Chapter 6

Commonwealth role: development of model legislation

Introduction

6.1 In Australia, adoption legislation falls within the jurisdiction of the states and territories. Prior to the 1960s, the states, and the Commonwealth on behalf of the territories, drafted and enacted adoption legislation separately from each other. However, during the period from 1961 to 1964, the Commonwealth and states held discussions about model adoption legislation. A variation of the model legislation was subsequently implemented in each state and territory between 1964 and 1968.

6.2 This chapter examines how adoption legislation changed in the period between 1896 and 1968. It first summarises the key purpose of the original adoption acts enacted by the states. Secondly, it examines the impetuses for model legislation and its development during the 1960s.

6.3 As model legislation was developed as a legislative response to a legal recognition problem, this chapter does not address adoption practice more broadly. Issues that arose during the drafting of model legislation, which the Attorney General's Department referred to as 'social welfare' issues, including consent, record keeping and the operation of adoption agencies, are discussed in Chapter 7. Instead, this chapter focuses on involvement of the Commonwealth in the development of model adoption legislation.

6.4 The Commonwealth does not have constitutional ability to legislate on adoption. The Commonwealth's legislative role was therefore limited to responsibilities of the Attorney-General and his Department, the Attorney-General's participation on the Standing Committee on Attorneys-General (SCAG), and the administration of the Commonwealth territories. While the Attorney-General of the early 1960s, Sir Garfield Barwick, was not the first person to suggest model adoption legislation, his advice to the Prime Minister to seek the states' support of the proposal, and the mechanism of SCAG, helped the model adoption bill to come to fruition. The Attorney-General's Department provided secretariat services and arranged meetings between the states to discuss the model bill. While the Commonwealth was technically responsible for adoption in its territories, it had minimal resources and the territories had very small populations. In the ACT, the administration of adoption was delegated to NSW authorities and in other territories very few adoptions took place. This chapter concludes that the Commonwealth's role in the development of model adoption legislation was primarily one of coordinating the relevant state parties in order to bring the bill to completion.

Initial adoption legislation in Australia

6.5 Anecdotal evidence suggests that informal adoption was taking place in the states and territories of Australia from the 19th century. The first state to enact adoption legislation was Western Australia, which passed the *Adoption of Children Act (WA)* in 1896. This was a relatively short act which formalised adoption arrangements by introducing Supreme Court-issued Adoption Orders. The Act set out basic particulars in relation to an adoption order, including permissible parties to an adoption, the legal effect of an order, and the court procedures to be followed.[1]

6.6 Other states enacted similar legislation during the early part of the 20th century. The relevant acts and ordinances were:

- *Adoption of Children Ordinance 1938 (Cth)* [2] (regulated adoption in ACT)
- *Adoption of Children Ordinance 1935 (Cth)* (regulated adoption in NT)
- *Child Welfare Act 1936*, Part XIX *Adoption of Children (NSW)*
- *Adoption of Children Act 1935 (Qld)*
- *Adoption of Children Act 1925 (SA)*
- *Adoption of Children Act 1920 (Tas)*
- *Adoption of Children Act 1928 (Vic)*
- *Adoption of Children Act 1896 (WA)*

6.7 The court issuing adoption orders varied between the jurisdictions. In Victoria, a County Court issued most adoption orders, in Tasmania, a police magistrate. Queensland was the only state where courts did not make adoption orders; the authority was granted to the Director of the State Children's Department.

Effect of the adoption order

6.8 The nucleus of the adoption legislation in all jurisdictions was to establish and define a legal relationship between the adopted child and his or her adopted parent, and (for the most part) extinguish the legal relationship between the child and his or her natural parents. The *Adoption of Children Act (WA),* for example, formally made the adopted child:

> [F]or all purposes, civil and criminal...to be deemed in law to be the child born in lawful wedlock of the adopting parents.[3]

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1 Audrey Marshall and Margaret McDonald, *The Many-Sided Triangle,* Melbourne University Press, Melbourne, 2001, p. 19.

2 The relevant ordinances in other Commonwealth territories were: *Adoption of Children Ordinance 1932–1936 (Cth)* to apply to Norfolk Island, and *Adoption of Children Ordinance 1951–1959 (Cth)* to apply to Papua New Guinea.

3 *Adoption of Children Act 1896 (WA),* s. 7.

6.9 All acts and ordinances across the states and territories defined the legal relationship between the adopted child and adopting parents, and stipulated certain rights and responsibilities. The formalisation of a legal relationship between these parties assisted them in their everyday interactions with the law. All acts and ordinances prescribed that the child should take the surname of the adopting parents. The Queensland legislation specifically noted that the right to consent to the marriage of the child became a right of the adopting parents.[4] These types of provisions assisted adopted children and their parents to avoid practical difficulties in everyday administrative tasks such as completing government forms.

Inheritance

6.10 The status of adopted children with respect to inheritance was an important legal matter defined in each act and ordinance. In several states, the rights granted to adopted children did not extend to property inheritance. In NSW, SA, Tasmania and WA, adopted children were not considered next-of-kin with respect to inheritance rights in cases where an adoptive parent died intestate (that is, without having made a will). However, in these states, children retained next-of-kin status if their natural parents died intestate.[5]

6.11 In the ACT, NT and Queensland, the legal situation was essentially the reverse. Adopted children were considered next-of-kin to their adoptive parents, but could not inherit property if *a relative* of their adoptive parents died intestate. In a complementary manner, adopted children could not inherit property from intestate natural parents, but could do so if a relative of their natural parents died without making a will.[6]

6.12 The effect of the Victorian legislation on property rights was different from all other jurisdictions. It completely extinguished the legal relationship between the adopted child and his or her natural parents.[7] Thus next-of-kin rules applied as if the adopted child were the natural child of his or her natural parents. The only specified caveat was that property rights were not affected in instances when a person had died intestate before the enactment of the legislation.[8]

6.13 The issue of property inheritance was important because prior to the introduction of adoption law, it was assumed that only natural children could automatically inherit property from relatives who died intestate. Victoria, and to some

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4 *Adoption of Children Act 1935 (Qld),* ss. 8(1).

5 However, it is difficult to contemplate many situations in which adopted persons would have actually inherited property from an intestate natural parent, especially if the adopted person was unaware of the identity of his or her natural parents.

6 For example, *Adoption of Children Ordinance 1938 (Cth),* s. 2.

7 The only specified caveat is that property rights are not affected where a person has died intestate before the enactment of the legislation.

8 *Adoption of Children Act (Vic),* ss. 8(1)(d).

extent the ACT, NT and Queensland, had also taken the first step towards addressing issues such as what they considered 'the interests of the child', and effecting a 'clean break' between the natural parents and child. These issues were to arise in discussions about model adoption legislation in the 1960s, as states sought to harmonise provisions including those relating to inheritance.

Model adoption legislation

6.14 Adoption acts and ordinances, originating in the early 20th century, varied significantly between the jurisdictions. This section addresses the key drivers for the development of model legislation in the 1960s. The most important issue, as brought to the attention of the Commonwealth, was the recognition of adoption arrangements between the states and territories, and internationally.

Impetus for the development of model legislation

6.15 While this section addresses the impetus for change to adoption legislation during the 1960s, this is not to say that adoption laws and ordinances were static between their original implementation and the 1960s. In fact, quite the opposite was true in most jurisdictions. As an example, the initial *Adoption of Children Act (Vic)* was implemented in 1928, and later changed (either replaced or amended) in 1936, 1942, 1953, 1954, 1955 and 1958. However, the changes to state and territory adoption legislation that took place between 1964–68 were the most significant up to that point because:

- Similar changes were made across all the jurisdictions, based on model legislation that was developed following discussions between the states and the Commonwealth;
- Each jurisdiction amended its legislation or enacted new legislation at the same time, between 1964 (Victoria) and 1968 (Tasmania); and
- The changes were substantial, with an emphasis on the welfare of the child rather than the legal rights of the parent.[9]

6.16 There are many difficulties that arise when looking back in 2012 at the reasons for the development of model adoption legislation in the early 1960s. Many key players are no longer living. The archival records are fragmented and incomplete. The records that do exist contain only glimpses of the views and intentions of legislators and bureaucrats of the time. Records surviving from the Attorney-General's Department files provide an indication of the Department's advice, but not always the official government position. Many of the institutions involved in childbirth and adoption have closed, and many records no longer exist.

9 Professor David Hambly, 'Adoption of Children: An Appraisal of the Uniform Acts', *Australian Law Review*, vol. 281 (1967–68), p. 283.

6.17 However, it is clear that the key issues driving the development of model adoption legislation were related to the recognition of adoption arrangements between:

- Australian states and territories; and
- Australian jurisdictions and overseas.

6.18 First, legislators wanted to facilitate legal recognition of adoption arrangements between the states and territories of Australia. This included related issues such as the desire to enable parents to adopt a child who was living in a different state. In addition, adoption law at the time did not contemplate legal recognition of adoption orders made overseas, or the adoption of a child living overseas by Australian parents. Once it was agreed that recognition of adoptions made in other jurisdictions would be advantageous, it followed that similarity (or uniformity) of state and territory legislation would make sense:

> One of the principle drivers for the development of the model laws, it appears from the files, was that the rules of private international law at that stage did not include any ability for adoptions conducted overseas to be recognised in Australia. In addition, because of the way adoptions were conducted, there were problems with recognition across jurisdictions within Australia. So it was considered at that time that it was important to deal with the effect of an adoption order both overseas and in Australia and to legislate for that, at the same time recognising…that developing some kind of uniformity in the legislation would be desirable.[10]

6.19 As the impetus for the development of model adoption legislation was the legal issue of recognition, this section is primarily a discussion of the legal issues and formal processes. Debate between the states that took place about the social welfare aspects of adoption is described in Chapter 7.

6.20 In the early part of the twentieth century, there were fewer coordination mechanisms between the states and territories than there are today. Organisations such as the Council of Australian Governments were non-existent, and long-distance travel and communication were much more difficult. Original adoption legislation did not contemplate the recognition of interstate adoptions, however a lack of such provisions was not unusual. Provisions to recognise interstate arrangements of other kinds rarely appeared in other legislation of the period either.

Early coordination on adoption legislation: transmission of documents

6.21 The first steps taken by the states towards model adoption legislation were amendments made to some state adoption acts in the early 1940s. The amendments provided for the transmission of adoption orders when a child was adopted in a state other than his or her state of birth. Therefore, the state where the child was born could note the adoption on its registry of births, deaths and marriages.

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10 Ms Kerri-Ann Smith, Attorney-General's Department, *Committee Hansard*, 28 September 2011, p. 3.

6.22 The committee understands that the first instance of such a change appeared in a set of 1940 amendments to the *Adoption of Children Ordinance 1938 (Cth).* One of the newly-inserted paragraphs allowed the Minister to make arrangements with Ministers of other states and territories about the exchange of adoption orders for registration when either a child was born in the ACT and adopted interstate or vice-versa.[11] In response to this insertion, the Secretary to the WA Registrar-General wrote to the Commonwealth Registrar-General in March 1940 to ask if it was 'the intention' that the Minister would be making arrangements of this type.[12]

6.23 A response was sent from the Commonwealth Department of the Interior, advising that:

> The question of making reciprocal arrangements with the state authorities for the transmission and reception of copies of adoption orders is receiving consideration.[13]

6.24 The consideration of reciprocal arrangements culminated in a letter from the Prime Minister to all State Premiers sent on 27 December 1940.[14] The letter formally advised premiers of the provisions relating to reciprocal arrangements, and requested:

> I should be glad if your Government would reciprocate by making arrangements for the transmission to the Minister for the Interior in Canberra of a copy of any adoption order concerning a child born in the Territory and adopted under the law of your State, and for reception from the Minister for the Interior of a copy of any adoption order concerning a child born in your State and adopted under the Adoption of Children Ordinance 1938–40.[15]

6.25 A positive reply from WA indicated that it had made the necessary arrangements and later supplied details of a child born in Canberra who had been adopted in WA.[16] However, the replies from SA, Tasmania, and Victoria indicated

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11 *Adoption of Children Ordinance 1938 (Cth),* ss. 7f(1).

12 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children,* letter from the WA Registrar General to the Commonwealth Registrar General, 6 March 1940, folio p. 1, digital p. 96.

13 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children,* letter from Commonwealth Registrar General to WA Registrar-General, 26 September 1940, digital p. 93.

14 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children,* letter from Prime Minister to premiers in all states, 27 December 1940, digital p. 74.

15 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children,* letter from Prime Minister to premiers in all states, 27 December 1940, digital p. 74.

16 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children,* letter from WA Premier to Prime Minister, 10 February 1941, digital p. 69.

that there was no provision in their legislation that allowed them to transmit and receive adoption orders.[17]

6.26 The reply from Tasmania indicated that it would make provision for such arrangements when it next amended its own adoption legislation.[18] Victoria suggested that it would be useful to extend such arrangements to children born in any state or territory and adopted in any another state or territory.[19] South Australia's reply raised the wider issue of the lack of recognition of interstate adoption arrangements more generally:

> This seems an opportune time to direct attention to the fact that adoption orders of different States have no binding effect outside those States, and that some form of reciprocal legislation or Commonwealth legislation seems to be justified so that uniformity of registration can be effective, and so the child and the adopting parents concerned can be afforded the privileges the law intended.[20]

6.27 Prime Minister the Hon. John Curtin responded, indicating that while it would be 'desirable' for adoption orders to be recognised throughout the Commonwealth, the constitution did not permit the Commonwealth to enact adoption legislation effective in the states:

> [T]he extension of the effect of adoption orders is a matter for action by the States and that the Commonwealth powers can be exercised only in respect of Territories of the Commonwealth and not generally.[21]

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17 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children:* letter from SA Premier Playford to Secretary, Department of the Interior, 11 March 1941, digital p. 66; letter from Victorian Acting Premier Lind to Prime Minister, 12 February 1941, digital p. 71; letter from Tas Premier Cosgrove to Prime Minister, 23 January 1941, digital p. 72.

18 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from Tasmanian Premier Cosgrove to Prime Minister, 23 January 1941, digital p. 72. Later in the same file, a subsequent letter from the Tasmanian Premier indicated that Tasmania could actually make such arrangements by amending its adoption regulations (letter from Premier Cosgrove to Prime Minister, 7 July 1941, digital p. 52.).

19 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from Victorian Acting Premier Lind to Prime Minister, 12 February 1941, digital p. 71.

20 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from SA Premier Playford to Secretary, Department of the Interior, 11 March 1941, digital p. 66.

21 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from Prime Minister to SA Premier, 2 January 1942, folio p. 89.

6.28 Further, the issue appears not to have been widely discussed amongst Commonwealth Ministers. An internal minute from the Department of the Interior noted that:

> the Minister has not yet been informed of the proposal to ask each of the States to introduce legislation to provide for registration of adoption orders.[22]

6.29 Despite a lack of progress on uniform adoption legislation, some states did make amendments to their acts or change their regulations in order to facilitate the transmission of adoption orders to the state of the child's birth (where the child was born interstate). The Acting Premier of Queensland forwarded a copy of its amendment in June 1941 and added:

> I am communicating with the other State Governments with a view to uniform legislation being enacted in this respect.[23]

6.30 Similar provisions were added to NSW legislation (1941), in Victoria (1942), and the Tasmanian rules (1941). While South Australia wrote indicating it would consider such legislation in the next session of parliament, it is not apparent that such legislation passed.[24] At this point, Northern Territory did not yet have an adoption ordinance, and arrangements had already been made in Western Australia.

Early problems with lack of recognition of interstate adoption orders

6.31 The above amendments contemplated that children born in one state, say, State A, might move to another state, State B, and be adopted in State B. However, this could only take place if the child was already living in State B before the adoption order was made. It was not possible for parents in State B to apply directly to State A to adopt a child.

6.32 The Attorney-General's Department had received letters from ACT residents who wished to adopt children living in NSW. It appears there were more prospective adopters living in the ACT than there were children born in the ACT to parents who wished them to be adopted.

6.33 Correspondence on the topic between the Attorney-General and the NSW Child Welfare Department seems to have been somewhat interlinked with

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22 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, Department of the Interior Brief to the Assistant Secretary, Civic Administration, Adoption of Children Ordinance 1938–40—Adoption Orders, 22 December 1941, digital p. 32.

23 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from Queensland Acting Premier to AGD, 18 June 1941, digital p. 55.

24 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from SA Premier Playford to Prime Minister, 14 January 1942, digital p. 21.

correspondence about provisions permitting the transmission of adoption orders. However, as an officer noted, this did not assist ACT parents wishing to adopt children from NSW:

> It seems to me that the proposed amending Ordinance and the proposed agreement only provide for the transmission and recording of adoption orders...have no bearing on the more important requirement that residents of the Territory may legally adopt children domiciled in New South Wales.[25]

6.34 A subsequent series of communications between the Commonwealth Attorney-General's Department (AGD), Commonwealth Department of the Interior, and NSW Child Welfare Department, confirm that NSW was considering the issue but do not indicate significant progress.[26] At one point, the Attorney-General's Department noted that the Director of Child Welfare NSW required a report on the suitability of adoptive parents before an order was made. He suggested that a NSW inspector of the Child Welfare Department, when visiting an area of the state close to the ACT, could detour into the Territory to assess prospective adoptive parents.[27]

6.35 AGD considered that it was NSW, not Commonwealth legislation, that needed amending, as per a Department of the Interior internal brief from 12 November 1943:

> [T]he Attorney-General's Department advised on the 10th December 1941, that there is no provision in the Constitution [under] which the Commonwealth Parliament can legislate with respect to adoption...

6.36 The committee found no further record of communication on the issue until the question of uniform adoption legislation was raised in a letter sent to the Prime Minister by the Country Women's Association Council of Queensland.

Early problems with disparity in adoption legislation across Australia

6.37 On 17 August 1944, the Country Women's Association Council of Queensland wrote to the Prime Minister, suggesting that adoption legislation be made uniform across the states and territories. The letter notes disparities between state

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25 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, brief from AGD Secretary Knowles to Secretary, Department of the Interior, 26 August 1941, digital p. 47, brief from NSW Director of Child Welfare to the (Commonwealth) Department of the Interior, 12 November 1943, digital p. 11.

26 For example, see NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from the Registrar-General to NSW the Director, Child Welfare Department, 24 September 1941, digital pp 45, 47.

27 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from AGD Secretary Knowles to Secretary of the Department of the Interior, 15 June 1942, digital p. 16.

legislation relating to what authority makes adoption orders, what the succession rights of the child become, and what records are kept and transmitted.[28]

6.38 The Prime Minister's Department referred the letter to the Department of the Interior, which then replied indicating its support for the CWA proposal in light of continued difficulties for prospective adoptive parents in the ACT:

> The difficulties mentioned in Mrs. Palmer's letter have been experienced in relation to the Australian Capital Territory due to conditions in legislation of certain States which is apparently incompatible with the adoption of children from such States by persons domiciled elsewhere.
>
> Steps were taken to include provisions in the law of the Australian Capital Territory whereby the Minister could make mutually satisfactory arrangements with the States in respect to the transmission and registration of adoption orders but it is found that this procedure does not go far enough as amendments to State legislation would be necessary to admit full reciprocity and reasonably simple administrative machinery for handling the cases that may arise.
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> In these circumstances it is the view of this Department that the suggestion made by the Country Women's Association Council of Queensland is a good one and that an attempt should be made to secure the maximum degree of uniformity possible throughout the Commonwealth in relation to this question including simple provisions for dealing with cases where the adopter or adopters and the children have a different domicile.
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> It is suggested that State Governments be invited to agree to this matter being considered at a conference of Commonwealth and State Ministers with the object of ascertaining whether it would be practicable for agreement to be reached in respect to the law on this subject including provisions for reciprocity and convenient machinery for administrative action.[29]

6.39 It appears that this advice was taken, as the Tasmanian and NSW premiers sent acknowledgements of notice that the issue was to be raised at the next meeting of Commonwealth and State ministers.[30]

6.40 However, the file is thus concluded, and no further detail is available about any 'meeting of Commonwealth of State Ministers'. The next mention of this issue

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28 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from Sgd Leila Palmer, State President, Qld Country Women's Association, to the Hon. John Curtin, Prime Minister, 17 August 1944, digital p. 6.

29 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, Department of the Interior Memorandum to the Secretary, Prime Minister's Department, digital p. 4.

30 NAA, A431/1 1949/1537, *Country Women's Association, Queensland. Uniformity in Australian Laws for the Adoption of Children*, letter from Tas Premier Cosgrove to Prime Minister, 14 November 1944, digital p. 3; letter on behalf of NSW Premier to Deputy Prime Minister, 22 November 1944, digital p. 2.

appears in a 1958–59 AGD file. However, in the meantime, several notable, and in one case widely publicised, adoption cases were brought to courts.

Adoption cases

6.41 Perhaps the most widely-publicised adoption case of the period was *Mace v Murray (1955).*[31] Miss Murray was a single mother who initially signed consent to adoption shortly after her son was born, but later withdrew her consent and sought custody of her son. Mr and Mrs Mace were prospective adopters with whom Miss Murray's son had been placed prior to an adoption order being made. After a lengthy legal process culminating in an appeal to the High Court, Mr and Mrs Mace were eventually granted the custody of the child on the basis that Miss Murray's consent could lawfully be dispensed with.[32]

6.42 The case of *Mace v Murray* is significant for a number of reasons. In the first instance, it attracted significant and nationwide publicity. The complex and lengthy legal battle between Miss Murray and Mr and Mrs Mace was reported in major newspapers across Australia and both raised and contributed to public awareness about adoption. This press coverage and related commentary demonstrated polar views about the rights of mothers, children and adopters, as well as exposing limitations of contemporary adoption legislation and practice. The most significant limitation was the failure of adoption legislation to adequately address a situation in which a mother revoked her consent to adoption after the child had already been placed with the prospective adopters. This issue is discussed further in Chapter 7.

6.43 *Mace v Murray* exposed a problem with an aspect of NSW adoption legislation. Such a problem could have been solved in NSW by an amendment to that state's legislation, without any action in other jurisdictions. However, consent provisions were very similar across jurisdictions—except in Victoria—and it is very likely that the case affected the administration of adoptions across Australia. While adoption numbers had been climbing until 1955, there was a 12 per cent fall that year, and adoptions did not exceed pre-case levels again until 1958.

6.44 In addition, the *Mace v Murray* case appeared to cross jurisdictional boundaries, because Mrs Mace took the child to the ACT for a day in order to escape the effect of a NSW court order compelling her to return the child to Miss Murray. While model adoption legislation did not seek to, and did not, change the application of NSW court orders interstate, Mrs Mace's actions contributed to greater public awareness of jurisdictional recognition issues and of the complexity of adoption law more generally. This kind of public awareness, and the high profile nature of the case that was almost certainly brought to the attention of government ministers of the

31 *Mace v Murray (1955)* 92 CLR 370.

32 *NSW Law Report*, 'Re Murray', vol. 55, pp 88–107.

day,[33] was likely to have contributed to building momentum towards adoption law reform, and potentially, collaborative law reform through model legislation.

6.45 Another potentially significant influence on the reform process was the new Attorney-General's personal experience. Sir Garfield Barwick was elected to Parliament in December 1958 and immediately became Attorney-General in the fourth Menzies government. Barwick had been an experienced barrister and Queens Counsel when, in 1953, he represented a woman and her adopted children in an appeal before the High Court.[34] The case concerned the application of provisions of the *Child Welfare Act (NSW)* to adopted children in respect of their capacity to be beneficiaries of a will of a relative of their mother.

6.46 Barwick's client was the beneficiary of a will that allowed her to choose to establish a trust for any children she might have. After the will had been made, the woman adopted two children and, nine years later, established a trust in their favour. At that point, a trustee of the same will brought proceedings against her, claiming that the act's provisions governing inheritance should prevent her from establishing a trust for an adopted child, if that child was adopted after the will was made.

6.47 The provisions of the *Child Welfare Act (NSW)* did not allow adopted children to benefit from any will made prior to the adoption order. The court effectively had to decide which was the decisive legal event: that the woman made a decision to establish the trust *after* the adoption order, or that the will had been made *prior* to the adoption order.

6.48 The legal arguments were technical, and Barwick's client lost. The court decided the critical fact was that the will had been made prior to the adoption order. As a result, the woman's adopted children could not be made beneficiaries on the basis that the Act did not allow adopted children to benefit from a will made prior to adoption.

6.49 Barwick referred to the case during subsequent discussions with the states. His bruising encounter with this area of law may have been one motivation in advancing the review of laws, and archival evidence shows that he wanted the relevant adoption law provisions changed to avoid the result that had ensued.[35]

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33 For example, a brief to the Commonwealth Attorney-General refers to the case as 'the Mace case' without further explanation. The committee therefore assumes that AGD was familiar with the case. NAA, A432, 1961/2241 Part 1, *Uniform Adoption Legislation—material prepared for Conference,* AGD Minute paper 61/2241, 8 June 1961, folio pp 71–72.

34 *Pedley-Smith v. Pedley Smith* (1953) 88 CLR 177.

35 NAA, A432, 1961/2241 Part 1, *Uniform Adoption Legislation—Material prepared by States,* AGD Minute paper 61/2176: Uniform Adoption Legislation – powers of appointment, digital p. 355.

6.50 The details and judgement of *Bairstow v Queensland Industries Pty. Ltd. (1955),*[36] later described by an AGD officer as 'unfortunate', was filed in full on the Attorney-General's files. It provided an account of a widow who sought to claim damages when her husband was killed in a car accident. While the judge awarded damages to the widow, he found that she could not claim damages for the benefit of her adopted child because the adoption order had been made in another jurisdiction (the UK). Despite the judgement, the Insurance Commissioner subsequently made a payment of £1550 to be held in a trust for the adopted child.[37]

6.51 Again, there appears to have been no practical steps taken to address uniformity in adoption legislation, or amendments facilitating the recognition of interstate or overseas adoptions. However, the issue continued to arise.

6.52 In a later adoption case, the Victorian Solicitor-General wrote to the Attorney-General providing a copy of a recent adoption order on 17 November 1960. The adoption order was made in favour of a couple who usually lived in NSW but had travelled to Victoria and adopted a Victorian child. While the adoption order was made by the Supreme Court, the judge noted considerable difficulty due to a lack of uniform legislation or any provisions providing recognition of adoption orders between states.[38]

Continued problems arising from disparity in adoption legislation across Australia

6.53 Problems continued to arise from a lack of recognition of adoption orders across states and territories. Records indicate that the Attorney-General's Department was sent or referred at least three letters during 1958–59 from constituents in relation to problems encountered by adopting parents of children who were living in other states.[39] One reply from the Attorney-General indicated that:

> If I do ultimately conclude that the Commonwealth is unable to do anything I will consider stimulating the States into passing identical laws. This may have some promise, as the States have recently agreed upon a common form of Hire Purchase Act and are now making progress towards a common form of Companies Act.[40]

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36 *Bairstow v. Queensland Industries Pty. Ltd.* (1955) St. R.Q. 335.

37 NAA, A432 1960/2471, *Adoption of Children Ordinance ACT (1938),*Memorandum for the Under Secretary, Justice Department, 14 December 1955, folio pp 58–59.

38 NAA, A432 1966/2404 Part 1, *Uniform Adoption Legislation,* letter from Victorian Solicitor General to Attorney-General Barwick, 17 November 1960, and attached copy of Judgement of Dean, J. Delivered 22 September 1960, *Re: An Infant,* digital pp 201–209.

39 See for example, NAA, A432 1958/3087, *Possibility of Commonwealth legislation re uniform processes of adoption,* letter from a constituent to the Hon. Hugh Roberton MP, 8 April 1958, digital pp 39–40.

40 NAA, A432 1958/3087, *Possibility of Commonwealth legislation re uniform processes of adoption,* letter from Attorney-General Sir Garfield Barwick, 14 December 1959, digital p. 18.

6.54 Separately, correspondence is noted between the WA Premier's Department and Commonwealth Department of External Affairs in relation to whether or not UK adoption orders were recognised in that state. Advice from the Attorney-General's Department was again sought, with WA ultimately advised:

> The need for uniform adoption laws, including uniform rules for recognition of foreign adoptions, is growing steadily, and the Commonwealth has given some consideration to the problem. The Attorney-General authorised me to say that early in the New Year he proposes to take steps to discuss with all states the law of adoption, with a view to considering the introduction of uniform laws on this subject. The Attorney-General is of [the] opinion that the success of the uniform company law and hire purchase meetings suggests that this is the best approach to the problem.[41]

6.55 The reference of the Attorney-General to 'a common form of Companies Act' referred to discussions between state attorneys-general at conferences of the Standing Committee of Attorneys-General. It is very likely that the advice sent to WA about the Attorney-General discussing adoption law with the states was also envisaged to take place at a conference of the committee. The emergence of this committee was one of the reasons that the development of model legislation emerged in the early 1960s, rather than in the 1940s when first suggested. The Standing Committee of Attorneys-General provided an effective mechanism for state attorneys-general to meet and debate issues of legislation.

First steps towards harmonisation of legislation: Standing Committee of Attorneys-General

6.56 Following a recommendation of the 1958 *Report from the Joint Committee on Constitutional Review*, conferences of the Commonwealth and State Ministers of Attorneys-General were held regularly between 1959 and early 1961 to consider and develop uniform company legislation.

6.57 The successful passage of the uniform company legislation in 1961–62 in the jurisdictions was the first major achievement of what became known as the Standing Committee of Attorneys-General (SCAG) in August 1961:

> There is a standing committee of Attorneys-General of the States and of the Commonwealth which, as I understand it, was given some form of regularity by the Attorney-General (Sir Garfield Barwick). Previously the committee had conducted ad hoc meetings somewhat irregularly. The purpose of that committee has been to achieve uniformity of State legislation on a variety of matters on which the Commonwealth itself could

41 NAA, A432 1958/3087, *Possibility of Commonwealth legislation re uniform processes of adoption*, 20 September 1960, digital p. 7.

> not act, or thought it could not act. An instance of such a matter was the uniform companies legislation.[42]

6.58 The committee, known as SCAG until September 2011, 'successfully developed uniform and model laws to reduce jurisdictional difference and create national systems.'[43]

6.59 It is clear that the Attorney-General considered that SCAG was the most effective mechanism to discuss uniform legislation. Writing in relation to the process in 1962, Sir Garfield Barwick noted:

> I have always considered that the co-ordination of the work necessary to prepare a draft model law of adoption is a matter which is peculiarly one that can best be done by the Standing Committee of Commonwealth and State Attorneys-General. In this regard, I would point out that it was in my capacity as Attorney-General for the Commonwealth that I had brought to my notice quite a number of matters that underlined the necessity for a uniform law of adoption, and also it was in that capacity that I took the initiative in having work commenced on this project.[44]

6.60 A later memorandum designed to brief the then new Attorney-General Sir William (Billy) Snedden on work to date on uniform adoption legislation, reiterates the message that Australian adoption law as it stood in the early sixties did not effectively coalesce with that in overseas jurisdictions:

> The rules of private international law relating to the recognition of foreign adoption orders are unsatisfactory, and have caused uncertainty in the recognition in Australia of adoptions overseas. The need to have up-to-date, uniform recognition rules prompted your predecessor to suggest to the States that an attempt be made to achieve uniformity in the whole field of adoption.[45]

6.61 It appears that the combination of the mechanism of SCAG and the continued problems arising from a lack of recognition between the adoption laws of the states and territories prompted the Attorney-General to decide to take action in late 1960.

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42 Sir William (Billy) Sneddon MP, *House of Representatives Hansard*, 19 April 1963, p. 792.

43 It is now called the *Standing Council on Law and Justice* (SCLJ). Attorney-General's Department, *Standing Council on Law and Justice*, http://www.scag.gov.au/ October 2011, (accessed 14 January 2012).

44 NAA, A432 1966/2404 Part 2, *Uniform Adoption Legislation,* letter from Attorney-General Barwick to Qld Minister for State Children Dr Noble, 9 November 1942, folio p. 12, digital p. 69.

45 NAA, A432, 1966/2404 Part 3, *Uniform Adoption Legislation,* AGD Minute Paper 60/2474, Uniform Adoption Legislation, to then new Attorney-General Sir William (Billy) Snedden, 17 March 1964, folio pp –138, digital pp 7–10.

Agreement to develop a model adoption bill

6.62 On 13 December 1960, the Attorney-General suggested to the then Prime Minister (Sir Robert Menzies) that he write to the states with a view to advancing the issue:

> I am minded to propose to the States a conference of Ministers to be followed by conferences of officers to seek a common form of adoption legislation... [46]

6.63 The Prime Minister agreed, and on 22 December 1960, letters were sent to premiers to seek their response to such a proposal. The letter explained that the Attorney-General had 'in mind for some time' the question of a model adoption bill, and that with the agreement of each Premier, the Commonwealth Attorney-General would pursue the matter with the states' attorneys-general:

> Matters at present in mind as suitable for inclusion in a model Bill are the process of adoption, the basis of jurisdiction of courts to make and rescind adoption orders, the status of an adoption order on legal relationships between the natural parents and their child when adopted, the effect of rescission of adoption orders, the recognition throughout Australia of adoptions made in any part of it, the recognition in Australia of foreign adoption orders both local and foreign; and the relationship between adoption and birth registrations. Other ancillary matters will, no doubt, suggest themselves.[47]

6.64 The states replied indicating their agreement with the proposal—although WA noted that it was not committing itself to enacting a uniform bill[48]—and a meeting of Attorneys-General was organised for 29 March 1961.

Commonwealth role

6.65 The Commonwealth, under section 51 of Australia's Constitution, has no legislative power to enact or enforce adoption legislation. Adoption legislation is the responsibility of the states, unless the states choose to refer it to the Commonwealth

46 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, letter from Attorney-General Barwick to Prime Minister Menzies, 13 December 1960, folio p. 50, digital p. 198.

47 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, letter to Prime Minister to all premiers, 22 December 1960, folio p. 53, digital p. 194.

48 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, letter from WA Acting Premier to Prime Minister Menzies, 8 February 1961, digital p. 172.

under section 51 (xxxvii), which they have not done at any point.[49] The Commonwealth was aware of its lack of legislative power with respect to adoption both prior to, and throughout the development of, model adoption legislation. As discussed above, Prime Minister John Curtin indicated to the SA Premier in 1942 that the Commonwealth could not legislate on adoption.[50] This position is repeated in numerous memoranda and briefs in the 1940s, 1950s and 1960s in AGD files.[51] The Commonwealth was well aware that it could not compel the states to develop or enact model adoption legislation.

6.66 However, the Commonwealth did play two main roles with respect to the development of model adoption legislation. The first was the coordination of meetings and correspondence about provisions of model adoption legislation. This coordination was undertaken by the AGD, acting as what would now be considered the 'secretariat' for SCAG. AGD briefed the Attorney-General on many of the legal aspects of the model legislation drafting process, and some of the legal problems that had arisen due to the lack of uniformity of state laws. In the 1960s, as is the case now, the portfolio of the Attorney-General related to law and justice. There is no presupposition that the Department had any expertise on, or provided direction in relation to, the principles behind adoption legislation.

6.67 The other role of the Commonwealth was the responsibility for the administration of the ACT, the NT and other Commonwealth territories. It appears that adoption took place on a very small scale in these territories; when AGD sought to obtain statistics on adoptions from the states it did not seek, nor was supplied with, such data from the Minister for Territories. Prior to self-government, laws of NSW applied in the ACT, but the Commonwealth could make ordinances for the territories that were then administered by the Minister for Territories under section 122 of the Constitution. In the ACT, the Department of the Interior also played an administrative role.[52] The Minister for Territories provided feedback only on the legal technicalities

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49 At the first meeting of Child Welfare Directors in May 1961, the secretary of AGD noted that the Commonwealth Attorney-General was prepared to introduce Commonwealth legislation on adoption if the states wanted, i.e., if the states wished to refer their power to do so. However, Directors considered that their own systems and legislation were preferable, and were willing to seek points of agreement for the purpose of amending their own acts. NAA, A432 1961/2241, *Uniform Adoption Legislation—Material prepared by States*, Uniform Adoption Legislation: Interstate Conference held at Sydney, New South Wales from 29th to 31st May 1961, folio p. 178, digital p. 44.

50 NAA, A431 1949/1537, *Possibility of Commonwealth legislation re uniform processes of adoption*, letter from Prime Minister to SA Premier, 2 January 1942, folio p. 89.

51 For example, see NAA, A432 1958/3087, *Possibility of Commonwealth legislation re uniform processes of adoption*, letter from Attorney-General Barwick to Mrs Power, 15 September 1960, digital p. 8.

52 According to an Administrative Arrangements Order dated 16 February 1962, the Department of the Interior administered the Seat of Government (Administration) Act 1910 and associated legislation relating to the ACT while the Department of Territories administered the NT legislation as well as legislation for the external territories.

of the model bill, but did not have the capacity to provide comment on any other substantial issues relating to adoption arrangements.

Commonwealth coordination; state input

6.68 AGD provided a range of secretariat and coordination services during the development of model legislation. It organised meetings of Ministers and officers.[53] It arranged accommodation for officers coming to Canberra.[54] It sent updates to officers who were absent.[55] AGD prepared draft minutes of these meetings and circulated them. It sent draft versions of the model bill to the states for comment.[56] This section provides examples of these types of activities to illustrate the process of the development of model legislation.

6.69 At the SCAG meeting of 29 March 1961, the states decided to pursue the development of model legislation, and to discuss the issue again at the next meeting on 16 June 1961. In the interim, it was suggested that meetings of child welfare officers should be arranged to debate the social welfare aspects of the bill.[57] In addition, it was later decided that Child Welfare Ministers should be invited to attend the June SCAG discussions on the issue.[58] Due to Chair responsibilities, the Victorian Attorney-General Mr Rylah invited Child Welfare Ministers to attend or send a representative to the June SCAG meeting. [59]

6.70 AGD sought and circulated meeting papers prior to the first meeting of child welfare officers on 29/30 May 1961. On 2 May, AGD circulated a paper from the retiring New South Wales Director of Child Welfare, Mr R.H. Hicks. States were

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53 For example, NAA, A432, 1966/2404 Part 3, *Uniform Adoption Legislation:* letter from AGD Secretary Yuill to Vic Assistant Parliamentary Draftsman and those with equivalent responsibilities in NSW, SA, Qld, WA and Tas, 21 November 1963, digital pp 305–06.

54 For example, NAA, A432, 1961/2241 Part 1, *Uniform Adoption Legislation—Material prepared by States*, letter from WA Child Welfare Department to Secretary Yuill, folio p. 87, digital p. 147.

55 For example, NAA, A432, 1966/2404 Part 3, *Uniform Adoption Legislation*: letter from AGD to WA, digital p. 218; NAA, A432, 1961/2241 Part 1, *Uniform Adoption Legislation - Material prepared by States*, letter from AGD to Qld, folio p. 124, digital p. 103.

56 See for example, NAA, A432, 1961/2241 Part 3, *Uniform Adoption Legislation*, letter from Qld Private Secretary, Office of the Minister for Justice to Attorney-General Barwick, 27 December 1962, folio p. 57, digital p. 167.

57 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation,* Memorandum for Secretary, Department of Territories from AGD Secretary Yuill, 19 May 1961, folio p. 96, digital p. 116.

58 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation,* Memorandum for Secretary, Department of Territories from AGD Secretary Yuill, 7 June 1961, folio p. 107, digital p. 103.

59 NAA, A432, 1961/2241 Part 1, *Uniform Adoption Legislation - Material prepared by States*, letter from Vic Attorney-General Rylah to Qld Minister for Health and Home Affairs, folio p. 54, digital p. 187.

invited to respond or prepare their own similar papers, and many did.[60] Following, AGD again wrote to the states requesting statistics and responses to a short list of questions.[61] AGD also circulated a detailed questionnaire.

6.71 The 29/30 May meeting was attended by child welfare officers from the states—with the exception of Queensland—and one representative from the NSW AGD. Commonwealth representatives were Mr Gordon Yuill, Secretary, AGD, and Mr L Harvey, Marriage Guidance Officer, AGD.[62] Mr Yuille, acting as Chair of the meeting, noted to the Attorney-General in a brief:

> As I felt I was not in a position to contribute authoritatively to the discussions on social welfare policy, I also acted as secretary to the meeting.[63]

6.72 It should be noted that AGD, acting as secretariat to SCAG, was also coordinating discussions on a range of other issues apart from adoption legislation. For example, much of the planning of the model adoption bill took place in 1961. SCAG met six times throughout that year. Minutes show that two of these were devoted to discussions on uniform company legislation, and one to discussions on trade practices legislation.[64] Adoption matters were mentioned for a few minutes at

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60 For example, see NAA, A432, 1961/2241 Part 1, *Uniform Adoption Legislation—Material prepared by States*, letter from AGD Secretary Yuill to Secretary, Children's Welfare Department, 2 May 1961, folio p. 26, digital p. 225. For state responses, see letter from Secretary, SA Children's Welfare and Public Relief Department to AGD Secretary Yuill, 19 May 1961, folio p. 93, digital p. 141.

61 See for example, NAA, A432, 1961/2241 Part 1, *Uniform Adoption Legislation— Material prepared by States*, letter from AGD Yuill to WA Child Welfare Department, 12 May 1961, digital pp 215–216.

62 NAA, A432 1961/2241 Part 1, *Uniform Adoption Legislation—Material prepared by States*, draft Report of the Officers' Conference on the Social Welfare Aspects of Adoption, 8 June 1961, folio p. 150. Mr Harvey was a psychologist employed by AGD to develop standards for organisations providing marriage counselling under the Marriage Act 1961. (Rosemary McDonald and Peg Pearsall, 1996, The Australian Association of Marriage and Family Counsellors: Twenty years on. *Journal of Family Studies* 2(2), p 107). While a draft note on adoption apparently written by Mr Harvey appears on file (NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, digital p. 24), there is no evidence this draft note was ever distributed. There is also no evidence Mr Harvey contributed to any debate on child welfare aspects of adoption.

63 NAA, A432 1961/2241 Part 1, *Uniform Adoption Legislation—Material prepared by States*, AGD Minute Paper ref 61/2241, 'Uniform Adoption Legislation', 8 June 1961, folio p. 153.

64 Minutes of the Conference of the Standing Committee of Commonwealth and State Ministers upon Uniform Company Legislation. Hobart 15–16 February 1961; Minutes of the Meeting of the Standing Committee of Attorneys-General of the States and the Commonwealth, Sydney, 10 November 1961; Minutes of the Meeting of the Standing Committee of Attorneys-General of the States and the Commonwealth, Melbourne, 11 August 1961.

the July and September meetings.[65] Only at the June meeting were provisions of a model adoption bill discussed in detail. This discussion lasted between 11.00am and 12.45pm, while other agenda items included: company law, hire purchase law, interstate enforcement of fines and operation of service and execution of process, a proposed uniform maintenance bill, a business names bill, and control of take-over efforts.[66]

6.73 It appears from the SCAG minutes that discussions on a model adoption bill occupied much less of the attorneys-generals' time in 1961 than issues such as company legislation; total discussion on adoption comprised less than two hours of SCAG's time over the year.

Coordination challenges

6.74 The development of model legislation was at times a difficult exercise. AGD tried to ensure that the process ran as smoothly as possible.[67] Such challenges were also recognised by the Victorian Attorney-General:

> One of the problems in relation to interstate co-operation is the delay that is inevitable when seven groups, separated by many thousands of miles, have to agree and I am anxious that the delay should be kept to a minimum.[68]

6.75 Despite such goodwill, each state and territory did have its own systems and processes, and unanimous agreement on adoption was difficult to obtain. For example, a brief to the Attorney-General of 8 June 1961 noted that:

> Unfortunately, a lot of this [time] will doubtless be taken up in discussions with the Queensland people, whose attitude seems to be that their legislation has worked well since 1935 and no changes are necessary or even desirable.[69]

6.76 This view appeared to be consistent with that held by the Queensland Minister. A letter from the Queensland Assistant Parliamentary Draftsman to Mr Yuille, dated 14 December 1962, notes that:

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65 Minutes of the Conference of the Standing Committee of Commonwealth and State Ministers to Consider Uniform Law Proposals, Canberra, 27 July 1961; Minutes of the Meeting of the Standing Committee of Attorneys-General of the States and the Commonwealth, Adelaide, 14th to 15th September 1961.

66 Minutes of the Conference of the Standing Committee of Commonwealth and State Ministers to Consider Uniform Law Proposals, Brisbane, 16 June 1961.

67 NAA, A432, 1966/2404 Part 2, *Uniform Adoption Legislation*, Brief from Principal Legal Officer Yuill to Solicitor–General, 4 April 1963, folio p. 32, digital p. 347.

68 NAA, A432, 1966/2404 Part 2, *Uniform Adoption Legislation*, letter from Vic Attorney-General to Qld Minister for Home and Health Affairs, 2 November 1962, folio p. 24, digital p. 356.

69 NAA, A432 1961/2241 Part 1, *Uniform Adoption Legislation—Material prepared by the States*, AGD Minute Paper 61/2241, 8 June 1961, folio p. 152.

> [O]ur Queensland [adoption] system is so different from the antiquated systems in other States that all our Minister does whenever he reads any of your communications on adoption is shudder.[70]

Communication with non-government stakeholders

6.77 When it became known that model adoption legislation was being developed, some stakeholders chose to send correspondence to AGD. (It is likely that more correspondence was forwarded to state governments, but this would be kept in state archives and was not viewed by the committee). Some of these documents were circulated to the states for comment. For example, the Law Society of Western Australia wrote in June 1961 providing its position on uniform adoption law provisions. It appears this, and similar documents, were circulated through the Commonwealth to the other state stakeholders.[71]

6.78 Other correspondents were referred to the states. For example, the Women Justices Association of WA wrote to AGD requesting a copy of the draft bill. The response from AGD reiterated its role as a coordinating body rather than a legislating body:

> Adoption of children is not a subject upon which the Commonwealth Parliament has power to legislate. The Commonwealth and the States have joined together in preparing a model Adoption Bill, which it is hoped will be introduced in each State and Territory of the Commonwealth. The Bill has not yet been finally settled, but it is hoped that the drafting will be completed shortly.
>
> Copies of the model Bill will be distributed to each State and you should make your request for a copy of the Bill to the Western Australian Government.[72]

6.79 However, AGD did communicate directly with national organisations, such as the Australian Council of Social Services:

> Publicity was given to the proposal for this uniform legislation, and representations were made by a number of welfare organisations, as well as by the Australian Council of Social Services...incorporating the recommendations of eight named member organisations of the Council...[73]

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70 NAA, A432, 1961/2241 Part 2, *Uniform Adoption Legislation—Material prepared for Conference*, letter from Qld Assistant Parliamentary Draftsman to AGD Secretary Yuill, 14 December 1961, folio p. 280.

71 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, letter from WA Law Society to the Secretary, Law Council of Australia, 26 June 1961, digital pp 20–23.

72 NAA, A432, 1966/2404 Part 2, *Uniform Adoption Legislation*, letter from AGD to WA Women Justices Association, 4 March 1963, folio p. 29, digital p. 350.

73 NAA, A432, 1966/2404 Part 3, *Uniform Adoption Legislation*, AGD Minute Paper 60/2474, 17 March 1964, folio pp 138–141, digital pp 349–350.

6.80 The Council, on behalf of its eight member organisations, sent AGD its comments on the issue of uniform adoption legislation on 6 November 1963.[74] AGD responded in 1964, noting that:

> [W]ith one major exception [role of agencies], the model Bill incorporates the principles that had unanimous or majority support among the Council's member organisations.[75]

6.81 This did not please ACOSS, which wrote to complain,[76] but no further correspondence on the issue appears to have been sent by AGD.

Drafting

6.82 Responsibility for drafting the model bill was originally vested by SCAG in the NSW Parliamentary Draftsman, Mr H. Rossiter. However, records indicate that Mr Rossiter's responsibilities increased to the extent that he told AGD that he was unable to continue drafting unless expressly directed by his Minister, the NSW Attorney-General.[77] It was subsequently decided that the Commonwealth Parliamentary Draftsman would take over from where Mr Rossiter had left off, drafting the model legislation as an ordinance.[78] It is clear that this happened for the sake of expediency rather than any other consideration.

Advice to the Commonwealth Attorney-General

6.83 As a member of SCAG, the Commonwealth Attorney-General was briefed on the issue of uniform adoption legislation by his department. AGD briefs focus on the key issues for the attorneys-general—provisions for the recognition of interstate and overseas adoption arrangements.

6.84 In the early parts of the process, the Attorney-General considered that interstate recognition of adoption arrangements was the most pressing issue, and should be addressed before a model bill was drafted. The summary of discussion from the Ministerial Conference on Adoption, 16 June 1961, notes that the Attorney-General considered that:

> Uniform Adoption Law in Australia was too high an aim to be achieved now. He thought that such arrangements as would permit mutual

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74 NAA, A432, 1966/2404 Part 2, *Uniform Adoption Legislation*, letter from ACOSS to AGD, 6 November 1963, digital pp 317–325.

75 NAA, A432, 1966/2404 Part 3, *Uniform Adoption Legislation*, letter from Attorney-General Barwick to ACOSS Chairman Dr J.G. Hunter, 4 February 1964, folio p. 93, digital p. 62.

76 NAA, A432, 1966/2404 Part 3, *Uniform Adoption Legislation*, letter from ACOSS to AGD, 24 February 1964, folio pp 127–128, digital pp 24–25.

77 NAA, A432, 1966/2404 Part 2, *Uniform Adoption Legislation*, AGD Minute Paper from the Principal Legal Officer to the Solicitor General, 21 May 1963, folio p. 36, digital p. 343.

78 NAA, A432, 1966/2404 Part 2, *Uniform Adoption Legislation*, Brief from AGD First Assistant Secretary to Acting Parliamentary Draftsman, 25 July 1963, folio p. 57, digital p. 318.

> recognition of an adoption by all the States for legal purposes a wiser goal at present.[79]

6.85 However, by September 1961, the secretary of AGD prepared a brief that suggested:

> Presumably a uniform bill is to be drafted, for circulation and consideration, although I can find no record of any such decision being made. You might wish to raise this question during any discussions on adoption.[80]

6.86 This turn-about could have been because it appeared by this time that states had agreed, or agreed to disagree, on other aspects of the substance of the bill. Following the June SCAG meeting, Sir Kenneth Bailey, Solicitor-General,[81] wrote to Professor Zelman Cowen, then Dean of the Faculty of Law at Melbourne University, noting that 'most of the social welfare policy has been settled',[82] and requesting he comment on the matter of recognition of adoption orders overseas.[83]

6.87 Professor Cowen's subsequent advice was supported by AGD. Professor Cowen indicated that an 'insistence upon a jurisdictional requirement of the domicile of the adoptive parents and the adopted child' could in some cases "disregard practical good sense'.[84] The Secretary wrote:

> With this view I would respectfully agree. Australia being an immigrant country, the recognition problem is much greater as regards recognition of foreign adoptions in Australia, than recognition of Australian adoptions overseas. And it would seem, on the basis of jurisdictions referred to [New Zealand, England, Canada], that Australian decrees would be generally recognized, at least in the common law countries.[85]

6.88 The minute notes that such a bill should address matters of recognition of adoption orders between states, but also internationally:

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79 NAA, A432 1961/2241 Part 1, *Uniform Adoption Legislation—Material prepared by States*, Summary of Discussion at the Ministerial Conference on Adoption in Brisbane on 16th June 1961, folio p. 190, digital p. 10.

80 NAA, A432 1961/2241 Part 2, *Uniform Adoption Legislation—Material prepared for Conference*, AGD Minute Paper 60/2474, 12 September 1961, digital pp 427–434.

81 At this time the Solicitor-General was deputy to the Attorney-General.

82 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, letter from Solicitor-General to Sir Zelman Cowen, 28 June 1961, digital p. 100.

83 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, letter from Solicitor-General to Sir Zelman Cowen, 28 June 1961, digital pp 100–101.

84 NAA, A432 1961/2241 Part 2, *Uniform Adoption Legislation—Material prepared for Conference*, AGD Minute Paper 60/2474, 12 September 1961, digital pp 427–434.

85 NAA, A432 1961/2241 Part 2, *Uniform Adoption Legislation—Material prepared for Conference*, AGD Minute Paper 60/2474, 12 September 1961, digital pp 427–434.

> The principal matters outstanding are connected with recognition. Recognition is, of course, bound up with jurisdiction...
>
> All states, except possibly Victoria, appear to have tacitly accepted the recommendation of the officers that the basis of the jurisdiction of an Australian tribunal to make an adoption order should be –
>
> a) the domicile of the adoptive parents in Australia...[86]

6.89 Such a recommendation was likely to have been made to give Australian parents priority over foreign citizens, due to 'long waiting lists for children'. However, it was raised that the courts should be able to exercise discretion in relation to this matter, such to enable an 'American stationed here to adopt his own illegitimate child'.

6.90 The Attorney-General also received advice on amendment of an aspect of the provisions affecting inheritance of property. On 31 August 1962 the secretary of AGD wrote to Sir Garfield Barwick, asking if he wished the laws to be revised in such a way as to ensure no repeat of the outcome of *Pedley-Smith v Pedley-Smith*, the 1953 High Court case in which Sir Garfield Barwick had appeared as a barrister. The secretary wrote, 'I assume that you would want the law to be altered so that adopted children would automatically be included as "issue", unless the donor of the power specifically excluded adopted children from the object of the power'.[87] The Attorney-General annotated the minute to say that he wished to seek such a change. 'If the law is to be so changed,' the secretary continued, 'it should, I suggest, only [apply] to powers of appointment created after the change in the law'. Sir Garfield Barwick concurred. The model law, and in particular the law in New South Wales (the jurisdiction from which *Pedley-Smith v Pedley-Smith* originated), were changed during the model laws process in exactly this way.[88]

6.91 While this kind of advice was delivered to the Attorney-General, no corresponding advice was delivered in relation to social welfare aspects of adoption. This reflected the portfolio responsibility of the Attorney-General, that is, that his expertise was legal rather than social, and that he attended SCAG rather than any meeting of Child Welfare Ministers. Indeed, the Commonwealth had no minister for child welfare; its responsibilities in the territories were carried by quite different portfolios.

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86 NAA, A432 1961/2241 Part 1, *Uniform Adoption Legislation—Material prepared by States,* AGD Minute Paper 60/2241, Uniform Adoption Legislation, 12 September 1961, digital pp 427–234.

87 NAA, A432 1961/2241 Part 2, *Uniform Adoption Legislation*, Minute paper 61/2176: Uniform Adoption Legislation – powers of appointment, digital p. 355.

88 *Adoption of Children Ordinance 1965 (Cth),* ss. 33, 34; *Adoption of Children Act 1965 (NSW),* ss. 35, 36.

Administration of the Commonwealth territories

6.92 As the SCAG coordinating body, the AGD briefed the Minister for the Territories and the Minister for the Interior on the development of the model legislation. Its advice to the two Departments reflected AGD's legal expertise and concerns and did not extend beyond legal issues:

> This paper is intended to examine briefly four main topics, which are interconnected and are fundamental to any uniform adoption legislation. They are:-
>
> (a) the jurisdiction to make and to rescind adoption orders;
>
> (b) the nature of the status of adoption and its incidents;
>
> (c) the recognition in a State or Territory of the Commonwealth of adoption orders made:
>
> (i) in another State or Territory; or
>
> (ii) elsewhere; and
>
> (d) the effect of recognizing in a State or Territory, the adoption orders referred to in (c).
>
> This paper does not in any way deal with the child welfare aspects of adoption.[89]

6.93 However, it appears from the records that neither the Minister for the Territories nor the Department of the Interior had any practical knowledge of adoption arrangements. In the first instance, the Secretary of the Department of the Interior delegated his role as the Director of Child Welfare under the *Adoption of Children Ordinance 1938 (Cth)* to the NSW Director of Child Welfare. This had the practical effect of NSW authorities arranging ACT adoptions. This arrangement reflected the ACT's scant resources and small population.

6.94 As neither the Minister for the Interior nor the Minister for Territories had the relevant portfolio responsibility, neither was invited to participate on the SCAG nor meetings of Child Welfare Ministers. As such, it fell to the AGD to brief these ministers on the development of model adoption legislation. A draft bill from December 1963 sent to the Secretary of the Department of the Interior noted NSW's role in arranging ACT adoptions:

> You will see that it [the adoption bill] confers a number of powers and functions, in relation to this Territory, on the Director of Child Welfare. I appreciate the fact that, under section 7 of the Child Welfare Ordinance, you yourself are the Director, and I am aware that you have delegated your functions under that Ordinance to the New South Wales Director of Child Welfare. Clause 6(2) of the draft Bill would enable you, if you so wished, to make a similar delegation of your powers and functions under the Act...

89 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, draft paper from AGD Secretary to the Attorney-General, digital pp 140–148.

> ...The New South Wales Director has indicated to me in the course of informal discussions that he would be willing to prepare the application papers for applications in this Territory...
>
> I should add that the New South Wales Director of Child Welfare has taken part in the discussions on the Bill at all stages. I think I am correct in saying that he agrees generally with the contents of the Bill, with the possible exception of the inclusion of provisions relating to interim orders....[90]

6.95 While AGD sent several briefs to the Minister for the Interior in relation to the model adoption legislation,[91] that Minister appears not to have followed the issue closely. In fact, his Department prepared an amendment to the *Adoption of Children Ordinance 1932 (Cth)*, which applied to Norfolk Island, at the same time as model legislation was being developed. It appears that AGD considered this action counterproductive:

> [I]t is proposed to draft a uniform adoption of children law...
>
> I have already written to you on this subject on a number of occasions...
>
> [U]nless you consider some hardship is being caused by the deficiencies in the existing law, you may consider it desirable not to proceed with the present amendments but to await receipt of the uniform bill.[92]

6.96 A departmental brief prepared for the Attorney-General in 1964 noted that 'there is nothing in the comments received from either Department [Department of the Interior; Department of Territories] to suggest that they would wish to make any alterations to the substance of the Bill.'[93] However, in the case of the Department of the Interior, the word 'comments' is used generously. The Department's response, in its entirety, read:

> I refer to your memorandum 20th December 1963, your reference 60/2474.
>
> The draft Uniform Adoption Bill is satisfactory for the purposes of this Department. I would appreciate your advice as to further progress in this matter.[94]

6.97 The Minister for Territories was primarily concerned with the legal question of whether the model legislation would be enacted in the form of an ordinance or

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90 NAA, A432, 1966/2404 Part 3, *Uniform Adoption Legislation,* letter from AGD Secretary Yuill to Secretary of the Department of the Interior, 20 December 1963, digital pp 181–182.

91 See for example, NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, Memorandum for the Secretary, Department of the Interior, from AGD Secretary Yuill, 7 June 1961, digital p.104; NAA, A432, 1966/2404 Part 2, *Uniform Adoption Legislation*, folio p. 73, digital p. 200.

92 NAA, A432, 1966/2404 Part 1, *Uniform Adoption Legislation*, letter from AGD Secretary Yuill to the Secretary, Department of Territories, 2 August 1961, folio p. 139, digital p. 70.

93 NAA, A432, 1966/2404 p. 3.

94 NAA, A432, 1966/2404 Part 3, *Uniform Adoption Legislation*, letter from Secretary, Department of the Interior, to Secretary, Attorney-General's Department, 17 January 1964, folio p. 74, digital p. 147.

Commonwealth law.[95] The option of an ordinance was much preferred by the Minister.[96] His response to the model bill cited the Constitution in relation to lack of Commonwealth power to make laws relating to adoption, and his own ability to make ordinances 'for the peace, order and good government of the Territory'.[97] Such administrative and legal concerns were the extent of the involvement of the minister.

Conclusion

6.98 The Commonwealth's role in the process of creating uniform adoption laws in the 1960s was significant in respect of the process, but limited in regard to the content. In terms of the process, it does appear that the Commonwealth initiated a review of adoption laws, arranged for the initial exchange of information, and provided some of the drafting support. It provided little of the substance of documents that were discussed. Even though the Commonwealth had legal responsibility for ordinances governing the ACT and NT, and reform of the ACT ordinance became the vehicle for enactment of the model legislation, the Commonwealth's ministers with responsibility for the territories provided no substantive input to the content of the laws.

6.99 The Commonwealth's interest was very limited regarding the actual content of adoption legislation, seeking only to have particular issues resolved. It wanted adoptions, and documentation related to them, to be recognised between the states and territories, and it wanted overseas adoptions to be recognised in Australia. There is also evidence that the Attorney-General secured a change to how inheritance laws applied in particular circumstances. Beyond these topics, to use the words of the secretary of AGD at the time, it 'was not in a position to contribute authoritatively to the discussions on social welfare policy' and, as the next chapter shows, did not generally do so.

95 See NAA, A432, 1966/2404 Part 2, *Uniform Adoption Legislation*, Internal AGD Minute Paper 60/2474 to the Assistant Secretary, 10 October 1963, folio p. 76, digital p. 197.

96 NAA, A432 1966/2404 Part 3, *Uniform Adoption Legislation*, letter from NT Administrator to Secretary, Department of Territories, 20 December 1963, folio pp 59–60, digital pp 164–165.

97 NAA, A432 1966/2404 Part 3, *Uniform Adoption Legislation*, letter from Minister for Territories to Attorney-General, 13 February 1964, folio p. 107, digital p. 48.