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**HOUSE OF REPRESENTATIVES – STANDING COMMITTEE ON SOCIAL POLICY AND  
LEGAL AFFAIRS**

**SUBMISSION – INQUIRY INTO LOCAL ADOPTION**

**INSTITUTE OF OPEN ADOPTION STUDIES**

Sydney School of Education and Social Work  
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*Submission – Inquiry into local adoption*

14 May 2018

The Hon. Julia Banks MP  
Chair, House of Representatives Committees  
Standing Committee on Social Policy and Legal Affairs

Dear Ms Banks,

I would like to thank the House of Representatives, Standing Committee on Social Policy and Legal Affairs, for inviting the Institute of Open Adoption Studies (the Institute) to make a submission to the inquiry into local adoption in Australia.

This response is made on behalf of the Institute of Open Adoption Studies (the Institute). The Institute is an independent centre formed by a consortium from the University of Sydney and Barnardos Australia. The Institute is the first of its kind in Australia to be publicly funded and is being hosted by the Sydney School of Education and Social Work in the Faculty of Arts and Social Sciences. The Institute's objectives, first and foremost, are about children and their best interests, with a focus on matters relating to permanency planning, including open adoption (involving contact between birth and adoptive families) for children and young people in out-of-home care (when reunification with their family is not appropriate).

There is a need for much greater research into the permanency pathways for children in out-of-home care, relevant to the Australian cultural and policy environment. To date, Australia has largely relied on international studies, which have limited generalisability given the substantial differences in legislative and service systems. Children and families involved in the child protection and out-of-home care systems are some of the most vulnerable families across Australia. It is vital that policy and legislation are based on the best available research and evidence.

I would like to acknowledge the various people who have contributed to the preparation of this submission. In particular, I would like to thank Professor Marcia Zug for her review of the Indian Child Welfare Act, and its relevance to the Aboriginal and Torres Strait Islander Placement Principle, included in Appendix 1. Marcia is a Professor of Law from the University of South Carolina, who is currently visiting Australia on a Fulbright Fellowship, and we appreciate her willingness to share her considerable knowledge of Indian law, and her research into Indigenous law in Australia. Julia M Zodins provided a detailed summary of the national legislative provisions for adoption, from her Honours project, a summary of which is provided at Appendix 2. Julia has also contributed to some of the discussion of the national legislation and policy approaches included in this submission. Suzanne Pope, Program Manager, at the Institute, for drawing together the information for the submission and drafting the report.

If you have any queries about this submission, and the recommendations for national guiding principles, please do not hesitate to contact the Institute. The institute is keen to be part of a broader, national debate about children who are in out-of-home care, a discussion that is evidence-informed and founded on their best interest.

Sincerely,

Amy Conley Wright

Director, Institute of Open Adoption Studies  
Sydney School of Education and Social Work  
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## TERMS OF REFERENCE

The House of Representatives Standing Committee on Social Policy and Legal Affairs will inquire into and report on approaches to a nationally consistent framework for local adoption in Australia, with specific reference to:

1. Stability and permanency for children in out-of-home care with local adoption as a viable option; and
2. Appropriate guiding principles for a national framework or code for local adoptions within Australia.

In undertaking its inquiry, the Committee will have regard to relevant legislative frameworks within Australia.

## RECOMMENDATIONS – NATIONAL FRAMEWORK FOR LOCAL ADOPTION WITHIN AUSTRALIA

The Standing Committee inquiry highlights the significant variation in the legislation and practices pertaining to adoption, and other permanency placements for children in out-of-home care, across Australia.<sup>1</sup> The establishment of a nationally framework for open adoption<sup>2</sup> represents an opportunity to consider the basis for agreement around core principles – including dispensation of consent, child voice, representation and age of consent; and need for an adoption plan.

Most Australian states and territories have conducted reviews of their adoption laws in recent years.<sup>3</sup> However, there has been little progress towards a more consistent approach across jurisdictions. National Principles in Adoption were developed in 1993, through the Community and Disability Services Ministers' Conference, and were amended in 1997 in response to Australia's obligations under the *United Nations Convention on the Rights of the Child* and *The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*. These Principles, however, have no legal standing.

In preparing our response to the Standing Committee inquiry, the Institute has conducted a review of the differences between the State and Territory legislation and policy pertaining to the permanent placements for children in out-of-home care, including adoption. An overview of the key differences is provided in attachment 2 of this submission. It is evident that these variations have created both structural and

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<sup>1</sup> This submission discusses the issues for 'known child' adoptions—where the child is already known to the adoptive parent(s), applying the Australian Institute of Health and Welfare (AIHW) definition. AIHW defines 'local' adoption as the adoption of Australian children not known to their adoptive parents.

<sup>2</sup> Open adoption seeks to sustain positive communication between the adopted child or young person, adoptive parents and birth parents, when it is in the best interests of the child or young person.

<sup>3</sup> Queensland and South Australia passed new Adoption Acts in 2016. See sections 45F, 45G and 45H inserted into the *Adoption Act 2000* (NSW) by the *Child Protection Amendment Act 2014* (NSW). See also *A Safe Home for Life*, the government response to the New South Wales Discussion Paper pp 38-39. Victorian Law Reform Commission (February 2017) *Review of the Adoption Act 1984*: Report.

cultural barriers to the adoption of children from care. Of concern is that the legislation operates in legal systems that are adversarial and adult-centric, with a focus on parental rather than children's rights. These systems are not designed to adequately represent the best interests of children nor do they address a child's developmental needs and timeframes, which may have a lifelong impact on their wellbeing.

It is likely that the history and practices of adoption in Australia have contributed to a reticence for public debate and discourse on open adoption. The Institute recently conducted an internet-based survey with 1,000 residents in NSW exploring perceptions, motivations, and barriers to adopting children, particularly from out-of-home care. Overall, it appears that public perceptions do not yet reflect current practice and policy changes. More than half of the respondents indicated that they did not know what 'open adoption' is and only 1 in 5 provided an accurate definition of open adoption. This suggests that targeted efforts are needed to address misconceptions about open adoption, including the process for pursuing an adoption, the legal status of adoptive families, and the supports available for children and families.

It should be acknowledged that adoption is not appropriate for all children. For example, adoption is not considered culturally appropriate for Aboriginal and Torres Strait Islander children, for whom placement with Kin is preferred. Adoption is most likely to be considered appropriate for younger children who are in long-term foster care. Between 2016 and 2017, nearly half (45.7%) of the 11, 557 children who entered out-of-home care were under the age of 5 years, and of these children, 42.6% were under the age of 12 months.<sup>4</sup> During this same period, just over 1 in 4 of the 9,854 children discharged from out-of-home care were under 5 and 1 in 3 were between the ages of 15 and 17 years (and hence likely to be ageing out of the system).<sup>5</sup> Further, as of June 2017, 41.2% of the 47,915 children who were in out-of-home care had been in continuous placement for 5 or more years.<sup>6</sup> This suggests there is a significant group, both in terms of numbers and potentially good outcomes, for whom adoption may be suitable.<sup>7</sup>

The assumption by some states/territories that permanent orders are equivalent to adoption has not been rigorously tested or supported by evidence. For example, all placement orders, other than adoption are appealable, and provide permanency only until a child reaches the age of 18 years. Current research strongly suggests that adoption is more beneficial for children than remaining in long-term foster care, in that it promotes a greater sense of security, stability, and belonging. Triseliotis (2002) review of adoption and long-term fostering concluded that children who have been adopted express a greater sense of belonging, emotional security, and wellbeing within their adoptive families. However, he conceded that factors such as the child's age, current attachments, adjustment, and their wish to be adopted need to be considered.<sup>8</sup>

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<sup>4</sup> Australian Institute of Health and Welfare (AIHW) supplementary Table S34: Children admitted to out-of-home care, by age group and Indigenous status, states and territories, 2016–17.

<sup>5</sup> AIHW Table S35: Children discharged from out-of-home care, by age group and Indigenous status, states and territories, 2016–17.

<sup>6</sup> AIHW Table S47: Children in out-of-home care, by length of time continuously in care and Indigenous status, states and territories, 30 June 2017.

<sup>7</sup> De Rosnay, M., Luu, B. and Wright, A. (2016) *Open Adoption and Young Children's Identity Formation*. Early Start, University of Wollongong.

<sup>8</sup> Triseliotis, J. (2002). Long-term foster care or adoption? The evidence examined. *Child and Family Social Work*, 7(1), 23–33.

During interviews conducted by De Rosnay et al. (2016) with adoptees between 9 and 23 years of age, from the Barnardos Find-a-Family program in NSW, one young man reported:

*I think the belief [in permanency] really came when the ink dried on the adoption paper, to say that this is you know, it's now been signed by a judge and this is it. Up until that point, right up until the paperwork is signed the parents can always give you back, they can always go, 'we don't want that, that's not for us'. You know, they can essentially reject you until that point when they sign that paperwork (see <http://youtu.be/rpPuN9svoiM>)<sup>9</sup>*

The Institute has drawn on the findings from our research, a review of the national and international literature, and the comparative analysis of State and Territory legislation and policy in the preparation of this submission. As a result of our investigation, we propose several core guiding principles for a national framework for adoption in Australia. The rationale and arguments for each of the following recommendations are articulated in the body of the submission.

The Institute recommends the following key guiding principles for a national framework or code for local adoptions within Australia:

**1. Adoption is a service for a child, not a parent**

As laid out in the principles of the *NSW Adoption Act 2000*, Section 7, which clearly states that open adoption is to be *a service to the child and not to the parent*. Decisions about adoption orders are made in relation to what is in the *best interests* of the child, as elaborated by NSW Supreme Court, Justice Brereton:

*"The concept of adoption being a service for the child means that adoption orders are made or declined according to what will best advance the interests of the child, not the interests of the proposed adoptive parents nor, for that matter, the interests of the birth parents. Adoption is not to be seen as a reward for being an outstandingly good foster parent, nor is refusing an adoption order to be seen as an incentive for birth parents to improve their lives or improve parenting capacity."*

**2. Children should have their views considered and opportunities to participate in the decisions that affect them.**

It is recommended that Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) provide the foundation for this principle, as described in 12.1:

*State Parties shall assure to the child who is capable of forming his or 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, and further in 12.2 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.*

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<sup>9</sup> De Rosnay, M., Luu, B. and Wright, A. (2016) *Open Adoption and Young Children's Identity Formation*. Early Start, University of Wollongong.

Finally, a child who is over 12 years of age, deemed mature enough to understand the implications of giving consent, and has been cared for by the prospective adoptive parents for at least 2 years, should be able to give sole consent to his or her adoption.

**3. Security and permanency should be measured by a child's sense of belonging**

The critical element of children's lived experience is children's own perceptions of the security and quality of their relationships. The measure of outcomes should not be the 'durability' and legal and physical permanency but children's sense of emotional security – their sense of belonging to a family for life, and feeling loved and cared for. Further, for children who are to be adopted by their carers, the court should dispense with the birth parents' consent if it is shown that the child has been in a stable secure long-term relationship with his or her carers, and if the adoption is considered to be in the child's best interests.

**4. Openness in adoptions should be encouraged – through adoption law and practice that assist a child to know and have access to his or her birth family and cultural heritage.**

In contrast to the secrecy of past adoptions in Australia, current adoption practice emphasises the needs and best interests of the child, which is characterised by an open exchange of information. Communicative openness implies a way of relating to children that is honest and responsive to their changing needs. It also implies that the child has the belief that they have the right to seek the information they want and need. Open adoptions are said to be *open* in that they promote the discussion of adoption-related issues within adoptive families such that children can understand why their birth parents are unable to look after them and the importance of building relationships with birth family members.

**5. Adoption is not suitable for all children in out-of-home care**

The research evidence (outlined later) is not conclusive that adoption necessarily provides for better outcomes for children *of all ages* than long-term stable foster care per se though there is evidence that it does provide greater emotional security and is less likely to disrupt. Adoptions are most likely to break down when children are in their teenage years, and when support services are less available. Adoption is not considered culturally appropriate for Aboriginal and Torres Strait Islander children, for whom placement with Kin is preferred.

**6. The Permanency Placement Principle should be supported at the national level with regular reporting on compliance and adherence.**

Australia does not currently have a systematic national protocol to monitor and assess implementation of the Principle. In considering a national Principle, the requirement to consult with Aboriginal communities should be both mandatory and presumptively determinative. This change would mean State courts must adopt the custody recommendation of the child's Aboriginal community absent a finding of "good cause." A national law implementing the Principle should have uniform standards for identifying Aboriginal children. Courts should be provided with clear guidelines stating when an examination into Aboriginality should be triggered and, if the child's Aboriginal community can be identified, they should have the ability to determine the child's Aboriginality and their decision should be conclusive.

7. **A placement assistance fund be established to provide financial and other assistance to children, their birth and adoptive parents or carers, to prepare for, and support adoption, or other permanency placements.**

A general principle for any national framework should be the acknowledgement that children in care, their birth parents and their caring families should be able to access support at key points in their lives. For open adoption, and other permanent care arrangements, to be effective, all parties to an adoption or permanent placement, need support, before, during, and after the placement.

8. **Quality data collection and reporting**

This should be driven at a national level to address the lack of a robust system for measuring the impact of and reporting on the outcomes achieved for children in care in the different permanency pathways in Australia.<sup>10</sup> Longitudinal data are critical to understand the outcomes for children in care and the efficacy of policies and systems to support them.<sup>11</sup> Recent advances in data linkage and machine learning offer the potential to harness data in ways that can inform policymakers about the outcomes of the permanency reforms, as well as future policy and service development. The Australian government is in the position to facilitate the whole-of-government agreements that would allow for the tracking children's outcomes across safety, health, welfare and education domains with appropriate safeguards for privacy concerns.

9. **National research agenda for children in out-of-home care**

A national research agenda in this field is essential to drive investment in collaborative efforts better understand the impact of legislation and policy on the outcomes achieved for children in out-of-home care, across all permanency pathways. A national research agenda is needed to address the current lack of research relevant to the Australian context, and to draw together a multidisciplinary research effort. This should include pathways and opportunities to encourage early career researchers into this field. National leadership is needed to address barriers to data sharing and linkage arrangements with relevant Commonwealth, State and Territory government agencies. The *NSW Pathways of Care Longitudinal Study* of children in out-of-home care provides a model for such a research platform.

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<sup>10</sup> See Productivity Commission, Chapter 16 *Child protection services*: p 16.10, 16.32, <https://www.pc.gov.au/research/ongoing/report-on-government-services/2018/community-services/child-protection/rogs-2018-partf-chapter16.pdf>:

"There are still, however, some major limitations in access to unit record data and in providing good measures in various areas, as the Productivity Commission reports point out. For example, the Commission could not report on a number of key indicators such as the "proportion of families identified as requiring support who receive support" and "children's safety in out-of-home care" and the "proportion of children and young people placed in out-of-home care who subsequently return home, and for whom there was no further substantiation (within a specified time period)".

<sup>11</sup> Australian Institute of Health and Welfare 2017. *Australia's Welfare 2017*. Australia's welfare series no. 13. AUS 214. Canberra: AIHW.



## **TOR 1. STABILITY AND PERMANENCY FOR CHILDREN IN OUT-OF-HOME CARE WITH LOCAL ADOPTION AS A VIABLE OPTION**

Developing secure relationships, including those with non-parent carers, can mitigate or reverse adverse outcomes.<sup>12</sup> This is because a ‘child who has been subject to trauma and loss requires a deep, meaningful and sustained primary attachment relationship to heal’.<sup>13</sup> Therefore, a key aim for children in out-of-home care is to achieve a stable, secure, long-term care arrangement.

In Australia, the impact of out-of-home care on children and young people, as well as the direct and indirect cost to the community, has been examined over many years in parliamentary inquiries, Council of Australian Governments (COAG) reforms and coronial inquests. In 2015, Australia’s Senate Inquiry into Out-of-Home Care concluded that placement stability and emotional security in the early years are critical to a child’s development and important in securing positive outcomes. The Committee also recommended that a nationally consistent approach to legal forms of permanence—including guardianship orders and adoption – be developed (Senate Community Affairs References Committee 2015).<sup>14</sup>

In November 2016, Community Services Ministers of Australian and state and territory governments agreed to develop a set of guiding principles to drive permanency arrangements for children in out-of-home care. These included a focus on permanency and stability, on the timeliness of permanent care decisions, and on improving outcomes for Indigenous families and children. Further, it was agreed that reform efforts be directed to improving consistency in permanent care arrangements across jurisdictions, and to investigating possible schemes for mutual recognition of the suitability of carers.

While these reform goals are commendable, Australia lacks a robust system for measuring the impact of and reporting on the outcomes achieved for children in care in the different permanency pathways. Longitudinal data are critical to understand the outcomes for children in care and the efficacy of policies and systems to support them.<sup>15</sup> Recent advances in data linkage and machine learning offer the potential to harness data in ways that can inform policymakers about the outcomes of the permanency reforms, as well as future policy and service development. The Australian government is in the position to facilitate the whole-of-government agreements that would allow for the tracking children’s outcomes across safety, health, welfare and education domains.

The *Pathways of Care Longitudinal Study* (POCLS) provides a model for research that provides a strong evidence base to inform policy and practice in order to improve decision-making and the support provided to children and young people who cannot live safely at home. Funded by the New South Wales Department of Family and Community Services (FACS), POCLS is the first large-scale prospective

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<sup>12</sup> Center on the Developing Child at Harvard University 2016. *Applying the science of child development in child welfare systems*. Cambridge: Harvard University. Viewed 11 January 2017, <<http://www.developingchild.harvard.edu>>.

<sup>13</sup> McPherson L & MacNamara, N. (2014). Therapeutic kinship care: a carer’s perspective. *Children Australia*, 39(4), 221–5.

<sup>14</sup> Senate Community Affairs References Committee 2015. *The Senate Community Affairs References Committee: Out of Home Care*. Canberra: Senate Community Affairs Committee Secretariat.

<sup>15</sup> Australian Institute of Health and Welfare 2017. *Australia’s Welfare 2017*. Australia’s welfare series no. 13. AUS 214. Canberra: AIHW.

longitudinal study of children and young people in out-of-home care in Australia. POCLS is the first study to link data on children’s child protection backgrounds, out-of-home care placements, health, education and offending held by multiple government agencies; and match it to firsthand accounts from children, caregivers, caseworkers and teachers. The POCLS database will allow researchers to track children’s experiences and outcomes from birth. Information on safety, permanency and wellbeing is being collected from various sources. The child developmental domains of interest are physical health, socio-emotional wellbeing and cognitive/learning ability.<sup>16</sup>

### Best interests of children

Article 21 of the UNCRC relates to the issue of adoption and establishes “*paramountcy of all children’s best interests in all adoption arrangements and details minimum requirements for adoption procedures*” (p. 293).

Under the NSW *Adoption Act 2000*, in adoption proceedings before the Supreme Court, the court must find that adoption is ‘clearly preferable’ to other orders. The Supreme Court has said that this requires “*something more than a slight preponderance of consideration in favour of adoption over the alternatives.*” This does not require satisfaction “*beyond reasonable doubt*” but instead that adoption be “*obviously, plainly or manifestly preferable to any other action that could be taken by law*”.<sup>17</sup> In response to each adoption application, the Supreme Court must independently determine whether adoption is the clearly preferred option for the child<sup>18</sup> and if it decides it is not, may make other orders including allocating parental responsibility to the Minister.<sup>19</sup>

Young adoptees interviewed by De Rosnay et al. (2016) could remember their adoption; even if they were quite young at the time, it had a significant impact.

*Yeah, I remember. I remember the day clearer than I remember anything else. It was pretty much, in the morning I woke up like I was really nervous but excited. On the car ride there, like, even nowadays, the work that I'm working with now, it's in Sydney. So even when I drive there, certain places I remember from the drive to the adoption. I remember the roads and all that to where it is. [How old were you then?] I think 7. We got to stamp the papers, that gave me a sense of relief and more safe. Brought more safety into me. More feeling like I can be more secure, not worrying that anyone could come in and take us out. (S41; 16-year-old)<sup>20</sup>*

The American Professor of Law, James Dwyer, conducted a study of the legal and state influences on the relationships of children in 2006, and how the legal system determines who should raise and associate with children. Dwyer contends that there are many examples of the state in western society making decisions about children’s relationships that are injurious to the children involved, when the state

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<sup>16</sup> Cashmore, J. & Taylor, A. (2017). Children’s Family Relationships in Out-of-Home Care. Pathways of Care Longitudinal Study: Outcomes of Children and Young People in Out-of-Home Care. Research Report Number 9. Sydney. NSW Department of Family and Community Services.

<sup>17</sup> Department of Community Services v D 37 FamLR 595 at [25].

<sup>18</sup> *Adoption Act 2000*, section 90(3).

<sup>19</sup> *Adoption Act 2000*, section 92.

<sup>20</sup> De Rosnay, M., Luu, B. and Wright, A. (2016). *Open Adoption and Young Children’s Identity Formation*. Early Start, University of Wollongong.

balances the children's interests against the interests and rights of the other parties. The issue raised by Dwyer's examination of the relationship rights of children is whether children should be given equivalent rights to adults to form and maintain relationships, and to choose not to have a relationship with adults who have been harmful to them. Dwyer states that adoption laws provide a very good example of how the state intervenes in the universal assumption that legal parenthood is conferred on the basis of biological connection. Dwyer cautioned that when "everything turns on the *possessory* rights of biological parents" some children may suffer, even after child protection authorities have intervened. Adoption challenges the proprietary view of biological parents because the relationship is legally and permanently severed.<sup>21</sup>

Children's sense of belonging and permanence in their adoptive or long-term foster placement was examined by Biehal et al. (2010) in an interview with two separate groups of children who had been in their adoptive or foster placements for at least 6 years. The majority of adopted children reported feeling emotionally secure and reported that they strongly identified with their adoptive families. In particular, children who were adopted by their foster carers described a strong sense of belonging to their adoptive families.<sup>22</sup> Biehal et al. (2014) suggested that the success of such (foster) carer adoptions may hinge on the pre-existing success of the child-carer relationship prior to the application for adoption.<sup>23</sup> This is consistent with the findings from the De Rosnay et al. study (2016) where young people reported a strong bond with the families who had raised them, including feelings of being safe, loved, and a part of their (new) family. For example:

*There's a quote from this movie. The quote is, and I want to get a tattoo across my ribs because that's how strong the quote is for me. The blood you carry doesn't determine your family, but the people who love and care for you determines your family. So, like you can be in a family that beats you and not care for you and not feed you, that doesn't determine them as your family, that determines them as other people who are cruel to you. But the people who love you, your friends and family. If I had my biological family here, and the family I'm living with here. I would say the family I'm living with is my family. (S41; 16-year-old)*

*My adopted family is much more a family than anyone that I am blood-related to. And adoption has shown me that. I think family is those who have always been there for you and I don't think it has to be through blood that you consider people family. There's a quote, and it's often misquoted, the blood is thicker than water quote. That's not actually the quote. It's actually the blood of the covenant is thicker than the water of the womb. Which means like those people who you've been through hard trials and hard times with, and stuck with you, they are closer to you, and more family than those born with blood. I agree with that, that those who've always stuck by you, cared for you, are more family than anyone else. (S91; 19-year-old)<sup>24</sup>*

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<sup>21</sup> Dwyer, J. (2006). *Relationship Rights of Children*. New York: Cambridge University Press.

<sup>22</sup> Biehal, N., Ellison, S., Baker, C., & Sinclair, I. (2010). *Belonging and permanence: Outcomes in long-term foster care and adoption*. London: British Association for Adoption and Fostering.

<sup>23</sup> Biehal, N. (2014). A sense of belonging: Meanings of family and home in long-term foster care. *British Journal of Social Work*, 44(4), 955–971.

<sup>24</sup> De Rosnay, M., Luu, B. and Wright, A. (2016) Open Adoption and Young Children's Identity Formation. Early Start, University of Wollongong.

### ***Sibling co-placement***

The issue of sibling placement is another area that has been understudied in the research literature, yet arises with some frequency in practice.<sup>25</sup> For example, the Children’s Act 1989 in English law requires that in “so far as is reasonably practicable and consistent with (the child’s) welfare.. .where the Authority are also providing accommodations for a sibling of his, they are accommodated together.”<sup>26</sup> In the United States, the Fostering Connections to Success and Increasing Adoptions Act of 2008 imposed a requirement upon states to make ‘reasonable efforts’ to keep siblings together in out-of-home care placements.

In New South Wales, the *Adoption Act* (2000) notes that judges should, among other issues, consider the relationship with siblings when determining whether adoption is in the best interests of the child. However, there is no specific provision requiring consideration of co-placement. Only Queensland and Western Australia had clear provisions for consideration of co-placement of siblings. In some overseas jurisdictions, legislation makes a specific point regarding consideration of co-placement of siblings. Longitudinal research in the UK suggests that while it is common for younger siblings to enter care, it is unusual for them to be placed with older siblings in the same adoptive family.<sup>27</sup> There is a lack of empirically grounded practice guidance for caseworkers regarding co-placement with siblings in out-of-home and adoptive families.<sup>28 29</sup>

### **Permanency orders versus adoption**

Current Australian approaches to permanency and stability for children in out-of-home care have prioritised various forms of parental responsibility orders over adoption. Victoria, for example, has used permanent care orders, a form of guardianship order, since 1992. Western Australian introduced Special Guardianship Orders in 2011, on a similar basis to Victoria’s Permanent Care Orders.<sup>30</sup> The legislative reforms introduced in New South Wales in 2014 included a new form of Guardianship Order, primarily for Kinship carers.<sup>31</sup> These permanent care orders do not automatically affect the child’s name, birth certificate or inheritance rights.

Victoria is the state that has most actively pursued permanent orders for children in out-of-home care in preference to adoption. For example, in 2015–16, Victoria issued 507 third-party parental responsibility

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<sup>25</sup> Miron, D., Sujan, A., & Middleton, M. (2013). Considering the best interests of infants in foster care placed separately from their siblings. *Children and Youth Services Review*, 35(9), 1385–1392.

<sup>26</sup> Maclean, K. (1991). Meeting the needs of sibling groups in care. *Adoption and Fostering*, 15(1), 33 – 37.

<sup>27</sup> Neil, E. (1999). The sibling relationships of adopted children and patterns of contact after adoption. *Adoption & Fostering*, 23 (1), 59–60.

<sup>28</sup> Miron, D., Sujan, A., & Middleton, M. (2013). Considering the best interests of infants in foster care placed separately from their siblings. *Children and Youth Services Review*, 35(9), 1385–1392.

<sup>29</sup> Tarren-Sweeney, M., & Hazell, P. (2005). The mental health and socialization of siblings in care. *Children and Youth Services Review*, 27(7), 821–843.

<sup>30</sup> Australian Institute of Health and Welfare *Adoptions Australia 2014-15* (2015) 47-48; s 60 Children and Community Services Act 2004 (WA).

<sup>31</sup> Section 79A, *Children and Young Persons (Care and Protection) Act* 1998 (NSW).

orders, compared to one known adoption order.<sup>32</sup> Victoria also has a different standard of consent for adoption compared to permanent care orders. In Victoria, adoption will be pursued only if the birth parents consent to the adoption and voluntarily relinquish all their legal rights. Permanent care orders are not voluntary placements, and birth parents do not consent to these placements.

It is argued that permanency orders provide relatively secure placement with kinship or foster carers for children who are unlikely to be restored to their parents' care.<sup>33</sup> There are, however, some significant differences between permanent care orders and adoption. These relate to their 'permanence', the effect of the order on children and the legal consequences in terms of federal law as well as inheritance.

One of the most significant differences between adoption and the various forms of permanent carer orders is that the orders expire when the child turns 18 years of age.<sup>34</sup> While the aim of permanent care orders is to give children a stable environment in which to grow up, they are not actually permanent and there is no legally enforceable right for the young person to remain with their carers when the order expires at the age of 18 years. Therefore, permanent care orders may be viewed as securing a fostering arrangement until the young person reaches adulthood, but does not necessarily secure a home for life.<sup>35</sup>

Under a permanent care order, the State transfers parental custody and guardianship to the permanent family. Legally this means that day-to-day care of the child and long-term decisions about things like education, changes in residence, health and employment is the responsibility of the permanent carer. They do not, however, have the same legal status as an adoptive parent. Being a 'permanent carer' also discloses a child's history and reveals their status as needing out-of-home care. There also remains an ongoing risk of further legal proceedings if the birth parents decided to contest custody in court.<sup>36</sup>

Laws across Australia use birth certificates as 'prima facie' proof that the people named as a child's parents in the certificate are the child's parents.<sup>37</sup> Some of the complications caused by the legal status of a parenting order include the lack of recognition by federal laws, for example:

- Applying for an Australian passport for the child requires the birth certificate
- Centrelink does not recognise a permanent care parent as being responsible for paying child support if a couple separates
- Permanent care parents are excluded from paid parental leave, as the federal scheme considers them more like foster carers than adoptive parents.

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<sup>32</sup> Australian Institute of Health and Welfare 2017. *Adoptions Australia 2016–17*. Child welfare series no. 67. Cat. no. CWS 61. Canberra: AIHW

<sup>33</sup> The 2015 *South Australian Adoption Act 1988* (SA) Review; <http://services.dhhs.vic.gov.au/permanent-care>

<sup>34</sup> <https://services.dhhs.vic.gov.au/permanent-care>

<sup>35</sup> Mackieson, P, Shlonsky, A and Connolly, M. (2017) Permanency planning and ideology in western child welfare systems: Implications for Victoria. *Communities, Children and Families Australia*, 11, No. 1, 3-16.

<sup>36</sup> Victorian Law Reform Commission (February 2017) *Review of the Adoption Act 1984: Report*

<sup>37</sup> Family Law Act 1975 (Cth) s 10; Status of Children Act 1974 (Vic) s 8(1); Parentage Act 2004 (ACT); Status of Children Act 1996 (NSW); Status of Children Act (NT) s 9; Status of Children Act 1978 (Qld); Status of Children Act 1974 (Tas); Family Law Act 1975 (Cth).

Issues may also arise when a child’s guardian passes away. In such circumstances the guardianship order ceases and parental responsibility for the child will revert by common law to the child’s parents. This may place the child at risk if the relevant Court cannot rescind its finding that there is no realistic possibility of restoration. When the Institute conducted focus groups with authorised NSW foster carers, concerns were raised about the ability to make decisions for children for whom they have parental responsibility under a permanency or guardianship order. Should they pass away before the child turns 18 years, parental responsibility does not remain with their extended family. When an order allocates parental responsibility jointly to two guardians, then the surviving guardian will hold sole parental responsibility. However, for single carers/guardians, their wishes about the most suitable care arrangements for the child may not necessarily be taken into account, and birth parents can apply to have the child returned to their care. These concerns are expressed by some focus group participants:

*If you’ve got sole guardianship, if I died, the child would go back to birth family. They wouldn’t even go back into care because they are not under guardian of the Minister. You’re the legal guardian. The way around that they said I could be is to be a joint guardian with my parents, even though they don’t live with us. But even so, they [birth parents] can lodge a Section 90. So no way, too risky.*

*Realising that now I’m divorced or separated, that if I were to die, that the children would live permanently with their foster dad and his partner. There would be no way I could enforce my kids to see their poppy and aunties, and that is distressing to me.*

Being placed back in care and separated from family again is likely to be a traumatic experience for the child, as one carer noted:

*For me, I am a single carer. My greatest fear is if I die before [child] turns 18, I have no rights to say where he’s going to go. I can’t put in my will that he will be looked after by my brother or my parents. He would just go back into care with some random stranger and how traumatising that would be. I mean it’s obviously traumatic if you die anyway, if you lose a parent, but to not be staying with family would just be so devastating. That’s the biggest thing for me. Not being able to put anything in my will about what happens to him.*

In 2015-2016, the NSW Department of Family and Community Services conducted a quality assurance project, including interviews with 33 adoptive families who had adopted a child or children from care over the 2010 – 2014 period. Adoptive parents reported that their primary motivations for pursuing an adoption were the desire to provide the child with a sense of belonging and security, and to achieve equality for the child within their family unit and society.<sup>38</sup> Adoptive parents also reported that the adoption had a range of positive impacts on the child(ren) including an increased sense of belonging and stability. Even when there had been some behaviour problems following the adoption, parents attributed this to increased feelings of security and permanency. For example:

*He always wanted to please. After adoption, I think he felt he could be a bit naughty.*

Parents also reported that children became more attached and confident:

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<sup>38</sup> Cravens, J. (February 2016). *The Adoption Journey*. OOHHC Adoption Practice Innovation Forum, NSW FACS, Sydney.

*Our relationships have grown even stronger. The children feel safe and that is reflected in all of their relationships. The kids seem to feel more comfortable in themselves”.*<sup>39</sup>

Some parents found that the children were viewed more positively within the community as they no longer had the stigma of being foster children. While parents frequently reiterated that they loved the child regardless of adoption, they also expressed a sense of relief and increased ability to parent more naturally. Parents also reported that institutions, such as health and education, treated them differently after the adoption and they had the legitimacy of their role as a parent for decision-making.<sup>40</sup>

For adoptees who remembered their adoption, they were able to describe some factors that helped with their adoption experience.

*I think because we were like, it was fun. And I guess we knew that we were in foster care, and we knew what adoption meant. But I think it was because we already felt like a family. So this was just making it legal. (S44; 13-year-old)*

*Well, because we were so young, we didn’t really know much about the whole adoption thing. But mum and dad led us through it, told us everything we needed to know, the whole family supported us and the whole adoption process. That really helped. It made us feel less different, and it helped us know that they wanted us here and they weren’t only doing it because we were two random kids. Like, they actually loved us. (S08; 15-year-old)*<sup>41</sup>

### **Child development and identity formation**

The purpose of both adoption and long-term fostering is to provide a sense of permanency and emotional security for children. Permanency with a stable and nurturing family is argued to facilitate children’s development and provide a sense of emotional security that will remain with them throughout their lives.<sup>42</sup> Research that compares adoption with long-term foster care attempts to establish whether there are different outcomes for children in those different care settings; and therefore, whether one strategy is better for children. However, it should be noted that it is often difficult to compare outcomes because of systematic differences in the characteristics of children who are placed in adoption and long-term foster care.<sup>43</sup> For instance, the circumstances of children who are placed in long-term foster care are generally not as well-planned and arranged as they are for children who are adopted, so it may be difficult to compare children who differ in their experiences.<sup>44</sup> The age at which children are placed in either form of care is an important factor, for example: when age is held constant, some of the differences in stability or breakdown rates are substantially reduced.<sup>45</sup>

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<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> De Rosnay, M., Luu, B. and Wright, A. (2016). *Open Adoption and Young Children’s Identity Formation*. Early Start, University of Wollongong.

<sup>42</sup> Livingston Smith, S., & Institute Staff. (2013). *A family for life: The vital need to achieve permanency for children in care*.

<sup>43</sup> Thomas, C. (2013). *Adoption for looked after children: An overview of the Adoption Research Initiative*. British Association for Adoption & Fostering, London.

<sup>44</sup> Quinton, D., & Selwyn, J. (2006). Adoption: Research, policy and practice. *Child and Family Law Quarterly*, 18(4), 459–477.

<sup>45</sup> Biehal, N., Ellison, S., Baker, C., & Sinclair, I. (2010). *Belonging and permanence: Outcomes in long-term foster care and adoption*. London: British Association for Adoption and Fostering.

While there are no longitudinal outcomes-focused studies that have examined open adoption specifically in the Australian context, it is unlikely that the outcomes for adopted children in Australia would differ markedly from those in other developed countries, such as the United States of America (US) and the United Kingdom (UK). It is therefore important and timely to examine the practices and procedures in the Australian legislative environment that will serve to support the children's development in open adoptions.

A longitudinal study conducted by Selwyn and Quinton (2004) examined 130 children, between the ages of 3 to 11 years, who were removed from their birth parents and the Court had recommended adoption as the best interest permanency placement. Of these children, 46 were not matched for adoption, so it was possible to compare the outcomes of children who were adopted with those who remained in long-term foster care. The results showed that both groups of children exhibited persistent behavioural and emotional difficulties, but children tended to show more improvements if they had been adopted than if they were in foster care. Most importantly, the rate of placement disruption for adopted children was found to be low: 80 of the 96 (83%) adopted children were still in their adoptive placement at follow-up seven years later. On the other hand, placements were more likely to be disrupted for the 46 children in foster care.<sup>46</sup>

When young people were asked whether remaining in foster care or being adopted made a difference, adoptees in the DeRosnay et al. (2016) study favoured adoption as providing security that foster care could not:

*Huge difference. Indescribable difference. I would not have felt the same degree of belonging. It would be like this itch that constantly reminds you that you're different or there's something that is not normal about your circumstances. So, everything I was telling you before about how normal it was and how natural felt, how it was like having brown hair or being a boy, things you don't think about. That is something I would not have had if I was actually a foster child. Because every time I would look at a form or something, or at my name on a schoolbook, or someone asking about my name, and having that pointed out to me that it was different from my mother's name again and again. And no matter how much they tried to make me feel like I was part of the family, and even if they made exactly the same efforts that they have made for me, I would still be constantly reminded of that. That would have brought up insecurities and made me question more like whether I really belong, whether I was really part of the family, whether I was really the same as everybody else. And I think a child should feel like they have a family and not like they are some burden that has been thrown upon a family, that they are somehow different purely because of the biology of their birth. It's just stupid, it's actually dumb. It makes no difference if you are biologically linked or not. You have other situations, like stepparents involved, and that doesn't make a difference; so why should it in this circumstance? (S14; 23-year-old)<sup>47</sup>*

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<sup>46</sup> Selwyn, J., & Quinton, D. (2004). Stability, permanence, outcomes and support: Foster care and adoption compared. *Adoption & Fostering*, 28(4), 6–15.

<sup>47</sup> De Rosnay, M., Luu, B. and Wright, A. (2016) *Open Adoption and Young Children's Identity Formation*. Early Start, University of Wollongong.



In 2015, Barnardos Australia commissioned a working paper, through its Centre for Excellence in Open Adoption, to establish how open adoption can support the best interests of children in optimising developmental outcomes and establishing healthy identity formation.<sup>48</sup> This study identified some key factors that serve to facilitate or hinder the identity development and wellbeing of these children, which could inform the development of national guidelines. These are:

**1. Early adoption brings about good outcomes for children**

There is robust evidence to support the benefits of early open adoption, early in a child's life, in meeting the developmental needs of children. Furthermore, research evidence suggests that adoption is, for the most part, a better permanency option than long-term foster care. It should be noted that the older age of children in known child adoptions is affected by, in many jurisdictions, the length of time the intended adoptive parent(s) need to have had a relationship with the child before an adoption.<sup>49</sup>

**2. Adoptees' access to information about their history is of profound significance for their identity formation**

There is strong evidence to suggest that, for most adopted persons, information about their history helps them make sense of and come to terms with their adoptive status and achieve a healthy and positive identity. Even children who have been adopted or placed for adoption at a very early age, with little or no memory of what happened, should have access to information about their personal history and/or their biological family. Openness in adoption includes opportunities for adoptees to engage in direct contact with members of their birth families to acquire more information about their personal history, and perhaps even verify what they have been told.

**3. Contact plays an important role in supporting identity formation but there is a need for clear guidelines to ensure that contact is used to support positive experiences and outcomes for children**

Contact with birth family members can serve to facilitate the formation of an adoptive identity. In most cases, contact is useful in allowing a child to maintain connections with their birth family so that they have access to information about their past, which is likely to be critical for adoptive identity formation during adolescence. It is important that contact has a purpose, that the rights and best interests of the child remain paramount, and that contact should not emphasise the rights of birth parents to have access to their biological child above the child's ordinary needs for safety, stability and protection.

**4. Adoptive parents are likely the key to promoting their children's healthy identity formation**

Adoptive parents play a very important, perhaps critical, role in supporting the development of their child's identity. The processes and practices within adoptive families are likely to have the strongest influence on children developing a balanced and coherent perspective on themselves as adopted persons, which integrates both the positive and negative aspects of their experience.

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<sup>48</sup> De Rosnay, M., Luu, B. and Wright, A. (2016). *Open Adoption and Young Children's Identity Formation*. Early Start, University of Wollongong.

<sup>49</sup> Australian Institute of Health and Welfare 2017. *Adoptions Australia 2016–17*. Child welfare series no. 67. Cat. no. CWS 61. Canberra: AIHW

The overarching benefits of early open adoption do not imply, of course, that adoption will be appropriate and should be pursued for all young children in out-of-home care. Thus, future research is needed to examine the characteristics and circumstances of children and young people who remain in long-term foster care, or who have benefited from such arrangements to support informed decisions about which permanent placement is most appropriate for a given child.

In the de Rosnay et al. study (2016), when adoptees were asked about their definition family, it was largely comprised of people who they live with, and who cared about and raised them. Most spontaneously stated that blood ties were not relevant to the concept of family.

*It's the people that matter to you most. Then again, there are a lot of people that matter to me that aren't family... family are the people that are close enough to you that you can do anything and they would still care about you... I don't think blood should ever define family, I don't think it does. It's a dated way of looking at defining families as being about blood ties.*

*Being adopted, I was given opportunities, reasons to live, and reasons to be a good person. If I hadn't been given that, I would have a longing for the things I didn't have, and felt deprived, and fallen into a category into a deprived person who didn't have opportunities and sought to make my own opportunities through ways that are not legal or very nice. I think I would have quite likely become a criminal. (S14; 23-year-old)<sup>50</sup>*

A guiding principle for a national framework for adoption in Australia should be the assurance that children, their birth parents, and carers have an opportunity to have their views considered in decisions that affect them. The Institute is committed to using child-centred methods in our research, and to involving birth, adoptive and carer families in the design and conduct of research. In 2018 the Institute commenced a series of semi-structured interviews with birth parents, caregivers, children and young people, exploring their experience of contact. The aim is to develop more respectful and inclusive ways of working together to achieve sustainable contact in the best interests of children, given the importance of birth family connection and its impact on other relationships and aspects of the child's life.

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<sup>50</sup> De Rosnay, M., Luu, B., & Wright, A. (2016). *Open Adoption and Young Children's Identity Formation*. Early Start, University of Wollongong.

## **TOR 2. APPROPRIATE GUIDING PRINCIPLES FOR A NATIONAL FRAMEWORK OR CODE FOR LOCAL ADOPTIONS WITHIN AUSTRALIA.**

Based on the main points in relation to the first of the Terms of Reference, outlined in our discussion in the first part of this submission, we will focus on the main issues we see as important in developing a set of appropriate guiding principles for a national framework or code for local adoptions within Australia in this section. This discussion will outline:

- the participation of children and young people in these decisions
- the legal aspects of dispensation of consent
- the permanency placement principle and the Aboriginal Placement Principle
- the importance of support for children, birth parents and adoptive parents
- the need for a national research agenda and quality data collection and reporting.

### **Participation of children and age for consent**

Article 12 of the CRC requires that the views of the child are given due weight in accordance with the age and maturity of the child.<sup>51</sup> The Committee on the Rights of the Child identified this right, often described as the right to be heard or the right to participation, as one of the four general principles of the CRC and highlighted *“the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights”*.<sup>52</sup>

All jurisdictions include the principle in legislation that children’s views must be considered and that children should have an opportunity to participate in the decision-making process. The processes and mechanism for their involvement vary considerably. There is also considerable variation in whether a child can consent to their adoption, and at which age they are able to consent. In NSW, Northern Territory, Western Australia and South Australia children over the age of 12 years are required to give consent to their adoption, if they are deemed competent to do so. Victoria, Queensland, Tasmania and the Australian Capital Territory have no provision within their legislation for a child to consent to their adoption irrespective of their age. The Victorian *Adoption of Children Act 1964* included the general requirement that a child from the age of 12 could to consent to their adoption; however, this was replaced in 1983 with the requirements for mandatory counselling and consideration of the child’s wishes.<sup>53</sup>

NSW is the state that has most actively supported children over the age of 12 years to consent to their own adoption. This is seen as an important step towards encouraging their autonomy and self-determination but most importantly respecting their right to be involved in a decision that can have a profound impact on their life. It provides children with a voice about who they consider their family to be. This accords with UNICEF research into children’s perspective and experience of children that concluded ‘it is increasingly clear ... that adults consistently underestimate children’s capacities’. While children’s

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<sup>51</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.

<sup>52</sup> United Nations Committee on the Rights of the Child, *General Comment No 12 (2009): The Right of the Child to be Heard*, 51st session, CRC/C/GC/12 (20 July 2009) [2].

<sup>53</sup> Dickey, A. (2014). *Family Law* (6th ed.) Law Book, 336.

physical immaturity, relative inexperience and lack of knowledge render them vulnerable and necessitate specific protections, it should not also deny them opportunities for decision-making in accordance with their evolving capacities. UNICEF concluded that the legal frameworks, policy and practice in most countries give insufficient consideration to the importance of recognising and respecting the capacities of children.<sup>54</sup>

Not all states allow for adults to consent to their adoption. In NSW, a person aged 18 years or over, may give sole consent to their own adoption by an adoptive parent(s) who has cared for them as a child. The Supreme Court must not dispense with the consent of a person who is aged 18 years or over. The *Tasmanian Adoption Act*, *Australian Capital Territory Adoption Act*, and Section 10 of the *Victorian Adoption Act* allows the court to grant an adoption order for the adoption of an adult who has been brought up, maintained and educated by the applicant(s) acting as the parent(s) of the person, without the consent of the person's birth parents. However, in Western Australian while the adoption legislation allows for an adult to be adopted by a person who was his or her carer or a step-parent immediately before he or she turns 18, consent of the proposed adoptive parents is required in addition to the person who is being adopted. The *South Australian Adoption (Review) Amendment Act 2016* has provided for the adoption of adults in certain circumstances, but this provision has not yet been commenced. The *Northern Territory and Queensland Adoption Acts* do not make provision for an adult to be adopted; an adoption order can be made only for a child aged under 18 years.<sup>55</sup>

A national framework for adoption should encompass how consideration is given to the wishes and views of the child. Best practice should be to always involve the child in decision-making where appropriate. Each child's level of competence needs to be assessed and will depend on a range of factors, including the individual child's abilities and previous experience. It should not be assumed that a child with learning difficulties is not competent to make their own decisions. This is commonly known as 'Gillick competence' (or demonstrable task-specific competence)<sup>56</sup>, where a child is able to consent if they can demonstrate they have the necessary emotional maturity and intellectual ability to understand the consequences of their decision.<sup>57</sup> Children who are not competent to consent should still be involved in the decision-making process as much as possible and their views taken into account.<sup>58</sup>

### **Dispensation of consent**

While each state has provisions for dispensing with parental consent, there is inconsistency as to when and how each jurisdiction will use these. All Australian jurisdictions allow for the dispensation of parental consent to adoption on the grounds that the parent(s) cannot be identified or located; or not capable of properly considering the question of consent. The Hallahan Review of the *South Australian Adoption Act*,

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<sup>54</sup> Lansdown, G. (2005). *The Evolving Capacities of the Child*. UNICEF, 30–1.

<sup>55</sup> Australian Institute of Health and Welfare 2017. *Adoptions Australia 2016–17*. Appendix 1, Child welfare series no. 67. Cat. no. CWS 61. Canberra: AIHW

<sup>56</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

<sup>57</sup> Cornock, M. *Nursing Standard*. <http://dx.doi.org/10.7748/ns.29.30.28.s28>. 25 March 2015.

<sup>58</sup> Department of Health (2001). *Seeking consent: Working with children*. London.

[http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_4007005](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4007005)

in 2015, noted that many out-of-home care practitioners were unaware that there were dispensation provisions, which reflected the policy that adoption was not the preferred solution to the problem of children in unsafe or unstable living arrangements.<sup>59</sup> It would seem that in many jurisdictions the approach to or unwillingness to utilise dispensation provisions reflects the idea that parents' decision-making rights have greater weighting as to whether adoption will be considered for a long term care plan than other aspects of the child's wellbeing and best interests.

While all States and Territories have a provision to dispense with parental consent, NSW and Western Australia are the only States that stipulates that a condition for the dispensation of parental consent is a child's established relationship with their carer, an acknowledgement of the importance of maintaining that attachment.

The Victorian *Adoption Act 1984* provides for adoption by consent and, in some cases, dispensation of consent, the thresholds for dispensing with consent are very high. It is only in situations where a child's parents are seeking to relinquish care, that adoption in Victoria is actively considered as the most appropriate permanency objective. Permanent care parents inquiring about adopting a child in their care, including whether they can dispense with a parent's consent, have been advised that if the parents do not want to consent, the intention is not to seek to dispense with natural parents' consent.<sup>60</sup>

The Victorian Government response to the Victorian Law Commission Review of the *Adoption Act 1984*, in 2016, noted:

*The location of adoption in the hierarchy recognises it is the most legally secure option for a child where reunification cannot safely be achieved. It is not anticipated this will lead to a change in the number of children adopted in Victoria. The Adoption Act 1984 requires parental consent, or for the Court to dispense with consent.*

There is an inherent conflict between the Victorian Law Reform Commission recommendations arising from their review of the *Adoption Act 1984*, that adoption decisions be made in the best interest of the child over all other interests, and their consideration that consent for adoption cannot be dispensed with on child protection grounds, because adoption is premised on consent.

*"in adoption decisions, the best interests of the child take precedence over all other interests, including those of birth parents, adoptive parents and political, state security or economic interests. It calls for the child and their needs to be at the centre of any decisions about adoption."*<sup>61</sup>

NSW and Western Australia are the only states that allow the Supreme Court to dispense with parental consent to adoption on the basis of the child's established and stable relationship with their carer. This clause makes a significant difference, as it goes to the heart of why an adoption order is being sought. Adoption practitioners in NSW report that this provision allows for a parent, who does not have the care

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<sup>59</sup> Hallahan, L. (2015). *Adoption Act 1988 (SA) Review*. Social and Policy Studies, Flinders University.

<sup>60</sup> From Victorian Law Commissions Review of the *Adoption Act 1984*: Child & Family Services Ballarat.

<sup>61</sup> Victorian Law Reform Commission (February 2017) *Review of the Adoption Act 1984: Report*

or custody of their child and may not oppose the adoption order, so as not to be seen as rejecting the child or giving them away. The *NSW Adoption Act 2000* has been changed to increase the involvement of parents in the development of an adoption plan, even when parents do not consent to the adoption. This change recognises parents' interest in planning for their child's future, including decisions about having contact with them and maintaining cultural identity and the importance of children retaining links with their birth family and other significant people in their lives where it is in their best interests.

### ***Changes to the adoption process in NSW***

In NSW, two key principles in adoption law include the rights and interests of the parents in decisions about a child's adoption, and the centrality of independent scrutiny of these decisions by the courts.<sup>62</sup> When parents do not consent to the adoption of their children, the process becomes more complex and lengthier. Recent amendments to the *NSW Adoption Act 2000* have made two important changes in relation to the likely speed and ease of finalising adoptions.<sup>63</sup> The first is the introduction of specified time frames for decisions about returning children to their parents. For children younger than two years of age, the Children's Court is required to make a decision, within six months of an interim order, and to accept the statutory department's assessment of whether there is a realistic possibility of restoration; for a child aged two and older, the period is within 12 months of the interim order.<sup>64</sup>

The second change is to make distinct provision for long-term carers to adopt, as opposed to the previously under-utilised and now repealed option of sole guardianship orders.<sup>65</sup> The adoption legislation has been amended to streamline the process for authorised carers who apply to adopt a child or young person in out-of-home care.<sup>66</sup> This means that carers are now able to be dually authorised as long term carers and adoptive parents, which allows for placement decisions to be better aligned with a child's long

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<sup>62</sup> S Harris-Short 'Holding onto the Past? Adoption, Birth Parents and the Law in the Twenty-First Century' in R Probert and C Barton (Eds) *Fifty Years in Family Law: Essays for Stephen Cretney*, Intersentia, Cambridge, 2012, 147-160, 148. 152.

<sup>63</sup> Ross, N. & Cashmore, J. (2016) Adoption reforms New South Wales style: A comparative look. *Australian Journal of Family Law*, 30(1), 51-75.

<sup>64</sup> Section 83 (5) and (5A) of the Children and Young Persons (Care and Protection) Act 1998 (NSW) as amended by the Child Protection Legislation Amendment Act 2014. See also Second Reading Speech for Child Protection Legislation Amendment Bill 2013, NSW, Parliamentary Debates, Legislative Assembly, Wednesday 26 March 2014, 27886 (Pru Goward, Minister for Family and Community Services).

<sup>65</sup> New South Wales Discussion Paper, above n 13, at 34 refers to the under-utilisation of these orders, but provides no further evidence in support. The Special Inquiry into Child Protection in New South Wales (2008) noted that between 133 and 149 parental responsibility orders were made to a non-relative in matters between 2005 and 2008: Volume 2, 604, Table 16.6. It is now possible for long-term carers to apply, with the consent of the Director-General, or through a designated agency, for a guardianship order: s 79B (1) (b) and s 79B (1) (c) The *Children and Young Persons (Care and Protection) Act 1998* (NSW) as amended by the *Child Protection Amendment Act 2014*. This may be in line with the preferences not only of carers but of older children who wish to remain with carers but retain a legal relationship with parents.

<sup>66</sup> See sections 45F, 45G and 45H inserted into the *Adoption Act 2000* (NSW) by the *Child Protection Amendment Act 2014* (NSW). See also *A Safe Home for Life*, the government response to the New South Wales Discussion Paper pp 38-39.

term care plan. These changes are in addition to conditions for dispensing with the consent of parents, which are:

- (a) where the authorised carers are making an application for the adoption of a child who has ‘established a stable relationship with those carers’ and the adoption ‘by those carers will promote the child’s welfare’ and
- (b) where ‘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 person who has parental responsibility.’<sup>67</sup> However, parents who do not consent to the adoption can now participate in the development of the adoption plan to a greater extent than before the amendment of the *Adoption Act* in 2014.<sup>68</sup>

### Aboriginal and Torres Strait Islander – Permanency Placement Principle

Article 8.1 of the UN CRC states that State parties to the Convention “undertake to respect the right of the child to preserve his or her own identity, including nationality, name and family relations” and further, under Article 29.1, “a child’s education is to be directed, among other things, to the development of respect for the child’s own cultural identity, language and value”.

The *Family Matters Report* (2017) found that despite a range of initiatives, the numbers of Aboriginal and Torres Strait Islander children in out-of-home care continue to rise across jurisdictions.<sup>69</sup> Since the release of the *Bringing Them Home* report into the Stolen Generations in 1997,<sup>70</sup> the number of Aboriginal and Torres Strait Islander children in out-of-home care has risen from 20 to 36%, with Indigenous children now in out-of-home care at a rate of almost 10 times that of other children.<sup>71</sup>

The causes for this over-representation and the increasing rates of Indigenous children in care are multiple and complex. They are, however, largely recognised as a combination of factors including the intergenerational effects of forced removal of children, poor socio-economic status, and cultural differences in child-rearing practices.<sup>72</sup> These factors are further exacerbated by a lack of culturally appropriate early intervention and support services, with many services being triggered by involvement

<sup>67</sup> Section 67 (c) and (d) *Adoption Act* 2000 (NSW) as amended by the *Adoption Amendment Act* 2006 (NSW).

<sup>68</sup> Section 46 (2A) and (2B) *Adoption Act* 2000 as amended by the *Child Protection Legislation Amendment Act* 2014.

<sup>69</sup> Lewis, N., Tilbury, C., Smith, T., Shlonsky, A., Parolini, A., Tan, W. et al. (2017) *Family Matters Report*. SNAICC – National Voice for our Children, the University of Melbourne, Griffith University, and Save the Children Australia.

<sup>70</sup> Human Rights and Equal Opportunity Commission. (1997). *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Canberra: Human Rights and Equal Opportunity Commission.

<sup>71</sup> Australian Institute of Health and Welfare 2017. *Australia’s welfare 2017*. Australia’s welfare series no. 13. AUS 214. Canberra: AIHW

<sup>72</sup> Australian Institute of Health and Welfare. (2014). *Child Protection Australia 2012–13 Child Welfare Series*. ACT: Australian Institute of Health and Welfare.

with child protection services, rather than before problems reach this crisis point.<sup>73</sup> There are also issues with the different cultural concepts of ‘family’ with the Aboriginal view of child rearing being the responsibility of the extended family and community being at odds with the European concept of nuclear family structures.<sup>74</sup>

The Aboriginal and Torres Strait Islander Child Placement Principle (the Principle) grew from a grassroots community movement initiated by Aboriginal and Islander Child Care Agencies (AICCAs) during the 1970s.<sup>75</sup> Inspired by the *Indian Child Welfare Act 1978* for Native American Indians in the United States, the Aboriginal and Torres Strait Islander Child Placement Principle similarly sought to establish distinct national child welfare legislation and policy focused on reducing rates of Indigenous child removal, and enhancing and preserving children's connections to family and community, as well as their sense of cultural identity.<sup>76</sup> Over time, the Principle has been introduced into legislation and policy across all Australian states and territories.

One of the key differences between the Indian Child Welfare Act and the Principle is that the implementation of the Principle is not within the control of Aboriginal and Torres Strait Islander families, communities and organisations.<sup>77</sup> The prevailing mainstream child protection systems in Australia rarely have strategies to promote Indigenous autonomy and self-determination, and may not understand traditional child rearing practices.<sup>78</sup> Inquiries and reviews have raised concerns that the best interests of children have not been considered paramount in determining placements for Indigenous children<sup>79</sup> and conversely, that cultural identity and connection have not always been a factor when making decisions about the best interests of children.<sup>80</sup> A more detailed analysis of the Indian Child Welfare Act and the how it may inform the application of the Principle is available in appendix 1.

There are considerable variations in the implementation of the Principle across jurisdictions. A policy review by Arney et al (2015) reported that the Principle had been applied in as few as 13% of child

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<sup>73</sup> Department of Education and Child Development. (2014). *The removal of many Aboriginal children*. Adelaide: Department of Education and Child Development.

<sup>74</sup> Seymour, J. (2016) *Children, Parents and the Courts*. Legal intervention in family life. Federation Press, Sydney.

<sup>75</sup> Arney, F., Iannos, M., Chong, A., McDougall, S., & Parkinson, S. (2015). *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (CFCA Paper No. 34). Melbourne: Child Family Community Australia information exchange.

<sup>76</sup> Tilbury, C., Burton, J., Sydenham, E., Boss, R., & Louw, T. (2013). *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and core elements*. Melbourne: Secretariat of National Aboriginal and Islander Child Care (SNAICC).

<sup>77</sup> Ban, P. (2005). Aboriginal child placement principle and family group conferences. *Australian Social Work*, 58(4), 384–394.

<sup>78</sup> Litwin, J. (1997). Child protection interventions within Indigenous communities: An “anthropological” perspective. *Australian Journal of Social Issues*, 32(4), 317–340.

<sup>79</sup> Crime and Misconduct Commission. (2004). *Protecting Children: An Inquiry into Abuse of Children in Foster Care*. Brisbane: Crime and Misconduct Commission.

<sup>80</sup> Australian Centre for Child Protection. (2013a). *Aboriginal and Torres Strait Islander Child Placement Principle Workshop summary*. Adelaide: University of South Australia.



protection cases involving Aboriginal and Torres Strait Islander children.<sup>81</sup> Enquiries conducted by States and Territories have highlighted concerns with the compliance and monitoring of the Principle. The UN Committee on the Rights of the Child has also specified poor implementation of the Principle as of serious concern in relation to the rights of Aboriginal and Torres Strait Islander children being placed in care.<sup>82</sup>

Australia does not currently have a systematic national protocol to monitor and assess implementation of the Principle. The Australian Institute of Health and Welfare reports on the percentage of Aboriginal and Torres Strait Islander children in out-of-home care were placed with either relatives/Kin, other Indigenous caregivers, or in Indigenous residential care.<sup>83</sup> This measure, however, reports only on the outcomes of placement decisions, and does not capture whether the processes outlined in the Principles for achieving familial and cultural connections have been followed.<sup>84</sup>

The only systematic audit that has explored the systemic and practice issues affecting compliance to the Principle has been conducted by the Queensland Commissioner for Children and Young People and Child Guardian. Three audits have been conducted, in 2008, 2010-11 and 2012-13. A key finding of these audits is that while compliance within each step was reported as "quite good", full compliance with each of the five required steps, when viewed together, was not achieved at all in the 2008 sample and was only achieved in 15% of the audit sample in 2010-11 and 12.5% in 2012-13.<sup>85</sup>

The Indian Child Welfare Act (ICWA) acknowledges the unique political status and cultural considerations for American Indian tribes. The measures ICWA takes to keep Native children in relative care whenever safe and possible to do so have been recognised as best practice in the wider field of child welfare, and increasingly codified into state and federal law for the wider population. However, research reports that there is still systemic bias in the child welfare system and that out-of-home placement still occurs more frequently for Native children than it does for the general population. This has been attributed to the non-compliance with the federal law and the lack of an official oversight agency at the federal level, a national data collection apparatus, and an enforcement authority for ICWA. In 2016, the Bureau of Indian Affairs, published revised *Guidelines for State Courts in Indian Child Custody Proceedings*. While these guidelines are non-legally binding, the first-ever comprehensive, legally binding, federal regulations addressing ICWA implementation for state courts' and public and private agencies' have been enacted, to provide clarification of many of the key requirements under ICWA.<sup>86</sup>

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<sup>81</sup> Arney, F., Iannos, M., Chong, A., McDougall, S., & Parkinson, S. (2015). *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (CFCA Paper No. 34). Melbourne: Child Family Community Australia information exchange.

<sup>82</sup> United Nations Committee on the Rights of the Child. (2012). Committee on the Rights of the Child, Sixtieth session 29 May–15 June 2012.

<sup>83</sup> Australian Institute of Health and Welfare. (2014). *Child Protection Australia 2012–13 Child Welfare Series*. ACT: Australian Institute of Health and Welfare.

<sup>84</sup> Higgins, D. J., Bromfield, L. M., & Richardson, N. (2005). *Enhancing out-of-home care for Aboriginal and Torres Strait Islander young people*. Melbourne: Australian Institute of Family Studies.

<sup>85</sup> Commission for Children and Young People and Child Guardian. (2014). *Indigenous Child Placement Principle audit report 2012/13*. Brisbane: Commission for Children and Young People and Child Guardian.

<sup>86</sup> <https://www.nicwa.org/about-icwa/>

There is currently significant variation in legislation and policies across jurisdictions in the involvement of Aboriginal and Torres Strait Islander organisations in decision-making, and the timing of their involvement in care and protection processes. There is an absence of a unifying national practice framework across jurisdictions, underpinning cultural care planning for Indigenous children<sup>87</sup> and research has shown that the integration of cultural care plans in departmental policies, resourcing for plans and how they are implemented in practice vary greatly between jurisdictions.<sup>88</sup> As well as this, inconsistencies in the way jurisdictions monitor, measure, collect and report compliance data make national interpretation and reporting difficult.<sup>89</sup> The Commonwealth has the opportunity to provide leadership for the harmonisation of government legislation and policy, including forming partnerships with Aboriginal and Torres Strait Islander organisations to improve adherence to the Principle and promote the involvement of Aboriginal and Torres Strait Islander agencies in the placement decision-making processes.

A potential model worthy of consideration is the Victorian Government agreement to improve outcomes for Aboriginal children and families residing in Victoria, based on the overarching principle of Aboriginal self-determination. The *Wungurilwil Gapgapduir* Strategic Action Plan (2018)<sup>90</sup> is a tripartite agreement between the Aboriginal community, the child and family services sector, and the Victorian Government, which builds on the release of *Korin Korin Balit-Djak* in 2017.<sup>91</sup> The *Korin Korin Balit-Djak* signified a commitment to Aboriginal self-determination by reforming existing health and human services government structures, policies and accountability mechanisms with the aim of improving health and wellbeing outcomes for Aboriginal children and families. *Wungurilwil Gapgapduir* aims to address the growing over-representation of Aboriginal children and young people in the child protection and out-of-home care systems by improving connection to culture, Country and community. This agreement is inclusive of the early years (conception to three years of age) as well as young Aboriginal people, so that every Aboriginal child participates in early years services from birth through to school.

The Aboriginal Child, Family and Community Care State Secretariat (AbSec) review of Aboriginal parenting programs in NSW emphasised the importance of Aboriginal community control and ownership of services and programs. Skilled Aboriginal practitioners, offering locally tailored approaches, embedded in cultural practice is critical in building trust and engagement with Aboriginal families. Aboriginal community control, ownership and oversight of Aboriginal programs and Aboriginal participation in the design, development of Aboriginal service delivery is an essential element of ongoing continuous improvement efforts, allowing data to be properly understood and approaches adjusted to further strengthen the outcomes achieved.

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<sup>87</sup> Richardson, N., Bromfield, L. M., & Osborn, A. (2007). *Cultural considerations in out of home care*. Melbourne: National Child Protection Clearinghouse, Australian Institute of Family Studies.

<sup>88</sup> Libesman, T. (2011). *Cultural care for Aboriginal and Torres Strait Islander children in out of home care*. Fitzroy, Melbourne: Secretariat of National Aboriginal and Islander Child Care (SNAICC).

<sup>89</sup> SNAICC. (2013). *Whose voice counts? Aboriginal and Torres Strait Islander participation in child protection decision-making*. Melbourne: Secretariat of National Aboriginal and Islander Child Care.

<sup>90</sup> Victorian Department of Health and Human Services, April 2018. *Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement*. Victorian Government, Melbourne.

<sup>91</sup> Victorian Department of Health and Human Services, August 2017. *Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017–2027*. Victorian Government, Melbourne.

The cultural endorsement and support of communities enabled practitioners to challenge parents and families to change their approach to parenting their children.<sup>92</sup>

There is a need for a national approach to the implementation of the Aboriginal and Torres Strait Islander Placement Principle. This includes the development a framework for the monitoring and culturally informed outcome measures, developed in consultation with local communities. The Principle needs to be supported through a suite of strategies that include funding, training, planning, cultural recognition and inclusion, and strengthened in legislation and policy, including the focus on Aboriginal and Torres Strait Islander children's best interests and safety.<sup>93</sup> The importance of children retaining cultural identity and connection has been well illustrated through the tragic legacy's of past policies that involved the severing of those connections.

### **Support for children and families**

A general principle for any national framework should be the acknowledgement that children in care, their birth parents and their caring families should be able to access support at key points in their lives. For open adoption, and other permanent care arrangements, to be effective, all parties to an adoption or permanent placement, need support, before and after the placement.

The Institute recommends that the following general principles guide the Standing Committees response, that is, the need for:

- (1) sustained support for parents *before* children are permanently removed
- (2) longer-term support for children and parents *when children are returned home*
- (3) support for birth parents *after children are permanently removed*, that is, not leaving parents abandoned in grief and in limbo and expected to participate appropriately with contact arrangements
- (4) availability of long-term support for all carers – in foster care, guardianship, adoptive parents.

The Institute recently conducted a review of the literature in relation to the types of post-permanency support are needed for children – in their birth, foster or adoptive families, including longer term support for children and their families when children are restored home. The key findings from this review include:

- The amount and quality of support is a factor in permanency adjustment and stability for children in out-of-home care. Early adverse experiences can result in a range of emotional and behavioural challenges, leading to some children being more likely to experience physical, emotional, cognitive, educational and social development needs,<sup>94</sup> and being at greater risk of poor mental health throughout their lifespan.<sup>95</sup>

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<sup>92</sup> Aboriginal Child, Family and Community Care State Secretariat (AbSec) (2017) *Aboriginal Parenting Programs: Review of Case Studies*.

<sup>93</sup> Valentine, B., & Gray, M. (2006). International perspectives on foster care: Keeping them home. *Aboriginal out-of-home care in Australia. Families in Society*, 87(4), 537–545.

<sup>94</sup> Richardson, J. & Lelliott, P. (2003). Mental health of looked after children, *Advances in Psychiatric Treatment*, 9, 249–51.

<sup>95</sup> Saunders, L. and Broad, B. (1997). *The health needs of young people leaving care*, Leicester: De Montfort University.

- Availability of post-permanency support is an important consideration for the pursuit of adoption or guardianship for children in care.<sup>96</sup>
- Peer support and information sharing among carers is highly valued.<sup>97</sup>
- Early therapeutic intervention for young children may prevent negative behaviours from becoming entrenched and destructive.<sup>98</sup>
- Birth families may require long-term, non-judgemental support to come to terms with the removal of their children and deal with grief and sadness.<sup>99</sup>
- Birth and permanent families may need support and guidance from skilled practitioners to build positive relationship to support contact that is in their children's best interests.
- Children's needs change over time. The need for and access to support services should be periodically reviewed and adjusted to child development and emergent issues.

### **Support for children**

Research conducted by Barnardos Australia into the outcomes of over 200 children placed for open adoption in NSW since 1986, found that most of these children were highly vulnerable with extremely adverse early childhood experiences. Over 80% of these children had experienced more than one form of abuse.<sup>100</sup>

In the UK, the Adoption Support Fund (ASF) was established in 2015 to provide post-adoption therapeutic support to families. It was initially established for children adopted from care, and was expanded to serve children on special guardianship orders and children adopted from overseas. Since its inception, the fund has expended over £45 million on services for 22,000 children and 18,000 families. Families may access services up to the 'Fair Access Limit' of £5,000 per year; additional expenditure may be approved in exceptional circumstances. The fund supports a range of services, including:

- Play therapies
- Therapeutic parenting training
- Conduct problem therapies
- Cognitive and Behavioural Therapies
- Overarching categories.<sup>101</sup>

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<sup>96</sup> Luu, B., Wright, A.C. & Pope, S. (2018, March). *Open adoption of children in NSW out-of-home care: General public perceptions and motivations*. Sydney, Australia: Institute of Open Adoption Studies, The University of Sydney.

<sup>97</sup> McRoy, R.G., Lynch, C.J., Chanmugam, A., Madden, E., & Ayers-Lopez, S. (2009). Children from care CAN be adopted. *International Advances in Adoption Research for Practice*. John Wiley & Sons Ltd.

<sup>98</sup> Rushton, A., Dance, C., & Argent, H. (2002). *Adoption Support Services for Families in Difficulty: A literature review and UK survey*. London: British Association of Adoption and Fostering.

<sup>99</sup> Neil, E., Cossar, J., Lorgelly, P., & Young, J. (2010). *Helping birth families: Services, costs and outcomes*. London: British Association of Adoption and Fostering (BAAF).

<sup>100</sup> Barnardos Australia (2017) Presentation: <https://bit.ly/2GyUMcC>

<sup>101</sup> King, S., Gieve, M., Iacopini, G., Hahne, A.S. & Stradling, H. (2017, August). *The evaluation of the Adoption Support Fund*. London: Tavistock Institute of Human Relations. Retrieved from

Families can access funding for assessment and therapeutic services, at any point from the time of placement until the child is 21 years of age, and in some cases, up to 25 years of age. Both the timing and ongoing access to services are significant. Most post-adoption supports are delivered around the time of placement.<sup>102</sup> Early intervention services for young children may prevent difficult behaviours from becoming entrenched and destructive. Early adolescence can also be a triggering time for the appearance or escalation of behaviours.<sup>103</sup>

In 2015, the UK Department of Education commissioned a review of evidence relating to 15 therapeutic interventions for adoption support; the report of the main findings was released in June 2016.<sup>104</sup> The aims of the review were to better understand key post-adoption therapeutic interventions for children and families; to examine the extent of the existing evidence on their effectiveness in achieving successful outcomes for adopted children and their families; and to identify gaps and make recommendations on what future research is needed.

The evaluation of the UK ASF suggests that families accessing support are in genuine need and that a substantial proportion of children showed the effects of early childhood neglect and abuse with predicted levels of emotional, behavioural, developmental and psychiatric problems. The follow-up survey of children receiving support through the ASF showed small but significant changes:

- Improved behaviour and mental health
- A small reduction in the predicted prevalence of psychiatric disorders among the sample of children
- A small decrease in aggressive behaviour
- Improved family functioning
- Enhanced parental understanding of their children's needs and increased confidence in taking care of their children.

Overseas studies suggest that a substantial proportion of families who adopt children from foster care are likely to seek counselling services for adjustment issues and children's emotional and behavioural issues.<sup>105</sup>  
<sup>106</sup> The evaluation of the Adoption Support Fund noted that children who received services through the fund and participated in the evaluation study showed improved behaviour and mental health, a small

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/634685/The\\_Evaluation\\_of\\_the\\_Adoption\\_Support\\_Fund.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/634685/The_Evaluation_of_the_Adoption_Support_Fund.pdf)

<sup>102</sup> Wijedasa, D. & Selwyn, J. (2017). Examining rates and risk factors for post-order adoption disruption in England and Wales through survival analyses. *Children and Youth Services Review*, 83, 179-189.

<sup>103</sup> Smith, S.L. & Donaldson Adoption Institute staff (2014). *Facilitating adoptions from care: A compendium of effective and promising practices*. London: British Association of Adoption and Fostering.

<sup>104</sup> Stock L., Spielhofer T., & Gieve M. (2016). *Independent evidence review: Post adoption services*. The Tavistock Institute of Human Relations (TIHR), UK.

<sup>105</sup> Vandivere, S., Malm, K., & Radel, L. (2009). *Adoption USA: A chartbook based on the 2007 National Survey of Adoptive Parents*. Washington, D.C.: U.S. Department of Health and Human Services.

<sup>106</sup> Rees, C. & Selwyn, J. (2009). Non-infant adoption from care: Lessons for safeguarding children. *Child: Care, Health and Development*, 35 (4), 561-567.

reduction in the predicted prevalence of mental health disorders and a small decrease in aggressive behaviours.<sup>107</sup>

### **Support for permanent or adoptive parents**

During October and November 2017, the Institute conducted a series of focus groups with current foster carers across four sites in New South Wales. Overall, many foster carers indicated that they would need some level of support to pursue permanency. In some cases, concern about the lack of post-permanency support presented a barrier to foster carers pursuing guardianship or adoption. Some foster carers expressed a perceived conflict between pursuing permanency to be a ‘forever family’ and the need for support to meet the child’s needs.

Foster carers identified the main support priorities as psychological and educational supports for the children. For example:

*The majority of children who come into care need something down the track. There’s not too many kids who I’ve had in my care that, haven’t needed some sort of support. To go to a psychologist cost me \$333 the other week because all these things are starting to come out. Now there’s no support. You do get a bit back from Medicare. Not everyone goes through trauma, they bring their kids up normal, they don’t need to see psychiatrists – not to say it won’t happen, but most children who come into care, somewhere down the track, it’s going to affect them in some way. So, I think you’ve just got to have some support that if the child needs it, that you can afford to do it.*

*We also need resources for training later on in trauma. Because it might be different from when you first get the child. It’s looking into the future, not just the immediate. Having training that is easily accessible about different things that might happen when they are older.*

It is important to consider how families access post-permanency support. Adoptive families may be reluctant to contact their adoption agencies when they are struggling, for fear of being judged as inadequate parents. Likewise, best practices recommend against requiring adoptive, or other permanent families, to come through the child protection system.<sup>108</sup> NSW foster carers noted they would prefer to seek support on their own terms and as needed, rather than have oversight by agencies. As one foster carer commented: “we just want permanency and to be a normal family without caseworkers”.

Preliminary findings from the Institute’s focus groups with authorised foster carers in NSW suggest that the availability of post-permanency support is particularly important in carers’ consideration to adopt or pursue guardianship for the child in their care. For example, in addition to financial supports post-adoption or guardianship, carers indicated their desire for educational and psychological support. In particular,

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<sup>107</sup> King, S., Gieve, M., Iacopini, G., Hahne, A.S. & Stradling, H. (2017). *The evaluation of the Adoption Support Fund*. London: Tavistock Institute of Human Relations.

<sup>108</sup> McKay, K. & Ross, L.E. (2011). Current practices and barriers to the provision of post-placement support: A pilot study from Toronto, Ontario, Canada. *British Journal of Social Work*, 41, 57-73.

carers noted the value of being guided during the transition period from foster carer to adoptive parent or guardian and understanding what supports were available:

*The case worker and adoption team would need to make sure that whatever services are out there that are available that a) you know about them, b) they've hooked you up with them, and c) there is some possibly ongoing supports say 6-12 months afterwards if you need. That you're not going to be thrown to the sharks. That there is a period of transition making sure that whatever supports are out there in the community. It's a lot of navigation, and they can help you navigate it, make sure it's set up and all working, and you and the child are getting what you need to continue that.*

In the USA, a four-year, nationwide prospective study conducted in 2009 with 161 adoptive families identified factors associated with their successful outcomes. Most of these families received financial support and adoption subsidies, with only 3% of families indicating that they did not use any post adoption services. The most common services sought by families were psychological and educational therapies, to address the child's needs. In addition to post-adoption supports for their children, more than half of these families identified supports for themselves. This included support from other adoptive parents; 47% reported using family therapy.<sup>109</sup>

These post-placement services fall along a spectrum, from preventative to problem-focused to clinical/therapeutic services as described below:<sup>110</sup>

**Level 1** - available to all, and providing a means to retain contact between the department that places children in adoption and the child/family post adoption. The primary activities are events, newsletters, and facilitating peer support.

**Level 2** - case-specific involving information and referral to local services and brokering to ensure needs are met.

**Level 3** - reserved for crisis situations requiring quick and individualised direct services, which may include brief respite care, assessing events leading to the crisis and developing an intervention plan, planning for ongoing support, offering therapeutic intervention, and providing case coordination.<sup>111</sup>

Despite their preference for post-permanency supports, carers want a degree of individual control over the timing and type. In other words, they would be satisfied if support services were in place, but they wanted to be able to seek and utilise such services for their child as they saw fit. Carers also raised their need for post-permanency supports as their child matured. Carers recognise that, while young children may not require immediate intervention, older children and adolescents may require therapeutic support

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<sup>109</sup> McRoy, R.G., Lynch, C.J., Chanmugam, A., Madden, E., & Ayers-Lopez, S. (2009). Children from care CAN be adopted. *International Advances in Adoption Research for Practice*. John Wiley & Sons Ltd.

<sup>110</sup> Rushton, A., Dance, C., & Argent, H. (2002). *Adoption Support Services for Families in Difficulty: A literature review and UK survey*. London: British Association of Adoption and Fostering.

<sup>111</sup> Smith, S.L. & Donaldson Adoption Institute staff (2014). *Facilitating adoptions from care: A compendium of effective and promising practices*. London: British Association of Adoption and Fostering.

as they begin to make sense of their history and experiences, which are often traumatic. The need for support did not cease upon permanent placement.

### ***Support for birth families***

In the UK, several studies have found that providing support for birth families, to help them cope with their sense of loss and grief after the removal and permanency placement of their child, may contribute to their welfare and to the well-being of their children. This support can help birth families adjust and maintain positive contact with their child and the family caring for them. The *Adoption Act 2002* in England and Wales provides birth relatives with the right to request an assessment for post-adoption support. This includes assistance with understanding the legal process and their rights, having access to a worker independent from the child's social worker, who can help them participate in discussions about contact plans, and support them to fulfil those plans.<sup>112</sup>

The most common type of support accessed by birth relatives was emotional support (83%), and the least common was group support (33%). One-third did not access any adoption support services, for reasons including: feeling that nothing could be done to help them, feelings of depression and passivity, resistance to engaging in emotion-focused work and lack of follow-up from the agency.

During focus groups conducted by the Institute in October and November 2017, NSW foster carers also recommended that support should be available for birth families, particularly in relation to contact and maintaining healthy boundaries. Some foster carers indicated that birth parents need support in understanding the child protection system and the implications of the change to legal status for open adoption or guardianship. Foster carers commented on how difficult it was for some birth families, usually birth mothers, to maintain appropriate boundaries during contact, and that they needed strategies for how to relate to their child in a positive way:

*One of the things that kind of broke my heart in this whole process was that the birth mother had no support. She would come and she clearly didn't know how to engage with him. And she just couldn't manage it. It was really difficult. She did some things to him that were unacceptable to him, and his eldest brother too. Because they don't know how to behave. We asked if a caseworker could drive her to visits and talk to her. It's very difficult for the child so we need to be there to support the child. We need support, we need the buffer. But also, the birth parents in many cases have lost their rights to parent the child because they don't know how to. And here they are in this environment where they're bereaved, they're afraid, angry, being watched, and here's someone who they carried in their bodies and is no longer there. And they have to go it alone. And I think it's heartbreaking and traumatising for me to see the pain that she has. I think very often that support for birth parents is completely obviated.*

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<sup>112</sup> Neil, E., Cossar, J., Lorgelly, P., & Young, J. (2010). *Helping birth families: Services, costs and outcomes*. London: British Association of Adoption and Fostering (BAAF).



## International models for known adoptions

The number of children in out-of-home care in Australia has risen sharply, doubling since 2004, from 21,795 to 47,915 in 2017.<sup>113</sup> There has also been an increase in the number of children who are remaining in care for longer periods, largely because of the combination of family violence, parental drug and alcohol problems, and mental health problems.<sup>114</sup> Of those who remain in the out-of-home care system for longer periods to the age of 18 years, around half are placed in the care of relatives or kin, and the rest mostly in foster care with people previously unknown to them; a small number of older children and adolescents are placed in residential care.<sup>115</sup> Very few children in Australia are adopted from out-of-home care.<sup>116</sup> There may be lessons to be learnt from studying the different approaches of other common law jurisdictions such as the US, England, and Wales to increase the adoption of children from out-of-home care. It is important to keep in mind, however, the different contexts in which these approaches have been tried, particularly in relation to the culture of the child protection systems in the different jurisdictions.<sup>117</sup>

The key elements of adoption law concern the role of the child's 'best interests' (the welfare principle), the rights and interests of the parents in decisions about their child's adoption, and the role of the courts in providing independent scrutiny of these decisions.<sup>118</sup> The differences lie in the approaches that are used to encourage adoption – to increase the number of adoptions and to reduce delays – and the context and place of adoption in these three child protection systems. The financial and service support available to families in the general population, before they are subject to care proceedings, also differs.<sup>119</sup> A further difference is that some countries, such as England, Wales and Australia,<sup>120</sup> for example, limit adoptions by relatives whereas the United States actively encourages adoption by relatives and usually provides incentives such as funding to support relatives and non-relatives adopting.<sup>121</sup> Even where they provide

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<sup>113</sup> AIHW *Child Protection Australia 2003-04* (2005); 47,915 children were in care at 30 June 2017: AIHW *Child Protection Australia 2016-17* (2018), Table 5.1, p 45.

<sup>114</sup> Fernandez, E. & Delfabbro, P. (2010). Reunification in Australia: Insights from South Australia and New South Wales. In R. Barth, R. Flynn, & R. Gilligan (eds). *How Does Foster Care Work? International Evidence on Outcomes* 111-130, 125.

<sup>115</sup> AIHW *Child Protection Australia 2016-17* (2018) p 45, Figure 5.2.

<sup>116</sup> AIHW *Adoptions Australia 2014-15* (2015) 28, Table 3.12. See also discussion by J Cashmore (2017). *Child Protection and Out-of-Home Care: The Responsibility of Families, Community and State*. In R. Grace et al (Eds.), *Children, Families and Communities* (5<sup>th</sup> ed). Melbourne: Oxford University Press.

<sup>117</sup> Ross and Cashmore

<sup>118</sup> Harris-Short, S. (2012). Holding onto the past? adoption, birth parents and the law in the twenty-first century. In R. Probert & C. Barton (Eds.) *Fifty Years in Family Law: Essays for Stephen Cretney*, Intersentia, Cambridge, , 147-160, 148. 152.

<sup>119</sup> Huntington, C. (2014). The child-welfare system and the limits of determinacy., *Law and Contemporary Problems*, 77, 231-234 at 221,.

<sup>120</sup> In 1996, the Family Law Amendment Act 1996 (Cth) and individual State and Territory laws restricted adoption by relatives, particularly those by step parents: ABS 'Family Formation: Adoptions' in *Australian Social Trends 1998* accessed 15.4.15 at

<http://www.abs.gov.au/Ausstats/abs@.nsf/2f762f95845417aeca25706c00834efa/c14cbc586a02bfd7ca2570ec001909fc!OpenDocument>

<sup>121</sup> Testa, M.F. (2005). The quality of permanence – lasting or binding? Subsidised guardianship and kinship foster care as alternatives to adoption. *Virginia Journal of Social Policy and the Law*, 12(3), 499-534. In the United States, almost all adoptions out of foster care, by relatives and non-relatives, involve a subsidy. In 2014, 91% of all adoptions

incentives, the rates of adoption are influenced by forms of kinship care: children in the care of relatives are less likely to be adopted, with relatives and children in many instances now preferring the option of subsidised guardianship.<sup>122</sup>

In 2002, the then Labour government in the UK passed *the Adoption and Children Act*. The Act encourages practitioners to focus on planning for permanence for 'looked after children' and to increase the number of children adopted, or otherwise placed permanently, from care.<sup>123</sup> In the United States of America (USA), the *Adoption and Safe Families Act 1997* provides that in making decisions about removing a child from or returning a child to the care of his or her parents, the child's health and safety are paramount. The federal government encourages adoption through providing funding incentives for states to improve their adoption rates, subsidies for those who adopted children, and requiring states to document their efforts to move children towards adoption.<sup>124</sup>

The *Adoption and Safe Families Act 1997* (ASFA) in the US emphasised reaching permanency without delay.<sup>125</sup> It was the first legislation to introduce a permanency hierarchy that made reunification with a biological parent the first option, followed by adoption (often by relatives) which was in turn prioritised over legal guardianship, and then permanent placement with a relative or caregiver, with long-term foster care as the last resort.<sup>126</sup> Recent amendments in New South Wales introduced a variant of this hierarchy, the main difference being that the New South Wales 'ordering' prioritises Kinship or relative care over adoption. England and Wales also apply a hierarchy of placements (rather than orders), which is closer to the New South Wales approach than the US model, and includes three types of placement that primarily apply to relatives – care with a relative who is a Local Authority foster carer, care under a child arrangement order, and special guardianship (in this order of preference). Special Guardianship Orders made under the *Children Act 1989* are most frequently made where children are placed with relatives, most commonly grandparents, but sometimes with unrelated foster carers.<sup>127</sup>

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attracted a subsidy: *The AFCARS Report, Preliminary FY 2014 Estimates as of July 2015*, No 22, Washington, DC: U.S. Department of Health and Human Services, Children's Bureau, 6.

<sup>122</sup> Geen, R. (2004). The Evolution of kinship care policy and practice. *The Future of Children*, 131-149, 141. See also Testa's discussion of why some kin prefer not to adopt, *ibid.* 510. For more information on current kinship adoption, see Child Welfare Information Gateway 'Kinship/Relative Adoption' Washington, DC: U.S at <https://www.childwelfare.gov/topics/permanency/relatives/adoption/#state> accessed on 22.4.16; Department of Health and Human Services, Children's Bureau and Child Welfare Information Gateway (2013). *Placement of Children with Relatives*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau, 4–5. For a discussion of subsidised guardianship options for relatives in the US. For a discussion of subsidised guardianship options for relatives in the US see Cynthia Godsoe, *Parsing Parenthood*, (2013) 17 *Lewis & Clark L. Rev.* 113, 144 -146.

<sup>123</sup> See Thomas (2013) for a summary of UK government policies and initiatives 2002-2012.

<sup>124</sup> Groze, V., Houlihan, L. & Wood, Z. B. (2005). Overview of adoption, in G P Mallon and P McHess (eds) *Child welfare for the twenty-first century: A handbook of practices, policies and programs*. NY: Columbia University Press, 2005.

<sup>125</sup> Festinger, T. (2008). The influence of an adoption experiment on social policy. In D. Lindsey & A. Schlonsky (Eds.) *Child Welfare Research: Advances for Practice and Policy* (Oxford University Press, New York).

<sup>126</sup> 16 42 U.S.C. § 675(5)(C); S Katz, 'The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997' (2013) *Michigan State Law Review* 1079, 1080.

<sup>127</sup> See s 22C and in particular s 22C (6) of the Children Act 1989 (England) amended by the Children Act 2008, which sets out the placement hierarchy for looked after children in England. Although the Adoption of Children Act 2002

### ***National research agenda and data***

This increased emphasis in the UK and USA on adoption as a permanency placement option for children in public care has led to a rise in the amount and quality of research on adoption and other forms of permanent placement. For example, in the United States, 3% of federal child welfare funding is dedicated to research, evaluation, technical assistance and demonstration projects.<sup>128</sup> Private foundations and special interest groups have invested in adoption research, such as the British Association for Adoption and Fostering (BAAF), and the Donaldson Adoption Institute in the USA. There has also been extensive research and collection of statistical data relating to adoption undertaken and published by government and government-funded or assisted research centres and foundations, particularly in the UK and the USA.

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applies to both England and Wales, it has been amended by the Children and Families Act 2014 to apply differently to these two countries. Adoption in Wales is now subject to the Welsh Government.

<sup>128</sup> <https://fas.org/sgp/crs/RA3458.pdf>

## **APPENDIX 1**

### **LESSONS FROM THE INDIAN CHILD WELFARE ACT**

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The ICWA was enacted to create uniform national standards regarding the removal and placement of American Indian children. In the forty years since the Act was passed, the ICWA has demonstrated the benefits of national standards as well as the need for significant precision when enacting such standards. The United States' experience with the ICWA reveals the advantages of a national law covering the placement of Indigenous children and the strategies that make such a law most effective.

Uniformity is one of the potential benefits of a national law, but it is not guaranteed. After the ICWA was enacted, differing state interpretations of the Act's provisions created disparities in its application.<sup>1</sup> Many of these disparities have now been addressed through court and legislative solutions. However, they caused significant problems along the way. Consequently, if possible, a national Child Placement Principle (the Principle) should attempt to anticipate and avoid similar conflicts. One advantage of a proposed national framework for the Child Placement Principle over the ICWA is that because the Principle has already been adopted by all Australian states and territories, many potential conflicts could be gleaned by examining current differences in the application of the Principle.

The United States' experience with the ICWA may also offer some suggestions for enacting an effective Indigenous child placement law. For example, conflicts over the application of the ICWA demonstrate the importance of explicitly defining the law's terms either within the body of the act or through reference to a federal definition. The US supreme Court case, *Mississippi Band of Choctaw v. Holyfield*, one of only two ICWA cases to reach the US Supreme Court, concerned the definition of the term "domicile" in the Act. In that case, the parties disagreed as to whether the term should be defined by state or federal law. Eventually, the Supreme Court held "domicile" must be interpreted according to federal law to ensure a uniform application of the Act.

Although the ICWA did not define the term "domicile," Congress did recognise the importance of defining "Indian child." According to the Act, an "Indian child" is a child who is "enrolled or eligible for enrolment in a federally recognised tribe." The ICWA's definition of "Indian child" leaves the determination of whether a

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<sup>1</sup> Many of these loopholes were initially addresses through the Bureau of Indian affairs guidelines which were non-binding but have recently been turned into binding federal regulations.

child is covered by the Act to the child's tribe. States have no say in this decision<sup>2</sup> and their obligations regarding identification of Indian children are extensive and specific.

Under the ICWA, if a state court or any parties to a child custody proceeding have any reason to believe the child is an Indian child, this possibility must be examined. In most cases, this information regarding possible native heritage is supplied by a family member. ICWA regulations state that a state court must ask each participant in a child custody proceeding whether they know or have reason to know that the child is an Indian child. The regulations further state that this inquiry must be made at the commencement of the proceeding and that after the court receives this information, it is required to contact the identified tribe and seek a determination from the tribe as to whether the child is "an Indian child." It is only after all potential tribes have stated the child is neither a member nor eligible for membership that a state court may determine the child is not an Indian child. However, if the parent or individual supplying this information regarding potential Indian heritage cannot identify a specific tribe or any relative who was a member of a tribe, the Act does not apply and the child will not be treated as an Indian child.

The Principle also contains criteria for identifying an Indigenous child however, studies examining compliance with the Principle indicate that identification of Aboriginal children is often done by looks,<sup>3</sup> and that children may be de-identified as Aboriginal based on subjective criteria. The identification system for the Principle thus creates significant variation in the application of the Principle and should be addressed in any national placement law. A national law implementing the Principle should have uniform standards for identifying Aboriginal children. Courts should be provided with clear guidelines stating when an examination into Aboriginality should be triggered and when a child can be de-identified. Moreover, if the child's Aboriginal community can be identified, they should have the ability to determine the child's Aboriginal status and their decision should be conclusive.<sup>4</sup>

A national Indigenous child custody law is most effective at keeping Indigenous children with their families and communities when it provides to a clear set of standards governing the placement of Indigenous children. A national law limits state variation and bias in these child custody proceedings. However, as the ICWA demonstrates, the effectiveness of such laws is also related to the amount of Indigenous input in and control over these custody decisions. The ICWA increases tribal participation in Indian child custody decisions by transferring most of these decisions to tribal courts. The Principle does not transfer decision-making power to Aboriginal communities, but it does require consultation. In considering a national Principle this consultation requirement should be made both mandatory, and presumptively determinative. This change would mean state courts must adopt the custody recommendation of the child's Aboriginal

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<sup>2</sup> It should be noted that some state courts have created an exception known as "the existing Indian family doctrine" which allows them to define a child a non-Indian despite being classified as Indian by a tribe. This is a highly controversial exception and one increasingly rejected by the courts.

<sup>3</sup> "Some authors have identified that in practice Aboriginality may be determined by skin colour (Valentine & Gray, 2006), and children may be de-identified as Aboriginal and/or Torres Strait Islander (the notion of "unticking the box") in instances where family could not be found or Aboriginality of children was not confirmed by others who may not know of the child's origins." Arney et al, Enhancing the Implementation of the Aboriginal and Torres Strait Islander Principle.

<sup>4</sup> Other definitional issues the proved problematic concerned what level of proof must be met prior to terminating an Indian parent's rights and what the term "active efforts," with respect to achieving reunification, required on the part of the state.

community absent a finding of “good cause.” Moreover, the law should state that any deviation for “good cause” must be justified and subject to appellate review.

In the ICWA, state courts are permitted to refuse transfer to tribal courts for “good cause.” They are also permitted to deviate from the placement preference for “good cause.” However, the history of ICWA shows that permitting deviation for “good cause” can be problematic and thus, a national Principle should clearly specify the contours of good cause. In the ICWA context, a lack of specificity regarding what constituted good cause for denying transfer of a case to tribal court caused numerous difficulties and affected the success of the Act. The “good cause” loop-hole was finally addressed in the recently adopted federal regulations regarding the ICWA. These regulations state that “good cause may be found if either parent objects, the tribal court declines, or the State court otherwise determines that good cause exists.” They also indicate that certain factors should no longer be considered, such as whether the proceeding is at an advanced stage or the level of contacts the child has had with the tribe.<sup>5</sup>

Like ICWA, the Principle presumes that it is in the best interests of Aboriginal children is to be placed within their families and communities. Any national law should reiterate that this is the Commonwealth’s position and that independent court analysis of “best interest” is contrary to the purpose of the Act. In addition, given the low rates of compliance with the CPPs placement preference, any national law should attempt to limit unjustified deviation from the placement preferences. Studies of ICWA cases demonstrated that courts often deviated from the placement guidelines when an Indian child had spent significant time in a family’s care (even though the placement was made in violation of ICWA). Consequently, a national Principle framework should emphasise the importance of early compliance and it should also clarify that “good cause” for deviating from the Principle does not include the normal bonding or attachment that may have resulted from a placement that failed to comply with the Act. Such a law should also clarify that that a court may not depart from the preferences based on the child’s lack of contacts with their Aboriginal family or community or based on the socio-economic status of one placement relative to another (except in extreme circumstances).

The proposed law should also mandate that the reasons for deviating from the placement preference must be stated on the record or in writing, and any that party to the proceeding must have the opportunity to provide the court with their views regarding the proposed placement. It should also state that if the placement preferences are not followed due to a lack of available carers, the agency handling the placement must demonstrate, through clear and convincing evidence, that a diligent search was conducted to seek out and identify placement options that would satisfy the placement preferences and explain why these preferences could not be met. Lastly, for purposes of such an analysis, a placement may not be considered unavailable if there is a placement that conforms to the prevailing social and cultural standards of the Aboriginal community in which the Aboriginal child's parent or extended family resides or with which the child's parent or extended family members maintain social and cultural ties.

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<sup>5</sup> This factor was eliminated from consideration due to the concern it unnecessarily introduces an outsider’s evaluation of the child’s relationship with the tribe and because it cannot reasonably be applied to infants.

## APPENDIX 2

# NATIONAL COMPARISON OF LEGISLATION GOVERNING ADOPTION FOR CHILDREN IN OUT-OF-HOME CARE

Submission – Inquiry into local adoption

ISSUE	NSW	VIC	QLD	ACT	TAS	NT	WA	SA
Legislation	Adoption Act 2000 Adoption Regulation 2015	Adoption Act 1984 Adoption Regulations 2008 Adoption Amendment Act 2013 Adoption Amendment Act 2015	Adoption Act 2009 Adoption Regulation 2009	Adoption Act 1993 Adoption Amendment Act 2009 Supreme Court of the Australian Capital Territory	Adoption Act 1988 Adoption Amendment Act 2007 Adoption Regulations 2016	Adoption of Children Act 1994 Adoption of Children Amendment Act 2006	Adoption Act 1994 Adoption Regulations 1995 Family Court of Western Australia	Adoption Act 1988 Adoption Regulations 2004 Youth Court of South Australia
Level of Court	Supreme Court of New South Wales	County Court of Victoria	Children's Court of Queensland	Capital Territory	Magistrate sitting alone	Northern Territory Local Court	Australia	Australia
Adoption from OOH	Hierarchy of long term alternatives must be considered: 1. restoration to parent 2. Guardianship by kin or other suitable person 3. Adoption (non-indigenous children) 4. PR to Minister	Hierarchy of long term alternatives must be considered: 1. Family preservation 2. Family reunification. 3. Adoption 4. Permanent care	The Chief Executive must ensure a case plan is developed for each child in need of protection under Child Protection Act 1999.	Long term placement options including adoption	Long term alternative care options including adoption	Long term alternative care options including adoption.	CEO must not approve the placement of the child under this section unless the CEO is satisfied that the child's adoption would be preferable to the making of a protection order (special guardianship) under the Children and Community Services Act 2004 in respect of the child.	Long term alternative care options including adoption. Must be clearly preferable to any other care order.
Grounds for OOH Adoption	Child has established a stable relationship with carers who are willing and suitable to adopt, is in child's best interest and other long term options are not preferable.	Adults must have been brought up, maintained and educated by applicants, as their child. Nothing specific for children in OOH or in child protection legislation as to when adoption might be chosen...	Child protection may identify that adoption will meet the needs of a particular child.	Nothing specific for children in OOH or in child protection legislation as to when adoption might be chosen.	Adults must have been brought up, maintained and educated by applicants, as their child. Nothing specific for children in OOH or in child protection legislation as to when adoption might be chosen.	Adults must have been brought up, maintained and educated by the applicant or applicants. Nothing specific for children in OOH or in child protection legislation as to when adoption might be chosen.	Carers may apply to be approved as adoptive parents with a view to adopt the child in their care. If permanency consultation identifies that adoption is in the best interest of the child, and communities approves, application may progress.	Court must be satisfied a significant parent-to child relationship existed between the persons to be adopted in adult adoption. Nothing specific for children in OOH or in child protection legislation as to when adoption might be chosen.
Who must give consent	Each person with parental responsibility for a child.	From mother and father of the child.	Consent is required from birth parents	Required from each parent and guardian.	Child's parents are required to give consent.	Required from each parent and guardian.	Required by each person with parental responsibility for child and guardian.	Required from each parent and guardian.
Birth Fathers	Putative birth fathers should be advised of their rights, including having paternity established, and reasonable efforts must be made to include them in the adoption process.	Father's consent will be required he was married to birth mother, or who's parental status is recognised under a range of specified provisions. If birth father is not recognised, any man believed to be the father must be given notice and proceed to establish paternity or his consent will not be required.	Reasonable steps must be taken to identify, locate and notify birth father of proposed adoption.	Fathers consent will only be required if they are presumed to be the father under the Parentage Act 2004	Father's consent will only be required if they were married to birth mother, or who's parental status or relationship with the mother is recognised under a range of specified provisions.	Fathers who were not married or in traditional Aboriginal marriage with birth mother will not be required to consent unless their parenthood is legally recognised. If consent has been given by mother, reasonable steps must be taken to identify and notify father. Birth father can then take steps to establish parenthood, if they don't take any action, their consent is not needed.	Presumptive fathers must be informed of consent to child's adoption and if he wishes to proceed with parenting order or determination of parentage, he must do so within 21 days. Notice can be extended or waived in exceptional circumstances.	The consent of the father of a child born outside lawful marriage is not required unless his paternity is recognised. If it appears to the Court that a particular person may be able to establish paternity of the child, the Court will not proceed to make an adoption order without allowing that person a reasonable opportunity to establish paternity.
Child's right to consent	Children over 12 are required to give consent if they are capable and have been cared for by adoptive parents for at least 2 years. Child may give sole consent to adoption by carers if the child has been cared for them for at least 2 years. Consent can only be dispensed with if child is incapable or other exceptional circumstances exist.	No requirement.	No requirement.	No requirement.	No requirement.	Children over 12 must consent to their adoption. If child does not consent, special reasons related to welfare and interest of child as to why order should be made.	Children over 12 must consent to their adoption. When a child is 16 or more and consents to being adopted by a relative or carer of child, parental consent may be dispensed with.	Children over 12 must consent. Children over 12 must proceed to make an adoption order without allowing that person a reasonable opportunity to establish paternity.



*Submission – Inquiry into local adoption*

<b>Child's views and participation</b>	Ensure child is able to participate in any decision made under this act that has a significant impact on his or her life. Opportunity and assistance to express views - may be provided in reports or affidavit, expressed to caseworker or adoption assessor.	Wishes must be ascertained and given due consideration. Child should be encouraged and given adequate opportunity to participate fully in decision making process. Should be provided with sufficient information in language and method they can understand. Must be given copy of any proposed case plan.	Must have views considered and kept informed of matters that affect them. Must be provided with information including prescribed information. Process must be explained using appropriate language.	The Court must be satisfied that child has been consulted about proposed adoption before order is made.	The Court must be satisfied that the wishes and feelings of the child have been ascertained and due consideration. Child must understand meaning of adoption.	The CEO is not to place a child with a view to the child's adoption unless it is relevant to the child's wishes. Where child is 2 or more, must have nature and implications of the adoption explained in appropriate manner.	Court must consider opinion of child over 5 years old. Views will be ascertained in interviews. While adoption is a care option, there is no policy framework currently operating to facilitate adoption from OOHG
<b>Child's participation in proceedings</b>	Court must appoint legal practitioner to represent child when guardian ad litem is appointed or may appoint legal practitioner if child appears to need representation. Age and capability of each child will direct whether they can give instruction. Generally children over 10 can give instruction.	Child must have separate representation when adoption order is contested, parental consent is being dispensed with or order is being discharged.	A child who is 12 may be called to give evidence and must have legal representation.	In child protection proceedings child has right to take part in proceedings. May express views directly or through a representative. No specific provision within Adoption Act.	In child protection proceedings child must be legally represented. No specific provision within Adoption Act.	May be separately represented and court may arrange this representation. May appear before court and be party to proceedings.	Court may direct that child be separately represented. CEO will make arrangements for any given a reasonable opportunity to personally present to the Court their views separately represented, legal practitioner must act on instructions of child. care and protection. Child may or may not be legally represented. No specific provision within Adoption Act.
<b>When parental consent is not required</b>	Not required when child gives sole consent to adoption by specified adoptive parent who has been child's carer for 2 or more years. Not required when adoptee is 18 or older.	Not required when child has turned 18 before making of order.	If parent is dead.	Not required when child has turned 18 before making of order.	Not required when adoptee is 18	Not required when adoptee is 18 or older.	Not required when adoptee is 18 or older.
<b>Adoption plans</b>	Birth parents can participate in and agree to arrangements in adoption plan, even if they do not consent to adoption. Are able to have provisions in adoption plan enforced if there has been a breach - even if they have not consented or agreed to plan.	After consent is given, a birth parent is given an opportunity to express in writing wishes about access to and information about the child. Adoption order may also be made subject to certain conditions including access arrangements and provision of information about the child. These can be varied or revoked on application. Greater rights of access cannot be granted unless adoptive parent(s) agree and child's wishes have been taken into consideration.	Birth parents will be involved in establishing adoption plan. Additionally, the court may make the adoption order subject to certain conditions, including right to access child, and require adoptive parents to provide information about the child. This order would only be made where birth parents have consented, and both birth parents and adoptive parents are in agreement that order should be subject to conditions. Birth and adoptive parents may apply to have conditions amended by the court.	The Secretary or Principle Officer must consider any wishes expressed by a parent of the child at the time when consent to the adoption was given or dispensed with about access to, or information about, the child, including notification in the event of the death of the child; and any arrangements agreed between a parent of the child and the proposed adoptive parents of the child for access to the child or for the giving of information about the child.	Relinquishing parents may record his or her wishes in respect of arrangements with the adoptive parent or parents in respect of access to the child or the giving and receiving of information about the child. Before making an order court must be satisfied that the Minister has ascertained and taken into account these wishes. If dispute arises between birth and adoptive parents, regarding access, either party can request counselling or mediation.	After consenting to the child's adoption, the child's birth parents have the right to negotiate as to the provision of information and the extent of any contact between the parties. Adoption plans form part of the adoption order and court may order mediation or enforce plan where there has been a breach/potential breach of any provision within plan. Birth parents may be party to an adoption plan and apply for a variation even if they did not consent to the adoption.	Agreements may be made between birth parents and adoptive parents. Agreement may include provision of information, contact including with other relatives and other matters related to the welfare of the child. Arrangements are put into register but are not enforceable. Any party to the agreement can ask for arrangements to be reviewed.



*Submission – Inquiry into local adoption*

<b>Adoption of Aboriginal and Torres Strait Islander children</b>	The NSW Act recognises that adoption is not customary in Aboriginal communities and arranged differently for Torres Strait Islander's. There are provisions in the NSW Act for the adoption of Aboriginal and Torres Strait Islander children for whom it is the best permanency option and after consultation. NSW is guided by the Placement Principle, and open adoption for Aboriginal children is not actively promoted by FACS.	The Victorian Act recognises the principles of Indigenous self-determination, and that adoption is not available in Indigenous child care arrangements. There are provisions in the VIC Act for the adoption of Aboriginal children after consultation with Aboriginal agencies. Members of child's community are also provided with an opportunity to contribute their views. Placements are guided by the Principle.	The Queensland Act recognises that adoption is not part of Aboriginal custom and that there are key differences in Torres Strait Islander "customary adoption" practice. The Act has provisions for adoption of Aboriginal and Torres Strait Islander children if there is no better available option meeting child's long-term care needs. Any exploration of adoption requires consultations appropriate to tradition and custom and extends to selection of adoptive parents.	The ACT has provisions for adoption of Indigenous children after consultation. There are particular safe guards, including the eligibility criteria apply for adoptive parents in accordance with the Principle. The department will not seek adoption for Aboriginal or Torres Strait Islander children.	Provision for adoption of Aboriginal children is not specifically set in the legislation, although the birth parent(s) may express wishes about race of adoptive parent(s). For children in OOHC, child protection legislation acknowledges cultural differences of Indigenous Australians, and makes provisions for placement of children within the Indigenous community is preferred.	The NT Act recognises the absence of adoption from Aboriginal child care arrangements. Adoptions of Aboriginal children can occur in consultation with Aboriginal community and organisations. The Act acknowledges custody is preferred with the child's extended family, and if that cannot be arranged preferable that the child should be placed with a family that has the same ethnic and cultural origins.	The WA Act recognises that adoption is not part of Aboriginal or Torres Strait Islander culture. There are provisions for adoption of Aboriginal and Torres Strait Islander children after consultation with the Aboriginal community and organisations. Adoptive placements must be selected in accordance with the Principle.	Provision for adoption of Aboriginal and Torres Strait Islander children is not specifically set in the legislation. However, adoption orders will not be made unless the Court is satisfied that adoption is clearly preferable, in the interests of the child, to any alternative order that may be made. Adoptive placements must be selected in accordance with the Principle.
<b>Adult adoption</b>	A person aged 18 or over who was cared for by the proposed adoptive parent as their child before turning 18, and who is in a 'fit condition' to give consent, may give sole consent to their own adoption. The Supreme Court must not dispense with the consent of a person who is 18 or over.	Section 10 of the Victorian Act allows the court to grant an adoption order for the adoption of an adult who has been brought up, maintained and educated by the applicant(s) acting as the parent(s) of the person. The adoption does not require the consent of the person's birth parents.	The Queensland Adoption Act does not make provision for an adult to be adopted. An adoption order can be made only for a child aged under 18.	Adult adoptions are legal under the Act, where the person is resident in the Australian Capital Territory, and has been brought up, maintained and educated by the applicants under a de facto adoption.	The Tasmanian Adoption Act provides for adult adoptions when a person has been brought up, maintained and educated by the proposed adoptive parent, or either of the proposed adoptive parents, or the proposed adoptive parent and his or her deceased spouse.	No provision for adult adoption in the legislation	An adult may be adopted by a person who was his or her carer or a step-parent immediately before he or she turns 18. Both the proposed adoptee and the proposed adoptive parent must consent to the adoption, and both birth parents of the proposed adoptee must be notified of the intention to apply for an adoption order.	The Adoption (review) Amendment Act 2016 has provided for the adoption of adults in certain circumstances. *Law is not yet in place
<b>Cultural and religious identity</b>	Adoption plan includes provisions for how child will be assisted to develop cultural identity, and details ways in which cultural heritage will be fostered. Reasonable efforts must be made to place child with person whose expressed intention for the religious upbringing and cultural heritage/identity/ ties are in accordance with parents wishes. Prospective adoptive parents are also assessed on their ability and willingness to maintain and facilitate connection to child's culture.	Natural parents can express wishes regarding race, ethnic background and religion of prospective adoptive parents. Prospective adoptive parents are assessed on their capacity to provide appropriate support to the maintenance of a child's cultural identity and religious faith.	Adoption plan includes provisions for how child will be assisted to develop cultural identity, and detail ways in which cultural heritage will be fostered. Placement decisions include consideration of the cultural and social background of the child as well as parents preferences for religious upbringing and characteristics of adoptive family. Prospective adoptive parents are also assessed on their willingness to understand child's background, maintain contact with child's community and language group and understanding that cultural identity needs to be preserved and enhanced.	Adoption plan includes provisions for how child will be assisted to develop cultural identity, and detail ways in which cultural heritage will be fostered. Placement decisions must consider parent preferences in relation to social and religious characteristics of adoptive family.	There are no specific provisions in the TAS Act for maintenance of cultural or religious identity for local adoptions. Within the child protection context placement decisions must consider the child's cultural, ethnic and religious background.	When making placement decisions the NT Act notes that it is preferable that the child should be placed with a family that has the same ethnic and cultural origins as the child's birth parents in order to facilitate an environment that will promote the child's cultural heritage and identity. Additionally, birth parents are able to express their wishes for the child to be placed with a family that has particular religious convictions, and preference is to be given to the placement of the child with such a family.	Prospective adoptive parents will be assessed on their understanding of value and need for cultural and ethnic continuity for the child, and their desire and ability to continue the child's established religious, cultural and ethnic arrangements.	There are no specific provisions in the SA Act for maintenance of cultural or religious identity for local adoptions. Within the child protection context placement decisions must ensure maintenance of cultural identity.
<b>Birth Certificates</b>	New certificate is issued with adoptive parents details	New certificate is issued with adoptive parents details	New certificate is issued with adoptive parents details	New certificate is issued with adoptive parents details	New certificate is issued with adoptive parents details	New certificate is issued with adoptive parents details	New certificate is issued with adoptive parents details	New certificate is issued with adoptive parents details. <i>*Integrated certificates with birth parents details has been accepted and soon to be enacted in legislation</i>

Submission – Inquiry into local adoption

Original Certificates		Original is kept on record and may be requested in an application	Original is kept on record and may be requested in an application	Original is kept on record and may be requested in an application	Original is kept on record and may be requested in an application	Original is kept on record and may be requested in an application
Provision of support to adoptive parents		Financial or other assistance	Financial or other assistance	Financial support	Financial or other assistance.	Financial or other assistance
After adoption	Financial or other assistance	Provided to ensure financial difficulties do not prevent adoption. Only provided in exceptional circumstances - where children have a disability, are part of a family group placement or have difficult or unusual circumstances.	Provided to ensure financial difficulties do not prevent adoption. Based on the complexity of the child's care needs and reviewed annually.	Provided to ensure financial difficulties do not prevent desirable adoption. Dependent on the child having complex or high needs and adoptive parents financial status.	Provided to ensure financial difficulties do not prevent desirable adoption. Can be based on complexity of child's needs OR adoptive parents financial status.	Provided to ensure financial difficulties do not prevent desirable adoption. Legislation is not clear but policy sets out this is based on complex needs AND adoptive parents financial status.
Basis of provision		Provided in order to assist or promote the best interest of the child. Legislation is not clear but policy sets out this can be based on complex needs OR adoptive parents financial status.	Provided to ensure financial difficulties do not prevent adoption. Only provided in exceptional circumstances - where children have a disability, are part of a family group placement or have difficult or unusual circumstances.	Provided to ensure financial difficulties do not prevent desirable adoption. Dependent on the child having complex or high needs and adoptive parents financial status.	Provided to ensure financial difficulties do not prevent desirable adoption. Can be based on complexity of child's needs OR adoptive parents financial status.	Provided to contribute to the support of the child after the making of an adoption order. Based on complexity of child's needs.
Provision of support to birth parents		Financial or other assistance	Financial or other assistance	Financial support	Financial or other assistance.	Financial or other assistance
Prior to adoption	Financial or other assistance	Parents must be given notice of adoption application. Will be notified of adoption order, unless they express the wish not to receive notice. Encouraged to seek legal advice, especially when opposing application. Court may appoint guardian ad litem or request legal practitioner to act as amicus curiae if it considers parents are incapable of giving proper legal instruction. May be accompanied by support person during court proceedings.	Must be notified when adoption order has been made. Must be notified of application to disperse with consent. Must be advised of right to seek legal advice and provided with details of free legal service. Other family members may participate as relevant.	Must be notified of application for adoption order. This requirement may be dispensed with if an exceptional reason exists. Must be notified of making of adoption order. Court must ensure parties understand nature and purpose of proceedings and know their appeal rights.	If consent has not been given by parent, they must be notified of application for adoption order. If they have consented they will be notified of adoption order.	Parents must be given notice of adoption application. Application can be made to dispense with notice. Relinquishing parents may state their preference as to whether they wish to receive notice making of an application for an order for the adoption.
After adoption	Financial or other assistance	FACS may enter into agreement with birth parents who's child has been placed for adoption to provide financial or other assistance. Terms and conditions as agreed.	Information, support and counselling will be offered and provided where considered appropriate.			No clear provision in legislation. If consent has not been given, parents must be given notice of adoption application. In some instances a birth parent's close relative may be notified in their absence. Application may be made to dispense with the requirement to give notice. If birth parent is a child, CEO must appoint representative. Representative may instruct legal practitioner on behalf of child.