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HUMAN RIGHTS COMMISSION
Discussion Paper No. 5

# RIGHTS OF RELINQUISHING MOTHERS TO ACCESS TO INFORMATION CONCERNING THEIR ADOPTED CHILDREN

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This is the fifth of the Human Rights Commission's Discussion series.

It is being circulated to raise points for discussion in relation to the rights of a relinquishing mother to information after she has consented to the adoption of her child. This in turn will compose part of a broader consideration of adoption legislation and practice in the A.C.T.

Any person or organisation is welcome to be in touch with the Commission on the issues raised in this paper. You could telephone, or preferably put what you have to say in writing to the Commission at its Canberra address.

As access to information in adoption is a pressing concern in a number of States contemplating legislative reform, and as the A.C.T. Adoption of Children Ordinance was drafted as a Model Act, it is hoped that this Discussion Paper and the subsequent review of legislation will be relevant to members of the adoption triangle throughout Australia.

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# RIGHTS OF RELINQUISHING MOTHERS TO ACCESS TO INFORMATION CONCERNING THEIR ADOPTED CHILDREN

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## I. INTRODUCTION

The Human Rights Commission has received a number of complaints arising from adoption legislation and practice.

2. In response to these complaints, and in accordance with its general mandate to examine acts and practices of the Commonwealth in relation to human rights, the Commission has determined to undertake a study of the A.C.T. Adoption of Children Ordinance 1965. As the 1965 Ordinance was drafted as a Model Act for State legislation, it is hoped that the Commission's study will have similarly broad relevance to adoption law in Australia. The study will consider such matters as: procedures for assessment of adoptive parents, provisions dealing with consent to adopt, open adoption, and the rights of the older adopted child to retain its surname.

3. The present Discussion Paper is part of that broader undertaking. Its purpose is to focus attention on the rights to information and to privacy involved in access to original adoption records. In particular, it looks at the rights of relinquishing mothers to access to information, as these have hitherto received the least attention. It is hoped that public response to this discussion paper will be of assistance to the Commission in its broad review of adoption legislation in the A.C.T.

## II. CHANGING PERCEPTIONS

4. The right of a relinquishing mother to information, particularly identifying information, about her adopted child has to be balanced against the rights to privacy of all the parties to an adoption. At present the bearing of these rights on adoption matters is being reconsidered in response to a

number of changes in social attitudes to adoption and to ex-nuptial birth. These changes have in their turn foregrounded a number of civil rights issues flowing from adoption, issues bound up with the Declaration of the Rights of the Child and with the Articles of the International Covenant on Civil and Political Rights (ICCPR) relating to privacy, access to information, discrimination on the grounds of status and the rights of the child.

5. While the relevance of specific Articles of the ICCPR to access matters cannot be questioned, the precise manner of their application is not always immediately apparent. What - to take an example - are the interests of the child which are to be protected under Article 24 in the case of access to information concerning its natural mother? Existing adoption legislation is based on the assumption that those interests are best served by closing off all records of adoption proceedings and original birth certificates. Recent research argues strongly that the best interests of the child are on the contrary far more frequently served by making all of its background information available to it, and that in fact to withhold such information may be to give rise to significant psychological damage. In cases such as those, where the relevant human rights instruments lay down clear principles which must be given practical content by relevant experience, the role of a human rights discussion paper is to examine both the human rights principles and the relevant practical experience and their relation to each other. Sociological research, informed opinion, overseas experience of different legal provisions and above all the views of participants in the adoption triangle - an orderly consideration of all of this evidence is necessary before a balanced judgement can be made of how the relevant human rights Articles apply to the actual conduct of access provisions.

6. It is also necessary to look at the Sex Discrimination Act to see whether current laws or practices relating to adoption constitute direct or indirect discrimination on the

ground of marital status (see below, Section IX, "Discrimination on the Grounds of Marital Status"). This paper does not raise final points for discussion about the rights of natural fathers for reasons set out in Section X, "Rights of Natural Fathers", and the issue of discrimination on the ground of sex is not discussed.

7. Current Australian adoption law dates, broadly speaking, from uniform legislation enacted in the 1960s. Its explicit function is to enact the principle that the adopted child shall be regarded as having been born in wedlock to the adoptive parents.[1] Its implicit function, then, is to give legislative effect to the assumption that the natural mother, in giving up her child for adoption, wishes to efface herself completely from that child's life.[2] And this assumption is in turn derived from the belief that the birth - presumably illegitimate - of the child is a matter of shame and secrecy for the mother, whose 'natural' wish accordingly is to "put the past behind her" and to "carry on as if it never happened". The very fact of the extra-marital birth was, in the 1960s, viewed as sufficient evidence of the natural mother's moral incompetence to act as a mother. Her practical incompetence was ensured by the absence of social security benefits for single mothers. Accused of selfishness for considering keeping her child, and then accused of selfishness for having given it up, the natural mother was implicitly punished and saved by the law which regulated the adoption of her child in circumstances of strict anonymity. A socially conditioned guilt ensured, or at least was thought likely to ensure, that the natural mother herself would want to preserve that anonymity. Adopted children seeking natural parents were warned that their mothers would not be

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1. Peter Quinn, Session 1, in Adoption Crisis, Trends and Solutions, Proceedings of a seminar, Adoptive Parents Association, Canberra, September 1978, p.18.

2. Cliff Picton and Mia Bieske-Vos, Persons in Question: adoptees in search of origins, C.J. Picton, Melbourne, 1982, pp. 12-13 summarises present research casting doubt on this assumption.

grateful to have their pasts "raked up" and published. And many natural mothers agreed.

8. Attitudes like these, and the arguments flowing from them, are being seriously questioned by groups interested in making information concerning adopted children available to relinquishing mothers.[1] Groups like the National Council for the Single Mother and Her Child and Jigsaw - which have been urging the introduction of provisions for access to such information since 1974 and 1976 respectively - have emerged in response to a number of factors. The provision of social security benefits for single mothers has meant a radical drop in the number of babies available for adoption - a drop of 50% in the past eight years - which has in turn increased the 'bargaining power' of those single mothers who do decide to give up their children for adoption. At the same time the social stigma, and the associated guilt, of extra-nuptial conception have shrunk significantly, thus increasing the tendency of single mothers to keep their children and decreasing the tendency of relinquishing mothers to desire or accept anonymity. In addition, as the Victorian Adoption Legislation Review Committee has pointed out,[2] there is a connection between the issue of access to information in adoption cases, and an overall increase in sensitivity to civil rights. Because adoption legislation in Australia is a State responsibility, Federal freedom of information provisions do not apply to adoption matters;[3] nevertheless, it is argued that the denial

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1. See Sister Kathleen Grant, "Access to Birth Information - An Overview", in In search of self-identity - access to information, Proceedings of a seminar, National Council for the Single Mother and her Child, (ed.) Patricia Harper, Melbourne, August 1980, p. 42, and Margaret McDonald, Session 1, APA Seminar 1978, Proceedings, p. 28.

2. Adoption Legislation Review Committee of Victoria, Report, Government Printing Office for the Department of Community Welfare Services, Melbourne, 1983, 6.2.2. Henceforth, Adoption Legislation Review Committee Report.

3. See Ron Brown, "Consumer Rights - Access to Files: Access to Information within the Department of Social Security", in Proceedings, Third Australian Conference on Adoption, May 1982, (ed.) R. Oxenberry, Adelaide, 1982,pp. 223-227.

of access to information in that instance is anomalous in relation to the overall pattern in Australian civil rights legislation. Certainly it raises questions in relation to the provisions of the ICCPR, to which Australia has been a signatory since 1980. Finally, if changes in ideology are largely responsible for the growth of such adoption pressure groups, the groups themselves are largely responsible, through various public relations strategies, for the emergence of changes in ideology which they seek to have enacted as law.

9. The overall thrust of recent ideological change, then, has been to push for a re-definition of the balance between privacy and access to information in adoption legislation. Such re-definition is of course complicated by the triangular relationships of adoption. That is, the rights to access to information and to privacy have to be considered in relation to the adopted child, the relinquishing parent(s), the adoptive parents and the relationships holding between them. While considerable attention has been given, and is being given, to increasing access to information by the adopted child, the position of the relinquishing mother remains in doubt. The Victorian Adoption Legislation Review Committee, for example, which brought out very explicit and detailed recommendations for making information accessible to adoptees, was reserved on the matter of whether identifying information about adopted persons should be made available to natural parents, though it "generally support[ed]" such legislation providing the adopted person was over 18 (Adoption Legislation Review Committee Report, 6.4.58). It is because most discussion of access to information and adoption has centred on the rights of adoptees that the present paper has been produced. The focus here is narrow: other issues arising from adoption, including the adoption of Aboriginal children, require separate papers.

## III. HUMAN RIGHTS - PRIVACY AND ACCESS

> In general terms one must strike a balance between human rights. There is obviously a right to privacy, but there is also I believe a right to information.[1]

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[1] [illegible] "Access to Adoption Information - A Basic

10. Provisions of the ICCPR relevant to the issue of access to information in adoption lie in Articles 17, 19, 23, 24 and 26.[1] Also relevant are Principles 2 and 6 of the Declaration of the Rights of the Child.[2] Article 17 states that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Its assertion of the right to privacy can be argued to cover equally cases of adopted persons ("interference with ... privacy"), adoptive parents ("interference with ... family"), and relinquishing mothers ("attacks on ... honour and reputation") so long as each is protected by law as is the case at present, or so long as any interference with privacy or family can be shown to be arbitrary. Article 19, on the other hand, provides for (paragraph 2) the "freedom to seek, receive and impart information and ideas of all kinds." Although this right to information is restricted in Article 19 by "respect for the rights or reputations of others," (3.(a)) it can nevertheless be seen to raise the question of whether current legal protections of privacy in adoption may be excessive to the detriment of the right to information.

11. Other provisions of the ICCPR and the Declaration of the Rights of the Child cited here are specifically relevant to the case of the adopted child, and affect the situation of the relinquishing mother and the adoptive parents only indirectly and as a result of their bearing on the rights of the child. So far as the rights to privacy and to information themselves are concerned, Articles 17 and 19 must constitute the fixed points of reference provided by the ICCPR. The general question raised is whether the two Articles are in conflict in the particular case of adoption records, and if so whether this conflict is a theoretical and irresolvable one, or whether it simply grows out of current legislation regarding adoption.

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1. For full text of these Articles, see Appendix 4.

2. For full text of these Principles, see Appendix 4.

12. The Australian Law Reform Commission, in its Report on Privacy, has argued that there is no inconsistency between privacy and access in that

> Information privacy rights would allow access to personal information to protect against the possibility of misrepresentation or unfair decision making. Recognition of a claim by the individual of a 'right to know' what information is held about him would reciprocate the Government agency's or private organisation's asserted 'right to collect' personal information about individuals.[1]

Since the Law Reform Commission acts under the obligation to ensure that the laws and proposals it reviews are consistent with the Articles of the International Covenant on Civil and Political Rights, its views on the matter of privacy and access are of particular relevance here. The argument then is that privacy is sustained if access is made available to the first person or subject of the record, while third persons would be restricted from access to sensitive material. But in the case of relinquishing mothers seeking access to information concerning their adopted children, no clear distinction between the first person and the third person is possible. That is, what may be sensitive information to a child - the fact that that child is adopted - may equally and reciprocally be sensitive information to the relinquishing mother. Granting access to either individual may be said to violate the privacy of the other, and yet in each case the right to access can be argued for. Thus it is that in the particular case of relinquishing mothers and their children, possible inconsistencies between rights to privacy and to access to information can be isolated. Additional difficulties are posed by the age differentials of mother and child. Can a child have reasonable expectations of privacy concerning records made on its behalf during its infancy in the same way that its mother can have reasonable expectations concerning those same records? Or must mothers wait 18 years for access to information if such a period were stipulated for access rights for adoptees? What are the rights of the adoptive parents, by whom the adoption

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1. Law Reform Commission, Report No. 22: Privacy, Australian Government Publishing Service, Canberra, 1983, 76.

might equally be regarded as a matter of sensitive personal information? Is it possible or desirable to allocate priorities in the case of collectively sensitive information? Even if we allow the answers to those questions to be based on those Articles of the ICCPR which give priority to the rights of the child, any proposed legislation, such as that discussed below - which would give access to adopted persons only at 18 - in effect puts the matter of children's rights out of the question.

13. Before trying to specify the interlocking sets of rights presented by adoption, it is necessary to look first at existing adoption legislation. That legislation implicitly established and/or responded to the allocation of rights in adoption which was dominant in the 1960s. It is important that such legislation and the assumptions it incorporates, be considered in relation to the principles enunciated in the ICCPR.

## IV. EXISTING ADOPTION PROVISIONS

14. Adoption in Australia is a State matter, with each State and Territory possessing its own adoption Acts or Ordinances. During the 1960s, legislation was passed in each State and Territory based on a Model Uniform Act.[1] Since that time, individual States have amended their legislation individually and there is accordingly some variation from State to State in adoption procedures.[2] But the assumption that adoption effects a permanent change in status for the adopted child is common to all the uniform legislation. The adopted child is regarded as having been born in wedlock to the adoptive parents - that is, it legally ceases to be a child of its

1. See Appendix 1: Comparison of State Adoption Provisions (Table).

2. See Justice Elizabeth Evatt, "National Adoption Policy and Law: Legal Aspects", in Proceedings, Second Australian Conference on Adoption, May 1978, (ed.) Cliff Picton, Melbourne, 1979, pp. 59 ff.

previous parents. The closest possible analogy is established between adoptive and non-adoptive parenthood. The usefulness of such an analogy has been increasingly viewed as questionable, but it can be seen to answer to the concepts of shameful illegitimacy and natural fitness or unfitness for parenthood from which the legislation flowed. "By a process which may best be likened to that of grafting a fresh scion on to parent stock in a botanical context, the illegitimate child's legally anonymous antecedent condition is suddenly superseded by membership of an established and accepted social family group in the legal and social sense."[1] Thus the legal effect of adoption laws in individual States reflects that uniformity of principle which was the intention of the legislation adopted in the 1960s. Also uniform were the principles of the general registration of adoption and the assumption of jurisdictional recognition of interstate and overseas adoption orders. Where adoption legislation in States and Territories varies is in the broad area of the regulation of the arrangement of adoptions, and the making of adoption orders. While the matter of the secrecy of adoption proceedings falls within this area, the States and Territories have nevertheless established common provisions which ensure that (1) applications for adoptions are not held in open court, but in camera, and are to include only parties or their representatives, while all reports and records of proceedings are closed to inspection unless the court otherwise orders, and (2) the publication of the identity of any of the parties involved in an application for adoption is prohibited.[2]

15. The assumption underlying all these provisions was recognised by the Royal Commission on Human Relationships as being

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1. H.A. Finlay, Family Law in Australia, Sydney, 1979, 1002.

2. See Finlay, op.cit., 1074.

> that the child's welfare and interests, rights and needs are paramount and that these are best served in a family situation. The needs and rights of the natural parents and the adopting parents are by definition secondary.[1]

This assumption is consistent with Article 23 of the ICCPR which states that -

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Furthermore, such an assumption is also consistent with Principle 2 of the Declaration of the Rights of the Child, which proclaims that -

> The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

16. But while Australian adoption law is based on an assumption on which Article 23 and Principle 2 are also based, it does not necessarily follow that existing provisions in Australia do more than articulate the interests of other parties to adoption as if they were the interests of the child. It is arguable for example that secrecy provisions may enable an adopted child "to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner". But it could also be argued that such protective insulation is no more than an enforced and possibly harmful ignorance entailed on the child by some adoptive parents or governmental agencies. While Australian adoption law recognises principles also recognised by the ICCPR and the Declaration of the Rights of the Child, translation of those principles into practice is increasingly a matter for debate. The debate is being pursued in a number of different States (see Appendix 2),

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1. Royal Commission on Human Relationships, Final Report, Volume 4 Part V: The Family, Australian Government Publishing Service, Canberra, 1977, 7.2.

but most crucially in Victoria. Indeed, recent and pending access legislation in Victoria must be regarded as having a strong potential bearing on the future of uniform adoption legislation. The present state of that legislation can be studied, together with statistics associated with it, in the A.C.T.

Australian Capital Territory

17. The Adoption of Children Ordinance 1965 was intended to serve as a model Act for uniform legislation for all the States, and all the States did in fact conform to the model more or less. With respect to access to information, the Ordinance makes the general provisions noted above regarding in camera proceedings, closed records and prohibition of the publication of the identity of participants (see Appendix 1). Section 65 of the Ordinance refers other matters flowing from adoption, including matters of access, to the Territory's Regulations, the relevant Regulations of which provide as follows:

> 10. (5) The Register of Adoptions or any memorandum or copy of an adoption order, or of an order discharging an adoption order, received by the Registrar of Births, Deaths and Marriages shall not be open for inspection.
>
> (6) Subject to the next succeeding regulation [regarding the issue of a certificate of date of birth of a person born overseas], the Registrar of Births, Deaths and Marriages shall not issue a copy of or extract from an entry in the Register of Adoptions or a copy of or extract from a memorandum or copy of an adoption order, or of an order discharging an adoption order, to any person unless the Court so orders or the Registrar of Births, Deaths and Marriages is satisfied that the copy or extract is properly required as evidence in proceedings under the Family Law Act 1975.
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> 11. (1) Where an order for the adoption of a child born in the Territory has been registered in the Register of Adoptions under regulation 10, the Registrar of Births, Deaths and Marriages shall re-register the birth of the child by entering in the Register of Births such of the following particulars as he is able to ascertain from the memorandum or copy of the adoption order:
>
> (a) the particulars of the child's name after adoption, sex and date and place of birth;

(b) particulars of the adopters;

(c) a notation to the entry, signed and dated by the Registrar of Births, Deaths and Marriages, to the effect that the birth of the child is registered in pursuance of this regulation.

(2) Where an order discharging an adoption order, in respect of a child born in the Territory, has been registered in the Register of Adoptions under regulation 10, the Registrar of Births, Deaths and Marriages shall -

(a) make a notation on the page in the Register of Births on which the birth of that child has been re-registered in pursuance of the last preceding sub-regulation to the effect that the adoption order has been so discharged; and

(b) make a further registration of the birth of that child to accord with the order discharging the adoption order.

(3) The notation referred to in either of the last two preceding sub-regulations shall not be included on any copy of, or extract from, an entry in the Register of Births issued by the Registrar of Births, Deaths and Marriages.

(4) Where the Registrar of Births, Deaths and Marriages re-registers the birth of an adopted child under this regulation, he shall write on the page of the Register of Births containing the original entry of the birth a notation, signed and dated by him, to the effect that the birth of the child has been re-registered on another page of the Register of Births, specified in the notation, in pursuance of this regulation.

(5) Where an adoption order relates to a child who has previously been adopted, the Registrar of Births, Deaths and Marriages shall re-register the birth of the child as if the entry relating to the previous adoption of that child were the original entry of the birth of that child.

(6) Where the birth of a child has been re-registered in the Register of Births in the pursuance of this regulation, the Registrar of Births, Deaths and Marriages shall not issue to that child or to another person a copy of, or an extract from, the original entry of the birth of that child unless the Registrar of Births, Deaths and Marriages is satisfied that the copy or extract is properly required as evidence of a fact of which a copy of, or extract from, the entry of the birth of that child made in pursuance of this regulation would not be evidence.

18. Section 31(1)(c)(i) of the Family Law Act 1975 confers on the Family Court of Australia jurisdiction to deal with the adoption of children in the A.C.T. However, in order for the Family Court to exercise that jurisdiction (the Supreme Court does currently), the Ordinance will require amendment.

19. Demographic data flowing from adoption in the A.C.T. is in line with similar data across Australia. In the year ending 30 June 1982 there were 46 children adopted in the A.C.T., all ex-nuptial children, whose mothers' ages at birth were as follows:

20 between 15 and 19
13 between 20 and 24
3 between 25 and 29.

These numbers fall within the Australia-wide pattern for 1981/82 in which 95.7% of children adopted by non-relatives were ex-nuptial, and of these 53.6% were relinquished by mothers between 15 and 19, while 29.4% were relinquished by mothers between 20 and 24. Between 1 July 1982 and 30 June 1983, 24 mothers relinquished in the A.C.T.; and between 30 June 1983 and 21 February 1984, there were 10 more. All were between 17 and 22. As a rule, children relinquished in the A.C.T. are adopted in the A.C.T. Exceptions arise in the case of agencies wishing to place children with particular ethnic backgrounds or medical needs or in the case of private religiously-based agencies. The Welfare Branch of the Department of Territories and Local Government, which places all children relinquished in the A.C.T., would go outside the Territory to place a child in an ethnic group similar to that of its parent(s) but outside the specific community to which a parent belonged. On the other hand, all six of the children from New South Wales placed in the A.C.T. in 1983 were brought to the Territory by private sectarian agencies. Current A.C.T. adoption waiting lists are composed as follows:

34 step-parents
106 being assessed
26 approved and awaiting placement
48 being assessed for overseas placements
13 approved for overseas placements
227

20. As an illustration of the directions that might, in future, be taken in A.C.T. legislation, the Victorian situation is particularly relevant.

Victoria

21. The first Victorian Adoption of Children Act was passed in 1928, two years after the first English Act. The Victorian version of the Model Act, passed in 1964, has been in force since 1966, and was amended in 1972 and 1974. In 1978 the Victorian Attorney-General appointed an Adoption Legislation Review Committee which was directed to consider, among other sources, the Statute Law Revision Committee's Recommendations on access to original records in adoption. However, before the Adoption Legislation Review Committee's final report was available, in December 1980, the Adoption of Children (Information) Act 1980, following the lines recommended by the Statute Law Revision Committee, was passed. Public response to the Act was such that it was proclaimed only in those sections relating to its title and the establishment of an information register. The register provided a format in which adoptees and natural parents could enter their names if they wished to seek information concerning the other, or if they wished to make contact.

22. Later, the Adoption Legislation Review Committee's final Report was made available (March 1983). According to that Report, the background of the current legislative situation is as follows. The Adoption Act 1964 had in fact instituted in Victoria a system of confidential adoption. At that time such legislation "was a reflection of what was seen to be community attitudes towards illegitimacy" and, it was argued -

- would protect the anonymity of the natural parents whether or not they wanted their parentage of the adopted person to be disclosed
- would protect adopted persons - it was assumed that only ex-nuptial children would need to be adopted - from the stigma of illegitimacy

- would protect the adoptive parents' privacy from intrusion by the natural parents
- were necessary before adoptive parents could build a good relationship with their child (Adoption Legislation Review Committee Report 6.0.2).

When pressure was brought to bear on the Victorian Government to open adoption records by those persons whom it had sought to protect, the Statute Law Revision Committee was asked to look into the matter. The recommendations of the SLRC and the subsequent provisions of the 1980 Act have been interpreted by both the Adoption Legislation Review Committee and various adoption pressure groups[1] as inherently conservative, still reliant on the assumptions governing the 1964 legislation, and as having "disregarded all available research, findings and information" (Adoption Legislation Review Committee Report 6.2.16). The SLRC's recommendation not to introduce any retrospective legislation has been described as "based on false premises" and "perpetuating the suffering of many adopted people who are deprived of the fundamental right which is basic to their psychological and social well-being".[2] It was also described as anomalous in the light of the recommendation that persons adopted after the legislation was enacted should in fact be given access to their original birth certificates at 18 if parents consented.

23. The establishment of an adoption register - the only provision in the 1980 Act which has in fact been proclaimed - will, it has been argued, offer a poor substitute for restrospective access legislation "and even that section is not effective as a section of the Act permitting the drawing up of Regulations and providing for the operation of the Register, has not been proclaimed" (Adoption Legislation Review Committee

1. Namely, the Victorian Standing Committee on Adoption, the Victorian Council of Social Service, the Adoptive Parents Association, Jigsaw, the National and Victorian Council for the Single Mother and her Child and a number of adoption agencies.

2. John Triseliotis, Letter to the Statute Law Revision Committee of 1 November, 1978, reprinted in NCSMC Seminar 1980, Proceedings, p. 51.

Report 6.12.16). The reason for this is that adoption registers, where established as an alternative to the enactment of retrospective legislation permitting access, have been proved to be ineffective. Their limitations are clear from the experience of New South Wales, where only six "matches" had occurred after two and a half years of operation (October 1976 to early 1979), and in South Australia, where only four contacts had been made after two years of operation (August 1977 to June 1979).[1] This scarcity of matches arises because the chance of mutual registration by an adopted person and a natural parent is very low unless bolstered by more active research and consultation. In the absence of such positive help, registers may produce more frustration than hope.

24. The Adoption Legislation Review Committee's recommendations, which if implemented would displace the 1980 and 1981 legislation, are, generally speaking, much more in line with current arguments about access for adopted persons, though the Report was reserved on the situation of natural parents. In fact the Committee took the view that

> proposals relating to the provision of identifying and non-identifying information to adoptees through the Adoption Information Service [should] apply to natural parents. This concept was discussed by the Committee before the publication of Working Paper Part I but the Committee did not make a specific Recommendation on it at that stage beyond recommending that identifying information could be given to a natural parent and supplied by, and with the consent of an adoptive parent. At that point the Committee had not moved to espouse the idea and considered too, that the proposal would be likely to be too far ahead of community attitudes to be accepted. The proposal, however, was raised and discussed in the public hearings held by the Committee. The Committee noted the acceptance and support shown for this idea among persons present at the public hearings, and that no person expressed opposition. (Adoption Legislation Review Committee Report, 6.2.21)

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1. Patricia Harper (ed.), NCSMC Seminar 1980, Proceedings, p.vi.

25. The Committee's further deliberations on access and the rights of all parties to adoption are incorporated in the discussion below. Its recommendations regarding access are given in Appendix 3, together with a brief account of draft legislation based on those recommendations.

## V. RELEVANT INTERNATIONAL ADOPTION LEGISLATION

### Scotland

26. For reasons flowing from Scottish inheritance law, adopted persons of 17 and above in Scotland have had access to their original birth certificates or extracts from original birth records since 1930 (Adoption of Children Act (Scotland) 1930). Thus they might obtain information about the names of their original parent(s), their occupations, their home addresses and the adopted person's place of birth. Interest in Scotland's access provisions has been growing significantly, as it is the only country sharing Australia's legal traditions able to provide evidence concerning the working of such a system over many years. Recent research has shown, firstly, that the application rate for birth information in Scotland has been running roughly at 1% of all adult adoptees or between 250 and 300 people yearly. Secondly, concern about possible invasion of the privacy of relinquishing mothers has produced the following:

> In 1972 the Registrar General Scotland reported to the Houghton Committee that there had been no complaints re the working of the system since 1930. Request[ed] for update on the situation as per 1980, the reply was "As far as we can ascertain from our records there have been no complaints about invasion of privacy".[1]

It appears, then, that in Scotland at least, natural mothers have not been disturbed by being contacted by their children.

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1. Social Work Services Group, Department of Education, Edinburgh, June 18, 1980.

27. There is considerable further research on the responses of adoptees and natural mothers in Scotland to access provisions there. Much of that research has been conducted by Dr John Triseliotis, whose letter to the Victorian Statute Legislation Review Committee criticising its findings on access was quoted above. Dr Triseliotis's findings are cited at length below in sections bearing on the rights of relinquishing mothers and adopted persons.

England

28. After the Houghton Committee's report on the Scottish experience of adoptee access, Parliament passed the Children Act 1975 (S.26) and the Adoption Act 1976 (S.51) giving all adoptees of 18 and above access to their original birth certificates on the single condition that they attend at least one counselling session. The application rate for such information follows the Scottish precedent. Also similar was the absence of complaints about invasion of privacy. Though letters concerning fears of privacy invasion had been received, no actual complaints of privacy invasion had been made.

New Zealand

29. In 1982 an Adult Adoption Information Bill was brought before the New Zealand Parliament by Mr Jonathan Hunt. The Bill provided for access by both adult adoptees and natural parents to birth certificates and related identifying information held by the New Zealand Registrar-General. Applications were required to be accompanied by a letter from a social worker or other approved person indicating that appropriate counselling had been given. Provision was also made for the removal of the names of natural parents from birth certificates at their written request, and the Registrar-General was also to record the adoptee's desire not to have contact with either or both natural parents. Access to information was also made available for medical reasons.

30. The Bill was not passed.

The United States

31. In the United States, as in Australia, adoption law varies by State. At present, only a few States permit inspection of adoption records without a court order. In 1971, a national Adoptees Liberty Movement Association was formed, and has since spread to Australia, with the purpose of establishing:

(a) that before adopted children reach the age of 18, their adoptive parents must inform them that they are adopted;

(b) that a human relationship registry be established to record details of adopted children and their natural parents;

(c) that once adopted children reach the age of 18, they, or their natural parents or either of their parents, may ask the registry to contact the other party and, if both parties agree, their identities should be revealed to each other and contact be established; and

(d) that data at the registry be preserved in the strictest confidence.[1]

32. In 1980, the United States Department of Health Education and Welfare released recommendations on a Model State Adoption Act and Model State Procedures. The Model Act allows access to records of proceedings by those who were parties to such proceedings. Thus natural parents and adoptees would have access to the original birth certificate and to court and agency records of the proceedings terminating parental rights. Similarly, adult adoptees and adoptive parents would have access to court and agency records of adoption proceedings. In addition to the principle of access to proceedings by parties to such proceedings, the draft Model State Adoption Act bases its access recommendations on three principles:

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1. Royal Commission on Human Relationships, Final Report, Vol. 4, Part V, 7.72.

1. Of all the persons involved in the adoption process, the child being adopted has the least control over the decisions made and procedures agreed upon. Hence, it is deemed unjust that in the inevitable balancing of rights and interests which must occur in every record-access dispute, the adoptee is deprived of a right while the rights of the more "responsible" parties are protected.

2. The policy that adoption is a service to adoptees, and the Model Act Preamble's guiding principle that when irreconcilable conflicts arise, the adoptee's rights should prevail.

3. The interests of adoptive parents, natural parents, and the State in keeping records sealed, are of less stature than the adoptee's interest in the personal growth and identity which can result from his encounter with the physical source of this being, a reunion which will be facilitated by the adoptee's inspection of his original birth certificate.[1]

Finland

33. Though most access provisions, where such exist at all, focus on establishing a right of access for the adopted person, and usually the adult adopted person, Finland's legislation gives access equally to adoptees, adoptive parents and natural parents with no formal age restrictions for applicants. Such access flows directly from the fact that under Finnish law all court documents are available to any person who is a party to any action. Agencies from which information is sought are liable to discourage the natural mother from contacting her child before that child reaches 20, but she may of right search the birth registers at any time. The Director of the largest adoption agency in Finland reports having encountered no special problems under the Finnish system, which has been operating for 58 years.

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1. Graeme Gregory, "Treating Adoptees as Persons", Australian Child and Family Welfare, Vol. 8, Nos. 1 and 2, Autumn-Winter 1980, p.43.

## VI. RIGHTS OF ADOPTED PERSONS

34. Given present legislation and the direction of current legislative reform in Australia, it appears most probable that provisions for access of adoptees will condition any recognition of rights to access of natural mothers. Partly, this is because of the lingering assumption that natural mothers would not wish access for themselves or for their natural children; but mainly it is because of the legal assumption that the rights, "welfare and interest" of the child should be paramount. This legal assumption, which is also found in the Declaration of the Rights of the Child, means that any legislation on behalf of natural mothers would have to arrange itself around legislation on behalf of adoptees.

35. There are in fact two problems with giving priority to the rights of the child in this context. The first is that the right of the child can be interpreted to mean protection from "disturbing" information, or access to non-identifying information only, or access to full details of his/her background, birth and adoption. Secondly, if (as appears to be the case) legislation giving access to adoptees stipulates that such access is dependent on their becoming adults first, then much of the force of the argument for priority for the rights of the child is dissipated. After all, many of the natural mothers relinquished their children before they themselves were 18; and recent research shows that the psychological distress is as real for some relinquishing mothers as for some adult adoptees. Both of these problems of legislative priority are bound up with current debate about the rights of access of adopted persons.

36. What Australian adoptee activist movements inherited from their American sources was an argument for access based on civil rights. In America the appeal was to the Fourteenth Amendment to the Bill of Rights of the American Constitution which. they argued, was violated when individuals were discriminated against on the basis of their status as adoptees.

In Australia since 1980 a similar appeal has been made based on Article 26 of the ICCPR, which prohibits discrimination on the grounds of "birth or other status".[1] The argument in both cases was that access to a copy of one's birth certificate is a basic human right which has been denied to adoptees of their adopted status. (In Australia this argument is predicated on Article 24(2) of the ICCPR, which states that "every child shall be registered immediately after birth and shall have a name".) Appeal to the ICCPR is reinforced by the finding of the U.N. Expert Group Meeting on Adoption and Foster Placement of Children (Geneva, 1978) that "the need of adult adoptees to know about their background should be recognised".[2] While a tenable argument regarding access can be based on the ICCPR, its provisions cannot be used to clarify the issue of the age at which such access should become, in law, a right.

37. A second argument for access by adoptees is grounded in Principle 2 of the Declaration of the Rights of the Child. This argument is based on research into the psychological effects of "genealogical bewilderment", or conscious ignorance of one's familial, social and cultural background. The first and crucial study of genealogical bewilderment in adoptees was conducted by Dr Triseliotis, who looked at 71% of those adoptees seeking birth certificates in Scotland between December 1969 and December 1970. Though the time under study was still early in the period during which illegitimacy was increasingly dissociated from shame. Dr Triseliotis found that the sample of adoptees he contacted felt that they had a right, and their parents a duty, to tell of their adopted status. Of course it must be understood that the Scottish sample was defined by its active interest in seeking birth certificates. It is not very surprising that many of his sample felt that parents who delayed

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1. See Patricia Harper, "Adoption law reform: in search of self-identity - access to information", Legal Service Bulletin, Vol. 6, No. 1, February 1981, pp. 52-3.

2. Expert Group Meeting on Adoption and Foster Placement of Children, draft Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, Geneva, 1978, Principle 17.

giving such information, or who were only pressed into giving it by the force of external circumstances, were signalling a lack of trust in their adopted children and in their relationship with their children.[1] All wanted facts and truth about origins rather than loss of faith in their parents:

> The general reaction to being told by or finding out from outside sources, especially in adolescence and adult life, was mostly painful and distressing. On the basis of the adoptees' comments, the view was formed that adoption is felt as a form of abandonment or rejection irrespective of the quality of other experiences. When knowledge of adoption is delayed to adolescence or adult age, the feeling of 'rejection' seems to be infinitely greater than when revelation takes place in earlier years. It appears that when knowledge of adoption comes early - possibly before the age of 8 or 10 - there is time for the trauma to heal where accepting and cherishing relationships prevail. The scar, however, appears to remain for ever and is liable to open up under extreme forms of stress.[2]

Such stress is likely to arise, for example, on the death of one of the adoptive parents or when the adopted person's first child is born; but, in general, adolescence is the period at which the individual requires, often urgently, information which will enable that individual to construct an image of self. Given no information concerning her/his natural parents, or given only uncertain information, the adoptee is thrown into a "state of confusion and uncertainty [which] ... fundamentally undermines his security and thus affects his mental health".[3] Later

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1. See Father Clem Kilby. "Rights of Children", Second Australian Conference on Adoption 1978, Proceedings, p.91.

2. John Triseliotis, In Search of Origins, London, 1973, p.155.

3. H.J. Sants, "Genealogical Bewilderment in Children with Substitute Parents", National Council for the Unmarried Mother and her Child, London, 1964, p.1. See also the Royal Commission on Human Relationships, Final Report. Vol. 4, Part V, 7.73 and Ian J. Harvey. "Research Methods in Adoption: Review, Trends, Implications and Future Needs", Second Australian Conference on Adoption 1978, Proceedings, p.162.

research by Sorosky, Baran and Pannor[1] generally reinforces Triseliotis's findings, although it clarifies the fact that genealogical bewilderment can cause distress independently of the quality of the relationships which prevail in the adoptive family. Findings like these have led to complete reversals in adoption policy, which used to urge concealment on the adoptive parents, even at one time going so far as to encourage prospective adoptive mothers to undertake progressive padding to simulate pregnancy before actually bringing the adopted child home. Now adoptive parents are strongly encouraged to inform their children of their adopted status, even when those children may be too young fully to understand the concept, so that their knowledge grows naturally with them. Some adoption agencies make the commitment to communicate a child's adopted status a prerequisite of adoption (Adoption Legislation Review Committee Report, 6.0.4). The same concern for psychological stress on adopted persons is opening the way for changes in adoption law. Such changes are not just theoretically desirable, they also follow practically from the insistence on informing adopted children of their adopted status.

38. It is, however, necessary to bear in mind in the course of arguments such as these that, in the cases of some adoptees, the psychological stress of knowledge might be at least as acute as the psychological stress of ignorance. The clearest example of a child so circumstanced would be that of the offspring of an incestuous relationship or rape. While many adopted people anticipate class differences between their natural and adoptive parents, the possibility of other, much more disturbing background circumstances is not so apparent. Highly uncommon situations such as these are not sufficient to counterbalance

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1. See A.D. Sorosky, A. Baran, and R. Pannor, The Adoption Triangle: the effects of the sealed record on adoptees, birth parents and adoptive parents, Garden City, N.Y., 1978, p.14 and cf. Triseliotis, "The Rights of Adoptees, Adoptive Parents and Natural Parents", Second Australian Conference on Adoption 1978, Proceedings, p. 34 and Picton, NCSMC Seminar 1980, Proceedings, p.36.

arguments for access for all adopted people; but they do contribute significantly to arguments concerning access procedures and the necessity for inserting some source of knowledge and informed advice between the adoptee and the information available to her or to him.

39. There remains in fact considerable debate concerning the most desirable procedures by which access should be given to adopted persons. Issues generally raised include: the desirable source of such information - adoption agency, adoptive parents or government departments; the age at which such information is given; the usefulness of non-identifying information as an interim measure until adulthood; and the acceptability of retrospective legislation granting access to persons adopted before any such provisions existed.

40. Although it is recognised by many groups that many adoptive parents and their children have been making use of informal sources of information, especially recently, there is strong support from adoptees and relinquishing parents for formalising the mechanisms by which access to information is made possible. According to Picton and Bieske-Vos,[1] whose research is based on Victorian sources, the most acceptable mechanism for access appears to be an officially established contact agency which would include on the staff qualified and experienced counsellors. Such an agency was set up in England under the Act which sanctioned access, and a successful working model therefore exists for government agencies of this sort. A second model for a government-operated agency was proposed by the Adoption Legislation Review Committee. Called the Adoption Information Service, its role would be to liaise with information sources by referral or research. Thus the Adoption Information Service would assist adopted persons by referring them to the agency which arranged the adoption or by supplying information from Departmental or agency records held by them. Since much sorely missed information has been lost upon the closure of adoption agencies and the destruction of their files,

1. Picton and Bieske-Vos, op.cit., 72.

a central permanent body to which records could be transferred would be a valuable resource for both adoptees and agencies. Links with other organisations and sources of information would help the Service to assist privately adopted persons to obtain information about their family backgrounds. The Adoption Legislation Review Committee also suggests that the Adoption Information Service could act for relinquishing mothers by providing non-identifying information concerning the progress and welfare of their adopted children. Alternatively, some adopted persons would prefer to by-pass such governmental agencies. Many have had unhappy experiences seeking information from agencies and their staff, and would prefer a system like the one operating in Scotland, where adoptees may obtain their birth certificates directly from the Registrar.[1]

41. Some of the adoptees contacted by Triseliotis took the view that ideally all relevant background information would be passed on to the adoptive parents who could then give it to their children. Although this is possibly a desirable way of handling such sensitive information, it would not always be a feasible one. Some adoptive parents feel bound by promises of secrecy given to agencies. Many adoptees feel the need for such information when adoptive parents are dangerously ill or recently deceased. And some adoptive parents are simply unable to make disclosures of the sort envisaged by adoptees. For these reasons, and in the absence of governmental bodies set up for the purpose, many adoptees support a call for adoption agencies to act as mechanisms of access. If legal provisions were to be made for this 'second-hand' agency of access, they would have to include the requirement that every agency keep a detailed account of the circumstances of each adoption, and that the name of the agency be included on the birth certificate issued to adoptees. The formal establishment of any one or a combination of these mechanisms of access would have profound effects on the issue of access for relinquishing mothers.

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1. Robert Bender, "Rights of Adopted Persons", Second Australian Conference on Adoption 1978, Proceedings, p.100. Mr Bender represented 'Jigsaw' Victoria.

Though - except in one partial instance - they are envisaged as one way channels of information, once such mechanisms are in place, their function could easily be enlarged to include access by relinquishing mothers.

42. The issue of the age at which access should be made available to adopted persons has been generally resolved to be the age of majority - usually 18. That is the age nominated in Australia by the 1976 First Australian Conference on Adoption, the 1978 Second Australian Conference on Adoption, the Victorian Standing Committee on Adoption, the 1980 NCSMC Adoption Seminar, the Adoption Legislation Review Committee Report, Jigsaw, Adoption Triangle and the Association of Relinquishing Mothers, among others. Two crucial questions concerning age were raised, however, at the Adoptive Parents Association Seminar (Canberra, 1978):

> Under the Commonwealth Family Law Act, the court may not make an order for custody in respect of a child over the age of 14 years without his or her consent. Might it not be argued that 'a right to know' if it does exist, may exist at the age of 16 or 14 or even less? Is there in fact a fixed age at all?
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> . . . . . .
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> Prior to attaining the age of majority it is certain that the interests of the child over-ride any other interests which are opposed to them, even those of the natural parents, but surely if the age of majority extinquishes the adoptive status of a person, it follows that the paramountcy of the welfare and interests of the former child, now adult, is simultaneously extinguished.[1]

Thus the argument basing the "right to seek ... information" on psychological need must accept that such need can, and very often does, precede 18, while the assumption that only adults can "handle" identifying information discreetly negates any claims adoptees may have to priority of interest over either their adoptive parents or their relinquishing parent(s). It may be that setting 18 as the age of access for adoptees settles the issue of priority of interest by pre-empting it and thus at least resolving possible conflicts of interest.

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1. Peter Quinn, op.cit., pp. 19 and 21. In fact section 29(b) of the Family Law Amendment Act 1983 has removed any

43. The view that 18 should be the age of access to identifying information is generally accompanied by the view that non-identifying information should be available to the adopted child before that time. Bodies which would not envisage unrestricted access at any age, such as the Royal Commission on Human Relationships, are also agreed on the desirability of making available non-identifying information about family backgrounds, such as the physical characteristics, medical history, occupation and family history of the relinquishing parent(s). In most cases this non-identifying information is seen as bridging the gap between the "need to know" and the age of 18. The availability of such information is thus taken to resolve any potential conflict between the welfare of the child and the privacy of the natural mother.

44. The matter of making access legislation retrospective is vexed, and will be handled separately below (see paragraphs 67-70).

45. The basic assumption underlying all these proposed provisions for access by adoptees to information concerning their background is this: that the establishment of formal procedures and mechanisms for giving access is at the same time the establishment of procedures and mechanisms for respecting privacy, even if not for making it absolute. There is, indeed, a distinction to be made here between secrecy, which is by its nature absolute, and privacy, which is a relative right. The right to privacy guaranteed by Article 17 has always to be balanced against the right to information guaranteed by Article 19. Future adoption legislation must and will have regard to this balance. At present it appears that, regardless of whether they do or do not wish privacy, relinquishing mothers will be fundamentally affected by the precedent of making provision for access in matters relating to individual privacy.

## VII. RIGHTS OF ADOPTIVE PARENTS

46. The argument for the adoptive parents' right to information flows from their role in protecting the welfare and interests of their children. This is certainly the view taken by the Adoption Legislation Review Committee (6.4.61) and by the Royal Commission on Human Relationships in its general recommendation that "in adoption practice every effort [be] made to obtain the fullest possible information about the background of babies who are surrendered for adoption and that this information be given in an unidentifiable form, in writing, to adopting parents at the time of placement".[1] Sorosky et. al. pressed for further developments along these lines, arguing the need for continuous reports of the birth parent's welfare from the original adoption agency. Such reports would then be available to the adoptive parents "to answer their child's inevitable questions and thus minimise the chance that the adoptee will resort to excessive fantasizing in an attempt to fill the identity lacunae".[2] Much social work literature since the mid-1950s has made the same point.

47. In fact, the natural mother's surname has often been shown on documents which are seen by adoptive parents. This has led one researcher to note that while in Western Australia, for example, adoptive parents have had identifying information and - it is agreed - should still be supplied with non-identifying information, the "natural mothers are never told the names of the strangers who adopt their babies. It is the adoptive parents only whose privacy is protected."[3] However inadequately such a state of affairs may reflect the desires and intentions of couples who are at present adopting children, it does certainly reflect a traditional position taken by adoptive parents as a whole. And it is they more than the other members

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1. Royal Commission on Human Relationships, Final Report, Vol. 4, Part V, 7.74.

2. Sorosky, Baran and Pannor, op.cit., 223-4.

3. Shirley Moulds, "86 Years of Adoption Practice - Western Australia", A paper Delivered to the Australian Relinquishing Mothers Society, October 25, 1982, p.10.

of the adoption triangle who have been in a position to affect legal provisions governing access to information in adoption. The influence of such interest groups on the history of adoption legislation in Western Australia can be seen in Appendix 2. As late as 1977, the Royal Commission on Human Relationships was arguing that while adoptees and natural mothers were calling for increased access to identifying information, "adoptive parents are as yet not as receptive to change on this matter".[1] While that is no longer the case - at least if the Adoptive Parents Association in Victoria can be taken as representative - adoptive parents still see their role as one of questioning the liberalisation of secrecy provisions in adoption law. As recently as October 1983, the Adoptive Parents Association took the view that certain of the Adoption Legislation Review Committee's recommendations -

> could lead to the disclosure of sensitive information to adoptees who are not emotionally ready to handle the situation. As parents we make a stand to safeguard the emotional development of our children.[2]

The example already raised of a possible discovery of an incestuous background is a clear case in point. Parents informed of such a child's origins would, at the very least, want to remain in a position to filter the information available to their child and to choose the time at which it should be passed on.

48. Parents were also concerned that access for relinquishing mothers would threaten "the security, stability and independence of adoptees and their families". This and the preceding point do not directly appeal to the right to privacy; rather, they are appeals to the rights enshrined in Article 24 of the ICCPR, which states (paragraph 1) that -

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1. Royal Commission on Human Relationships, Final Report, Vol. 4, Part V, 7.69.

2. "The fear haunting adoptive families", The Age. 5 October 1983, p.20.

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origins, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state.

But, as has been pointed out in other contexts, appeals to the right of a child to psychological and emotional protection can be made on both sides of the access argument until the child is 18, at which point the relevance of Article 24 lapses. Adoptive parents opposed to access also appeal to the concept of the family as a fundamental entity (articulated in Article 23 of the ICCPR) as if that entity were by definition exclusive of relinquishing mothers. Such exclusivity is, of course, an assumption which adoption law at present endorses.

49. Appeals to the emotional security of the child and the integrity of the family carry undeniable force grounded in Articles 23 and 24; but they also carry the responsibility of distinguishing between real fears for a child's security, the possible insecurity of the adoptive parents themselves and the pressure brought to bear on individual adoptive parents by special interest groups. It is undoubtedly the case that such pressure is being brought to bear; but it is also the case that the nature of that pressure is changing. Relatively recent adoptive parents of the past two to five years have been prepared by social welfare workers to be open with their children about their adopted status; most have access to some non-identifying information about their children's natural parent(s), information which they are willing to pass on. Most of these parents are also prepared to accept the Adoptive Parent Association's recommendation that children have access to their birth certificates at age 18. However, they express strong reservations[1] about the passing of identifying information to either the relinquishing mother or the adopted child before the child turns 18. A position of this sort marks a considerable shift from the kind of lobbying pursued by adoptive parents of

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1. loc.cit., and views expressed by Dawn Newell, representing the Adoptive Parents Association of the A.C.T., The City Extra Program, ABC Radio 2CN, 2 May, 1983.

an earlier ideological generation, and indicates the probable existence of sharply divided opinions among adoptive parents from different periods.

50. Because of divisions of this sort, some bodies - the Adoption Legislation Review Committee and the New South Wales Government among them - have recommended that under certain circumstances adoptive parents have the right to restrict or admit access by giving or withholding their consent. These circumstances are differently defined. The New South Wales Department of Youth and Community Services has until recently required the consent of adoptive parents before the adopted child - of any age from 18 on - could place his or her name on the New South Wales Adopted Persons Contact Register. That scheme has since been changed to permit registration without consent, but to require consent before contact is established between a child and a natural parent should a match be made. On the more liberal end of the scale, the Adoption Legislation Review Committee has recommended that, where an adopted child under the age of 18 is seeking identifying information concerning his or her natural parent(s), such information may be made available with the consent of both the adoptive and the natural parent(s) (Adoption Legislation Review Committee Report, 6.4.51). While the Adoption Legislation Review Committee is representative in regarding as important the right of adoptive parents to make decisions about the readiness of their particular children to confront a second parent or set of parents, there is much less to be said for giving them similar control over the decisions of their adult children:

> ... adoptive parents have no 'rights' in the matter of having a veto over their grown up children's decision to register with a contact agency if they want to meet their natural parents ... Adulthood is a status conferring independence in decision making.[1]

51. Apart from its recognition of the parental rights of adoptive parents, the establishment of a consent provision also helps to allay fears adoptive parents might have that they will lose control of their relationship with their adoptive

1. Robert Bender, Session 2, APA Seminar 1978. Proceedings, p.53.

children. So long as the choice of access remains that of the adoptive parents, the reassurance exists that children cannot replace one or both parents with another relationship at some time of particular stress or family crisis. In fact, research indicates that adoptees are particularly sensitive about offending or distressing their adoptive parents when taking steps to seek out their origins, and that such searches are often means of strengthening rather than weakening adoptive relationships:

> The overwhelming evidence from all adoption research ... shows that even in adoption involving older children strong relationships with adoptive parents are developed despite memories of earlier attachments. Sorosky et al conclude in their study that adoptive parents do become psychological parents and need not feel threatened or rejected if adoptees seek to discover their origins. Indeed some of their respondents reported an enhancement of their relationships with adoptive parents after finding their original parents. Lifton comes to similar conclusions and Partridge, herself an adoptee, an adoptive parent and a social worker, makes a similar assertion. Similarly, respondents in the Victorian study reported improvements in relationships and in some instances adopting parents who have encouraged and assisted in the search.[1]

Indeed, it appears to be the case that the greater the openness shown by adoptive parents to the special needs - for information or just for discussion - of their children, the more the threat of access is likely to be dissolved. It was on these grounds that the Adoption Legislation Review Committee ultimately concluded that "adopted persons' significant attachment to adoptive families are often positively affected by access to information" (Adoption Legislation Review Committee Report, 6.2.12.7).

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1. Cliff Picton, "Research: Its Contribution to the Access Debate in Adoption", NCSMC Seminar 1980, Proceedings, p.37.

52. Arguments which follow lines such as these do not, however, allay fears of adoptive parents of invasion of privacy by relinquishing mothers. And so long as relinquishing mothers are by law not defined as part of the family unit there exists no grounds, some adoptive parents argue,[1] on which they should be given access to it, or information making such access possible. Is knowledge itself an invasion of privacy when such knowledge is given to a party to the act of which knowledge is required? Is non-identifying information the only solution to relinquishing mothers' access needs, or at what point should it become identifying information? To what extent are relinquishing mothers' corresponding rights to privacy limited in the face of access claims for and by adoptees?

## VIII. RIGHTS OF RELINQUISHING MOTHERS

53. The position of relinquishing mothers has thus far in Australian practice been strongly conditioned by the rights of the adopted child as these were in turn perceived by legislators and adoptive parents. It is probable that in future the rights of relinquishing mothers will be crucially affected by the existence of access rights for adopted persons. The grounds on which those rights have been acknowledged and the legislative forms they are likely to take have been outlined above. It remains necessary to look directly at the issue of access rights for relinquishing mothers. There are about 60,000 relinquishing mothers in Australia. While those who have joined Jigsaw (300) and the Australian Relinquishing Mothers Association (400) are in favour of both access to information and contact with their relinquished children, it has been argued that many or most of the relinquishing mothers who have not joined such organisations are probably content with the existing legal provisions.[2] Despite such estimates, recent research throws doubt on the premise on which arguments for the status quo are based. The Adoption Legislation Review Committee refers to the assumption that relinquishing mothers can forget about the children they

1. See The Age, loc.cit.

2. See The Age, 16 November 1983, p.26.

relinquished as "a fallacy of thinking on which certain aspects of adoption policy and practice have been based" (Adoption Legislation Review Committee Report, 6.2.5.2). According to a study sponsored by the Institute of Family Studies and the Western Australian Department for Community Welfare. most relinquishing mothers are neither anxious nor able to "put it all behind them" and "carry on as if nothing had happened". Conducted by Margaret van Keppel and Robin Winkler at the Department of Psychology of the University of Western Australia, the research project investigated "The Effect on the Mother of Relinquishing a Child for Adoption". Researchers involved in the project surveyed a population of volunteer relinquishing mothers. The fact that they were volunteers must be taken into account in considering the team's findings that:

> (1) The effects of relinquishment on the mother are negative and long-lasting.
>
> (4) Relinquishing mothers, compared to a carefully matched control group of women had significantly more problems of psychological adjustment.
>
> (7) The relinquishing mothers expressed a clear view that their sense of loss and problems of adjustment to the relinquishment would be eased by knowledge about what had happened to the child they gave for adoption. For most women, non-identifying information would be sufficient to ease their sense of loss and problems of adjustment.[1]

54. In order to describe more exactly the nature of the effects of relinquishment, the researchers developed a theoretical framework based on two themes: relinquishment as a loss or bereavement, and relinquishment as a stressful life event. The stresses of ex-nuptial pregnancy and the pressures surrounding consent to adopt will be considered shortly. In the context of bereavement, the closest analogy researchers could find for relinquishment was perinatal death. Characteristic

1. Robin Winkler and Margaret van Keppel, "The Long-Term Adjustment of Relinquishing Mothers in Adoption", draft copy of a paper to be published as a monograph by the Institute of Family Studies, i.

responses to perinatal death - shock, guilt, shame and the need (often frustrated) to communicate and work through such feelings - find parallels in relinquishment:

> many mothers relinquished their children in a social climate which was hostile towards sexual activity outside of marriage, ex-nuptial pregnancies and single motherhood. Relinquishing a child typically produced strong feelings of shame and guilt, both because the mothers had transgressed society's norms regarding sexual behaviour and in so doing embarrassed their families and friends, and because they had failed their child as a mother ...[1]

This analogy and conclusion is supported by an American study, which also points to "the involuntary response of mourning to a loss complicated by the fact that it was intentional and by the child's continued existence".[2] These findings coincide with the Western Australian study. That is, the sense of loss and bereavement is, in the case of relinquishment, complicated by the mother's sense of complicity, and then further complicated by the fact that there is no presence or body to mourn, so that the bereavement is not completed or even able to be completed:

> In normal grief producing situations grief and mourning processes culminate in the resolution and acceptance by means of which the grieving person can resume meaningful activities. For the relinquishing parent, who may not even know that the adoption took place, the processes of grief and mourning often lack the culminating resolution which would enable them to 'let go'. This is likely to be accentuated if the decision to relinquish was taken under pressure and without the support of someone who could convey an understanding of the mother's feelings. It could also be argued that part of the adoptee's search for information entails the completion of a grieving process.[3]

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1. Winkler and van Keppel, op.cit., 8.

2. Edward K. Rynearson, "Relinquishment and its Maternal Complications: A Preliminary Study", American Journal of Psychiatry, 139:3, March 1982. p. 340.

3. Picton and Bieske-Vos, op.cit., 70-71.

Finally, the necessity of remaining silent about the loss, rather than seeking out the consolation of family and friends, is likely to result in an unresolved and unexpressed grief:

> Additional reinforcement for the 'conspiracy of silence' comes from traditional adoption legislation that alters birth certificates and maintains closed doors, operating from the apparently incorrect assumption that the relinquishing mother wants her identity to remain a secret to her child.[1]

55. The bereavement experienced by a relinquishing mother, and her continuing concern about the fate of her child, can take many forms. Some mothers report posting unaddressed birthday cards to their children each year on the anniversary of the birth. In New Zealand, a relinquishing mother undertook clerical studies in order to take a job in an adoption agency in order to have access to the files concerning her child. Another possibility is that a bereaved mother will attempt to "replace" her relinquished child, either by adopting or by getting pregnant again as soon as possible. In either case, she is likely to realise too late that the new baby is not a substitute for the lost one. "The emotional havoc wreaked on natural mothers of adopted children is frightening and it reaches into every other relationship they have with subsequent children and partners."[2] And the relinquishing mother who repeats her pregnancy in order to recover her adopted child becomes evidence of "the kind of woman" who is unfit to raise a child.

56. Van Keppel and Winkler report that the volunteer relinquishing mothers whom they interviewed "expressed a clear view that their sense of loss and problems of adjustment to the relinquishment would be eased by knowledge about what has happened to the child they gave for adoption".[3] Some

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1. Winkler and van Keppel, op.cit., 9. See also Marie Meggitt, "The Forgotten Person in Adoption - The Natural Parent", A Paper delivered by the Convenor, Australian Relinquishing Mothers' Society at an Adoption Conference, Melbourne, 3.12.82. p. 4.
2. Joss Shawyer, op.cit., 20. Death By Adoption (NZ) Cicada. 1978
3. Winkler and van Keppel, op.cit., i.

mechanism which would make available a continuing flow of information concerning the progress of their adopted children would contribute to resolution of feelings of guilt and bereavement. Such information might, according to the Western Australian study, take various forms, "ranging from non-identifying information to reunions, according to the needs and wishes of all concerned".[1] While meeting the needs and wishes of all concerned is often a more difficult matter than such a statement implies, the study lends considerable weight to arguments that a workable formula should be found.

57. The second issue raised by the study as a whole was the need for "greater availability of counselling and support services for women who have relinquished a child for adoption in the past and for women currently relinquishing a child."[2] Counselling and support services in the case of women considering relinquishment have in the past been fundamentally given in support of, and in the interests of, those couples considered by agencies to be suitable adoptive parents. Take, for example, the following advice to social workers assisting unmarried mothers in their decision about adoption:

> The social workers' part is to counsel the girl; to provide her with a realistic picture of the alternatives so that she may decide for herself what action is right for <u>her baby</u>; certainly not for her family or even in a sense for her. The decision must inevitably differ from girl to girl since no two people's circumstances ever exactly match. Finance is only one of the considerations a girl must take into account in deciding whether to retain her baby or allow it to be adopted. The more important facts the girl has to consider is what security (emotional as well as financial) she can offer the child, how normal a life she can provide, not only for a baby, but a growing child, and the likelihood of future marriage to someone other than the baby's father. Her natural love for the baby and all this means to her has to be weighed against the cold hard facts of what the future is likely to hold. The deciding factor has to be not what the mother <u>wants</u> but what she thinks she will be able to give.[3]

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1. ibid., ii.

2. Winkler and van Keppel, op. cit., ii.

3. Saunders, <u>A Guide to Adoption in New Zealand</u>, 1971. quoted in [illegible] op. cit., p.10

That is, the natural mother, both before and during hospitalisation, has been encouraged to regard herself as unfit to become a parent, and to regard her child as 'not hers' in the same ways as the child of a married woman. Pressure of this sort may be regarded as affecting the single mother's rights under Article 7 of the ICCPR, which stipulates that "No one shall be subjected to cruel, inhuman or degrading treatment or punishment". Furthermore, discrimination against a single mother on the grounds of her unmarried status may under the Sex Discrimination Act be an infringement of her rights (see paragraphs 61-2), which should be the same as those of any other patient, and specifically those of married mothers. That is:

> She has the right to name her child and the right to see her child with no more restrictions than any other patient in the hospital, and even those restrictions are subject to her final decision. She can sign herself out of the hospital as can any other patient who is not subject to a commital for psychiatric reasons. She has the right to see anyone she wishes, including the putative father of the child, and he has the right to see the child as much as any other father has the right.
>
> Many of these rights are not being recognised, apparently on the grounds that restrictions are in the interests of a mother or her child. Not only is there no evidence to support restrictions on such grounds, but there is an abundance of evidence that this type of repression is damaging to mother and child and can seriously jeopardize the realism of the decision that the mother is endeavouring to make about whether or not she should surrender her child for adoption. There is clearly a need for those helping disadvantaged people - and single mothers are frequently disadvantaged - to critically examine their motivation and their way of dealing with those they are intended to assist.[1]

It is as a result of practices such as these that many young women found themselves signing consent forms and giving their children up for adoption. Policies, particularly in hospitals,

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1. J. Davaren, "Decisions About Adoption - uses and abuses of the system", February, 1976, p.5.

have been altered recently, another factor which has contributed to the fall in the number of babies available for adoption. Since, for example, unmarried women have been allowed the same rights to see and hold their babies in Western Australia as married women, the number of babies available for adoption has fallen from 670 in 1969 to 99 in 1981 - though that of course is also a period during which social attitudes to the retention of children by unmarried mothers have changed.

58. Although the rights to privacy and to information require careful balancing in the matter of access, where consent to adoption is concerned there are clear guidelines in the Declaration of the Rights of the Child. Principle 6 of the Declaration states that the child "shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother". Principle 6 places an obligation on counsellors, hospital workers and state agencies to give priority to assisting, rather than separating, the unmarried mother and her child. To this end a number of recommendations have been put forward by the Adoption Legislation Review Committee in Victoria, while in Western Australia it has been argued that legislation should be amended so that the natural parent is given the option of permanent legal guardianship and of temporary fostering as well as relinquishment. A number of procedures designed to slow down the process of consenting to adoption, and to ensure that the decision to relinquish is "meaningfully absorbed and understood" were described at the Second Australian Conference on Adoption.[1] While not strictly relevant to access issues, such procedures, if put into practice, would be likely to reduce some of the tensions surrounding relinquishment and its aftermath, including access arrangements:

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1 Harper, "Pregnancy and Adoption", Second Australian Conference on Adoption 1978, Proceedings, 114.

> Until seven or eight years ago (and in many instances since then), the decision of many, if not most, relinquishing mothers was not her own so much as that of the community in which she lived. Recognition of this fact is essential when considering the way in which the natural mother herself sees her attitude and relationship to her child given for adoption - as distinct from the way in which society has described (and indeed prescribed) her attitude and relationship to her child. ... It was assumed that, because bearing a child outside marriage was held to be shameful and immoral, the single mother would not possess the normal emotions of a mother towards her child - those of love and the desire for a close and continuing relationship with her child. Thus the community assumed it had the right to state that the single mother should have no further contact, or relationship, with her child. In so doing, not only did the community deny the mother the opportunity for further contact with her child, if her child ever so chose, but it denied the right of a child to access to information regarding his/her origins.[1]

59. The same kind of logic can be applied to arguments concerning the natural mother's assumed desire for permanent anonymity and privacy. That is, "it is only if the community properly understands the feelings of relinquishing mothers to the children to whom they have given birth, that the community can understand the feelings of these mothers to later having their identity known by, or to being contacted by, their child."[2] The assumption that ex-nuptial pregnancy is above all other considerations shameful begets the assumption that the relinquishing mother desires above all things to be left alone. If it were generally assumed that the natural mother's greatest fear would be that her child might go through life feeling originally rejected, then the reverse view would naturally follow, namely, that relinquishing mothers would welcome, and/or seek out an opportunity of explaining the circumstances of the relinquishment to their children. If the community insists that "if you love your child you will give it up", it cannot then assume that love no longer exists once the consent form has been signed, or that the mother would not wish to explain to the mature child what she could not explain to the infant. 95% of the mothers volunteering for the Western Australian study wanted information about themselves kept by the adoption agency and wanted it to be recorded that they cared about the child they

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1. Harper (ed.), NCSMC Seminar 1980, Proceedings, ii.

2. Harper (ed.), NCSMC Seminar 1980, Proceedings, iii.

relinquished.[1] Such research into relinquishment post-dates, and should modify, assumptions by public bodies that "many natural parents, having surrendered their child in good faith, believing that they were severing all contact, would have gone on to make new lives and the advent of the young person may be unwelcome and even traumatic".[2]

60. There are, then, two factors which together modify considerably the argument that most relinquishing mothers would prefer anonymity to access. The first is the very strong indication given by current research that privacy is not the primary concern of relinquishing mothers. And the second modifying factor is the equally strong likelihood that access provisions are going to be made for adoptees. At worst such provisions will make privacy a one way street, with access for adoptees and none for their natural mothers. At best they will clarify the need for access for relinquishing mothers.[3] In fact, the kinds of arguments made for access for adoptees apply equally to relinquishing mothers. There is clear evidence of emotional suffering in both cases; both should not be denied access to records of the legal transaction directly concerning themselves; and in both cases privacy is most likely to be preserved by the provision of due procedures and mechanisms for access. "The only way to allay fears of invasion of privacy is to allow access to information in a systematic and controlled manner".[4] No matter what form of access is envisaged - updated non-identifying information, identifying information, or contact - the existence of a central clearing-house for information and counselling must contribute greatly to a constructive and

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1. Winkler and van Keppel, op.cit., 7.

2. New South Wales Council of Social Service Standing Committee on Adoption, quoted in its turn by the Royal Commission on Human Relationships, Final Report, Vol. 4, Part V, 7.74.

3. This has, for example, been the case in the United Kingdom. See Shawyer, op.cit., 40.

4. Picton and Bieske-Vos, op.cit., 73.

careful approach to the right to privacy of all parties to adoption. Adoptive parents could record on-going information; adoptees could pursue their pasts as far as would satisfy and no further. And relinqishing mothers might seek and find reassurance that their decision to relinquish, however painful, had not left their children institutionalised and unprotected. Each party, that is, could choose to limit her or his participation in access to seeking or giving information. Each could record a desire for privacy which would then be communicated to the other parties to the adoption.

## IX. DISCRIMINATION ON THE GROUND OF MARITAL STATUS

61. While it does not appear that the provisions of the Sex Discrimination Act affect the rights of relinquishing mothers to access to information, there may be effects in the areas of consent to adoption and peri-natal care. If, for example, a hospital social worker were to put pressure, either directly or indirectly, on single women to consent to adoption because an assumption is made about the capability of single women (as opposed to partnered women) to support a child, or because of an assumption that a single parent would be unable to provide a stable, happy background for the child, then that pressure could constitute a direct discrimination on the ground of marital status.

62. Similarly, if, once a mother had indicated her interest in the possibility of relinquishing her child, she became subject to any automatically applied rules which denied her access while in hospital to her child or to information about her child, that denial could constitute indirect discrimination on the ground of marital status. That is, if it were found that the great majority of mothers to whom these rules applied were single (which is the case - see paragraph 19), and if the rules themselves were found to be unreasonable in the circumstances, then a case may be made for the imposition of indirect

discrimination. The unreasonableness of rules restricting access to children likely to be put up for adoption is arguable on the grounds that such restrictions, rather than helping the mother to make a responsible decision, are in fact designed to make that decision for her. Post-natal access to children would clarify the full implications of any decision to consent to adopt. Denial of access presumes that the (mainly) single relinquishing mother should be encouraged to part with her child because she is less fit to act as a parent than approved partnered mothers.

## RIGHTS OF THE NATURAL FATHER

63. Recent legislation in South Australia and New South Wales, and the recent recommendations of the Adoption Legislation Review Committee in Victoria are indicative of an increasing attention to the rights of the natural father, particularly with respect to consenting to adoption. The National Council for the Single Mother and Her Child proposes that "in all cases where paternity has been established, the consent of the father, in addition to that of the mother, should be required before the child can be placed for adoption, otherwise the father should be awarded custody of his ex-nuptial child".[1] It has been proposed that the following criteria should establish paternity for the purposes of consent to adoption:

1. Where he was married to the mother during the possible period of conception, unless the mother has made a sworn statement that he is not the father.

2. Where he is living with the mother, that is cohabitation, during the possible period of conception; again, unless the mother has made a sworn statement that he is not the father.

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1. Harper, "Pregnancy and Adoption", Second Australian Conference on Adoption 1978, Proceedings, 116. See also Richard Chisholm, "End of Uniformity: New Adoption Laws for N.S.W.", Legal Service Bulletin, Vol.5, No.2, April 1980, pp. 49-50.

3. That he has signed the registration of birth form, and this requires the agreement of the mother of an ex-nuptial child.

4. That he has signed an acknowledgement of paternity in accordance with the Victorian Status of Children Act.

5. That he has been named in a court order as the father.[1]

The same criteria might be applicable in access applications, and interest is growing in the rights of natural fathers to information concerning their adopted children. Resistance to the concept of rights in adoption for natural fathers has come from those who argue that their paternity may have resulted from a passing relationship or even a rape. Such arguments do not recognise the situation of most natural fathers; nor do they recognise the need for law reform in this area or the implications of the non-discriminatory provisions of the Sex Discrimination Act. It is nevertheless desirable to separate the cases of the relinquishing mother and the natural father until further research has been undertaken into the position of the natural father in the adoption triangle.

## XI. AID AND IVF AND ACCESS TO INFORMATION

64. The Family Law Amendment Act 1983 made provision to legitimise children born through artificial insemination by a donor (AID) or in vitro fertilisation techniques (IVF). For constitutional reasons, this provision is being backed up by the Marriage Amendment Bill 1984, which will amend the Marriage Act 1961, and which is currently receiving its second reading.

65. One effect of this legislation is to confirm a categorical distinction between AID and IVF children and adopted children. With all AID and IVF births, birth certificates record the names of the social parents, who before present legislation may technically have made a false declaration but were never required actually to adopt their children. The existence of such a technical distinction makes it possible to

1. W.C. Davey, "The Rights of the Natural Father", Third Australian Conference on Adoption 1982, Proceedings, p.369.

proceed with access legislation for relinquishing mothers and their adopted children while research and discussion continues in the case of donors and IVF/AID children. Since the oldest AID children in, for example, Melbourne, were eight years old in 1984, 10 years remain before these children would be expected to seek access to information concerning their natural parents.

66. Another consideration distinguishing AID from adopted children is the nearly wholesale withdrawal of sperm from AID programs by donors reacting to the possibility of access to donor records being made available. Appropriate consideration of IVF/AID access rights cannot be undertaken here, though it is clear that, until some future time when access issues have been fully considered, hospitals should abandon the practice of destroying donor record cards or any other practice - such as using sperm from more than one donor at one time - intended to make identification of the biological parent impossible.

## XII. RETROSPECTIVITY

67. When the Victorian Statute Law Revision Committee brought down the recommmendation that changes in adoption legislation should not be retrospective, there was a strong negative response from many interested groups - so strong, in fact, that much of the Adoption of Children (Information) Act 1980 was never proclaimed. It was pointed out that in the absence of retrospectivity, access provisions would not come into effect until the 1990s, leaving thousands of adopted persons in Victoria in enforced ignorance of their past. Among other things the Statute Law Revision Committee was accused of having ignored the findings of current Australian and overseas research on the effects of adoption. Taking a similar line to the Statute Law Revision Committee, however, the Royal Commission on Human Relationships declared itself to be against

any "automatic right to identifying information in respect of past adoptions as this could upset many people and intrude upon their privacy".[1] The New South Wales Adoption Legislation Review Committee (McClelland Committee) took the same position. These findings were published in 1978, 1977 and 1976 respectively. They address, as do most of the arguments concerning retrospectivity, the issue of access for adoptees. Their arguments are also directly relevant to access for relinquishing mothers, but only by implication.

68. On the other side of the retrospectivity debate are the Victorian Adoptive Parents Association, the New South Wales Adoptive Parents Association, the Victorian Adoption Legislation Review Committee, the National Council for the Single Mother and Her Child, the Australian Association of Relinquishing Mothers and a number of eminent researchers such as Day, Picton and Triseliotis. Their arguments approach the issue of retrospectivity on two different grounds. There is, first of all, the argument based on humane considerations. Those opposed to retrospectivity on these grounds argue that "it would entail altering rules of practice without the consent of those whose lives were significantly affected by the original rules".[2] Such alterations would threaten the privacy of parties to the adoption who would wish the adoption in effect forgotten for reasons of family security or individual shame, guilt or embarrassment. The response to this argument is that the "original rules" of adoption were not well-founded from the humane point of view and should not therefore be used to bind the parties to an adoption to mistaken assumptions. Research shows, these people argue, that both adopted persons and relinquishing mothers may be placed under severe psychological stress by being denied access to adoption records. The ideology of shame and guilt for both mother and illegitimate child on which adoption law was premised should be replaced by these new research findings as the basis for a new, more humane law:

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1 Royal Commission on Human Relationships, Final Report, Vol. 4, Part V., 7.93.

2. Cliff Picton, "The Research Experience - What Does It Show?", NCSMC Seminar 1980, Proceedings, 35.

> The reason the law needs changing is that there are, right now, thousands of adoptees across this country suffering identity problems which can only be resolved by unsealing their birth records. These people must not be swept under the carpet. They need a humane response, not a haughty lecture about changing the rules half way through the game.[1]

69. Those opposed to retrospectivity on legal grounds, or on an analogy with legal situations, argue that adoption is like a contract which should not be broken without the agreement of the original parties. This was the position taken by the Victorian Statute Law Revision Committee, for example, when it recommended that access not be retrospectively granted. It is of course arguable that in the case of the adopted person one party is being bound to a contract to which she or he did not agree. And, also in the case of the adopted person, it is most probable that existing secrecy provisions are in violation of any or all of Articles 19, 24 and 26 of the ICCPR. But arguments more directly relevant to the case of the relinquishing mother have been put by Patricia Harper of the Institute of Family Studies and Professor David Hambly of the Law Faculty of the Australian National University. Both have attacked the analogy between adoption and the commercial contract or bargain:

> I do not think it is appropriate to describe adoption as a contract or bargain; nor do I think it is tasteful ... We are not really dealing with commercial bargains that need to be strictly enforced. We are dealing with a much more complex matter of human relationships in a rapidly changing society. It seems to me that it is arid to regard the parent-child relationship as an inflexible bargain or contract, just as it is unreal to regard a marriage and divorce in this way. When changes in divorce law are being debated, nobody argues that they should apply only to future marriages, so as to avoid improper interference with the terms of existing contracts.[2]

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1 Bender, "Rights of Adopted Persons", Second Australian Conference on Adoption 1978, Proceedings, 96.

2. David Hambly, "The legal situation", NCSMC Seminar 1980, Proceedings, 31, and see Patricia Harper, Changing laws for changing families, Discussion Paper No. 9, the Institute of Family Studies, Melbourne, 1983, p.14.

The Adoption Legislation Review Committee quoted this passage with approval in its own Report. Citing a situation more analogous to adoption access than a contract, the Law Reform Commission Report on Privacy argued that:

> There can be no basis for limiting the right of access to personal records created after the implementation of the Commission's recommendations. The risks for privacy involved in misuse of a record of personal information, collected or recorded before a particular date, are no different to the risks involved in misuse of records of personal information collected after that date. It matters little how old the record is. A right of access should extend to all records.[1]

70. A second response to the contract analogy is the argument that it has not affected previous retrospective changes in adoption legislation:

- In Queensland, prior to 1964. the name of the parent of origin appeared on the birth certificate issued to an adopted person.

- Section 13(a)(8) of the South Australian Adoption of Children Act, 1925, which gave adoptees of 17 or more access to original birth information, applied from 1931 until 1967 when it was repealed.

- A series of changes in Western Australian law described in Appendix 2 progressively and retrospectively restricted adoptees' access to information including their birth names.

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1 Australian Law Reform Commission, Report No. 22: Privacy. Vol. 2. 1241.

It appears that retrospectivity did not become an issue restricting adoption legislation until that legislation began to move towards opening access rather than closing it. This introduces the final argument against retrospectivity, put by the Adoption Legislation Review Committee: "In matters relating to adoption the law should be an enabling, not a restricting instrument" (Adoption Legislation Review Committee Report, 1.2.1.9).

## XIII. CONCLUSION

71. Different points of view exist concerning the kinds of access which should be available to relinquishing mothers. These could include -

1. using a register to encourage the adoptee to make contact;
2. access to non-identifying information regularly up-dated by the adoptive parents;
3. access to identifying information once the child has reached a specified age, usually 18 (Adoption Legislation Review Committee) or 21 (ARMS);
4. access to identifying information during childhood for some pressing reason, such as the relinquishing mother's severe or terminal illness;
5. access to identifying information at any time by mutual agreement;
6. access without mutual agreement; and/or
7. some form of open adoption permitting continuous contact or even shared parenting.

Though ordered in a progressively liberalised sequence, a number of these views can be and are held simultaneously. Access to current non-identifying information is felt by many - the Adoptive Parents Association, the Australian Association of Relinquishing Mothers, the Victorian Adoption Legislation Review Committee, the National Council for the Single Mother and her Child, Triseliotis, Shawyer, Picton and Bieske-Vos - to constitute the minimal common ground for those interested in the

issue of access for relinquishing mothers. Some adoptive parents have clear reservations about providing relinquishing mothers with identifying information at any time, for reasons recorded above (paragraphs 47-49). Nevertheless, so long as the adopted child has an acknowledged right to her/his birth certificate at age 18, there would be no difference in principle in making such rights available to the other adult parties to the adoption. Individual adoptees who are not ready for or interested in contact could record their wishes with a central agency, as could adoptive parents who judged their children to be likely to be endangered in any way. The same kind of process would apply in cases in which the adoptee was under 18, with the addition of some mechanism such as a court or tribunal to resolve disagreements. The recommendations put forward by the Victorian Adoption Legislation Review Committee are relevant here:

> 6.4.55 That, where natural parents seek identifying information concerning their children who have been adopted, and who have not reached the age of 18, the Adoption Information Service may approach the adoptive parents to seek their consent and co-operation in furnishing such information.
>
> 6.4.56 That identifying information not be available to natural parents of adopted children who have not reached the age of 18, where the adoptive parents and/or the child object to this. However, the Adoption Information Service may take an active counselling role with all parties with a view to the needs of the natural parents being met.
>
> 6.4.57 That, where access to identifying information is sought by a natural parent through the Adoption Information Service, in relation to an adopted child under the age of 18, but is not agreed to by the adoptive parents or the child concerned, an application may be made to a judge in Chambers to determine whether special circumstances exist to warrant the granting of an order permitting access to the adoption birth certificate.

72. Provisions such as these regulating access by relinquishing mothers would prevent such access from arbitrarily breaching the privacy of the adopted person or his/her family under Article 17. The principle involved is that articulated by the Australian Law Reform Commission Report on privacy, which argued while defining privacy that "the individual should be able to exercise a measure of control over relationships with others".[1] Such diminution of privacy as may result from contacts made after the appropriate forms have been observed could not be regarded as exceeding "a measure of control" or as constituting an infringement of Article 17. If, to take the extreme case, either the adoptive parents or the adopted child or both have refused to authorise the exchange of identifying information throughout the child's minority, and if their refusal has been upheld by a Judge in Chambers, and if in the face of this the relinquishing mother's desire for identifying information has persisted for 18 years, then by that time her right to information under Article 19 would carry the same weight as those of the other parties to the adoption, at least one of whom will very likely have an automatic right to identifying information regarding the relinquishing mother.

73. On the other hand, access to identifying information before the adopted person reaches 18 and in the absence of consent or against the positive wishes of the adopted person or her/his adoptive parents may constitute a threat to individual privacy. In that instance the child's well-being, which can only be evaluated by that child or her/his adoptive parents, must take priority over the well-being of the relinquishing mother (Article 24), and so the appeal to psychological welfare ceases to be relevant to her case. Also, the adoptee under 18 has no rights to access on her/his own behalf. With neither of these factors to mitigate the adoptee's right to privacy, the

1. Australian Law Reform Commission, Report No. 22: Privacy, Vol. 2, 1032. The other main feature of privacy specified is that of "the person of the individual", which is not relevant in this context.

relinquishing mother's claim to access must be based on a pre-existing relationship with the child, a relationship which she has renounced in law no matter how strongly it may persist in fact.

74. In the reverse case - the case of a relinquishing mother who does not desire to be known or contacted - the "measure of control over relationships" to which she has a right must be balanced against the adopted person's right to information under Article 19, his or her right to a birth certificate regardless of birth status (Articles 24 and 26) and finally against that priority which must be given to his/her psychological well-being during childhood (Principle 2). If it is agreed that Principle 2 can be met by the provision of non-identifying information - and this is not likely without the accompanying prospect of identifying information at 18 - then the question remains whether the relinquishing mother can be said to have an absolute right to absolute privacy after 18 years have passed and at the risk of infringing the adopted person's rights under Articles 19, 24 and 26. Undoubtedly she can and should take advantage of an established central bureau or agency for registering her objections to contact and the reasons behind those objections. She can also assure herself that those objections will accompany any information passed to the adopted person. In the case of a relinquishing mother who does not wish her second family to have any knowledge of her adopted child, a central bureau could act to facilitate a private meeting if the adoptee wished to use identifying information received to make contact. But a relinquishing mother would hardly be able to justify, on the grounds of Article 17; denying her adult natural child's right to access to identifying information under Article 17 and in fact it is unlikely that a relinquishing mother would wish to keep her adopted child in ignorance once the possible long-term effects of such ignorance have become widely recognised.

75. In general, it is increasingly apparent that that "measure of control over relationships with others" which flows from the concept of privacy can only be sustained through a set of formal provisions and mechanisms permitting access under specified conditions. So long as contacts are left to luck and to those with personal resources, or with the time and means for extensive research, no party to an adoption can be assured of making her/his views on contact known before contact itself takes place. If a central agency for information were established, a further control would be given to the individual, whose wishes about contact could be made known before contact itself could be established. And in addition such an agency could include counselling facilities which would assist all parties in making responsible decisions. While it is generally agreed that counselling should be optional, it is equally agreed that counselling facilities would be greatly to the advantage of all parties in the possibly stressful event of receiving new information and perhaps making contact.

76. All of the preceding considerations should be applied to any review of A.C.T. access provisions.

77. Changing the legal form of adoption so as to retain the family relationship between a natural parent and an adopted child is the final and most far reaching case for access. And this may in fact be the direction which Australian adoption law ultimately takes. Those who support such a change in the law argue that while the law can create new relationships it cannot in real human terms dissolve the emotional bond between a natural mother and her child. The full implications of signing a consent form for adoption, whether the relinquishing mother is fully aware of them or not, include an emotional relinquishment as well as a physical one. Once it is accepted that that kind of detachment is only a legal assumption and not a psychological probability, a case can be made for bringing the law into line with parental needs of the relinquishing parent(s) as well as those of the adoptive parents. "Adoption as we know it should cease" was the call that came from the First National Conference

of Relinquishing Mothers in 1983.[1] In practice, a natural parent could, for example, relinquish "all legal, moral and nurturing rights to [a] child, but retain the right to continuing contact and knowledge of the child's whereabouts and welfare".[2] A woman would then be able to watch the development of her child through a negotiated contact arrangement agreed upon in advance with the adoptive parents.[3] Arrangements like these are discussed in the American Model State Proposals, where consideration is given to the situation of children in long-term fostering or in new families formed after a divorce, who remain suspended between two families because of a reluctance on the part of the non-custodial biological parent to sever family ties. In addition, the open adoption concept is extended to include very young mothers who may be losing the struggle to raise a child themselves but who do not on the other hand wish to lose contact with their children. Special attention is also given to the views of older children concerning such open arrangements. As a result of their Australian research, Winkler and Van Keppel call for -

> changes to adoption legislation that will allow the introduction of alternatives to the current traditional system of 'closed adoptions'. For example, Sorich and Siebert (1982) describe the practice of 'open adoption' as the meeting of relinquishing parent(s) and adoptive parents; identifying information is exchanged and the terms for the exchange of on-going information should this be desired by both parties, are specified in a written contract. The authors report that 'open adoption' and other placements which make provision for the exchange of non-identifying information are gaining acceptance in the United States of America as viable alternatives to 'closed adoptions'.[4]

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1. News Release, First National Conference of Relinquishing Mothers, quoting Ethel Maguire, of the Welfare Branch of the Department of Territories and Local Government.

2. Sorosky, Baran and Pannor, op.cit., 214.

3. See the suggestion of Ms J. Watkins, M.L.A. for Western Australia, West Australian, 29 July 1983, p.2.

4. Winkler and van Keppel, op.cit., 87.

Given such contractual arrangements the privacy issue of course disappears. The Adoptive Parents Association of Victoria has registered strong reservations about such open adoptions, which, they feel, will "transform adoption into long-term fostering arrangements, subjecting adoptees to the same insecurity, instability and traumas that might be produced by multi-parenting arrangements after divorce".[1] Despite such objections, it is increasingly possible that the shortage of children available for adoption will compel more prospective adoptive parents to consider the feasibility of open adoptions. Any associated change in the law would, however, have to be accompanied by substantial research into the effects on children of existing multi-parenting arrangements.[2]

## XIV. POINTS FOR DISCUSSION

The following are the principal points emerging from a discussion of the rights of relinquishing mothers to access to information regarding their adopted children:

(a) that relinquishing mothers should have access to non-identifying information concerning their adopted children until those children are 18 (paragraph 56);

(b) that relinquishing mothers should have access to identifying information concerning their children once the children are 18 or over (paragraphs 71-2);

(c) that the recommendations of the Victorian Adoption Legislation Committee (paragraphs 71, 73) be supported -

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1. The Age, 5 October, 1983, p.20.

2. For existing research on and case law support for open adoption, see Carol Amadio and Stuart L. Deutsch, "Open Adoption: Allowing Adopted Children to 'Stay in Touch' with Blood Relatives", Journal of Family Law, Vol. 22, No. 1, 1983-4, 59-93. A sample Open Adoption Agreement taken from this source is included as Appendix 4.

6.4.55 That, where natural parents seek identifying information concerning their children who have been adopted, and who have not reached the age of 18, the Adoption Information Service may approach the adoptive parents to seek their consent and co-operation in furnishing such information.

6.4.56 That identifying information not be available to natural parents of adopted children who have not reached the age of 18, where the adoptive parents and/or the child object to this. However, the Adoption Information Service may take an active counselling role with all parties with a view to the needs of the natural parents being met.

6.4.57 That, where access to identifying information is sought by a natural parent through the Adoption Information Service, in relation to an adopted child under the age of 18, but is not agreed to by the adoptive parents or the child concerned, an application may be made to a judge in Chambers to determine whether special circumstances exist to warrant the granting of an order permitting access to the adoption birth certificate.

(See Appendix 3 for the other Victorian recommendations regarding access.)

(d) that a central bureau or agency should be established to:

- act as a research and resource centre for adoption information including general information, non-identifying and identifying information relevant to all members of the adoption triangle at all stages of the process of action (paragraph 40)
- store adoption files which would otherwise be destroyed (paragraph 40)
- make counselling available to all members of the adoption triangle (paragraph 75)
- act as a 'post office' between members of the adoption triangle (paragraph 75);

(e) that the rights of adoptive fathers should be considered as soon as satisfactory criteria have been set up for the determination of paternity, but that the rights of relinquishing mothers should be allowed to progress as a separate issue (paragraph 63);

(f) that problems associated with access to information in AID and IVF births be treated as involving some issues distinct from those involved in adoption, and therefore separately (paragraph 66);

(g) that the advantages of open adoption be carefully considered, especially in those cases in which it provides an alternative to long-term institutionalisation or fostering of children (paragraph 77);

(h) that all legislative reform with respect to access to information in adoption be retrospective (paragraphs 67-70;

(i) that all these considerations be taken into account in any review of A.C.T. adoption legislation (paragraph 76).

## COMPARISON OF STATE ADOPTION PROVISIONS

| | N.S.W | VIC. | S.A. | TAS. | W.A. | N.T. | QLD. | A.C.T |
|---|---|---|---|---|---|---|---|---|
| Proceedings in camera; records closed | Ss.64-66, 67 | Ss.60-62* | Ss.65-67 | Ss.57, 59-60, cf.20 | S.11 | Ss.54-56 | Ss.58-59** | Ss.59-61 |
| Prohibition of publication of identity of participants | S.53 | S.49 | S.46 | S.46 cf.58 | S.20 | S.46 | S.45 | S.50 |
| General referral of other matters to Regulations, including: | S.73 | S.67 | S.72 | S.67 | | S.60 | S.65 | S.65 |
| Access | | S.67(g) | S.72(h) | | | S.60(f) | S.65(1)(f) & (g) | S.65(c) |
| Transcripts of records | | S.67(h) | S.72(i) | | | S.60(g) | S.65(1)(h) | S.65(d) |
| Other relevant Provisions | | | S.72 (e)**** | S.67 (k)*** | 12A(5)+ | | S.65(g)++ | |

* Ss.61 and 62 of the Victorian Adoption of Children Act 1964 are repealed by the Adoption of Children (Information) Act 1980, only partly proclaimed. See paragraphs 21-23 above.

** S.59 of the Queensland Adoption of Children Act 1964 was repealed and replaced and a new s.59A inserted by the Adoption of Children Act Amendment Act 1972; a new S.59B was inserted by the Adoption of Children Act Amendment Act 1979, and repealed and replaced by the Adoption of Children Act Amendment Act 1981. The thrust of all this legislation is to control the flow of information passing through persons administering the Act, who are restricted from making disclosures except in the course of their duties. The Adoption of Children Act Amentment Act 1983 makes no significant changes to existing access provisions.

*** Under S.67 of the Tasmanian Adoption of Children Act 1968, which provides for the making of Regulations, (k) further specifies that "applications for adoption orders being made or dealt with in such a way that the identities of the children proposed to be adopted pursuant to those applications are not to be disclosed to the applicants for those orders and that the identity or identities of the adopter or adopters is or are not disclosed to the parents or guardians of those children, except where all parties to those applications otherwise agree".

**** S.72(e) in the South Australian Adoption of Children Act, 1966-67 is analogous to 67(k) in the Tasmanian Adoption of Children Act 1968.

\+ S.12A(5) of the Western Australian Adoption of Children Act 1896 provides that "the original entry of the birth of the child the duplicate of that original kept in the general registry shall not be open to inspection and a certified copy of the original entry of the birth of the child or the duplicate of that original which is kept in the general registry or the entry relating to the re-registration of the birth of the child shall not be issued, except with the approval of the Registrar-General".

++ S.65(1)(g) of the Queensland Adoption of Children Act 1964 provides for regulations with respect to the inspection of any proceedings under the Act.

APPENDIX 2

## THE ACCESS DEBATE

### New South Wales

The effect of the New South Wales Adoption of Children (Amendment) Act, 1980 has been to undermine the uniform adoption laws of the 1960s.[1] The provisions of the Act affect the rights of ex-nuptial fathers, consent to adoption, the establishment of an Adoption Tribunal and the status of the New South Wales Adoption Contact Register. Access itself was not affected, as the inquiries of the Adoption Legislation Review (McClelland) Committee did not produce favourable responses. The Committee received more submissions concerning access than on any other issue; and since these submissions were very strongly against access, the Committee decided in 1976 against any change in the law. Again, retrospectivity was raised as a barrier to change, and it was pointed out that court orders were available to those determined to find information while at the same time there were "sufficient checks in the present system to prevent indiscriminate disclosure of information".[2] Since that time, however, the New South Wales Standing Committee on Adoption has developed a position on access which supersedes the views of the McClelland Committee to the following effect:

(a) An adult adopted person has a right of access to his or her original birth certificate.

(b) The change in legislation necessary to achieve this should be retrospective subject to a period of grace of two years during which any parent who has relinquished a child prior to the period of grace may make application that the birth record be sealed and that the sealing will last for a period of up to twenty years.

(c) The right of a natural parent to ask for closure should be exercised only after compulsory counselling which would enable discussion of the parents' fears regarding disclosure, and in the event of the right to closure being exercised would provide a record of the reasons for closure which may be of some satisfaction to the adoptee. Such counselling interviews may also be able to obtain some of the background history, medical information, etc., that is in many cases the main reason that access is being sought.

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1. See Chisholm, op.cit., 49.

2. Report of the N.S.W. Adoption Legislation Review Committee to the Minister for Youth and Community Services (February 1976).

(d) Compulsory counselling should also be a condition of the release of birth records to an adult adoptee whose adoption was arranged prior to the introduction of the legislation. The British system appears to have justified itself in practice both in allaying public fears about open access and in the service that it has offered to adoptees.

To these provisions I would like to see the following added:

(e) The counselling service associated with access should be available to adoptive parents.

(f) The introduction of such a provision would need to be preceded and accompanied by wide, informed and carefully co-ordinated publicity.[1]

The New South Wales Adoption Contact Register, which was first established by a Ministerial decision, was confirmed by the 1980 Act. Registration of persons under 18 requires the consent of adoptive parents; for persons over 18 registration itself is unrestricted. The ineffectiveness of the register has been noted. Apart from the sheer statistical difficulty of making matches, one major problem has been the stipulation that where a match is found the permission of the adoptive parents is required before contact can be made, or, failing that, an adoptee must institute court proceedings to obtain the release of information concerning the adoption. This is - as has been pointed out - a provision almost designed to "create or aggravate stress in their [the adopted person and his/her adoptive parents'] relationship by exposing a conflict between them".[2] Research[3] has shown that adopted persons are very wary of giving rise to any uneasiness or insecurity in their adoptive parents, and this provision may inhibit a number of adopted persons from registering where they would be unable to proceed with the discretion they might otherwise exercise.

Queensland

The Adoption of Children Act 1964 provides very strict secrecy criteria analogous to those of other States with respect to adoption records in Queensland. In 1982, the then Minister for Welfare Services, Terry White, issued a public document outlining present legislation and recent changes in adoption

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1. John Wall, "Access to Information", in Third Australian Conference on Adoption 1982, Proceedings, p. 153.

2. David Hambly, "Adoption in Australia - Legal Issues", in Adoptive Families: The Need for a National Body, Papers presented at the Conference/Workshop in Canberra, (ed.) Dawn Newell and Geneveive Power, June 1981, p. 31.

3. See Cliff Picton, "Research: Its Contribution to the Access Debate in Adoption", NCSMC Seminar 1980, Proceedings, pp. 38-9.

practice in other States and overseas, and possible changes in Queensland law. In that document access issues are stressed, though the emphasis is almost wholly on the situation of the adopted person. Unlike submissions received by the New South Wales Legislation Review Committee in 1976, submissions to the 1982 Queensland Government were predominantly in favour of making access available, though both open access and limited access were proposed. In the event, the Adoption of Children Amendment Act 1983 made no significant change to access provisions, though it did provide or improve provision for: appeal procedures for unfavourably assessed applicants to adopt, step-parent adoption, adoption of children with special needs and inter-country adoptions. No provision was made for a contact register. The Bill was assented to and reserved pending the drafting of regulations.

South Australia

Under the provisions of the Adoption of Children Act Amendment Act, 1978, a South Australian Adoption Panel was established to include a clinical psychologist, gynaecologist, legal practitioner, a paediatrician, a psychologist and a social worker. The Panel's functions are advisory, and no new legislation regarding access has as yet been recommended. Existing access facilities are restricted to the Contact Register administered by the South Australian Department of Community Welfare. In the case of the South Australian register, neither registration by adopted persons and a natural parent over 18 nor subsequent action to make contact by the Department when a match occurs requires the consent of the adoptive parents. Very recently the Register has begun to act as a clearing-house for non-identifying information. Relinquishing mothers can obtain what non-identifying information is available from the original adoption orders, though such data is not systematically updated. Relinquishing and adoptive parents can leave gifts and letters, again of a non-identifying sort. According to a Department representative, letters from relinquishing mothers frequently take the form of explanations to children of their decision to relinquish.

Western Australia

Recent research[1] into the history of adoption law in Western Australia has revealed that the tendency of changes in legislation in that State has been progressively to restrict what were originally, by present standards, fairly liberal provisions. Until 1921, for example, adopted children retained their full birth names, both Christian and surname, and the surname of the adoptive father was simply added on. This use by adoptees of their original names ended in 1921 after pressure was applied to members of the State Parliament by adoptive parents. In 1926, under a further amendment, the original register of birth was closed to inspection by adult adoptees

1. Shirley Moulds, op.cit.

except with the approval of the Registrar-General. This meant that adoptees of any age were barred from seeking their original identity. In 1949 adoptive parents expressed the desire to control their adopted children's first names, and that, too, was installed as law. The thrust of research into adoption in Western Australia has been to demonstrate, firstly, that present law is not a norm or a fixed point against which all moves must be measured as more or less innovatory, and secondly, that the impetus behind change in adoption law, at least in Western Australia, has hitherto been the adoptive parent, not the adopted person or the natural parent.

In a recent (June 1983) submission to the Western Australian Minister for Youth and Community Services regarding proposed changes to adoption legislation and practice in that State, the Western Australian Branch of the Association of Relinquishing Mothers called for the repeal of the 1926 amendment closing adoption records, and for amendment of related provisions of the Adoption of Children Act 1896. Citing recent research and the emergence of financial assistance to single parents, they argued that changes to access provisions should be made to apply retrospectively to mothers who relinquished their children in the absence of adequate information and financial support. They also proposed changes to consent provisions and to the form of adoption itself.

More recently (August 1983), a member of the Western Australian Parliament, Ms Jackie Watkins, called for sweeping changes in adoption laws which would give natural mothers a form of legal guardianship which would persist after adoption. She has also called for uniform legislation based on her proposals to be introduced in all States. A subsequent Committee of Inquiry into proposed legislative changes has announced that it would urge the Government not to make any changes retrospective.

Tasmania

In Tasmania all the legal and administrative processes leading to adoption are covered by the Adoption of Children Act, 1968, which is administered by the Director of Social Welfare. Although there have been no radical changes to the legislation or its administration, the Department of Social Welfare has experienced a recent increase in applications from individual parties to adoption for non-identifying information. Their response has been to supply what information of a non-identifying kind is available to them. While the State has not itself the resources to undertake a thorough-going review of adoption legislation, notice has been taken of the useful groundwork laid in Victoria for adoption law reform.

Northern Territory

Apart from a recent recognition of Aboriginal customary marriage for the purposes of adoption, there have been no significant changes in Northern Territory adoption legislation since the Adoption of Children Ordinance 1964. The Territorial government is, however, contemplating a thorough review of adoption legislation with a view to meeting changing community needs. It is very likely that access issues will compose part of such a broad review, which should be in train before the end of 1984.

Commonwealth Jurisdiction

The Australian Constitutional Convention held in Hobart in 1976 recommended that legislative power over adoption be referred by the States to the Commonwealth. The matter was not on the agenda for the 1983 Constitutional Convention, and consequently the recommendation still stands. This recommendation represented a response to the fact that, under the Commonwealth Constitution, the Commonwealth Parliament has power to make laws only with respect to marriage and "divorce and matrimonial causes, and in relation thereto, parental rights and the custody and guardianship of children" (The Constitution, s.51(XXI), (XXII)). Since neither relinquishment nor adoption itself fall under these headings, each State and Territory would have to agree to refer its powers regarding adoption before genuinely uniform legislation could be produced. A further move towards such unification - and in general towards the unification of family law and family jurisdiction throughout Australia - was endorsed by the Royal Commission on Human Relationships in 1977. In 1978, at the Second Australian Conference on Adoption, similar arguments were made concerning the desirability of uniformity so long as the variation which at present exists was clearly arbitrary and not the result of the tailoring of legislation to local needs. It was, however, also pointed out that there may be in addition to possible States rights issues, a number of practical problems in the way of any unification. These would flow from the difficulty of establishing an efficient working relationship between the federal Family Court of Australia and the miscellaneous State agencies which variously deal with adoption issues. It was also argued at the conference that any assumption that a uniform law would necessarily be a more enlightened law was open to considerable doubt.[1] Nevertheless, the spokesperson for the National Council for the Single Mother and Her Child spoke of federal jurisdiction as presenting the only really promising method of ending "discrimination against ex-nuptial children and their families".[2]

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1. Justice Elizabeth Evatt, op.cit., 61.

2. Patricia Harper, "Pregnancy and Adoption: The Rights and Needs of the Natural Mother", in Second Australian Conference on Adoption 1978. Proceedings. p. 115.

APPENDIX 3

## Recommendations of the Victorian Adoption Legislation Review Committee Regarding Access - and Associated Draft Legislation

### Recommendations

We recommend:-

6.4.43 That an adult adopted person be entitled to a copy of his or her original birth certificate. Entitlement to the original birth certificate should be available without restriction, and should be given in a situation where appropriate counselling is available but not compulsory.

6.4.44 That any adopted person have the right to identifying information when he or she is aged 18 years or more, irrespective of when the adoption order was granted. The natural or adoptive parents' permission should not be required for access to information by an adult adopted person.

6.4.45 That an Adoption Information Service be established within the DCWS. The Adoption Information Service should liaise and consult with and make referrals to adoption agencies, publicise its functions, and provide an information service for persons and organizations involved in adoption as well as fulfil a community education functions.

6.4.46 That the Adoption Information Service assist adult adopted persons to obtain a copy of their original birth certificate. It should supply further personal identifying information both orally and in writing from agency records to adult adopted persons.

6.4.47 That natural parents be able to register their wishes with respect to meeting the child when he or she is 18 years of age or more. This information with attendant explanation should be given both orally and in writing to adult adopted persons seeking copies of their birth certificate or at any time they request the information.

6.4.48 That natural parents be given any identifying or non-identifying information both orally and in writing about their child which the adoptive parents are willing to supply at any stage.

6.4.49 That the Adoption Information Service provide an optional counselling service for adopted persons who seek copies of their original birth certificates and background information about their origins and for natural parents who have relinquished children for adoption.

6.4.50 That an adopted child under the age of 18 have access to counselling and non-identifying information both orally and in writing from the Adoption Information Service whether or not the adoptive parents are involved, although every effort should be made to involve the adoptive parents.

6.4.51 That, where an adopted child under the age of 18 is seeking identifying information concerning his natural parents, and where the adoptive parents do not oppose this, the Adoption Information Service may approach the natural parents to seek their consent and co-operation in furnishing such information. Where this is forthcoming, the information be shared both orally and in writing with the child and his adoptive parents.

6.4.52 That identifying information not be available to the adopted child under 18 unless the natural and adoptive parents are in agreement to information being given. However the Adoption Information Service may take an active counselling role with all parties with a view to the needs of the adopted child being met.

6.4.53 That, where access to identifying information is sought by an adopted child through the Adoption Information Service, but is opposed by the natural or adoptive parents, an application may be made to a judge in Chambers to determine whether special circumstances exist to warrant the granting of an order permitting the child to have access to his/her original birth certificate.

6.4.54 That natural parents have access to counselling from the Adoption Information Service and be given any non-identifying information both orally and in writing that may be available.

6.4.55 That, where natural parents seek identifying information concerning their children who have been adopted, and who have not reached the age of 18, the Adoption Information Service may approach the adoptive parents to seek their consent and co-operation in furnishing such information.

6.4.56 That identifying information not be available to natural parents of adopted children who have not reached the age of 18, where the adoptive parents and/or the child object to this. However, the Adoption Information Service may take an active counselling role with all parties with a view to the needs of the natural parents being met.

6.4.57 That, where access to identifying information is sought by a natural parent through the Adoption Information Service, in relation to an adopted child under the age of 18, but is not agreed to by the adoptive parents or the child concerned, an application may be made to a judge in Chambers to determine whether special circumstances exist to warrant the granting of an order permitting access to the adoption birth certificate.

6.4.58 That the matter of whether identifying information about an adopted person should be made available to his/her natural parents when the adoptee is adult be kept under review in Victoria with a view to formulating legislation, noting that this Committee generally supports that identifying information be available to natural parents, on application when the adoptee is aged 18 years or over.

6.4.59 That natural parents, adoptive parents and adopted persons participate in both the practice and policy development of the Adoption Information Service and that such participation be encouraged in private agencies.

6.4.60 That the Adoption Information Service provide when possible non-identifying information concerning the progress and welfare of the adopted child both orally and in writing to the natural parents.

6.4.61 That the Adoption Information Service supply non-identifying information about the origins of the child both orally and in writing to the adoptive family.

6.4.62 That, in special circumstances the Adoption Information Service supply identifying information to adopted minors or to the adoptive parents of minors subject to authorisation by a court.

6.4.63 That for persons seeking information, but whose case records are not available, the Adoption Information Service seek to establish links with other information sources.

6.4.64 That the Adoption Information Service ensure that all information is released in a situation where applicants are aware that a specialised counselling service is available for those who wish to discuss the implications of this information.

6.4.65 That non-identifying information generally be released to parents, siblings, grandparents, aunts and uncles both orally and in writing. Any other person should be required to establish a valid interest.

6.4.66 That, when a birth certificate is issued to an adult adoptee the Adoption Information Service would have an obligation to inform that person of the wishes of the natural parent regarding contact, if such information is recorded. Contact should not be actively promoted where a natural parent or adult adoptee has indicated that they do not want contact.

6.4.67 That the Adoption Information Service record the wishes of natural parents about contact by adult adopted persons. If contact is desired by both parties the Service should assist if requested to do so. The Adoption Information Service should not interfere with the right of natural parents and adopted adults to proceed, or not to proceed, with contact, as they choose.

6.4.68 That the Adoption Information Service be required to consult with agencies to establish and review policy concerning the responsibility for following up an adoption where information about the progress of the child is sought by natural parents and relatives.

6.4.69 That, when an adoption agency closes down, its records be transferred to the Adoption Information Service.

6.4.70 That the Adoption Information Service have the right to obtain original birth certificates and adoption birth certificates from the Government Statist in relation to all persons on the Adoption Information Register.

6.4.71 That the Adoption Information Service publicise guidelines on what type of information is available to those involved in adoption.

6.4.72 That the Adoption Information Service provide a public information service to interested persons about the procedures involved in relinquishing a child for adoption or adopting a child. It should provide information about adoption legislation and regulations, agencies, waiting lists, and about the specialised services of inter-country and special needs adoption.

6.4.73 That the Adoption Information Service seek to develop greater community sensitivity to adoption through the use of discussion groups, films, seminars, distribution of pamphlets, media advertising and visits to community groups.

<u>The Victorian Adoption Bill</u>

On 2 May 1984 the Victorian Minister for Community Welfare Services moved the Second Reading of and introduced the Adoption Bill 1984. Debate has been adjourned awaiting public comment on the Bill.

Part VI of the Bill contains provisions about access to information and creates an Adoption Information Service and an Adoption Information Register.

The provisions in Part VI of the Bill are, in general, consistent with the recommendations in Chapter 6.4 of the Adoption Legislation Review Committee Report.

The main features of the Bill are:

- Adult adopted persons are entitled to access to their original birth certificate, without the consent of the natural parents or any other person, on application to the Director-General of Community Welfare Services (the Director-General);

- Other provisions deal with access to information about adopted persons (this must not unreasonably disclose personal affairs of any person) on application to the Director-General:

  - adult adopted persons are entitled to all available information (identifying or not) without the consent of any person;[1]

  - adopted persons under 18 years, natural parents, natural relatives and adoptive parents are entitled to non-identifying information;

  - natural parents of adopted persons under 18 years are entitled to identifying information with the agreement of the adoptive parents or if the adoptive parents are deceased; the wishes of the adopted person must be taken into account;

  - (Recommendation 6.4.56 gives greater weight to the wishes of the adopted person. It provides that "identifying information not be available to natural parents ... where the adoptive parents and/or the child object to this");

  - natural parents of adult adopted persons are entitled to identifying information with the agreement of the adopted person or if the adopted person is deceased;

  - natural relatives are entitled to identifying information subject to relevant agreements;

  - adoptive parents are entitled to identifying information with the agreement of the natural parent or if the natural parents are deceased.

- County Court orders may be obtained to dispense with requirements for agreement in specified circumstances.

- The Adoption Information Service established within the Department of Community Welfare Services is to provide advice and counselling and to deal with applications for access and provide information.

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1. An officer of the Department of Community Welfare Services advises that this is the intention of the Bill. As drafted, clauses 91 and 93 suggest that only non-identifying information is intended while the absence of a requirement for agreement by interested parties, as in clauses 94 to 98, suggests that identifying material is also intended.

- The Adoption Information Register is to include details of relevant persons who wish to be included, including their wishes about obtaining and providing information and about meeting other persons on the Register.

The Bill is not as specific as the Committee's recommendations about counselling and the way in which information should be provided, but provides a framework within which recommendations on these points could be effected. The Bill does not refer to any educational or promotional role of the Adoption Information Service as in the recommendations.

APPENDIX 4

# INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

(Relevant Articles)

## ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

## ARTICLE 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

## ARTICLE 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

## ARTICLE 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

ARTICLE 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or bith. the right to such measures of protection as are required by his status as a minor, on the part of his family. society and the State.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

ARTICLE 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect. the law shall prohibit any discrimination and guarantee to áll persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, polticial or other opinion, national or social origin. property. birth or other status.

DECLARATION OF THE RIGHTS OF THE CHILD

(Selected Principles)

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities. by law and by other means, to enable him to develop physically. mentally. morally. spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Principle 6

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.