the Victorian Parliament in June 2017.

In broad terms, the Institute supports many of the conclusions reached by the Commission regarding the role of adoption in Australian society today including its recommendations in relation to the dispensation of consent. We believe that the social and legal circumstances in Victoria are sufficiently similar to those in the Australian Capital Territory for the work of the Commission to be relevant to this consultation.

The Institute has also considered the role of adoption in the context of evidence presented by Professor Daryl Higgins the Director of the Institute to the Inquiry into Local Adoption conducted by the Federal Parliament's Standing Committee on Social Policy and Legal Affairs in 2018.

In each context, we believe that it is important to recognise a number of significant social developments in recent years that have had impact on our understanding of the value and role of adoption in Australian society. These include the changing attitudes and opportunities for fathers to play a greater role in the care and development of children¹; better understanding of the importance of the views and experiences of children², greater understanding of the importance of family and culture including relationships with birth family, both generally and in the context of child development³; and the removal of social and legal barriers to the care of children born outside of formal and legal marriage⁴.

Even more critically, we now understand the impact of past adoption practices upon children, parents, family and community where, in particular, processes have failed to require informed and voluntary consent. Many of the practices have in fact justifiably been described as “forced adoption”.

The Institute's Director Professor Daryl Higgins has extensive research experience into the impacts of past adoption practices. The following reports are of particular relevance:

- “Past adoption practices: Implications for current interventions” (2014) *In Psych: The Bulletin of the Australian Psychological Society*, 36(4), 8-11.
- “Current trauma: The impact of adoption practices up to the early 1970s” (2011) *Family Relationships Quarterly*, 19, 6-9

¹ “Review of the Adoption Act 1984” (2017) Victorian Law Reform Commission esp. pp 141-147

² “Review of the Adoption Act 1984” (2017) Victorian Law Reform Commission esp. chapter 3

³ “Review of the Adoption Act 1984” (2017) Victorian Law Reform Commission esp. chapter 7

⁴ “Review of the Adoption Act 1984” (2017) Victorian Law Reform Commission esp. p 9

- “Unfit mothers ... unjust practices? Key issues from Australian research on the impact of past adoption practices” (2011) *Family Matters* 87, 56-67.
- “Impact of past adoption practices: Summary of key issues from Australian research” (2010) *Australian Journal of Adoption*, 2(2)
- “National Practice Standards for Australian Government funded Forced Adoption Support Services: Discussion Paper” (2015) Australian Institute of Family Studies (“AIFS”)
- “Forced Adoption Support Services: Establishing and building networks” (2015) AIFS
- “Good Practice Principles in providing services to those affected by forced adoption and family separation” (2015) AIFS
- “Forced Adoption Support Services Scoping Study: Report for the Department of Social Services” (2014) AIFS
- “Past adoption practices: Key messages for service delivery responses and current policies” (2014) *Families, policy and the law: Selected essays on contemporary issues for Australia*, pp. 29-38 AIFS

The key critical finding at the heart of this research is the importance of recognising and respecting the right of a child to information and knowledge, and where possible and appropriate, the ability to resume or continue ongoing contact with their birth family. The broader international research environment has also led to a re-appraisal not only of the processes undertaken in adoption but also of the appropriateness of adoption itself as a practice. This re-appraisal acknowledges that adoption ends the legal relationship between child and birth family and through this change in status and relationship can impact the child’s understanding and appreciation of their cultural background, their family connections and their own identity.

Adoption and Child Protection

This research work on adoption sits alongside the Institute’s work in researching and improving child protection practice in Australia. It includes understanding the importance of stability in the provision and management of care arrangements for children and young people in the care system. It is our view that the existing orders available in the care system can, with appropriate attention to carer recruitment, selection, support and monitoring, offer more appropriate means of providing stability in the lives of children and young people in care without requiring the more permanent impacts of adoption in terms of potential loss of contact and connection with family, heritage and culture.

For these reasons, it is our view that adoption is not necessarily an appropriate option to address stability in care and protection arrangements. There will be circumstances where adoption is appropriate for a particular child in addressing their needs by providing ongoing care within the context of a familiar and connected wider family environment. These include known child adoption; step-parent adoption; kinship adoption. However we are not convinced that it is routinely appropriate to include it as an option when the state has and continues to play a role in the care and protection of a child or young person; and more importantly that adoption should not be given a priority over arrangements that can provide ongoing care and maintain family and cultural connections.

This does not represent an unqualified endorsement of the design and operation of the current care and protection system. There are significant challenges facing the care and protection system. These include the ability of the system to recruit, train and support carers; to support carers to provide ongoing and stable care for a child; to provide support to parents and family while their children are in the formal care of the State; and to ensure that care arrangements support effective engagement with a child’s wider family and community.

Given the nature and purpose of the child protection system, it is important to recognise that the motivations for adoption will be different from those of families wishing to foster or provide support for children living in vulnerable circumstances. Many of the children in care have been born into or living in circumstances that include experiences of domestic/family violence, exposure to parental substance misuse, poor mental health, or neglect. These children will require trauma-informed care and ongoing support. However none of these experiences should lead inevitably to the conclusion that these children cannot benefit now or in the future from relationships with their family and community.

Finally it is critically important that any system that is to make changes to the legal status of relationships for a child and its family is made primarily in the best interests of the child now and in the future and takes as much care to hear and support the views and wishes of the child as is possible in the circumstances.

Consent in Adoption Law

Adoption law in recent years has started from the premise that consent for an adoption is required from the child's birth mother and father. Then it has sought to define the limited circumstances in which it is possible for the court to dispense with that consent. This process has been used to protect the rights of the birth parents and to make provision for a child's right to know, be cared for and not arbitrarily separated from their parents.

It is critical that these processes should be rigorous and capable of ensuring that consent is informed and voluntary. The process for determining whether and when the consent of parents is dispensed with should be narrowly framed and as rigorously assessed.

To ensure that consent is both informed and voluntary, information and counselling must be provided about all options for care of the child that are available; all aspects of the adoption process and the possible impacts of the process and the outcome. The Institute supports the general intent of the recommendations of the Victorian Law Reform Commission in respect of the requirements to contact (and involve in discussions regarding consent) the man believed to be the father of a child to be adopted. We acknowledge the need to balance the safety of a mother and child and the prospect of grief and loss for a child (and father) if the man is not contacted and involved.

The Institute believes that there is further work required in reform of adoption law and practice in considering the views of children (under the age of eighteen) involved in the process.

The Child in Adoption

It is now generally appreciated that for an adoption to proceed, it must be in the best interests of the particular child. Our understanding of what is in the best interests of the child has been confounded in the past by a failure to consistently apply the 'best interests' principle as set out in the United Nations Convention on the Rights of the Child and by a tendency to redefine it according to varying statutory formula.

An informed application of the principle calls for a comprehensive assessment of all the circumstances of the individual child with reference to all the substantive rights of the child (including the right to be heard). Participation is one of the four general principles of the Convention that should be considered in the implementation of all rights.

The child is capable of expression and participation at all stages and ages of development. This calls for an ongoing commitment on the part of those working with children to support the participation of the child in decision-making processes – particularly those decisions that will have impact on the life and experience of the child.

In our view, this calls for a fundamental shift in adoption law and practice as well. The child must become the most important person in the adoption process and their participation must be integral to and integrated into the process. There must be particular care given to ensure the child can offer their views and be supported to understand and contribute to the maximum extent possible. The child should be given all necessary information and advice to understand the issues and to express their views. The information should be provided in format and style that suits the particular circumstances for each child.

A child is able to form views from a very young age. A child may use a range of forms of communication to express themselves and their views. A child (and indeed many adults) will not necessarily express themselves verbally. There must be the opportunity to express views using the most appropriate form of communication for the particular child (including through body language, play and art).

We note that a child may choose not to express their views. However in our view this is a matter that should still be considered in the context of deciding whether an adoption should proceed and whether it is in the best interest of the child. Ideally adoption should be understood and supported by the child. Given the critical nature of the change that adoption triggers in terms of status and relationships, we consider that there should be a presumption against adoption unless the child has consistently and decisively indicated their support.

The Child as Parent

We raise the issue of the process of involvement of a child (as defined legally as under the age of 18 years) who is the birth parent of the child to be adopted. The Victorian Law Reform Commission considered when consent of a child who is a parent can be given; whether an assessment of competency (to consent) is required; whether a child's guardian should be able to give consent on behalf of a child who is a parent; or whether the requirement for consent should be dispensed with.

These issues are not dealt with consistently across Australia. In Victoria, the Commission concluded that there should be additional protection and guidance for a child who is a parent to give consent. Generally it recommended that the approach taken in Queensland should be applied in Victoria. In the event that a child who is a parent is proposing to consent to their child being adopted, there should be an independent assessment undertaken as to the parent's capacity to understand and give consent to the adoption.

The assessment should be made by someone who can assess capacity and understanding and should not be the same person who provides the parent with counselling to understand the process and impact of adoption. The assessment of capacity and understanding is made of each individual child and is not determined on the basis of assumed capacity of a child of a particular age.

The Institute supports this approach. Our view is that there should be a presumption that adoption is not the preferred option for the provision of a care for a child including in circumstances where the parents or parents are also children. Other options for stable and ongoing care and support should be identified, available and on offer to the parents.

If the parents are not considered capable of understanding and giving consent to the adoption, consent should not be dispensed with as a requirement. The other options for stable and ongoing care and support that maintain relationships between the 'child' parents and their children should be considered.

Dispensing with consent

"Consent is the cornerstone of the adoption process and a crucial element in ensuring that the rights of parents are protected and that an adoption is in the best interests of the child." (Victorian Law Reform Commission)

The Institute agrees with the conclusion of the Victorian Law Reform Commission that the current grounds for dispensation with consent are too broad and that adoption should not be considered as an option in child protection proceedings. Orders for Enduring Parental Responsibility in the Australian Capital Territory provide for the transfer of responsibility for day to day and long-term decisions for a child or young person to a carer. Such orders do not remove the underlying legal relationship between the child or young person and their birth family. These orders give 'parental responsibility' to the carer until the young person becomes an adult but allow for the maintenance of the child's relationship and connection with their birth family.

The Institute supports the view of the Commission that grounds for dispensation with consent should be narrowed to exclude the use of adoption for child protection matters. The existing mechanism to dispense with consent is found in section 35(1) of the *Adoption Act 1993* (ACT). Of the five grounds in which an adoption might proceed without the consent of a parent or guardian, we would support the removal of the grounds set out in section 35 (1) (b), (c) and (d). We would support a reframing of the grounds in section 35 (1) (a) and (e).

There will be some limited circumstances in which dispensation with consent should be allowed where it is in the best interests of the child. These grounds should cover situations where a parent cannot consent because they cannot be found or because they lack capacity and are unlikely to regain it. We agree with the Victorian Law Reform Commission that the grounds should cover situations such as where the child was conceived as the result of a criminal offence committed by the father, where the father is a lineal relative of the mother, and where seeking consent would present an unacceptable risk of harm to the child or mother.

There should also be provision for other exceptional circumstances where consent should be dispensed with in the best interests of the child but not where the matter would otherwise be dealt with as a child protection matter.

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