The Secretary
Senate Standing Community Affairs Committees
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Dear Sir/ Madam,

re: **Inquiry pertaining to Adoption**

1. Powers of the Commonwealth in the matter of adoption

The Australian Constitution s.51 xxii limited the powers of the Commonwealth to dealing with the guardianship of children to the terms of marriage and divorce. Quick and Garran (1901) present more detailed argument for this position. [1] Barely five decades earlier divorce had been taken away from the ecclesiastical courts.

At that time adoption legislation was not enacted in all Australian colonies nor entailing the measure of the practice a century later when overseas adoption, which may involve the Commonwealth powers in immigration, is probably more frequent than adoption within Australia. However, Garran (1958) adds an informative remark that up to the time of his writing – c.1957 – the Commonwealth legislation had not progressed further than 'matter of domicile and procedure' for children subject to parental divorce proceedings. [2] Divorce remained a State matter until the mid-1970s. When the Commonwealth had power to address children in terms of matrimonial causes, it had barely progressed. However, even the Family Law Act (1975) did not afford the same privileges to illegitimate children until the transfers of State powers in the years following. [3]

Are the issues constant ?

In the 1890s, at the time of the Conventions leading to the construction of the Commonwealth Constitution, not all colonies had legislated for adoption. Victoria and Queensland, were the last to enact legislation that was based on the British 1926 statute that focussed only on establishing the legal rights of the child to the adoptive parents and vice versa and the simultaneous removal of any legal right and link from the birth parent or parents.

New Zealand is cited as the first British community to enact adoption legislation in 1895. Western Australia followed in 1896, Tasmania in 1920 and New South Wales in 1923. However, Lady Alice Northcote, wife of His Excellency the Governor General in the early C20th had been adopted in Canada sometime in the C19th. [4]

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1. R R Garran Prosper the Commonwealth Angus and Robertson Sydney 1958 p.149

2. J Quick and R R Garran The annotated constitution of the Australian Commonwealth Angus and Robertson Sydney and Melville and Mullen Melbourne 1901 p.609-610

3. (ed) G E D Pont Halsbury's Laws of Australia Vol 13 p.378,589 viz Status of Children Act 1974 and Commonwealth Powers Family Law – Children Act 1986]

4. G Serle Australian Dictionary of Biography 1891-1939 Vol 11 Melbourne University Press. Melbourne. 1988 p. 40 viz Sir John Northcote]

The late introduction in at least two States, meant that there were unequal rights provided by legislation between the States of the Commonwealth. Until each State legislated for adoption the practice was probably for a parent to informally relinquish the child and let the couple change the child's name by deed poll. The latter step might not have been taken in many cases and the surname change be established only be custom. In addition, Humphrey v Polak (1901) 2 KB 385 had upheld that it was not valid to transfer by contract the rights and liabilities of a mother of a child to another person. Early court ruling in 1837 had largely identified that view. Thus it might be argued that the founders of the Commonwealth knew of the position of these children. but recognised it to be colonial/state matter and did not exercise any view to encourage even uniformity. The latter position has probably remained unchanged.

The years after the end of World War One, found an increase in the births of illegitimate children. Hunter Davies (2003) explained that this increment fostered the move in England to legislate for adoption. Naturally, there was the counter claim that the recognition that such children might be legally given away, could encourage the practices leading to the increase in illegitimate children. [5]

By 1926, there had been decades of public and influential opinion that felt that passing the children of poor women, usually single women and girls, to respectable couples or families would provide the children with better prospects in life. Such a view was established even before the morality of illegitimacy or teenage pregnancy was identified. The Attorney General's second reading speech Adoption of Children Act (Vic) 1928 provides some insights that remain relevant –

- '…a strange fact that in Victoria there is no child adoption system….in the legal sense of the word adoption…..'
- many years of work and agitation by philanthropic societies and persons engaged in children's welfare work to direct public attention to the legislative need
- would reduce the expenditure for boarded-out children
- focus on the change of status for the child
- child should retain its rights of inheritance in the natural family but not take the same rights into the adopting family
- removing the capacity for the natural parent to enter when the child had been reared
- providing a new vista for the child that avoids the stigma of illegitimacy - anticipated 90% of illegitimate children would be adopted.

The Act provided a complex registration practice. The child, when born in Victoria would be registered as any other child born under the Births, Deaths and Marriages Act. When an Adoption order was made, the Registrar having custody of the register containing the original entry would make a fresh entry using the detail from the Adopted Children's Register. For a child not born and registered in Victoria, the record from the Adopted Children's Register would be used as the equivalent record. This created different forms of record. A child born interstate could not gain an original record of birth, so in the Victorian practice needed to bear a record that proclaimed to all an adopted status. [6]

What the second reading speech or the interjections does not cover is equally informative. As recently as 1978 the Report from the Statute Law Revision Committee upon access had.

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5. Hunter Davis A history of adoption and a tale of triplets Time Warner, London. 2003

6. Victoria Parliamentary Debates Session 1928 Vol 176 pp.671-678 Second reading speed

grappled with the prospect of adopted person having access to the original birth certificate. Age of the adoptee, the finality of the adoption order to sever the natural relationship and create a new family, the role of non-identifying and identifying and the judicial mechanism for access and the consent of the adoptive parents were considered. No retrospectivity was recommended. However, adopting parents were encouraged to occasionally supply detail of the child's progress to the agency concerned. It was a very cautious step that entailed a risk of a dual track system. [7] Only two years later Victoria legislated for limited access to information in the Adoption (Access to Information) Act. More importantly, this amendment was introduced by the same government after four years of consideration.

When the major reform legislation Adoption Bill (Vic) 1984 was introduced into the State Parliament, this reflected a significant shift in public and governmental views. The Adoption Bill 1984 modified the Adoption Legislation Review Committee report (June 1983) but incorporated new theses in legislation –

- welfare and interests of the child concerned shall be regarded as the paramount consideration;
- allowing relinquishing parents to place conditions on adoption;
- introducing financial assistance for adoption;
- extending the minimum time to elapse before consent to relinquish is lawful
- logical extension of the information provisions driven by the 'welfare and interest' theme and adding the concept of identifying information
- simplifying inheritance from the relinquishing families and their immediate relatives. [8]

This legislation, which was informed by a recent Parliamentary Paper responded to the competing views of the relinquishing parent, the adopted child, the adoptive family and the complexities of legality, rights, privacy and emotion. In particular the law was taken into the less certain area of the feeling of the parties.

The Minister observed that among recommendations would require further negotiation. The one of principal interest is that the Family Court of Australia have jurisdiction on adoption. [9] Implied in the failure for this to occur may pass some responsibility directly to the Commonwealth. Constitutionally, there are powers for the State to transfer and the Commonwealth to agree to exercise powers in the same arena.

Bourke & Fogarty (1967) offer an administrative approach to Maintenance Act (Vic) but did note that the adoption statutes and any other similar statute was an invasion of common law. [10] They did not specify the tenets infringed. Perhaps they would have contemplated –

- a child born to a woman is her child or when born to a married woman, the child of her husband.
- acknowledging that common law had held that the relinquishing of responsibilities and liabilities was not approved
- an inference that a child was entitled to know its biological family

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7. Victoria Parliamentary Papers 1978-9 2: 17

8. Victoria Parliamentary Debates Session 1983-1984 Vol 374, 2nd May 1984, pp. 4243-4254

9. ibidem p.4254

10. J P Bourke, J F Fogarty Maintenance act 1965 Butterworth & Co Sydney 1967

- an presumption that unless a child were a foundling, it would be named by its parent
- persons under significant duress not be expected to make significant legal choices and not without competent advice
- an expectation of equitable service provision
- avoiding the creation of levels of information about a person, to which only selected people could have partial access. The simplest example is that the adopting family knew, the extended family and immediate community could know or conclude but the child could not have a right to know.

Rarely, has anyone challenged the invasion of the common law or focussed on the additional aspects of that law that might have been over-ridden. More likely, no one could raise the case to be upheld in a court given the difficulty of constructing the legal relationships for the case and then to override the statute. Had the matter reached a court, and most legal advice would probably have countenanced against, the judiciary would only turn to the statutes. Addressing common law aspects would be far more complex.

The problem with this rights transfer model is that other rights have been subjugated and ignored. Whether relinquishing people, adopted persons and adoptive parents expressed concern about the subjugation of the other rights in those earlier times, is probably unclear. Perhaps, it is simpler to assert that these people probably had thoughts similar to those that have been documented from the late 1960s but they were not as broadly articulated.

In the post 1926 era, the Commonwealth has amended its Constitution to allow for expanded social welfare funding to individuals, has entered into international agreements pertaining to human rights or other agreements that assume the recognition of aspects of additional rights but for reasons unknown has not clarified the probability that it has failed to assert an increasing responsibility toward the relinquishing, adopting and adopted community in Australia. The celebrated case Commonwealth v Tasmania (1983) 158 CLR 1 focussed on the Commonwealth Parliament's passing legislation to give effect to international obligations made under treaties and conventions. This legislation relied on the external affairs powers in the Constitution. The Teoh case (1995) focussed on the relationship of domestic laws with the international treaties. In each instance the case pertained to Commonwealth legislation but not a State statute. This might not be insurmountable. As an example, each state has privacy legislation that applies to its government and public bodies, leaving the Commonwealth legislation to apply to the remaining entities. In part the state interest arose from the economic necessity for the States to enter individually into contracts with the European Union countries. These contracts demanded that the Australian states impose standards consistent with the Union. It is conceivable that the Commonwealth as a similar signatory would become responsible to demonstrate similar adherence in its legislation, regulation and dealings. The primary interest in such a construction is that non-government agencies have played and continue to play a critical role in the adoption process or the search and re-unification process. In each instance the States and Commonwealth could be joined in having to defend an overseas standard. [11]

Practice matters

In addition to the discourse on some of the legal aspects inherent in the adoption practice, there are broader societal issues that are well worthy of consideration of the Senate.

A couple of key issues occur –

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11. J Pierce Inside the Mason Court revolution Carolina Academic Press, USA. 2006

1. Adopting practice was left to charitable agencies until the mid-1960s

This shows that government was content for non-government services to manage this activity from its own limited financial resources. What other disadvantaged group relies alone on charity for support ?

2. The care of young pregnant women and girls was left to the churches

This shows that government was content for non-government services to manage this activity from its own limited financial resources. It also exposed these young women to the morality of religion that invariably shunned the conception and birth of children outside marriage. It is little wonder such girls could be transferred away from their home district, even interstate to wait the birth of the mysterious child only to return home without the baby. Invariably, such girls worked in menial domestic duties and laundry work while waiting the birth. Free labour in return for the bare necessities of life to bear the child is contrast for the public view of Australia. One might wonder at the correlation of the birth weight by age of mother for the child who is adopted and those not adopted.

3. Abortion was illegal, often forcing the prospective mother to bear an unwanted child

This shows the long-standing view that abortion was seen to be criminal activity be definition while usually the activity against the pregnant mother was probably more likely to be medically negligent and unskilled. The crux is that the alternative to going away to charity and placing the baby to adoption was probably an illegal abortion that risked the mother's health. Such a proposition would invite research into the religious background of the relinquishing mother.

There is reported evidence of the mother's face being shielded at birth to prevent her sighting the child or even having the chance to hold the baby. One report is of a pillow being forced onto her chest to obscure any view of the child.

4. Social welfare payments to an expecting mother and in the post partum period were rarely if ever explained to the mother as one source of government support that might have enabled her to maintain the baby in its natural family

It seems improbable that any advice given to the pregnant mother could be balanced in the sense of giving her choices. Otherwise, it seems incredible that so few women kept the baby prior to the 1970s. Strange it is that so many made a uniform decision. Some understanding of that uniformity might be gleaned from the later requirement of written information, of lengthened periods before consent could be given, and the implied role of prescribed medication in the decision-making. Perhaps it was the influence of the inference that with the baby out of the way the mother could resume her role in the community, so it became her self-preservation against that of the child. It is my assertion that these women were given only limited information that did not include the legal right for them to obtain Commonwealth social welfare funds.

5. Identity of the individual was given government approval where the person was legitimately born or born to at least one married parent but the same privilege was taken away from the adopted child.

The fifth issue focuses on the emphasis and primary role of specific rights to the detriment of others. In brief, the rights of inheritance were at stake and not say any right to a recognised

identity or to have knowledge and understanding of a birth family and in time the prospect of passing on family traits into subsequent generations.

While there is a belief that the relinquishing mother was to receive absolute confidentiality of her identity, there is procedural practice that enabled the adoptive parents to know her identity. However, this allusion of absolute confidentiality became the bulwark used to stem the request from adopted persons to information about their natural parentage.

The Commonwealth has chosen to ignore until this inquiry its direct and indirect interest in the practice of adoption within the States' jurisdiction. Whilst the legislative and the social features of adoption in each state are specific, the timing of the legislative developments is not uniform and necessarily common. Hence any Commonwealth interest in the matter may vary at particular periods. Knowing that is not feasible to re-write the previous, it can be only to acknowledge the past and ensure the improvement in the future.

6. Digressions were permitted from uniform legislative agreement established between the States in the early 1960s

The Commonwealth by its supreme legislative powers where contradiction occurred could have readily kept the States and Territories to a consistent model.

7. The emphasis has been on establishing the legal rights of the adopted child to the detriment of other interest of the same person and that this practice was based on a probability that a minor at law was expected to make a binding contract.

The literature suggests that birth mothers, who relinquish children for adoption, do and continue to present with symptoms of stress. While some view this as better alleviated by counselling at the time of the adoption, the same presentation is open to the view that the subsequent symptoms are a healthy response to loss, and by no means needing counselling for remediation. However, much literature continues to assert that this is a side effect of the model that allows these children to receive care.

A change in the type of stress is observed while the adopted child is a minor. At this time the birth mother knows someone else has the parenting rights of the child. There is some attraction to the view that the birth mother has done the right thing for the child and the mother knows she will not have to justify this to the child. Once the child had reached adulthood this changes as the birth mother knows that now she may have a relationship with the former child and might have to address the reasons for the giving up of the child. Other features have emerged –

- about one third of birth mothers suffer secondary infertility
- a higher proportion of natural mothers suffering cancer in middle age

For the adopted person

- a higher proportion seeking counselling or more advanced care
- Painful legacy of Adoption in The Age (June 1993) cited of 147 suicides of youth in St Kilda arising from drugs and abuse over the decade, 142 had an adopted background.
- learned suppression of true feelings
- the original separation as a defining moment in life and a determinant on their value system and outlook

The Committee is urged to report in the following terms -

(1) make a meaningful and genuine apology to the following –

the relinquishing mothers
the relinquishing fathers
their subsequent children
the adopted child
the adopting parents
the siblings
the children and families of the adopted person
the professional community for limiting their technical skills to the limits of statutes

for allowing charity to take on this onerous burden with minimal understanding

(2) negotiate with the States collectively or individually to develop a response to address the long term harm created for this section of the community

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