

Hon Bronwyn Bishop MP
Chairman
Standing Committee on Family and Human Services
Parliament House
CANBERRA ACT 2600

12 May, 2005

Dear Ms Bishop

INQUIRY INTO ADOPTION OF CHILDREN FROM OVERSEAS.

My husband and I are resident in Tasmania and wish to adopt a child from overseas, preferably from China. We wish to adopt as young a child as possible but are restricted by the age requirements imposed by Regulation 29 of the *Tasmania Adoption Regulations 1992* in respect of the placement of children. As my husband is aged 46 years, Regulation 29(d) presently prevents the placement of a child younger than 6 years with us. That age will, of course, increase by the time it takes to attain approval and a placement. Due to our age, the Tasmanian law has determined that my husband and I have nothing to offer a child under six years that would be in the best interests of that child. The law has prescribed this in advance of our assessment for suitability to parent, or knowledge of the child that may be placed with us from China.

I understand that the *Tasmania Adoption Regulations* are currently being reviewed and to that end I have made a submission to the Department of Health and Human Services (DHHS) in Tasmania. I believe however, that the submission has specific relevance to the terms of reference of your inquiry as it addresses the inconsistencies between state and territory approval processes for overseas adoptions. The submission addresses the inconsistency between state and territory laws as they relate to age of adoptive parents and the age of child placed with them.

Whilst I acknowledge that the age of prospective adoptive parents is a factor which should be taken into account in the approval process, I do not believe an arbitrary age limit should be imposed. The primary issue should always be what is in the best interests of the child. It is significant that the Hague Convention on the Protection of Children and Co-operation in respect of Intercountry Adoption does not impose any upper age limits in respect of adoptive parents. Moreover, the *Tasmania Adoption Act 1988* does not impose any such limit (Section 22 requires a minimum age difference between a child and their adoptive parents). Similarly, the predecessor to the current regulations (the *Tasmania Adoption Regulations 1969*) did not impose any age limit. It would seem likely that Regulation 29(d) and (e) of the current regulations were made to conform with the age criteria contained in the *National Principles in Adoption*, namely:

(i) The maximum age difference between the oldest of the applicants and the first child placed in the family should be 40 years.

(ii) In subsequent placements or where there is already a child in the family the maximum age difference between the eldest of the applicants and the child should be 45 years.

(iii) The age criteria should apply to Australian born and intercountry adoptions.

I understand that at the time the *National Principles* were formulated they reflected a uniform approach across Australia to upper age restrictions. That is, however, no longer the case. Half of the jurisdictions have abandoned such restrictions and others are currently reviewing the issue.

The laws of New South Wales, Victoria, Queensland and the Australian Capital Territory provide that age is but one element for assessment in suitability to adopt, but no prescription is made. The laws of Tasmania, Northern Territory, Western Australia and South Australia prescribe ages which exclude older couples from adopting younger children. The prescribed exclusions however, are not uniform. For example, on the basis of age alone, a 44 year old couple resident in Western Australia or South Australia is deemed fit to parent an infant while the same couple resident in Tasmania, or the Northern Territory, is deemed unfit.

The upper age limits imposed by the New South Wales regulations were removed in response to recommendations made by the Law Reform Commission of that State in 1997 following a comprehensive review of the legislation. The Commission's report (Report 81 (1997) – Review of the *Adoption of Children Act 1965 (NSW)*) contained the following general observations (at paragraph 6.128) in relation to eligibility criteria:

"There should be very few legislative requirements relating to eligibility. There are two reasons for this:

- First, the best interests of any particular child are unlikely to be promoted if the law initially excludes from any consideration individuals or families who might be suitable to adopt that child.*
- Secondly, selection choices can respond to contemporary social conditions and changing community attitudes if suitability to adopt is determined by adaptive assessment considerations and not by legislatively entrenched requirements."*

The following recommendations were made at paragraph 6.130 of the Report:

"Legislation should therefore support flexibility and adaptability in agency decision-making, rather than restrict the types of adoptive parents able to

be considered by adoption professionals. Consequently, restrictions on eligibility under the adoption legislation should be few, although guidelines should identify the factors that may be taken into account in assessing suitability to adopt."

In relation to age criteria the Report concluded (at paragraph 6.90):

"First, the minimum age of both male and female applicants should be the same. Secondly, with respect to an upper age limit, the assessment of applicants should take into account the general desirability of placing children with adoptive parents who are of an age at which it is common for people in the community to become parents. However, the selection process should be flexible enough to allow placements with older applicants where this is shown to be appropriate for particular children. This principle should apply equally to local and intercountry adoptions and to all types of children. However, these decisions should be made in practice an upper age limit should not be arbitrarily prescribed in legislation. Age is simply one factor to be considered in relation to the child's interests."

Queensland removed upper age limits from its regulations in 2004 prior to completion of an extensive ongoing review of its adoption laws. The following passages are reproduced from the Ministerial media release of 6 August, 2004 concerning the issue:

"Queensland couples wishing to be assessed as adoptive parents will not be prevented from expressing interest because of arbitrary age limits when adoption registers re-open in September, Minister for Child Safety Mike Reynolds announced today.

Mr Reynolds said he had amended the Adoption of Children Regulation 1999 to completely remove maximum age limits from the eligibility criteria for all categories of adoption including the Intercountry Adoption and Queensland General Children's Adoption Programs.

'There is a lack of evidence linking adoption outcomes to any particular age range and I removed the age limits from the eligibility criteria accordingly,' Mr Reynolds said.

Mr Reynolds said his decision to remove the age limit followed numerous representations from the community and was supported by feedback obtained during the initial phases of the Adoption Legislation Review.

'The review commenced in 2002 and has considered most adoption issues, including eligibility criteria.

The initial public consultation phase indicated widespread agreement that current age eligibility criteria did not necessarily meet the differing needs of children in both Queensland and overseas.

Participants agreed that the effect of a person's age on their capacity to provide long-term, stable care for a child should be considered in conjunction with other factors in suitability assessment.

While age limits could have been dealt with as part of the overall review of Queensland's adoption legislation, I moved urgently to address this particular issue ..."

South Australia is currently reviewing the age criteria contained in its regulations. The discussion paper released during the public consultation process advised, however, that the Minister is inclined to remove the presumption against adoption by older couples leaving age as just one of a number of determinants in assessing a couple's suitability to adopt.

Following a general review of its adoption legislation in 1997, Western Australia increased the permissible age differences between adopted children and adoptive parents to 45 years (for the younger parent) and 50 years (for the older parent). In relation to the criteria for application and assessment in adoption, the 1997 review concluded that eligibility criteria were necessarily discriminatory but justifiable in ensuring the best interests of the child. Consequently, the review determined that raising the age criteria was appropriate as follows:

"All criteria.....were considered and reviewed in light of prevailing community trends, information from submissions and the National Principles in Adoption. It was concluded that all criteria, other than age, should remain as provided in the present legislation."

"Increasing the age of adoptive parents recognises that couples are starting families later and that where an applicant is infertile it may take some time for this to be determined. Decisions to apply to adopt are being made later, resulting in a trend towards older applicants. Increasing the age will also provide a greater opportunity for a child to be brought up with siblings by providing an increased opportunity for a second or subsequent adoption."

The inconsistency between the jurisdictions in respect of upper age limits conflicts with General Principle 17 of the *National Principles*, which states:

"Persons involved in the adoption process should not be discriminated against or disadvantaged by Australian, State or Territory legislative differences."

The intent of this principle is reflected in Principle 9.1, which states that:

“Applicants for adoption should be treated in a fair and equitable manner when transferring their application between state/territories and not be unfairly advantaged or disadvantaged by such a transfer.”

It is clearly desirable to consider the issue of upper age limits for adoptive parents during the current inquiry. I believe that the prescribed age criteria should be removed to bring Tasmania into uniformity with the majority of Australian jurisdictions. At the very least, the age limits should be increased to take account of the increased life expectancy of both sexes.

The criteria for adoption should be based on the capacity of the adopting family to best provide for the needs of the particular child where, under the principles of the adoption process, the needs of the child are paramount. The assessment of a prospective applicant to parent an infant based on an age criterion alone appears nonsensical and becomes even more so when older couples resident in Tasmania are treated more prohibitively than if they were residents of Australian jurisdictions where age is not prescribed. The arbitrary nature of the exclusion becomes even more apparent in the case of inter-country adoption where the countries in which the children reside apply their own age criteria. In the majority of cases, participating countries such as Taiwan, Thailand, Philippines, Lithuania, India, Hong Kong and China apply less prohibitive age criteria than the Tasmanian law allows. In instances of intercountry adoption, those Australian jurisdictions without upper age limits simply apply the age criteria prescribed by the participating country.

The best interests of the child are paramount in the adoption process. We have yet to hear compelling argument from the Tasmania Adoption Service (DHHS) as to:

- why the application of a 40 year maximum age difference between parent and first child is in the best interests of the child,
- why, for example, increasing the age difference to 45 years is *not* in the best interests of the first child,
- why, in the best interests of the child, the age of applicants is the primary criterion used to determine the age of the child placed with them above all other characteristics and circumstances relating to those applicants, or
- why the best interests of the child *cannot* be served by removing the arbitrary age limits and considering age as but one element for applicants' assessment in suitability to adopt.

The response to these questions has consistently been “it is the law”.

Presumably at the time the law was enacted, it was based on a credible rationale that was of such importance to the best interests of the child that it warranted legislation above all other considerations. If so, what was the rationale, is it relevant today, and is it relevant in the instance of adoption of children from overseas who are in institutionalised care? I challenge the

foundation of this law and suggest that there are strong counter-arguments against it which have resulted in changes to legislation in other jurisdictions.

As I mentioned earlier, my husband and I wish to adopt a child from overseas, preferably from China. As a lay person, I question what would be in the better interests of children in China's orphanages - six years of institutionalised care before placement with my husband and I, or the opportunity to have been placed with us years earlier. The latter answer is the attitude reflected in China's adoption guidelines. The most recent guidelines applied by the China Centre of Adoption Affairs (CCAA) determine that my husband and I would be considered for placement with a child up to 12 months old in the first instance. China determines that we are fit to parent an infant or younger child in the best interest of their children, whilst Tasmanian law arbitrarily determines that we are not.

It appears that older couples resident in Tasmania are treated more prohibitively than the majority of other Australians which is in clear conflict with the intent of the *National Principles in Adoption* as they relate to adoptive parents. I urge you to investigate the evidence base supporting the legislation of arbitrary upper age criteria and address the inconsistency between state and territory laws as they relate to age of adoptive parents and the age of child placed with them.

Yours sincerely

