



VANISH Inc. Submission to the  
House of Representatives  
Standing Committee on  
Social Policy and Legal Affairs

# National Inquiry into Local Adoption

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## 1. INTRODUCTION

VANISH thanks the House of Representatives Standing Committee on Social Policy and Legal Affairs ('the Committee') for the invitation to make a written submission to its inquiry into a nationally consistent framework for local adoption in Australia, with specific reference to:

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

Our submission includes background information about VANISH (section 2); our position on permanency and adoption (section 3); our responses to the Inquiry's terms of reference (section 4); concluding comments (section 5); and the references we have cited in the body of the submission (section 6).

## 2. ABOUT VANISH

### 2.1 History of VANISH

VANISH Inc. (Victorian Adoption Network for Information and Self Help) is a secular community-based not-for-profit organisation funded since 1990 by the Victorian Department of Health & Human Services (DHHS) to provide information, search, and individual and group support services to those with an experience of separation through adoption in Victoria – including people residing in other Australian states and territories, and overseas. VANISH is an accredited organisation against ASES (Australian Service Excellence Standards) and Human Services Standards (DHHS).

VANISH has 28 years' experience providing family search and support services to people separated from natural or biological relatives through adoption, state wardship and, most recently, donor conception. VANISH works with the complexity of the lived experience for people who seek assistance and support in finding their natural family members. This includes individuals who were adopted (formally or informally) and/or lived in childhood institutions, mothers separated from their child, fathers separated from their child, and the extended family members of such people. VANISH is well informed as to the impacts of separation from family on the individual, their parents and other family members across their lifetime and subsequent generations.

VANISH was established in 1989 by people affected by adoption in response to the long waiting list of adopted adults seeking access to their adoption records (including original birth certificates and identifying information about their natural parents) consequent to retrospective provisions of the *Victorian Adoption Act 1984*. The introduction of that Act followed a comprehensive four-and-a-half-year review of adoption legislation in Victoria, which recommended more open and consensual adoption practices (ALRC 1983).

Initially, VANISH received 800-900 new search requests per year, and this gradually subsided and has stabilised at around 300 new search requests annually. Currently, 72 years is the average age of the natural family member being searched for through VANISH, which reflects that most of the adoptions concerned were granted prior to the *Adoption Act 1984*, in the era of forced and closed adoptions in Victoria, when adoption numbers were considerably higher than they are now. However, VANISH has been approached for search assistance and support by a steady stream of people affected by post-1984 'open' adoptions for several years now, which reflects that even in the context of open information and contact arrangements, there is a tendency for contact between children and their natural parents and extended family members to be curtailed after an adoption order is granted. This is consistent with current research into open adoption over time with respect to children adopted locally in Victoria (Castle 2014) and in overseas research with children adopted from out-of-home care (Neil, Beek et al. 2013).

VANISH has considerable experience, knowledge and expertise in relation to the impacts of adoption. VANISH recruits qualified specialists who may also have an adoption experience; and our Committee of Management comprises individuals with extensive professional experience in child and family welfare, adoption, counselling, family mediation and education, as well as people with direct personal experience of adoption or donor conception.

VANISH draws its policy positions from our direct contact with the many thousands of clients to whom we provide, and have provided, services; and from our growing membership of over 800 people from the adoption, donor conception and associated communities. Our membership comprises individuals, predominantly those who have a direct personal or professional experience of adoption, rather than organisations or groups with allied interests in adoption. VANISH also shares many common interests and positive links with post-adoption groups and organisations in Victoria, interstate and overseas.

VANISH does not claim to represent the entire Victorian adoption community; rather, we endeavour to represent the perspectives of our service users and membership. VANISH recognises strong parallels between the lived experiences of people in our different service user cohorts and the complexities they face throughout their lives. We thus provide information and training services to community groups, organisations and professionals who come into contact or work with such people. We also take a vital interest in, and advocate on, policy, legislation and services in relation to adoption, donor conception and surrogacy.

## 2.2 Contributions to previous inquiries into adoption and their relevance to the current inquiry

VANISH has contributed to several significant government inquiries and law reform reviews regarding adoption and related matters and subsequent implementation strategies. We discuss these below as relevant background to our interest in the current inquiry.

### 2.2.1 National Contribution to Former Forced Adoption Policies and Practices

Seven years ago, in 2011, VANISH formally submitted to, and participated in consultations regarding, the Senate Community Affairs References Committee's Inquiry into the Commonwealth Contribution to Former Forced Adoption Policies and Practices. One of the key recommendations from the inquiry was that a National Apology be made to those affected by forced adoption policies and practices (Committee 2012).

VANISH's Chairperson at the time, Mr Leigh Hubbard, and former VANISH Manager and current member, Mr Gary Coles, were appointed members of the Commonwealth Government's Forced Adoption Apology Reference Group throughout 2012-13, which consulted on the wording of the Apology. This group was chaired by Professor Nahum Mushin, a former Family Court judge and current adjunct professor of law at Monash University. It is noted that three former members of the Senate Community Affairs References Committee were also members of the Apology Reference Group, namely Rachel Siewert, Claire Moore and Sue Boyce. VANISH's membership provided input to the Apology Reference Group during the process of developing the Apology. Further, VANISH was funded by the Commonwealth Government to assist people affected to attend the Apology in Canberra and a live telecast of the event in Melbourne on 21 March 2013.

In the context of the current inquiry and on behalf of our membership, VANISH highlights to the Committee the importance of remembering the commitments recently made by the Victorian and Commonwealth governments through their formal Apologies.

On 25 October 2012, a bipartisan Apology for Past Adoption Practices was delivered by then Premier Ted Baillieu in the Victorian Parliament, which undertook to "never forget what happened and to never repeat these practices" (Baillieu 2012).

On 21 March 2013, a bipartisan National Apology for Forced Adoptions was delivered by then Prime Minister Julia Gillard in the Australian Parliament (Gillard 2013). The Apology concluded by asserting:

We resolve, as a nation, to do all in our power to make sure these practices are never repeated. In facing future challenges, we will remember the lessons of family separation. Our focus will be on protecting the fundamental rights of children and on the importance of the child's right to know and be cared for by his or her parents.

These Apologies enshrine formal acknowledgement by the respective governments on behalf of the communities they represent that there were significant unintended negative consequences from previous coercive adoption policies and practices, and that there are formal commitments to preventing repetition of such adoption policies and practices. It is thus clear that any permanency planning policy which prioritises adoption of children from out-of-home care is an adoption policy that risks repeating the unethical coercive practices so recently condemned by both the Victorian and Commonwealth governments.

Some proponents of the increased and expedited use of adoption from out-of-home care may argue to the Committee that forced adoption policies and practices are in the past and, therefore, that the negative consequences of the past are addressed by advancing 'open' adoption for children in out-of-home care (e.g. Sammut 2015; Adopt Change 2018). In this section, and in more detail later in our

submission, VANISH provides evidence that there are continuous paradigms between ‘forced’ and ‘open’ adoptions that cause lifelong harms, both through the involvement of coercive practices, which legally separate the child from their family of origin, and the renaming of the child giving him/her a new identity ‘as if born to’ the adopting parents. Indeed, these paradigms reflect the “flawed and outdated ideology about child rescue” (Ainsworth 2016, p. 163) which so characterised the policies and practices that the National and State Apologies sought to redress. Further, open adoption practices do not overcome all the negative consequences of past adoption practices, nor do they uphold the commitments to never again repeat these practices.

In May 2013, the Government established the Forced Adoptions Implementation Working Group (Working Group) chaired by Professor Mushin with Mr Leigh Hubbard and Mr Gary Coles as members. The Working Group’s role was to provide key advice to government departments, namely the Department of Social Services (DSS), the Department of Health, the Attorney- General’s Department (AGD) and the National Archives of Australia. This advice concerned how to implement the services and projects initiated in response to the recommendations of the Senate Inquiry into Forced Adoption Policies and Practices. This work acknowledged the role of the Commonwealth in developing a national framework to assist states and territories to address the consequences for the mothers, fathers, their families and children (now adults) who were subject to forced adoption policies and practices.

It is important to note that the services and projects then implemented continue to be funded, because there continues to be a need for such services by those affected by past adoption policies and practices. Similarly, there is also a continuing need to ensure that no future generations of people adopted from care, along with members of their families of origin, will require similar acknowledgement and support because the lessons of the past were not heeded.

VANISH received additional (time-limited) funding from the Victorian Government to implement a three-year Workforce Capacity Development Project in response to its bipartisan Apology, delivered on 25 October 2012. That project had three major initiatives, all of which pre-dated the Commonwealth’s response, outlined above. These initiatives included the expansion of VANISH’s support groups to regional Victoria, the provision of a free counselling service, and the development and delivery of a two-day training course, *Looking through the ‘lens of adoption’ in working with loss and trauma* (Green 2013). This training program was delivered to counsellors working in Medicare Locals across Victoria, as well as State and non-government auspiced search and support services. VANISH continues to run the regional support groups, to provide a small counselling service (free to service users) and, on an annual basis, to deliver the training program to counsellors.

## 2.2.2 Victorian Review of the *Adoption Act 1984* and Permanency Amendments Inquiry

More recently, VANISH submitted to, and consulted with, the Victorian Law Reform Commission regarding its review of the *Adoption Act (Vic) 1984* (VLRC 2016) and to the Victorian Commission for Children and Young People’s Permanency Amendments Inquiry (CCYP 2016).

In these submissions, VANISH contends that adoption should be undertaken as the measure of absolute last resort and thus should not be prioritised or promoted. This position is consistent with

the views of thousands of people in Victoria who have experienced adoption, based on VANISH's experience working with this cohort over more than a quarter of a century. This position is also consistent with child welfare policy and practice in Victoria since the introduction in 1984 of the state's current adoption legislation, and particularly since implementation of Permanent Care Orders (PCOs) in 1992. In NSW, the government and one non-government child and family welfare agency, Barnardos, in particular, have touted that adoption is the sole means of achieving 'permanency' for children unable to live with their parents. Victoria, on the other hand, has for over 25 years had a unique history of providing children with permanency through the provision of PCOs. Unlike adoption, a PCO does not permanently legally sever the child's ties to their family of origin by cancelling his/her original birth certificate and issuing a new birth certificate in a new name; and provides for ongoing contact with family of origin.

As relevant today as they were then, these points were made by then Victorian Community Services Minister Peter Spyker when describing PCOs in his second reading speech regarding the *Children and Young Persons Bill* on 8 December 1988:

The Bill provides for the Family Division of the court to make a permanent care order in respect of certain children, such orders vesting guardianship and custody of a child in a new set of care givers or "parents". These provisions have been included as a means of providing children with another family when their own family is unable to provide for their long-term care—while enabling children to maintain maximum contact and involvement with members of their natural family. Permanent care orders also provide a means of dealing with "welfare drift". This problem, which arises when a child is temporarily taken into care by the State, has troubled child welfare authorities the world over. Child welfare systems do not generally make good "parents". As a result, some children drift on and become "lost" in the system, in some cases losing contact with their family altogether. Permanent care orders will enable these children to be cared for within a "permanent" family. (Spyker 1988, p. 1153)

In this context, an adoption order should only be used for a child in circumstances where no alternative less interventionist order (for example, a PCO from the Victorian Children's Court or a Parenting Order from the Australian Family Court) could achieve a suitable alternative permanent parenting arrangement.

The relevance of the lessons learnt from past forced adoption policies and practice for legislators and the community today were addressed recently by Professor Mushin in his keynote speech at the 5<sup>th</sup> anniversary event of the National Apology for Forced Adoptions in Melbourne, which was co-aided by VANISH. In his address, Professor Mushin asked:

So what of the future? ...Moreover, do we need adoption at all? Is not the law relating to the best interests of children capable of considering what is now adoption? Is it appropriate that children placed in out-of-home care should be the subject of an adoption order rather than a parenting order, albeit with one or more adults who start off as strangers to the child?

I suggest that answers to these questions can be found, at least in part, from Australia's experiences with forced adoption. While large numbers of those experiences represent the very worst aspects of adoption, the issues of consent, ongoing parental involvement and, in particular for adoptees, personal identity should inform our consideration of the possibilities of the law reform in this area. (Mushin 2018)



Professor Mushin's rationale is consistent with VANISH's position on permanency and adoption, outlined in more detail in the next section.

### 3. VANISH'S POSITION ON PERMANENCY AND ADOPTION

VANISH's position on adoption is embedded in our position on permanency for vulnerable children. We view adoption to be at the extreme end of the range of permanent care options potentially available to children deemed unable to be raised safely by their parents. That said, we also view adoption as a redundant permanency option, particularly in Victoria, given the existence of other less drastic legally-supported permanent placement options that better support the child's identity and connections with their family of origin.

Adoption legally removes one set of parents and replaces them with another set of parents, and the child is recognised in law 'as if born to' the new parents. This compounds the child's loss of family by violating their rights to preservation of name, heritage, identity, and often also family relationships, across the life cycle. These losses are inappropriate and unnecessary, and the severance of family relationships can and does occur even in 'open' adoptions. Research findings and personal testimonies over several decades demonstrate that these factors negatively impact the adopted person's identity development and well-being throughout their entire life, not just during childhood, and inter-generationally (Kenny, Higgins et al. 2012; Conrick 2012; Green 2013).

VANISH is strongly committed to upholding the *rights*, as well as the *best interests*, of children, and we view these as integral to any consideration of permanency planning for vulnerable children. VANISH recognises and supports other more suitable permanent placement options available to vulnerable children – in particular, Victoria's PCOs granted through the Children's Court.

VANISH believes that consideration should only be given to permanently removing children whose parents are unable to care, or resume caring, for them in an adequately safe, nurturing and secure manner after appropriate support services have been provided for a reasonable period. Sustained change can often require more than two years of service provision. Thus, we consider it inappropriate to impose an arbitrary time limit on reunification efforts, rather this should be assessed on a case-by-case basis, as appropriate to the individual circumstances and best interests of the child.

VANISH holds that appropriate housing, income support and family support/preservation services, including those related to substance abuse, mental health and domestic violence, should be made readily available to vulnerable families from the earliest point that parenting of their children comes to the attention of child protection authorities. These services must be child-centred, affordable and accessible for such families (e.g. including the provision of transport and childcare).

Where it has been assessed by child protection authorities and decided by the respective Children's Court that a child is unable to be raised safely by their parents, VANISH holds that:

- the child's best interests must be ensured by timely provision of a suitably safe, nurturing and secure alternative family placement, looking first to the child's kinship network; and
- it is imperative to commence as soon as practicable a permanency case planning process to consider the most suitable alternative permanent placement option available for the child (kinship care or 'stranger' care), and to minimise the number of placement changes the child may experience.

VANISH holds that implementation of PCOs, or other third-party parenting responsibility or guardianship-type orders, would be significantly enhanced by a child-focussed, rather than service-focussed, approach. This involves:

- an integrated case management model which seamlessly connects planning for vulnerable children from the time they are identified by the child protection system through to permanency planning and placement, as required; and
- a structural realignment of the out-of-home care system from a silo approach – which differentiates between prospective foster carers (respite, short-term and long-term), permanent carers and adopters – to a robust 'one-door' model of recruitment, training, screening, assessment and matching of carers to the vulnerable children entering out-of-home care.

VANISH acknowledges that more alternative family carers are required, as are improved carer retention rates, in Australia's out-of-home care systems. We recommend strengthening the out-of-home care system via the following reforms:

- providing sufficient funding to the whole out-of-home care system;
- embracing a 'one-door' approach and actively marketing it to prospective carers;
- focussing on meeting the child's needs, including minimising placement changes and maximising stability, maintaining relationships, and promoting the concept of belonging to families rather than being 'owned' by only one family;
- introducing a *guardian ad litem* system to strengthen advocacy for the child;
- standardising training and assessment processes to achieve best practice standards across the out-of-home care system;
- providing adequate financial support to all carers;
- providing adequate ongoing support and training to all carers and adequate ongoing support to the children and their families of origin – with a view to ensuring the maintenance of quality contact between child and family of origin throughout the duration of the child's placement and beyond;

- conducting appropriate research regarding permanency outcomes; and
- addressing any security, travel and inheritance issues in relation to PCOs, or other third-party parenting responsibility or guardianship-type orders, particularly from the perspective of the child, as appropriate.

VANISH holds that, until such time as it is no longer available as an option, adoption should only be considered when all other placement options have been fully explored.

In the rare event that adoption is the selected placement option, then it should be undertaken in accordance with best practice principles, including:

- *Honesty, accuracy and transparency* – the child must be provided with full and accurate information regarding the circumstances of their birth, adoption and family history. This necessarily includes that it is not appropriate to change the adopted child's registered birth details or names; and
- *Openness* – parents should generally be encouraged to be involved in selection of the adoptive parents. Further, every effort must be made to ensure maintenance of ongoing, safe and, where necessary, supported contact and connection between the child and their parents, extended family and culture following adoption proceedings, which should be set out in the adoption order.

## 4. VANISH'S RESPONSES TO THE CURRENT INQUIRY'S TERMS OF REFERENCE

### 4.1 Stability and permanency for children in out-of-home care with local adoption as a viable option

In addressing this term of reference, there is a need to clarify and define the concepts used, including 'permanency', 'best interests of the child', 'local adoption', 'non-consensual' or 'forced' adoption, and 'consent and the child'; as well as key assumptions commonly made in considerations of adoption from out-of-home care.

#### 4.1.1 Clarification of terms

##### Permanency

There are at least three dimensions of permanency: legal, relational/social/emotional and physical (e.g. Testa 2005; Godsoe 2014; Walsh 2015). Permanency is often mistakenly equated solely with a narrow legal conception, as embodied in adoption. In the social sciences, permanency is a social construct equated with the sense of security that a child experiences from belonging in a family and

culture. Permanency thus includes a sense of identity and continuity, including in a physical sense, as it also relates to a child's genealogical heritage and biological 'mirroring'. It is these relational and physical aspects of permanence that make the difference in feeling a sense of continuity and security at an individual level for the child and their sense of psychosocial and emotional well-being and identity. When adoption is proposed as a 'solution' to drift in the out-of-home care system, the legal concept of permanency is conflated with relational and physical permanency.

Mistakes in social policy and unintended consequences are more likely when only a limited range of options are considered, and this is equally true in regard to permanency planning. Overemphasising or prioritising the legal permanency of adoption as the solution or panacea is a simplistic view of the complex issues related to a child's relational and physical sense of belonging. In any event, adoption is not guaranteed to ensure the best interests of the child.

Currently, adoption legislation conflates legal parenting arrangements, or legal parenting responsibilities, with the child's sense of permanency. But there is no need to legally extinguish the natural parents' relationships with the child, in addition to terminating their parental rights for custody and guardianship. The impacts of this practice ripple through the adopted person's life – they are not merely confined to childhood, the period during which legal clarity of parenting arrangements and responsibilities is required. Adoption is not the only option for achieving stability and continuity of care and, as will be described, the Permanent Care model in Victoria is an effective alternative.

### **Best interests of the child**

There are fundamental flaws in seeking to ensure that the 'best interests of the child' are the foremost consideration in adoption, in that this principle is contestable and takes too short a view. The 'best interests of the child' principle is contestable because there are many different perspectives on what is in a child's best interests and thus no single agreed definition. Further, the 'best interests of the child' principle does not take a sufficiently long-term view of the potential adopted person's best interests, given that an adoptee will spend much more of their life as an adult than they will as a child.

Adoption is permanent, with lifelong and inter-generational implications and impacts. However, the circumstances that require an alternative family placement generally exist only during the adopted person's childhood (i.e. until the age of 18). Thus, adoption reaches too far in endeavouring to resolve what is, in fact, a temporary – albeit critical – circumstance in the life of the child, who will spend a greater proportion of their life as an adult. Other legal permanency orders can achieve stability and security for the child, without risking the long-term negative impacts for the individual associated with the enduring legal change of identity and loss of connection with their natural parents and extended family members that are inherent in adoption.

Adoption proponents may argue that some parents do not have the capacity to make decisions in the best interests of their child. Indeed, age-related immaturity, a history of maltreatment or placement in out-of-home care, alcohol/drug addiction or abuse, mental health issues and/or a learning or intellectual disability may contribute to the perceived incapacity of a parent to provide appropriate care for their child or to make appropriate decisions regarding their child's care.

However, such factors are not necessarily permanent and can, particularly with the timely provision of appropriate treatment and/or support, be remedied or, at least, significantly improved. Therefore, expeditious dispensation of parental consent for adoption of a child in such circumstances will often be too short-sighted and unduly punitive of parents who are already experiencing significant disadvantage.

### **Local adoption**

‘Local adoption’, as the term is used in Victoria, does not generally apply to children in out-of-home care; rather, adoption from out-of-home care is more commonly known as ‘carer adoption’ (or ‘foster care conversion’). In Victoria, local adoption refers to the small number of parents each year who voluntarily consent to not raising or remaining the legal parents of their child (usually an infant), except in the rare circumstance that the child’s parents cannot be located and the order is subsequently made in their absence without their consent. Figure 1 below shows the numbers and cohorts of children adopted in Victoria since 2000-01, including local adoptions (around 20 per annum), relative and known child (including by foster carer) adoptions, and intercountry adoptions arranged through the Victorian Government’s intercountry adoption program.

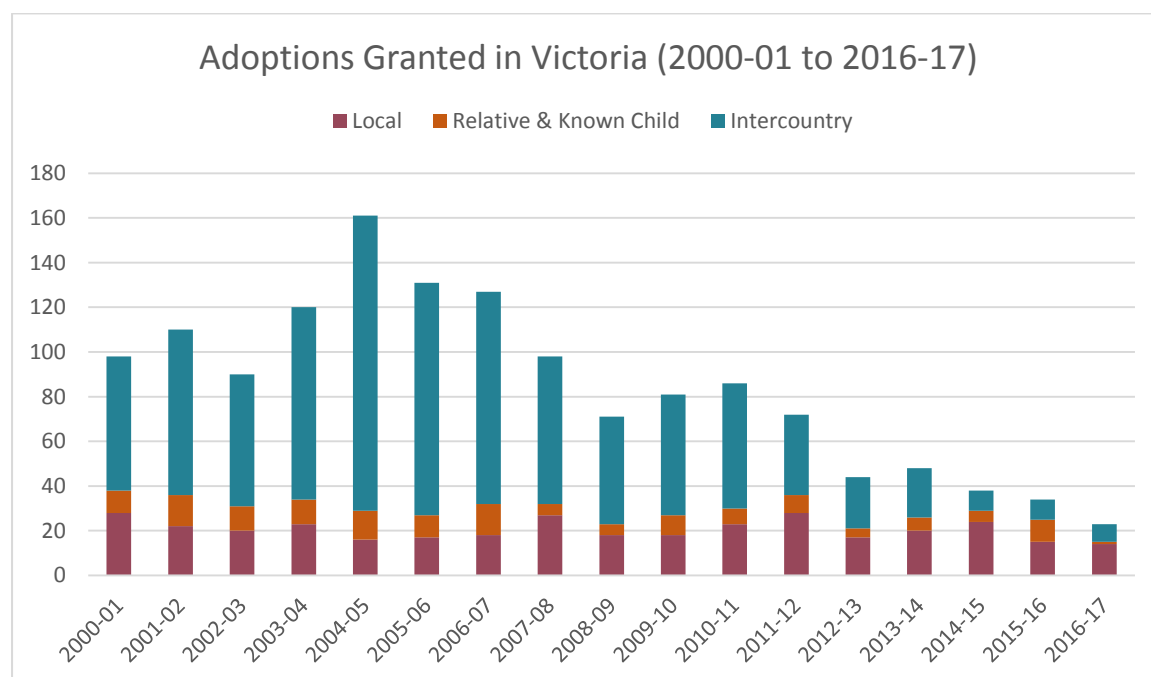
Figure 1 shows that the numbers of local, relative and carer adoptions have been relatively stable in Victoria since the turn of the century. The type that has undergone the most notable change is domestically-arranged intercountry adoptions, which have decreased dramatically since 2004–05 and remain low.

In Victoria, there are a number of safeguards in relation to local adoption, such as counselling for the parents to explore alternatives to adoption and a defined period of time in which they can decide whether or not to proceed with their consent to the adoption. As explained by DHS (2008, p. 8), “the purpose of counselling is to assist you in making an informed decision about options for the care of your child by providing support and information, and by assisting in exploring relevant issues”.

The rates of adoption in Victoria are low and, therefore, not of concern. VANISH contends this is because, in contemporary Australian society, adoptions should be rare given that local adoption is no longer ‘forced’ and, with the provision of other options, natural parents rarely voluntarily choose to relinquish their children.

Adoption from out-of-home care as it occurs elsewhere in Australia, however, most particularly in NSW, is non-consensual or occurs in the context of state intervention, and therefore is more properly described as ‘forced’ adoption. It is thus a myth that forced adoptions are a thing of the past. Furthermore, when the importance of relational and physical permanency for the child is considered, the dispensation of parental consent is a counter-productive means to achieve a stable loving placement that preserves a child’s identity and relationships with family of origin members, as it exacerbates what is already an adversarial and coercive situation.

**Figure 1: Adoptions (Local, Relative & Known Child, and Intercountry) Granted in Victoria from 2000-01 to 2016-17<sup>1</sup>**



Thus, in the Victorian context, the term ‘local adoption’ refers to ‘consensual adoption’, as characterised by Victoria’s current adoption legislation, policy and practice, which emphasises informed consent by the parents.

### Non-consensual or forced adoption

In the United Kingdom (UK), in contrast to the use of adoption in Australia, especially in Victoria, non-consensual closed adoption has come to be considered the ‘gold standard’ approach to permanency planning for children in out-of-home care. This approach has been strongly promoted by governments across the UK, especially in England (Hall 2008; McSherry, Fargas et al. 2016), and Australian adoption proponents often quote UK literature in support of this approach (e.g. Pike 2014). However, the approach has also been widely criticised, recently prompting the British Association of Social Workers (BASW) to undertake an inquiry into the ethics and human rights involved in non-consensual adoptions from out-of-home care.

The final report from the BASW inquiry (Featherstone, Gupta et al. 2018) noted that adoption is one of the most controversial areas of social policy:

Recent policy and the use particularly of non-consensual adoption across the UK has sparked disagreements between judiciary and government, criticism from many birth parents whose children have been adopted against their wishes, and questions within the social work profession itself about the ethics of this increasingly politicised area of practice. (p. 3)

<sup>1</sup> This data was sourced from the Australian Institute of Health and Welfare (AIHW) publications, *Adoptions Australia*, up to the 2017 issue.

The report also outlined the reason for the need to scrutinise, from an ethical perspective, the practice of social workers in undertaking non-consensual adoptions:

Social workers' decision making is at the heart of adoption and needs to be subject to ethical scrutiny form within the profession and without. The higher rate of care proceedings and adoption involving children from families that are particularly disadvantaged – by poverty, social trauma, mental health difficulties or learning disability, for instance – is an ethical and practice concern for social workers, not least because it raises questioned about the adequacy of support and protection of human rights of parents. (p. 3)

There were five recommendations from the BASW inquiry, two of which are highly relevant to the Australian context and which we therefore draw to the Committee's attention, as follows:

- The use of adoption needs to be located and discussed in the context of wider social policies relating to poverty and inequality; and
- There needs to be further debate about the status of adoption and its relationship to other permanence options.

As suggested earlier in this submission, VANISH is concerned that routinely dispensing with parental consent for adoption in the Australian child protection context would compound the multiple disadvantages often experienced by parents whose children are placed in out-of-home care against their wishes in the first place.

### **Consent and the child**

In some Australian states and territories, children aged 12 and over can consent to an adoption order and proponents of adoption from out-of-home care presume that if a child requests or agrees to adoption that they are doing this with informed consent, thus legitimising the practice.

It is obviously very important to consider the wishes of the child/young person in regard to the person/people with whom they wish to reside. However, proponents of adoption argue that adoption is consensual where the young person agrees to the order. Ethically, it is both unrealistic and unfair to place the onus on the child/young person to choose between adoption and another legal order as the mechanism to ensure their own permanent placement. Given adults generally lack an understanding of the full implications of adoption, and children and young people are developmentally less able to understand the long-term consequences of various courses of action than adults, how can a child/young person be reasonably expected to appreciate the gravity of the lifelong and inter-generational implications of such a choice? The impacts of adoption are, in many ways, more significant than those of marriage. In contemporary Australia, do we consider it appropriate for a child as young as 12 years to decide that they wish to marry? Do we consider it appropriate for a child's parent/guardian to decide on their behalf that the child should marry as young as aged 10?

Notwithstanding that the child/young person's wishes should always be sought and considered in all out-of-home care proceedings and that the child/young person's involvement should be facilitated to the fullest extent possible, VANISH opposes the onus being placed on the child/young person to

have to consent to being adopted – given adoption is a legal institution with a more profound influence throughout the adoptee’s adulthood and beyond than marriage.

Before outlining the significant issues associated with considering adoption from out-of-home care as a viable option, two other points need to be made: first is the misrepresentation of the out-of-home care system being in crisis with respect to the large number of children lacking a permanent placement; and second, that adoption is a budget-saving measure.

#### 4.1.2 Inaccuracy in the depiction of children available for adoption

The number of children in out-of-home care in Australia has been increasing at a steady rate over the last 15 to 20 years, having almost trebled from just over 14,000 in 1997 to 39,621 in 2011-12 (AIHW 2013). Notwithstanding the strong population growth during this period, many of these children will be on interim orders and will return home, as only a small proportion of children for whom there are substantiated concerns about child abuse or neglect are found to be "in need of care and protection" necessitating a court order, and even fewer are permanently removed from their homes or have parental responsibility (or guardianship) transferred from their parents.

Proponents of adoption from out-of-home care consistently both overestimate and misrepresent the number of children who may be available for adoption from care from the above figures. For example, Sammut (2014) states that, in 2012–13, there were only 210 local adoptions, despite more than 40,000 children being in care, and despite almost 28,000 of these children having been in care for more than two years. However, unlike other countries, such as those in the UK, more than half of the children defined as being in out-of-home care in Australia are actually in kinship care. When children enter out-of-home care, they are most likely to be placed with a relative or a member of their kinship group (47% across Australia, with a high of 56% in NSW). Relative or kinship care means that children live with a member of their family (often a grandparent, aunt/uncle or older sibling) or, particularly for Aboriginal children, another person in their kinship group. Furthermore, Aboriginal and Torres Strait Islander children are heavily over-represented in out-of-home care, at 10 or more times the rate for non-Indigenous children across Australia; and they comprise about a third (34%) of the children in care (AIHW 2013, p. 125). Adoption is not seen as an appropriate option for Indigenous children, and this is enshrined in the Aboriginal and Torres Strait Islander Child Placement Principle.

Thus, it is extremely misleading to describe the out-of-home care system as being in crisis with some 28,000–40,000 children in care that may be eligible for adoption.

#### **Adoption mistakenly assumed to be budget-saving**

It is often mistakenly assumed that adoption is a budget-saving measure, compared with maintaining children in long-term foster care arrangements. This reflects a widespread lack of recognition of the significant hidden costs associated with adoption throughout the lifetime. The complexity of children’s needs does not disappear on the granting of an adoption order – legal permanency does not automatically resolve the child’s needs for relational and physical continuity, stability and security. There are ongoing needs for specialist support services to address the needs of children who have suffered trauma, and to facilitate the maintenance of contact between the child



and their parents and extended family of origin members (e.g. Walsh 2015).

Research into ‘open adoption’ has established that there is an ongoing need for specialist post-adoption support services throughout the adoptee’s lifetime. For example, Neil, Beek and Ward (2013) have undertaken longitudinal research on open adoption in the UK with the same sample of children adopted from care over a 16-year period. In Phase Three of their research with 87 children adopted from care, they found that over half of these young people were now adults and, for many, their psychological work in relation to making sense of their adoption was very much still in progress, and the support of adoptive parents, birth relatives and, in most cases, also professionals was still needed. However, the availability of post-adoption support services for this group was lacking.

Thus, just as was the case for adopted people subject to past forced adoption policies and practices, love is not enough to overcome the challenges faced by children who are permanently removed from their parents’ care.

In the context of a policy promoting adoptions from out-of-home care, there is also pressure for prospective adoptive parents to transition (i.e. ‘convert’) from foster (including kinship) care arrangements to adoption. However, on the granting of an adoption order, the adoptive parents will lose access to support services and the relevant foster care allowance, which is usually significantly more than any allowance they may be eligible to receive as adoptive parents (or permanent carers).

As previously mentioned, granting an adoption order under ‘open’ arrangements does not guarantee that contact between a child and their family of origin will be maintained. This is particularly the case in the absence of dedicated specialist services to support and manage the inevitably changing needs of the adopted child and their family of origin and adoptive family members as the child matures (Neil, Beek et al. 2013). Similarly, for those who experience the breakdown of contact during the adoptee’s childhood, there will be a continuing need for services, such as those provided by VANISH, to facilitate family member searches and reconnection for those who desire it.

So, while adoption from out-of-home-care may appear to be budget-saving in the short-term in that the cost to the government is transferred, along with guardianship responsibility for the child, to the adoptive parent(s), in reality, the ongoing and potentially lifelong support needs of the parties involved will continue to be the responsibility of government and will need to be borne by government in one way or another.

#### 4.1.3 Adoption as the option of last resort and the rights of the child

Cancelling the child’s original birth certificate and issuing a new one, falsified and condoned by the state, violates the adopted child’s rights to preservation of their identity and relationships with family of origin, as enshrined in Articles 7 and 8 of the United Nations Convention on the Rights of the Child, or UNCROC (UNICEF 1989). Non-consensual adoption thus violates children’s rights and parents’ rights, as well. Therefore, there are strong arguments that, in the context of child

protection, an adoption order is punitive for the parents and child, and a violation of UNCROC, to which Australia is signatory.

After all, an adoption order:

- severs the legal ties between a child and all of their biological/genetic family members – not only their parents, but their siblings, grandparents, etc., too;
- results in cancellation of the child's original birth certificate and issuance of a new birth certificate, and thus also a new identity, as if the child was naturally born to the substitute parents – this practice supports and promotes a manifestly false and discriminatory practice for the adopted person; and
- negatively impacts the likelihood of social relationships between the child and their family of origin members being preserved – even where a contact plan is in place at the time the adoption is finalised.

It is because adoption breaches UNCROC's own provisions that UNCROC does not promote the use of adoption and, in fact, incorporates safeguards to be implemented in countries that use adoption as an alternative means of care for children (see Article 21).

On the basis of the drastic legal nature of adoption, which breaches various children's and parents' rights, VANISH argues that adoption from out-of-home care should be considered as the permanency placement option of absolute last resort, if it is considered at all.

#### 4.1.4 Unanticipated consequences of adoption-driven systems

There are a range of critical negative impacts from promoting adoption from out-of-home care that commonly go unrecognised. These include costs to family preservation; the perpetuation of ongoing inter-generational trauma; adoption breakdown and disruption; the status of legal orphans; and the lack of recognition of the need for lifelong post-adoption support, not only for the adoptive child/adult but also for the mothers and fathers who lose their child to adoption and other members of the child's family of origin.

##### **Cost to family preservation**

An adoption-focussed system moves children and resources from disadvantaged families to privileged families at the expense of family preservation. For example, in the USA, after 28 years of practice under the *Adoption and Safe Families Act* (ASFA 1997), a number of concerns have been raised regarding the focus on 'timely' adoption versus family restoration in that there has been a 'slowdown' in reunification processes, at least among children who are in care for the first time (Golden, Macomber et al. 2009). Furthermore, shortening the period for parents to address protective concerns redirects child protection efforts into long-term planning rather than the provision of intensive family supports and other crucial services, such as housing, in order to address protective concerns (Brooks 2001; Cashmore 2001; Pelton 2008). Similar concerns were raised in the BASW's recent inquiry into the ethics and human rights involved in non-consensual adoption in the UK (Featherstone, Gupta et al. 2018), mentioned earlier.

In the USA, it is noted that there is a push for reversing the termination of parental rights (TPR) for families where adoption has occurred, but reunification becomes more feasible, either before or following adoption (e.g. if a young person requests such a reversal and the birth parent is now functioning well while the adoptive parent has failing health). Several US states (e.g. California) have begun such efforts (Golden, Macomber et al. 2009), illustrating that adoption is not necessarily a legal finality where associated with a lack of attention to the overriding need for family preservation services and careful planning for permanency.

### **Contributes to the perpetuation of inter-generational trauma**

Australian state/territory and national data is scarce, if not non-existent, regarding the characteristics of families that are subject to child protection intervention. However, research studies have found that there are groups who are at higher risk of their children being placed in long-term out-of-home care and thus are vulnerable to losing their children to adoption from out-of-home care (Hilton 2013; Thompson and Thorpe 2013). Groups at higher risk are:

- Young mothers in care;
- Young people leaving care;
- Parents with an intellectual disability;
- Mothers who use substances prenatally;
- Mothers with a past or current criminal history;
- Mothers who have previously lost the care of a child;
- New refugees who have suffered significant cumulative trauma; and
- Parents who experience a combination of factors, such as substance use issues, family violence, mental health problems, housing difficulties, homelessness, and isolation and a lack of family or extended support.

Not only is there often a combination of contemporaneous issues for mothers, as cited above, but also a history marked by social disadvantage, trauma and childhood abuse, such as:

- Exposure to domestic violence;
- Homelessness or transience in the family;
- Low educational attainment, unemployment and poverty;
- Emotional, physical and sexual abuse or neglect;
- Spending time in care, or being raised in care or in the care of relatives;
- Raised by parents who also may have been in care themselves (e.g. Forgotten Australians); and/or
- Parents in a high-risk category for any of the above significant risk factors.

When mothers in these groups lose their children to out-of-home care, few services are provided to assist them to deal with either their previous trauma (such as their own experiences in the care system or with personal abuse) or the trauma of losing their child. Mental health difficulties can cause mothers to be less emotionally able to have contact with their child placed in out-of-home care, even if appropriate support is offered and provided.

Broadhurst, Alrouh et al. (2015) also argue that there is an expectation of natural recovery for mothers who lose their children to adoption from care. Similar to women who suffered past forced adoption, the expectation is that they will go on to live their lives ‘as if’ they did not have a child at all. As we know, the outcome was often lifelong mental health difficulties from the trauma of losing their child to adoption, with mothers suffering a high incidence of secondary infertility due to fear of the pain of another such loss (Kenny, Higgins et al. 2012).

On the other hand, regarding mothers who lose their child to current practices of adoption from out-of-home care, there is evidence that a sizeable percentage of women reappear in the child protection system because their problems are repeated rather than resolved, and they subsequently experience recurrent loss of their children to care. An expectation of ‘natural recovery’ fails this group—research indicates that women do return to court, sometimes multiple times, losing successive infants to public care and adoption. Findings reveal that the system recycles a significant proportion of mothers (24%) through repeat episodes of care proceedings, with young women aged 16 to 19 years most at risk of recurrence (Broadhurst, Kershaw et al. 2015). This data on recurrent pregnancy is similar to the findings regarding women who become pregnant again within 12 months of perinatal loss or child death. Other research that has examined the impact of a subsequent birth on grief for mothers who experienced a pregnancy loss concluded that a subsequent birth significantly lessened mothers’ sense of grief. The notion of ‘replacement child syndrome’ has a long history in the literature on perinatal loss and child death, with studies confirming that subsequent pregnancy is a way of coping. Thus, this body of literature offers a different perspective on mothers caught in a cycle of rapid repeat pregnancy and compulsory removal who might otherwise appear self-defeating or unreasonable (Broadhurst, Kershaw et al. 2015). This cycle results in ongoing inter-generational trauma, not only for the mother but also for her children who are lost to the care system and disconnected from their parents, siblings and extended family of origin.

### **Breakdown, disruption and dissolution**

There is concern in the USA about the rapid growth in adoptions from care and that some placements are poorly done, which results in a greater number of adverse outcomes. Adoption disruption means the breakdown of a planned placement, so that the child’s legal ties to the adopting family are never legalised (although ‘disruption’ is often also used to cover *all* adoptions from foster care that go awry). Displacements occur when the adoptive family stays legally connected to the child, but the child is not in the home (e.g. has run away or is in residential care). Dissolution refers to instances in which the courts have legally terminated the adoptive placement. Research on these various outcomes is sparse, yet there is concern that they appear to be on the rise (Golden, Macomber et al. 2009).

In the UK, the average disruption rate for adoption is about 20% (Ruston 2013). This varies with the age of the child at placement, with disruptions tending to occur the older the child; for example, from under 5% for infants to 40-50% for 11 to 12-year-olds (Fratter, Rowe et al. 1991; The Central Office of Information 2000). When age is taken into account, Cashmore (2014) found that “the research evidence is not conclusive that adoption necessarily provides for better outcomes for children than long-term stable foster care *per se*” (p. 147).

As we have previously pointed out, adoption from out-of-home care is not unlike past adoption policies, which assumed that the provision of a loving family is sufficient to meet the needs of a child to whom they are not biologically related.

### **Legal orphans**

There has been a push to shorten the timeframes for permanency planning, to 'free up' the children for adoption and thus make adoptions 'quicker and easier'. Where US child protection systems have been proactive in TPR within six months of a child coming into care, a negative outcome has been the creation of 'legal orphans' (Guggenheim 1995; Golden, Macomber et al. 2009). This is despite relatives and kin, as well strangers, being able to adopt. ASFA's emphasis on TPR even before an adopting family has been found may be enlarging the group of children who have no parental ties but will also not be adopted. Expressed as a nationwide annual average, in the last few years there have been about 70,000 instances of TPR, but only about 50,000 adoptions from foster care. Although children affected by a TPR decision may not be adopted within that same year, this gap is not closing with time. There is a growing awareness of the hardships facing young people who eventually leave care without any parental ties.

Professor Judy Cashmore (2001) of the University of Sydney has also remarked upon the phenomenon in the US of 'rushing' to TPR before an adoptive family has been secured:

Being 'freed' for adoption but 'not chosen' is perhaps one of the worst possible outcomes for children; it leaves them in limbo without a legal parent and is most likely to undermine rather than increase any sense of permanence or security for these children. (p. 3)

#### **4.1.5 Permanent Care Orders as the preferred permanency option**

The primary consideration in any permanency planning process – indeed, in any child protection process – should be to choose the least heavy-handed approach, that is, the least drastic legal order available, to achieve the rights and best interests of the child. As emphasised in his second reading speech for the *Children and Young Persons Bill* in the Victorian Legislative Assembly on 25 May 1989, Noel Maughan said:

We need to be careful that we do not adopt a heavy-handed punitive approach which is clearly inappropriate when dealing with children who are abused or neglected. We need to adopt a caring, understanding, considerate and helpful approach. (Maughan 1989, p. 2055)

Hence, a permanency planning hierarchy should reflect the prioritisation of placement options available for achieving a stable long-term family placement for the child/young person until they achieve adulthood, with the options most supportive of the legal and social connections between the child and their natural parents/family at the top, descending to those that progressively transfer parenting responsibility and custody rights to third parties at the bottom. This is the reason that, in all permanency hierarchies, family preservation is always the first priority, followed by family reunification/restoration where a child has been temporarily placed out-of-home as a protection measure. Any difference in approach to permanency between jurisdictions usually manifests in the

third choice of permanency option; it is here that adoption will be positioned in jurisdictions which favour a legalistic and interventionist permanency approach.

This is also the nub of the reason that PCOs were introduced in Victoria in preference to adoption in 1989 (and implemented in 1992) – to provide a permanency option that secures a suitable alternative family to raise a child unable to be safely raised by their natural parents, while not legally disconnecting the child from their natural parents and extended family members. Thus, a child may be placed on a PCO in the care of relatives who have provided them with kinship foster care but do not wish to adopt the child because of the distortion of biological relationships that would legally occur and/or because they wish to preserve positive relationships with the child’s natural parents. Similarly, a child may be placed on a PCO with non-kinship carers who have provided them with foster care, or with approved ‘stranger’ carers recruited formally through a Permanent Care program. In other words, PCOs can accommodate either kinship or non-kinship placements that commence temporarily, with no requirement for the child to move placement to access this permanency option.

**Figure 2: Adoption Matrix (from O’Brien 2015<sup>2</sup>)**

	<u>SUPPLANTED</u>	<u>SUPPLEMENTED</u>
<u>FORMAL</u>	<b>Full adoption</b> Legal Transfer of rights /responsibility . State Record. No kinship ties between family groups.	<b>Foster care /simple ad.</b> Can be revoked. Two kinship groups. Legal basis.
<u>INFORMAL</u>	<b>De facto / common law</b> Historical ‘abandonment Without legal sanction. No kinship ties. Voluntary care?	<b>Extended family adoption /customary</b> Oldest /mores. Within kinship group. Driven by family, community & child need.

PCOs were thus designed to be supportive, or supplementing, by preserving the child’s identity and relationships with their parents and kin, rather than supplant them. Irish academic, Valerie O’Brien (2015), has conceptualised this dimension of permanency as it relates to adoption as supplanting/supplementing, with the other key dimension being formal/informal (or legal). A PCO would be located in the top right box – ‘Supplemented-Formal’ – of O’Brien’s Adoption Matrix presented in Figure 2.

<sup>2</sup> O’Brien cited this matrix as having been adapted from “Kearney (2012)”; however, that reference was not available in O’Brien (2015).

While inherently supplementing/supportive, a PCO, like a non-consensual adoption order, is generally granted against the wishes of the child's parents (i.e. without parental consent). This is due to protective concerns having been proven and restoration to the parents, for whatever reason, having not been realised. However, unlike in non-consensual adoption, a PCO is determined by the Children's Court on the basis of evidence presented over time. In other words, Permanent Care differs from non-consensual adoption in that the Children's Court examines and reviews the individual circumstances of the child and their family from the time the child first enters the child protection/out-of-home care system whereas, in most Australian jurisdictions, an adoption order is considered in another court at a single point in time. This is arguably an advantage of the Children's Court jurisdiction in that it examines child protection evidence in context rather than the matter being referred to a higher court with a view to expediting an adoption order.

Further, in the Victorian jurisdiction, given the finality of a PCO, parents have legal representation in the Children's Court where evidence is provided from both sides on the matter and the parents have a say and at least feel heard. This is unlike higher courts where non-consensual adoption would be granted and where legal representation is not available unless a parent can afford it, which is extremely rare. Under PCOs, there are also up to four court-ordered contacts built into the first year of the order, with additional contacts to be directly negotiated between the parties involved up until the child reaches 18 years. This contrasts with 'open adoption' arrangements from out-of-home care in other states, such as NSW, where the majority of arrangements are informal contracts between parties that are not monitored by the court and where there is no avenue for review by any of the parties from the outset.

A PCO expires on the young person turning 18 years – another point of difference between PCOs, which VANISH supports, and adoption. If a child/young person placed on a PCO and their permanent care family wish to make their family arrangement legally enduring after the child reaches 18, the option of adoption is available to them from that time. This is consistent with an approach focused on supporting the rights of the young person concerned, as the young person is legally deemed an adult at the age of 18 and able to make an informed decision in relation to the lifelong ramifications of being legally adopted – of choosing to legally disconnect themselves and their future children from their natural family and legally supplanting them with their adoptive family. That a young person might choose not to do this at 18 should not hinder the continuation of the care arrangement between the young person and the family that raised them in relational terms.

## 4.2 Appropriate guiding principles for a national framework or code for local adoptions within Australia

On the basis of the information and arguments we have presented in this submission, VANISH offers the following comments in relation to appropriate guiding principles for any national framework for local adoptions within Australia.

While adoption legislation in Australia continues to legally and permanently disconnect a child from their natural family, changes the adopted child's identity and is legally very difficult to reverse:

- Adoption should be treated as the option of absolute last resort, if it is considered at all, in the child protection/out-of-home care context – given adoption is the most extreme legal option; has lifelong and inter-generational impacts; and is not necessary to secure a permanent placement for a vulnerable child/young person when required, either with kin or non-kin.
- If adoption is used in the child protection/out-of-home care context, there should be strict safeguards – including conditions requiring that adoption only be used where both the child's parents are dead or permanently incapacitated and there are no extended kin suitable/in a position to care for the child.
- If adoption is used in the child protection/out-of-home care context, targets should not be set to increase the number of adoptions – because adoption from care should be regarded as a rare event to be used only in circumstances where parental consent is impossible, and all alternative options have been explored.
- The term 'local adoption' should not be used in considerations of 'adoption from out-of-home care' – because it is inaccurate and misleading. Local adoption more properly equates to adoption in the context of informed and voluntary consent by the child's parents. Adoption from out-of-home care is really coerced/non-consensual/state-ordered adoption. Thus, referring to adoption from care as local adoption effectively appropriates, or re-purposes, local adoption as non-consensual (as referred to in the UK) or forced adoption, which breaches the commitments made in the 2013 National Apology for Forced Adoptions and the numerous state and territory Apologies.
- Permanent Care Orders, as demonstrated through the Victorian model, or similar third-party parenting responsibility/guardianship orders, should always be prioritised ahead of non-consensual adoption in a permanency hierarchy.

## 5. CONCLUDING COMMENTS

A common theme in the series of state/territory and national Apologies from 2008 through 2013 for people impacted by past family separation and adoption practices is the commitment by Australian



governments to learn from past mistakes in child and family welfare policy and practice, and to never repeat them. The Victorian community and Commonwealth Government will need to continue dealing with the current and inter-generational legacies of poor past adoption practices for several decades to come, given that the peak of adoption numbers occurred in 1971-72.

There is a need to move away from a paternalist-protectionist model, which infantilises adoptees and stigmatises parents, to a rights and strengths-based model, which acknowledges the trauma of adoption and better respects and addresses the lifelong needs of all parties involved.

VANISH does not want another generation of people impacted by forced adoptions to be created as a result of the promotion of adoption from out-of-home care – people who, like those in previous generations, had no say in adoption being chosen ahead of other options that would have preserved their identities and connections with their families of origin.

In summary, VANISH's position on adoption is consistent with the views of thousands of Victorians with lived experience of adoption; the weight of more than three decades of domestic child welfare legislation and practice in regard to permanency planning; relevant research evidence; moral and ethical considerations; and universal child rights, as enshrined in UNCROC. It is for these reasons that VANISH strongly opposes the inclusion of adoption *per se*, and the prioritisation of adoption ahead of Permanent Care, in any permanency hierarchy. VANISH holds that adoption is not necessary to ensure the care of vulnerable children residing in out-of-home care and unable to be returned to their parents' care in Victoria – indeed, in Australia – as other options are available which have less detrimental impacts on the rights of the child. In Victoria, Permanent Care Orders have been used extensively for this purpose for more than 25 years and VANISH sees no reason for this to change, and furthermore strongly recommends that other states pursue similar models of permanency.

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