

Commonwealth contribution to former forced adoption policies and practices
Answers to Questions on Notice
Attorney-General's Department

On 28 September 2011, the Attorney-General's Department appeared and provided evidence at a public hearing for the Senate Community Affairs References Committee Inquiry into Commonwealth contribution to former forced adoption policies and practices. This document responds to the questions on notice provided by the Committee following that hearing, noting that the Department is not able to provide legal advice to the Committee.

Jurisdictional issues

- 1. The committee has heard shocking stories of forced adoptions taking place in all states and territories of Australia, in public hospitals and in homes for mothers, and of the complicit coercion of social workers, doctors and nurses. In many cases mothers were subjected to physical and emotional abuse, forced to sign documents under the influence of drugs, and misled about what documents were being signed. If such actions took place between the 1950s and 1970s, would they have breached any laws? If so, which?***

The Commonwealth Attorney General's Department is not in a position to define the extent to which the actions described may have breached Australian laws in force at the time. In this respect we note that Australian criminal law is primarily a matter for the State and Territory governments. Depending on the specific circumstances, the actions described may possibly have given rise to offences under various State or Territory laws (for example, those relating to assault or engaging in deceptive conduct as well as specific offences arising under State and Territory adoption legislation). However, it is not possible for the Department to establish the extent to which the actions described would have been in breach of such laws.

- 2. If the Commonwealth had knowledge of forced adoptions taking place in the states and territories, what formal or informal avenues would it have had to address these issues?***

The Commonwealth Government does not have general legislative power relating to the conduct of adoptions, and would not have had jurisdiction to address such issues formally except to the extent they fell within other legislative powers of the Commonwealth (for example, the power to make laws for the government of the territories). We are not aware of any general Commonwealth legislative provisions which would have been considered relevant to adoption processes undertaken in the States of Australia.

As outlined in evidence to the Committee, the Commonwealth was engaged in the development of model adoption legislation through the Standing Committee of Attorneys-General process during the early 1960s. However we have not identified any records from that process which expressly deal with allegations of forced adoptions.

Alleged breaches of law

3. ***Did the ACT Ordinance or other legislation in force (such as a Crimes Act) set out any limitations on when actions could be launched under the various offences in the Ordinance? Does the Department believe there are any areas of the Ordinance under which an alleged breach could still be prosecuted today?***

As noted in the Department's evidence to the Committee, the ACT *Adoption of Children Ordinance 1965* did not include any provisions regarding time limits for commencement of prosecutions. The Department is not in a position to provide definitive advice on the extent to which alleged breaches of the Ordinance could be prosecuted today. However, we note the current ACT law on general time limits for prosecutions is set out in section 192 of the *Legislation Act 2001* (ACT). In essence, that provision indicates that prosecution for an offence by an individual which is punishable by imprisonment for not more than six months must be commenced within one year of the offence. None of the offence provisions in the original ACT Ordinance were punishable by periods of imprisonment exceeding six months.

4. ***One of the key issues for stakeholders is accessing records that tell them the identity of children or parents.***

During evidence, AGs indicated that under the ACT Ordinance, an adoption order had the effect of legally substituting adoptive parents in place of the biological parents. It was also indicated that the adoption order was sent to the registrar of births, where the information was to be entered into a register of adoptions, but also into the register of births.

However, your evidence also indicated that the ACT Ordinance maintained the legal restrictions on sexual relations between consanguineous individuals. For such offences to be tested in court, there would need to be a record, admissible in court, of who was biologically related. This implies there must have been maintained an official record of who the biological parents were of an adopted child.

Can you confirm that this was the case?

The Department is not in a position to confirm the details of records which were maintained by State and Territory Registries. However, we note that regulations made under the *Adoption of Children Ordinance 1965* (ACT) included a statutory form for the memorandum of adoption order (see Form 2 in Schedule 1 to the *Adoption of Children Regulations 1966* (ACT)). The form includes reference to the full names of the mother and father of the adopted child. This indicates that such official records were provided for under the ACT legislation.

5. ***Several submitters have claimed breaches of what they consider are implied rights from the Constitution, or protections arising from common law. These submitters consider that there are protections in common law or the Constitution from physical abuse, discrimination on the basis of marital status, being obliged to sign documents under sedation, having one's baby removed without consent, or being misled/ not informed about benefits or choices. Could you clarify whether any such provisions do exist or are implied either by the Constitution or in Commonwealth common law (criminal code), that afford citizens any such protection?***

The Constitution is a fundamental expression of the rule of law in Australia. The rule of law protects individuals from the arbitrary or capricious exercise of power by government officials. The question of the operation of the law in any particular case is a matter for legal advice. The Department is not able to give legal advice to the Committee.

6. *It has been claimed that in some cases religious or public organisations assigned religions to children for adoption against their mothers' wishes, or without consulting with mothers. It is also claimed that babies were 'matched' with parents of the same religion as the mother or hospital. Could you indicate whether this claim was brought to the attention of any of the then Attorneys-General during the period 1950s–70s. If this practice had occurred, especially in the Commonwealth territories, would it have been legal? If so, how would such practice have complied with s116 of the Constitution?*

The available records do not indicate any reference to this claim being brought to the attention of any of the Attorneys-General during the relevant period. We are not aware of any Commonwealth legislation which would have precluded the 'matching' of children's religions with those of hospitals or adoptive parents. However, the Department is not able to give the Committee legal advice.

Model legislation

7. *Can you describe the process by which model adoption legislation was developed, applied in the territories and incorporated into state legislation during the 1960s. Which federal government departments were involved? How did the Commonwealth Attorney-General facilitate this process?*

The Department provided a summary of its involvement during its opening statement. We are happy to provide the following further information, taken from publicly available files held at the National Archives.

A memorandum in the records, dated 1958, noted the Commonwealth did not have the constitutional power required to make a Federal adoption law.

In 1960 the then Attorney-General Garfield Barwick wrote to the then-Prime Minister, Robert Menzies, noting that the law relating to the adoption of children in Australia could be made uniform. A minute from the Secretary of the Attorney-General's Department to the Attorney-General (dated 1964) indicates that the Prime Minister had then in turn written to the State Premiers suggesting conferences of Ministers and officers, aimed at formulating a model Bill to provide the basis of uniform adoption legislation.

A memorandum from Secretary Yuill to the Secretary of the Department of the Interior (dispatched 1961) advised that the Attorneys-General had agreed that uniform laws of adoption throughout the Commonwealth were desirable.

A combination of documents on the file, including letters and memoranda, show that regular meetings occurred throughout Australia between 1961 and early 1964 at both the officer and Ministerial level. The records indicate those meetings included discussion of aspects of adoption policy and the framework of the model legislation and that Attorneys-General were involved due to the 'legal aspects' and State Child Welfare Directors were involved due to the 'social aspects'. Out-of-session correspondence noted points of agreement or disagreement. Both State and Commonwealth representatives attended and participated.

The records indicate that ACOSS (8 named member organisations) made representations on the uniform legislation and that all but one of those recommendations were incorporated in the draft legislation.

A series of minutes on the files indicate that responsibility for drafting the bill originally rested with Victoria, then New South Wales until being assumed by the Commonwealth in 1963. Officers from Australian Capital Territory and Northern Territory Officers appear to have been consulted on at least the later drafts of the bill, but do not appear to have participated to the same extent as the States.

The model bill was implemented with some change in the ACT as the *Adoption of Children Ordinance 1965*, and in the other States and Territories as their various Adoption Acts. The records do not indicate the extent to which the States and Territories departed from the model bill in their implementation, nor how they amended the legislation subsequent to that. There is no indication that the Commonwealth had any role in implementing or administering the adoption legislation at the State level. A minute from the Attorney-General's Department Secretary to the then Attorney General in 1964 indicates that the administration of adoption laws was expected to fall to the relevant Minister for each individual State.

8. *The committee understands that during the process of developing uniform adoption laws in the early 1960s, states circulated summaries of their adoption laws, setting out the current position on the various issues (such as consents) that were under discussion. Can you confirm this?*

The Department has not identified from the records it has examined any actual summaries of adoption legislation which were circulated during this process. However, the adoption laws in all jurisdictions would have been on the public record and therefore available to officers in each jurisdiction.

Publicly available records held at the National Archives indicate the discussions addressed a range of issues to be considered in the development of model legislation, including the issue of consents to adoption.

Commonwealth pensions (section 51xxIIIA of the constitution)

9. *Some submitters consider that the lack of pensions for unmarried mothers prior to the Whitlam government reforms was a factor contributing to forced adoption practices. What is the department's response to the suggestion of some submitters that if the Commonwealth had provided payments to mothers regardless of their marital status, fewer forced adoptions might have taken place?*

The Department is not in a position to comment on the social or economic impacts of the availability of Commonwealth pensions. Issues concerning the effect of income security policies and programs fall within the portfolio responsibilities of the Department of Families, Housing, Committee Services and Indigenous Affairs.

Human Rights and Equal Opportunity Commission

10. In 1984 the Human Rights Commission compiled a discussion paper *Rights of Relinquishing Mothers to Access to Information Concerning their Adopted Children*, following several complaints about adoption legislation and practice. Was the department made aware of this publication? If so, when, and what actions were subsequently taken?

The Department is aware of the discussion paper. An electronic record search identified one potentially relevant file (Reps by the Human Rights Commission re Discussion Paper No 5 Rights of Relinquishing Mothers, 84/9797-1) which was destroyed in 2002. As such, the Department does not have any records of if or when the report was received, or if any action resulted from its release.

11. What legal responsibility would the Commonwealth have if it could be demonstrated that forced adoptions had taken place in the ACT between 1986 (establishment of the Human Rights and Equal Opportunity Commission) and 1988 (ACT self-government)?

The Department is not able to give legal advice to the Committee.

12. What legal responsibility did the Commonwealth have in the territories with respect to the rights of parties to adoption prior to 1986, and prior to self-government (1978 and 1988 in the NT and ACT respectively)?

The Department is not able to give legal advice to the Committee.

Principles of intercountry adoption policy

13. Do Australian government laws place any requirements that prevent intercountry adoption from states that have information restrictions (such as 'closed adoptions')?

There are no Australian Commonwealth laws preventing intercountry adoptions from states that have information restrictions in place.

Discussions about adoption law

14. In evidence on 22 September, FaHCSIA representatives indicated that "there is some work on principles around adoptions which Attorney-General's are leading". Can you explain what that work is?

As outlined to the Committee in evidence, the Attorney-General's Department is not leading the development of the updated principles.

The Community and Disability Services Minister's Advisory Council's Enhancing Adoption as a Service for Children Working Group (EASC) was established in 2008 and is led by Victoria. Under one of its Terms of Reference, it is drafting updated adoption principles. FaHCSIA is the jurisdictional coordinator for the Council and is formally represented on EASC.

The Attorney-General's Department Chairs the Intercountry Adoption Harmonisation Working Group (the HWG) established under the *Commonwealth-State Agreement for Continued Operation of Australia's Intercountry Adoption Programs*. The HWG works to harmonise practices, policies and procedures for intercountry adoption. The HWG was drafting high-level principles when the Attorney-General's Department learned of EASC's review of adoption principles. The HWG deferred to the EASC process to establish one set of high-level principles relevant to both domestic and intercountry adoption.

While not initially a member of the Working Group, the Attorney-General's Department has been participating with the objective of incorporating the intercountry perspective in the one set of adoption principles.

15. *Has there been an item regarding adoption laws on the agenda of Standing Committee of Attorneys-General (SCAG) meetings since 1964? If so, when, and what have been the issues under discussion?*

Yes, see table at Attachment A.

a. *In particular, has there been any discussion at SCAG meetings since 1964 about the implementation of state and territory adoption legislation following the drafting of model legislation in the early 1960s?*

Yes.

16. *Has there been an item regarding adoption laws on the agenda of a meeting of officers from the Commonwealth, state and territory departments of Attorneys-General since 1964? If so, when, and what have been the policy issues under discussion?*

No, noting that records of meetings of the National Justice Chief Executive Officers' Group were not made prior to 2005.

17. *Has the Commonwealth held any discussions since 1990 with the states and territories about developing common approaches to adoption law?*

Yes, in terms of the Commonwealth's engagement with States and Territories through the Standing Committee of Attorneys General: see table at Attachment A.

Under the *Commonwealth State Agreement for the Continued Operation of Australia's Intercountry Adoption Programs*, officers from the Commonwealth, States and Territories engage on policy and operational aspects of intercountry adoption.

From time to time, issues are relevant to both domestic and intercountry adoption. Having roles and expertise in both intercountry adoption and domestic child welfare, our State and Territory colleagues take into account their broader responsibilities, including domestic adoption. Consequently the outcomes of our intercountry adoption work may be relevant in the domestic sphere.

18. Question on Notice: Has AGD drawn on the lessons of children in institutional care, and of past adoption practices, in its involvement in framing surrogacy law? Can you outline how?

The Standing Committee of Attorneys-General (SCAG), now the Standing Council on Law and Justice (SCLJ), has been working towards developing model provisions aimed at achieving harmonisation of surrogacy laws in Australia. At the SCAG meeting of 5–6 November 2009, Ministers agreed to a set of 15 draft principles upon which model provisions could be based. The draft 15 surrogacy principles are available at http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_reports. SCAG consideration of the experience of past adoption practices in the context of access to information is reflected in principle 13 of the draft surrogacy principles.

The parentage of children conceived through surrogacy arrangements and other artificial conception procedures is a matter for the States and Territories. For the purposes of family law proceedings the *Family Law Act 1975* (Cth) recognises orders about the parentage of children born under surrogacy arrangements made by State and Territory courts.

Meeting	Issues discussed
Sydney, 23 January, 1964	Presentation of Adoption Bill Bill to be put to State and Territory Child Welfare Ministers for consideration and comment
Perth, 6-7 August, 1964	Passing of Adoption Bill by Victoria Maintenance of uniformity in legislation among States and Territories
Melbourne, July, 1965	Enactment of adoption legislation by States and Territories, and Papua New Guinea January set as a target date
Melbourne, July, 1971	Implementation of State and Territory adoption legislation based on draft model legislation produced in 1964
Perth, July, 1973	Uniform legislation in relation to foreign adoption
Wellington, February, 1974	Recognition of foreign adoption Adoption of Children Acts
Canberra, 1 July, 1975	Consideration of recommendations arising from a joint meeting of Social Welfare Administrators and Legal Officers, held in October 1974 regarding: <ol style="list-style-type: none"> 1. Welfare of the child paramount 2. Consents 3. Inheritance of property 4. Effect of adoption 5. Legal proceedings to be heard in camera 6. Carnal Knowledge 7. Adoption by a Natural Parent 8. Recognition of Foreign Adoptions
Melbourne, 17 October, 1975	Effect of proposed or enacted Status of Children legislation upon the question of consent to adoption of illegitimate children
Hobart, 5 March, 1976	Consent to adoption Recognition of foreign adoption
Adelaide, 16-17 June, 1976	Recognition of foreign adoption
Queensland, 13-15 October, 1976	Recognition of foreign adoption and dispensing with consents
Canberra, 24-25 March, 1977	Dispensing with consents in relation to foreign adoption
Sydney, 30 June, 1977	Recognition of foreign adoption
Perth, 3-4 November, 1977	Recognition of foreign adoption
Darwin, 21-22 July, 1978	Establishment by Victorian Attorney-General and Social Welfare Minister of an Adoption Legislation Review Committee to make reports to SCAG
Hobart, 18-19 January, 1979	Report from Victorian Adoption Legislation Review Committee (VALRC)
Meeting	Issues discussed
Port Moresby, 24 July, 1979	Birth certificates of adopted children Progress report from VALRC
Hobart, 13-14 February, 1980	Progress report from VALRC
Adelaide, 3-4 July, 1980	Progress report from VALRC
Alice Springs, 6-7	Discussion on Victoria's Adoption of Children (Information) Bill

November, 1980	
Queenstown, 15 February, 1982	Adoption of children – access to records
Mackay, 15 July, 1983	Noting of recommendations of a report by VALRC regarding: <ol style="list-style-type: none"> 1. The child in adoption 2. New forms of adoption 3. Adoption by relatives and step-parents 4. Adoption and Aboriginal children 5. Access to information 6. The agency role in adoption 7. Registration board for agencies 8. Adoption consents 9. Selection of adoption parents 10. Inter-country adoption 11. Adoption appeals committee 12. Adoption Jurisdiction
Sydney, 4 November, 1993	Development of the Hague Convention on the Protection of Children and Co-operation in respect of Inter-country adoption
Brisbane, 26 July, 1997	Hague Convention on Inter-country adoption