



Adoptions Taskforce
Community Services Directorate
Human Services Policy
By email: adoptionstaskforce@act.gov.au

Dear Adoptions Taskforce,

Response to the Discussion Paper - 'Dispensing with Consent'

The Human Rights Commission welcomes the opportunity to provide input into the consultation on possible reforms to the *Adoption Act 1993* to support more timely and appropriate adoption processes to enhance permanency outcomes for children and young people under *A Step Up for Our Kids – One Step Can make a Lifetime of Difference (Out of Home Care Strategy 2015-2020)*.

The paper outlines various barriers in the current Act that the Community Services Directorate believes impact the Court's proper consideration of the 'best interests' of the child or young person.¹ These barriers are described as:

1. the grounds for dispensing with consent that may not reflect a modern understanding of community issues such as disability and domestic violence
2. the voices of children and young people are not consistently considered in the adoption process because the dispensation provisions are primarily directed at the conduct of adults
3. children and young people are not commonly provided an independent children's advocate in the adoption matters
4. there is little legislative guidance about the grounds and what evidence is required to establish them.

This submission provides detail on the human rights framework in which adoption policy and legislation must be considered and responds to the issues identified in the discussion paper. It has been prepared in two parts – part one provides summary responses to the discussion questions and part two provides more detailed information in support of our submission.

Part One – Responses to discussion questions

1. How should the circumstances of children in out of home care influence the grounds for dispensing with consent?

Adoption is a mechanism for the legal transfer of parental responsibility from the birth parents to other carers. It is not a mechanism for responding to failures of parenting or keeping children and young people safe. Those processes are separate and administered under the *Children and Young People Act 2008*. Removal of a child or young person should not necessarily mean that a parent has no right to refuse consent to an adoption application – adoption is not a mere formality that is a necessary consequence of such out of home care arrangements being ordered.² Children and young people in need of care and protection who must be separated from their parents in their best interests can still be kept safe and provided with a stable family life under existing out of home care enduring care arrangements, without a formal adoption proceeding.

¹ Community Services Directorate 'Dispensing with Consent: Discussion paper' (December 2018), p 5.

² *In the matter of the adoption of R* [2012] ACTSC 36 at [7].

The evidence-base showing that long-term, secure, loving relationships are instrumental to children and young people's wellbeing is solid. However, there is a dearth of evidence guiding decisions about what forms of long-term relationships are preferable for children and young people living in out of home care. There are limited studies looking at long-term outcomes for children and young people who are adopted compared with other long-term placements such as Enduring Parental Responsibility, but those that have been conducted suggest that "few differences were found between children's levels of emotional and behavioural difficulties, and participation and progress in school, for those in stable long-term foster care and those in adoptive placements".³

What has been described as "the major advantage, however, is that children and young people who have been adopted may feel a greater sense of security and do not face the prospect of "leaving care" at age 18 (or earlier)".⁴ Supporting further longitudinal research, conducted independently of the organisations that provide adoption services, along with in-depth qualitative research about what adoption means to children and young people, would assist in shaping adoption policy into the future.

The Commission considers that the starting point should be that, except in very limited circumstances, adoption should only take place with the consent of the birth parents, or if they are competent, the child or young person affected. This is consistent with the case law that describes a "decision to sever the parental tie being one of the gravest that a judge may ever take".⁵

As has been expressed by the Supreme Court, although best interests are the paramount consideration when applying the grounds for dispensation of consent, the Adoption Act, in "providing for the residual discretion of the Court and the statutory requirement for the consent of the birth parents....balances other moral interests".⁶

The Commission acknowledges arguments that the current grounds for dispensing with consent are focused on "the birth parents' behaviours, like if they'd abandoned, neglected or treated the child badly".⁷ However, this is a logical consequence of the grounds on which children or young people are removed from their parents in the first place which are based on the need to provide emergency care and protection. Decisions to temporarily or permanently make alternative care arrangements is a clear judgement about the failings of the birth parents.

The Commission considers that it would be incorrect to say, as recently reported in the Canberra Times, that the 'best interests' of the child are not already considered by the Courts.⁸ Sections 4 and 5 of the Adoption Act requires the Court to consider the best interests of the child or young person in all decisions under the Act.⁹ However, it would not logically follow that there should be grounds for dispensing with consent – such as where the child/young person has formed a bond with the foster parents – where that bond only results from the initial decision to place the child/young person with foster parents. Such reasoning was dismissed in the case of PT where the Court held that the mother had a reasonable excuse for not discharging her obligations as a parent, where there were care orders in place that restricted her ability to have contact with her child.¹⁰

³ Thomas, C, *Adoption for looked after children: Messages from research. An overview of the Adoption Research Initiative* (2013 London: British Association for Adoption & Fostering) p 31.

⁴ Cashmore, J. 'Children in the out-of-home care system' in Australian Institute of Family Studies, *Family, policy and the law* (May 2014) available at <https://aifs.gov.au/publications/families-policy-and-law/15-children-out-home-care-system>

⁵ *In the matter of the adoption of MS* [2017] ACTSC 412 at [57].

⁶ *In the matter of the adoption of MS* [2017] ACTSC 412 at [16].

⁷ Kimberly Le Livre, '9 children were adopted by their carers in 3 years, of the 835 in care' *Canberra Times*, 3 February 2019.

⁸ *Ibid.*

⁹ *In the Matter of the Adoption of PT* [2018] ACTSC 14 at [11-13].

¹⁰ *In the Matter of the Adoption of PT* [2018] ACTSC 14 at [66].

2. How should grounds for dispensing with consent reflect contemporary language, particularly with respect to a person's capacity to consent?

The Human Rights Commission considers that the current grounds for dispensing with consent encompass situations where the parents **cannot** consent (because they cannot be located or cannot understand the consequences of giving consent to an adoption with all reasonable support) or because the parents have **waived** their right to consent (through intentional abandonment, sustained failure to engage with their parental responsibility or proven neglect or ill treatment).

The existing grounds could be reframed to reflect contemporary understanding, particularly around capacity to encourage the use of supported decision-making in adoption processes in situations where the decision-making ability of a parent/s and children or young people who might wish to be adopted is in question.

Supported decision-making (SDM) allows people with impaired or limited decision-making capacity to make choices about their own lives with support from other people. People with impaired or limited decision-making capacity choose people they know and trust to be part of a support network to assist them with decision-making. People with impaired or limited decision-making capacity should receive the support necessary to enable them to make and implement the decisions that affect them. This is particularly relevant to people with cognitive impairments or mental illnesses that affect their decision-making.

In the Commission's experience, even frameworks with comprehensive criteria for dispensing with consent, such as the *Mental Health Act 2015*, need stringent scrutiny. In practice, despite the Mental Health Act, mental health decisions about capacity are dominated by particular professions, and individual professionals. The decision-making framework lacks key safeguards such as a routine requirement for a second professional opinion and the involvement of staff skilled in supported decision-making.

Case study

A birth mother with a cognitive impairment who, while 'happy' to consent to the adoption of her children, was concerned that she might not get to have contact with them after the adoption. This concern suggests that her consent was not fully informed or freely given, and that she had been inadequately supported in the decision-making process. It also highlights the concern that contact with birth parents will be ceased and will be at the discretion of the adoptive parents as there will no longer be a statutory authorisation in relation to contact.

In the Commission's view, frameworks for considering capacity to consent to an adoption process require an even higher threshold and rigorous oversight. While decisions under the Mental Health Act that override or dispense with the requirement for consent (such as Psychiatric Treatment Orders) are temporary and subject to review, adoption is a permanent decision.

The Commission would support a better mechanism for determining the capacity and competence of children and young people to make applications for their own adoption. Where a child or young person has had appropriate support and information to understand the legal consequences of an adoption, they should be empowered to make an application for their own adoption to a person on the register.

3. How should the capacity to care for and protect a child or young person be considered in an adoption proceeding?

The Commission considers that the capacity to care for and protect a child or young person is not, in itself, a relevant consideration for an adoption proceeding. Those questions are relevant to whether a child or young person should be removed from their parents and put into out of home care.

Dispensation of consent is not a necessary consequence of the removal of children or young people into out of home care order or the making of an enduring parental responsibility order. Adoption is not a mechanism for finding “who would be ‘the better parent’ or whether the carers would provide “greater developmental opportunities for the child, or whether those opportunities would be in the child’s best interests so as to outweigh a mother’s right to care for her own child”.¹¹

The Commission considers that the consent should only be dispensed with where the parent **cannot** consent (because they cannot be located after all reasonable efforts, or cannot understand the consequences of consenting after all reasonable supports have been provided or where parents effectively **waived** their right to consent (through abandonment or sustained ill treatment, neglect or failure to discharge responsibilities).

However, the Commission acknowledges that there may be situations where there are exceptional or a combination of special circumstances that would justify consent being dispensed with where it is in the **best interests** of the child or young person, based on an expanded definition that is consistent with the definition in s 60CC of the *Family Law Act 1975* (Cth).

4. In what circumstances is dispensing with consent justified?

The Commission is of the view that the current provisions are justified, but applications should be supported by independent expert analysis of all cases that would better assist the Court to establish that grounds for dispensing with consent.

The Commission would support a change to s 35(1)(e) to change ‘any other circumstances’ to reflect a general ground that there are ‘exceptional circumstances’ that mean it is in the **best interests** of the child or young person for the adoption to proceed without the consent of one or both parents.

Best interests should be more robustly defined based on the criteria in s 60CC of the Family Law Act.

In what circumstances is dispensing with consent not justified?

The Commission is of the view that a decision to dispense with consent must remain a decision made only by a Judge of the Supreme Court following review of all relevant information.

Compatibility with human rights requires that in no case should a child or young person be separated from parents on the sole basis of a disability of either the child/young person or one or both of the parents. Instead, supports should be provided to the parents to enable them to care for their child, or, to make an informed decision to consent to adoption. Consent should only be dispensed with where there has been a deliberate decision of the parent to waive parental rights through intentional ill-treatment, neglect, rejection of care responsibilities or abandonment.

¹¹ *In the Matter of the Adoption of PT* [2018] ACTSC 14 at [84].

5. What criteria are necessary for the Court to decide an application to dispense with consent?

As outlined above the Court should decide to allow an application to dispense with consent only on the existing grounds, or in exceptional circumstances where it is in the best interests of the child or young person. The best interests of the child should be based on the expanded criteria in the definition in s 60CC of the Family Law Act.

6. Should the views of the young person determine the outcome of a proposed adoption, if they are considered sufficiently mature and capable to make decisions about their life?

In accordance with their rights under the UNCRC children and young person's views should be taken into account and afforded serious consideration in adoption decisions.

Children's right to participation is now an established principle and one that the Commission upholds and promotes. Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) provides the basis for this principle:

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

However, creating a statutory requirement to hear the views of children and young people is an inadequate mechanism for enlivening this right. The Commission remains concerned about the extent to which the ACT Care and Protection system and the ACT legal system are equipped to ascertain children and young people's views, advocate for children and young people's views, and support children and young people with the outcomes of decisions that affect them.

The Commission considers that specialist non-lawyers are required to work with children and young people to ascertain and support their views, and assist in bringing these views to the court or other decision-making forums. This view extends to the current consultation process, which directly affects children and young people in the out of home care system.

Children and young people are paramount stakeholders in adoption reform. They have a right not only to be heard in specific proceedings, but in system level review and design. Children and young people's perspectives can be different to those that adults advocate on their behalf, and services and policies for children and young people stand to be more effective when they are consulted in their development. Such consultation is a specialised task. Adoption in particular is a sensitive topic and direct consultations will require impeccable ethical conduct and risk management. The Commission recommends that additional funding be made available to the Taskforce to auspice this work.

The Commission considers that where a child or young person has 'Gillick competence' and is supported to make a fully informed, supported and voluntary decisions, the views of the child or young person should be the primary determining ground for dispensing with the requirement of parental consent. They should also be the determining factor in any application for adoption, even if parental consent is given, meaning that a child or young person can reject an adoption application even if birth parents consent.¹²

¹² *Secretary, Department of Health and Community Services v JWB and SMB (Marion's case)* [1992] HCA 15, (1992) 175 CLR 218 (6 May 1992) following *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7.

Case Study

A young person who wanted to be adopted by his prospective adoptive parents (his long-term foster carers) whose birth mother gave consent but whose birth father (despite no contact with the child since birth and significant criminal record) refused consent. The young person felt they had no choice but to wait until age 18 years when they could be adopted without the birth father's consent.

Of course, adequate safeguards would need to be built in so that assessment of the capacity of children and young people is sufficiently robust and so that there is sufficient oversight of the decision-making process to ensure that decisions are not tainted by specific or system level pressures, duress or outcome bias.

Conversely, competent children and young people should be empowered under the Adoption Act to make applications for their adoption into the family of a person(s) on the register. Recognising their own agency and self-determination will enable children and young people who have had disrupted upbringings to take control of their life and move forward in a way that feels right for them.

7. How might birth parents be better supported to engage and remain engaged in child protection matters, prior to an adoption proceeding commencing?

Adoption has historically been a process that happens **to** someone, rather than a process that engages **with** children, young people and their family to determine the best supports, care and protection arrangements that will further the best interests of the child or young person.

Greater focus should be placed on working with birth parents to encourage them to engage with the care and protection aims, purposes, and pathways. Mechanisms such as mandated post-adoption contact schemes and best practice integrated birth certificates that record both birth parents and adoptive parents may encourage birth parents who are no longer day-to-day caregivers for their child to consider consenting to adoption where it does not mean a complete severing of all contact and all family ties.

Part Two – Detailed commentary

Background

The vision of the Out of Home Care Strategy is 'children and young people in care - growing up strong, safe and connected'. The strategy aims to re-centre care and protection services, "both government and non-government around the child or young person's needs and will require changes to culture and practice to ensure that the voice of the child or young person is clearly heard".¹³

It groups reform activity into three domains:

- strengthening high-risk families
- creating a continuum of care
- strengthening accountability and ensuring a high-functioning care system.

These three domains aim to prevent children and young people entering the care and protection system, finding stable, safe and appropriate arrangements for those that do, and improving the accountability and functioning of the care system.

¹³ Out of Home care Strategy 2015-2020

The Strategy notes that “where children and young people cannot return home safely, it aims to normalise children and young people’s lives by exiting as many children and young people from care into permanent alternative homes as soon as possible”.

Adoptions Taskforce

Adoption is a legal mechanism for the transfer of parental care responsibilities from a child or young person’s birth parents to another person(s). The Adoptions Taskforce was established by the Legislative Assembly in 2016 to identify issues and make recommendations about the timely and appropriate completion of the adoption process, to further enhance permanency for children and young people.

Recommendation 3 of the Taskforce, which the Government agreed with, was to explore dispensation of consent provisions in the Adoption Act to allow the ACT to better respond to the complexity of out of home care circumstances.

However, before any change in relation to the particular question of whether and in what circumstances a Court should be able to do away with the requirement to consent to adoption, it is necessary to examine the human rights principles relating to adoption, which highlight the inherent tension in adoption policy and the need for considerable caution before any changes are made.

Human Rights principles relating to adoption

The ACT *Human Rights Act 2004* recognises the rights to protection of family and children. Section 11 of the HRA states:

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

These rights are drawn from article 24 of the International Covenant on Civil and Political Rights.¹⁴

The Convention on the Rights of the Child (CRC) expands the substantive rights of children and young people and outlines the special protections that State parties must guarantee through laws and policies to support them. Article 8 requires states to respect a child’s/young person’s right to preserve their identity, including nationality, name and family relations as recognised by law without unlawful interference.

Article 3 relevantly provides that State Parties “undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures”.¹⁵

The Convention on the Rights of the Child does acknowledge adoption as an example of alternative care for a child or young person who is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment.¹⁶

The Convention requires that State Parties “shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern”.¹⁷

¹⁴ International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

¹⁵ Article 3(2) *Convention on the Rights of the Child*, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

¹⁶ Article 20 (3) *Convention on the Rights of the Child*.

¹⁷ Article 18(1) *Convention on the Rights of the Child*.

However, it also provides that “when considering solutions [for placement outside the family], due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background”.¹⁸

The CRC requires that the best interests of the child or young person shall be the paramount consideration in decisions affecting the child or young person. In identifying the child's/young person's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's/young person's best interests that their ties with their family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's/young person's best interests to ensure their development in a safe and secure environment.

In respect of adoption, the CRC states that state parties must:

ensure that the adoption of a child is **authorised only by competent authorities** who determine, in accordance with applicable law and procedures and on the basis of **all pertinent and reliable information**, that the **adoption is permissible in view of the child's status** concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their **informed consent to the adoption on the basis of such counselling** as may be necessary (emphasis added).¹⁹

The UN Human Rights Council has outlined the interplay of the rights to family and children in the context of separation of family in its recent report on protection of the family:

The right to family life is reflected in the general preference for preserving the family unit and non-separation of its members, particularly dependent members. The Convention on the Rights of the Child affirms the right of children not to be separated from their parents against their will, except where “**necessary for the best interest of the child,**” such as in cases of abuse or neglect (art. 9.1), following a **judicial determination** to this effect. Children deprived of their family environment should be provided alternative care (art. 20), and, whenever possible, to **have contact with their parents** (art. 9(3)). According to article 23(4) of the Convention on the Rights of Persons with Disabilities, in **no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents** (emphasis added).²⁰

These international principles provide an indication of the minimum elements necessary to be secured, maintained or improved in any changes to the domestic adoption process in the ACT, including the mechanisms for dispensing with the consent of one or both birth parents so that an adoption can proceed.

The need for change

The Human Rights Commission acknowledges the challenges facing the ACT Government in responding to increasing demand for care and protection interventions and subsequently, pressures to find stable and more permanent care arrangements for more children and young people.

While there can be clear benefit in reforming and simplifying adoption practices in the ACT to ensure that adoptions, where appropriate, can occur without unnecessary delay, the Commission considers that financial and budgetary factors are also a driver for the push to reform adoption processes to increase ‘timeliness’. We are aware that the Out of Home Care (OOHC) system in the ACT, under the ‘A Step Up for

¹⁸ Article 20(3) *Convention on the Rights of the Child*.

¹⁹ Article 21(a) *Convention on the Rights of the Child*.

²⁰ Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights ‘Report on Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development’ A/HRC/31/37, 15 January 2016, [35].

Our Kids' strategy, is under significant budget pressure from increasing service delivery costs under the ACT Together consortium contract.

While adoption may be a preferable pathway for some children and young people, giving long-term secure parental relationships, it is apparent that it is also a way for Government to reduce out of home care costs, with adoption having the least ongoing government involvement out of any of the mechanisms for long term care arrangements. There is therefore considerable scope for conscious or unconscious bias in the system to encourage or pressure children, young people and families towards adoption, as a preferable lower cost pathway.

There is a danger that these administrative pressures on the out of home care system may, if not carefully monitored and managed, create an environment where there is a system-level expectation that adoptions will be fast-tracked as a preferred out of home care option, raising the spectre of the forced adoptions that occurred throughout Australia in the 20th century. While adoptions in the ACT are open (noting that integrated birth certificates are not yet available) and legislation relating to children's rights has been improved, these concerns should remain in mind, given the scale of the trauma caused by previous adoption policy.

As noted in an essay by former Family Court Judge Nahum Mushin on the 'forced adoption' policies occurring up to the 1970s, "particularly given that a court order is, and always was, necessary to formalise an adoption, how could an adoption be "forced"? In order to answer that question, it is necessary to look not at that formal process but rather at the societal attitudes and circumstances in which the children were removed from their mothers".²¹

In the past, requirements to obtain consent were meaningless when societal pressures to place children and young people from single parent families with 'better off' adoptive parents meant that the system was predicated on "lack of informed consent, ignorance of the right of revocation, [and] no independent advice" for birth parents.²² The danger of a legislative scheme for more readily dispensing with consent is that it will incentivise officials to either perfunctorily engage with birth parents, or bypass them completely by seeking an order for dispensing with consent without any engagement with the parents. If there is a greater range of circumstances in which consent is not required, birth parents may feel as though the law is tipped in favour of adoption, with the effect that they give consent without it being fully voluntary.

Although the operating context of care and protection services has changed in the context of the awareness of previous institutional failings to respond to abuse, and in recognition of the impacts of family violence, the challenges of making decisions about adoption have always been significant because of the long term consequences for families. The Australian Institute of Family Studies study in 2012 '*Past Adoption Experiences: National Research Study on the Service Response to Past Adoption Practices*' found that "for adopted individuals, regardless of the quality of upbringing they experienced from their adoptive families, the majority of participants said that their adoption had some negative effects on their lives".²³

The Commission notes that while the social context that enabled past adoption practices has changed, and subsequent learnings have made the role of Government intervention in families more sensitive, this should not mean that the law is changed to make the process administratively easier. As the courts have long acknowledged -

²¹ Mushin, N. 'The forced adoption apology: Righting wrongs of a dark past' in Australian Institute of Family Studies, *Family, policy and the law* (May 2014) available at <https://aifs.gov.au/publications/families-policy-and-law/5-forced-adoption-apology-righting-wrongs-dark-past>

²² Ibid.

²³ Kenny, P and Higgins, D. 'Past adoption practices: Key messages for service delivery responses and current policies' in Australian Institute of Family Studies, *Family, policy and the law* (May 2014) available at <https://aifs.gov.au/publications/families-policy-and-law/4-past-adoption-practices-key-messages-service-delivery>

To make an order for adoption and sever the family ties with a child's parent is, of course, a serious matter. Such is clear from the unanimous decision of a Full Court of the High Court of Australia in *Mace v Murray* (1955) 92 CLR 370 especially when referring at 380 to "the grave responsibility which the application placed" on the judge hearing an adoption application, to the fact that "the natural ties between mother and child ought not to be lightly broken" and to the need for "powerful reasons ... [to] be shown before a court can properly deem it just and reasonable, notwithstanding a mother's objection, to sever the relationship between her child and herself and make the child for most purposes of the law ... the child of other persons."²⁴

The Commission considers that the Court's discretion to dispense with consent should remain limited, in recognition of the fact that adoption is such a serious matter, with permanent consequences. Instead, the Commission would support amendments to the Adoption Act to provide the Court with more guidance in how to assess the best interests of a child or young person, and how to achieve a balance between the rights in play. Other factors that may discourage prospective adoptive parents, including the loss of foster carer payments have not been addressed in the discussion paper.

The Commission is of the strong view that any reform to the Adoption Act must ensure that any decision-making framework regarding the 'best interests' of the child or young person in adoption processes, particularly any decision-making framework allowing for the dispensation of consent, is both robust and transparent.

Best interests in relation to adoption and consent

Section 5 of the *Adoption Act 1993* requires that decisions made under the Act must consider the best interests of the child or young person as paramount, however as the Supreme Court has noted, "that does not mean that it is the overriding consideration or the only consideration".²⁵

Section 5(2) of the Adoption Act includes a list of factors that the Court must take into account when determining the best interests of any child or young person who is affected by a decision under the Act. If the Government considers that Courts are not properly applying these tests, or that there is insufficient guidance to enable different judges to make decisions more consistently when dispensing with consent, these could be expanded or reworked.

The Court can only ultimately make an adoption order if the adoption is in the best interests of the child or young person.²⁶ This means that the best interests of the child or young person are considered at multiple points throughout the adoption process, and may not always result in an order to dispense with consent or make the adoption order even if some of the best interests considerations are made out.

Case study

A long-term foster parent who, while intending to pursue adoption of the child with disability in her care, planned to wait until the child turned 18 before doing so. In the mother's opinion, adoption was in the long-term best interests of the child. However, given the security of permanent ongoing support until the child turned 18, the child's best interests were best served in the interim by having the child remain under Enduring Parental Responsibility, so as to obtain the financial support the Care and Protection system provided to assist in meeting the child's disability and other needs.

²⁴ *D v Director-General, Department of Community Services* [2005] NSWCA 474; 34 Fam LR 445 [6].

²⁵ *In the matter of the adoption of PT* [2018] ACTSC 14 at [11].

²⁶ s 39F(1)(c)(iii) *Adoption Act 1993*.

The Commission agrees that the criteria used to inform the consideration of best interests in the current Act could usefully be updated and would benefit from greater clarity. The concept of ‘best interests’ is neither absolute nor static over time. It can be, and is, argued by different adults to support different purposes.

If the Adoption Act included more detail on the relevant factors to be taken into account in determining the best interests of the child or young person then it may be possible to improve the adoptions process by targeting evidence at more specific criteria, to support the Court to make informed decisions without altering the thresholds for dispensing with consent in s 35. For example, if one of the criteria was whether there is a family violence order in place against a birth parent in respect of a child or young person, that may enable quicker resolution of the question of whether the parent has ill-treated or neglected the child or young person for the existing ground section s 35(1)(c).

Section 60CC of the *Family Law Act 1975 (Cth)* provides a useful reference point in terms of an updated range of factors that need to be taken into account in determining the ‘best interests’ of a child or young person, and the competing priorities that need to be considered.

In particular, the primary considerations in determining best interests under the Family Law Act are:

- (2) (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Of these, s (2A) stipulates that “in applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b)” meaning protection of the child or young person from harm is the primary consideration in determining what it in the child’s or young person’s best interests.

The additional considerations in s 60CC(3) are extracted at [Appendix A](#), and touch not only on the circumstances of the child/young person, and the family generally, but also the whether there are specific circumstances such as a family violence order in place.

While the discussion paper raises issues in relation to children and young people involved in adoption processes, and the position of both birth parents and prospective adoptive parents, absent from the discussion is a consideration of siblings. The Commission is aware of many cases of children and young people in out of home care where siblings are separated.

Case study

Siblings where, both having been in out of home care, one was adopted and the other was not. The care and protection system therefore had no ability to facilitate contact between the siblings, with no statutory authority in relation to contact for the adopted child.

While there are exceptions, a general guiding principle is that it is better for siblings to remain together and for contact to be maintained. The Commission would support a requirement that sibling relationships be given greater weight in any reworked set of factors that would inform an assessment of the best interests of the child or young person in adoption proceedings.

The Commission supports the ACT position that adoption is not generally a suitable placement solution for Aboriginal or Torres Strait Islander children and young people in the ACT in recognition of their right under s 27(2) of the Human Rights Act not to be denied the ability to maintain their kinship ties.

Further the Commission is of the view that any expanded list of best interest considerations include the cultural needs of children and young people in out of home care from minority groups, and the implications

of section 27(1) of the Human Rights Act on adoption practices. The Commission has observed an increase in the number of children and young people in the care and protection system from minority groups, and the cultural needs of these children and young people need to be considered and protected should they become part of an adoption process.

Evidence

No matter how the factors specified for determining the best interests of the child or young person are formulated, if they are mandatory considerations, it will remain the burden of the person applying for dispensation of consent to place “before the Court evidence sufficient for proper, genuine and realistic consideration of the above matters” in order to satisfy the Court that it is lawfully able to exercise its jurisdiction to dispense with consent on one or more of the grounds in s 35(1).

The applicant will bear a “heavy onus” in establishing the evidence needed to enliven one of the grounds for dispensation of consent. The ACT Supreme Court has held that “it is not for either birth parent to demonstrate here that he or she has recent and effective capacity to parent. The question is whether the Court ought to dispense with the birth parents’ consent so as to enable the familial tie to be permanently severed”.²⁷

The Human Rights Commission does not support any change to reverse the presumption that birth parents are to be recognised as the primary relations and caregivers of their children, with an inherent right to be heard in relation to decisions about their children. While that default principle may be mitigated if the parents show no interest in being consulted or there are grounds for their views not to be given weight (on the basis that they have neglected or abandoned their children), the starting point must remain that parents, even struggling parents, should not have to prove their fitness to parent. In the same way they should not have to establish their right to refuse consent to the adoption of their children.

Adoption is a means of formalising the transfer of parental responsibility. It is not a mechanism for dealing with immediate safety concerns for children and young people, who will normally be in out of home care when an application is made for an adoption. There are separate provisions governing the removal of children and young people from parents where their safety is at risk, and for the placement of children and young people in out of home care under temporary or enduring care or parental responsibility orders.

The provisions allowing for the Court to dispense with the requirement to obtain the consent of the parents address a different issue. This is either where the parents cannot give consent because they cannot be located or because they do not have the capacity to consent, or because the law considers that they have essentially abdicated the right to consent through lack of engagement with the life of their child or their parental responsibilities, for example, through abandonment, neglect or ill treatment.

There is, in the view of the Commission, no clear role for an assessment of whether the parent is fit or proper. Attempts to make those kind of arguments, particularly on the grounds of ‘any other circumstances’ under s 35(1)(e) which the Discussion Paper argues allows the Court “discretion to make judgments on their fitness to parent, based on past conduct and present circumstances, including what the parents or guardians failed or ought to have done”²⁸ should be critically examined.

The discussion paper indicates that there are concerns about inconsistency in the treatment of evidence before the Children’s Court in the Supreme Court in adoption matters. In our view, the hesitancy of the Supreme Court to accept evidence from Children’s Court proceedings is warranted because Children’s Court processes are for a different purpose to those under the Adoption Act. In addition the jurisdiction is different, with different rules of evidence.

²⁷ *In the matter of the adoption of PT* [2018] ACTSC 14 at [45].

²⁸ Community Services Directorate ‘*Dispensing with Consent: Discussion paper*’ (December 2018), p 15.

Conclusion

The Commission acknowledges that there may be instances where the rights of birth parents must cede to the imperative to protect the safety and security of their child,²⁹ and that the best interests of the child or young person may warrant dispensing with the normal requirement for the consent of birth parents where an adoption is proposed.

However the Commission considers that any amendments to the Adoption Act to automatically use the existence of care and protection orders to support adoption proceedings or to place burdens on birth parents to prove their fitness to parent or consent, are likely to raise significant issues of incompatibility with the Human Rights Act.

Judicial oversight and discretion need to be maintained to support the balancing of the best interests of the child or young person concerned, even if the Act is amended to provide greater guidance about the criteria used to assess the best interests, for example by incorporating the considerations in s 60CC of the Family Act. Ultimately the views and wishes of the affected child or young person (where they are Gillick competent) must be the determining factor either in favour or in opposition to a proposed adoption.

In order to generate a human rights compatible adoptions framework that supports both the best interests of children and young people requiring permanent alternative care arrangements, as well as the rights of parents and family a full reworking of the Adoption Act may be a worthwhile process.

If you have any questions or comments the contact in my office is Alex Jorgensen, Human Rights Legal Adviser, who can be reached on 6207 0534 or at alex.jorgensen@act.gov.au.

Kind regards



Dr Helen Watchirs OAM

President and Human Rights Commissioner



Jodie Griffiths-Cook

Public Advocate and Children and Young People Commissioner



Karen Toohey

Discrimination, Health Services, and Disability and Community Services Commissioner

27 March 2019

²⁹ *Y.C. v the United Kingdom*, ((Application no. 4547/10) [2012] E.C.H.R. 433).

APPENDIX A – S 60CC FAMILY LAW ACT 1975 (CTH)

60CC How a court determines what is in a child's best interests

Determining child's best interests

- (1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

- (2) The primary considerations are:
 - (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
 - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

- (2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

Additional considerations

- (3) Additional considerations are:
 - (a) any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views;
 - (b) the nature of the relationship of the child with:
 - (i) each of the child's parents; and
 - (ii) other persons (including any grandparent or other relative of the child);
 - (c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:
 - (i) to participate in making decisions about major long-term issues in relation to the child; and
 - (ii) to spend time with the child; and
 - (iii) to communicate with the child;
 - (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;
 - (d) the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
 - (i) either of his or her parents; or
 - (ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;
 - (e) the practical difficulty and expense of a child spending time with and communicating with a parent and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;
 - (f) the capacity of:
 - (i) each of the child's parents; and
 - (ii) any other person (including any grandparent or other relative of the child);to provide for the needs of the child, including emotional and intellectual needs;
 - (g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

- (h) if the child is an Aboriginal child or a Torres Strait Islander child:
 - (i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and
 - (ii) the likely impact any proposed parenting order under this Part will have on that right;
- (i) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents;
- (j) any family violence involving the child or a member of the child's family;
- (k) if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from the order, taking into account the following:
 - (i) the nature of the order;
 - (ii) the circumstances in which the order was made;
 - (iii) any evidence admitted in proceedings for the order;
 - (iv) any findings made by the court in, or in proceedings for, the order;
 - (v) any other relevant matter;
- (l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;
- (m) any other fact or circumstance that the court thinks is relevant.

Consent orders

- (5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

- (6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:
 - (a) to maintain a connection with that culture; and
 - (b) to have the support, opportunity and encouragement necessary:
 - (i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and
 - (ii) to develop a positive appreciation of that culture.