

## Legislative and policy framework

- 2.1 This chapter reviews existing state and territory legislative frameworks as well as national policy approaches that provide for adoption of Australian children.
- 2.2 It considers the key elements of the states' and territories' current legislation, and how a national law for adoption could provide a uniform approach to adoption for Australian children in out-of-home care.

## International obligations

- 2.3 The United Nations Convention on the Rights of the Child sets out the human rights of all children and includes a number of articles relevant to adoptions within Australia.<sup>1</sup>
- Article 8 provides that children have the right to preserve their own identity, including nationality.
  - Article 9 provides that a child shall not be separated from their parents against their will, unless it is necessary for the best interests of the child.
  - Article 12 provides that children capable of forming their own views have a right to express those views and be heard in any judicial or administrative proceeding affecting the child.
  - Article 20 provides that for children who cannot remain in the family environment, alternative care should have regard to the child's ethnic, religious, cultural and linguistic background.
  - Article 21 provides that the best interests of the child must be the paramount consideration in adoption matters.<sup>2</sup>

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1 Australian Human Rights Commission, *Submission 103*, p. 6.

- 2.4 As a Party to the Convention, Australia is required to ensure that its national (including state and territory) laws are compliant with its provisions.
- 2.5 Australia is also a signatory to the Declaration on the Rights of Indigenous Peoples. The Declaration sets out minimum standards for the survival, dignity and well-being of Indigenous peoples, including the principle of free, prior and informed consent; the right to culture and the right to self-determination.<sup>3</sup>

## **Roles of the Commonwealth, state and territory governments**

- 2.6 The key role of the Commonwealth Government is to provide national leadership to improve the safety and wellbeing of Australia's children through the National Framework for Protecting Australia's Children 2009-2020, discussed below. The Commonwealth collaborates with states, territories and the non-government sector through the National Framework to deliver a more consistent national response for children in out-of-home care.<sup>4</sup>
- 2.7 The Commonwealth's national approach is vital, because under current arrangements there is no national law governing adoption of Australian children, and significant variation exists in adoption legislation and practice across Australia.<sup>5</sup>
- 2.8 The Commonwealth Government also supports families and children through:
- income support payments;
  - access to services such as childcare; and
  - specific programs which seek to strengthen family relationships and parenting skills.<sup>6</sup>
- 2.9 The state and territory governments have statutory responsibility for child protection systems, and administer legislation in relation to adoption and other permanent care options for children in out-of-home care.<sup>7</sup>

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2 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

3 Australian Human Rights Commission, *Submission 103*, p. 6; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295.

4 Department of Social Services, *Submission 40*, p. 1.

5 Institute of Open Adoption Studies, *Submission 76*, p. 3.

6 Department of Social Services, *Submission 40*, p. 1.

## National Framework and policy approaches

- 2.10 A National Framework for Protecting Australia's Children 2009-2020 (National Framework) was agreed in 2009.<sup>8</sup>
- 2.11 The National Framework is underpinned by the following principles:
- All children have a right to grow up in an environment free from neglect and abuse. Their best interests are paramount in all decisions affecting them.
  - Children and their families have a right to participate in decisions affecting them.
  - Improving the safety and wellbeing of children is a national priority.
  - The safety and wellbeing of children is primarily the responsibility of their families, who should be supported by their communities and governments.
  - Australian society values, supports and works in partnership with parents, families and others in fulfilling their caring responsibilities for children.
  - Children's rights are upheld by systems and institutions.
  - Policies and interventions are evidence based.<sup>9</sup>
- 2.12 The National Framework also recognises the importance of promoting the wellbeing of Aboriginal and Torres Strait Islander children, young people and families across all outcome areas.<sup>10</sup>
- 2.13 It was suggested that a national approach to adoption of children from out-of-home care should be aligned with, and complementary to, the National Framework.<sup>11</sup>
- 2.14 The Committee understands that the Department of Social Services is working with state and territory governments and the non-government

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7 Department of Social Services, *Submission 40*, p. 1.

8 Department of Social Services, *Submission 40*, p. 1.

9 Department of Social Services, 'Protecting Children is Everyone's Business – National Framework for Protecting Australia's Children 2009-2020', 2009, p. 12, <[https://www.dss.gov.au/sites/default/files/documents/child\\_protection\\_framework.pdf](https://www.dss.gov.au/sites/default/files/documents/child_protection_framework.pdf)> viewed 16 July 2018.

10 Department of Social Services, 'Protecting Children is Everyone's Business – National Framework for Protecting Australia's Children 2009-2020', 2009, p. 12, <[https://www.dss.gov.au/sites/default/files/documents/child\\_protection\\_framework.pdf](https://www.dss.gov.au/sites/default/files/documents/child_protection_framework.pdf)> viewed 16 July 2018.

11 EY (Ernst & Young), *Submission 51*, p. 5.

sector on what comes after the National Framework when it ends in 2020.<sup>12</sup>

## Guiding Principles for Permanency Best Practice

- 2.15 On 25 August 2017, Commonwealth, state and territory Community Services Ministers<sup>13</sup> agreed to:
- reduce state guardianship of children in out-of-home care by securing permanency outcomes, including adoption, for children who cannot be safely reunified with their families within a reasonable time;<sup>14</sup>
  - secure timeframes for permanent care decisions for children including through child protection legislation and/or policy and practice, and national public reporting on permanency timeframes;<sup>15</sup> and
  - adopt the Guiding Principles for Permanency Best Practice, which are set out in Figure 2.1.<sup>16</sup>

## National Permanency Work Plan

- 2.16 To put the Guiding Principles for Permanency Best Practice into action, and build on reforms already underway in the states and territories, on 1 June 2018 Community Services Ministers agreed to a National Permanency Work Plan that outlines 14 actions to deliver on five strategies to improve permanency outcomes.<sup>17</sup>
- 2.17 The five strategies of the National Permanency Work Plan are to:
- develop a permanency outcomes performance framework;
  - ensure that the Aboriginal and Torres Strait Islander Child Placement Principle is upheld and Aboriginal community controlled organisations

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12 Ms Elizabeth Hefren-Webb, Deputy Secretary, Department of Social Services, *Committee Hansard*, Canberra, 21 August 2018, p. 9.

13 Community Services Ministers from all jurisdictions meet to discuss and agree priorities for the safety and wellbeing of Australia's children and young people. Ministers are supported by the Children and Families Secretaries Group which comprises senior officials from relevant government departments. Commonwealth Community Services Ministers are: the Minister for Families and Social Services; the Assistant Minister for Social Services, Housing and Disability Services; and the Assistant Minister for Children and Families.

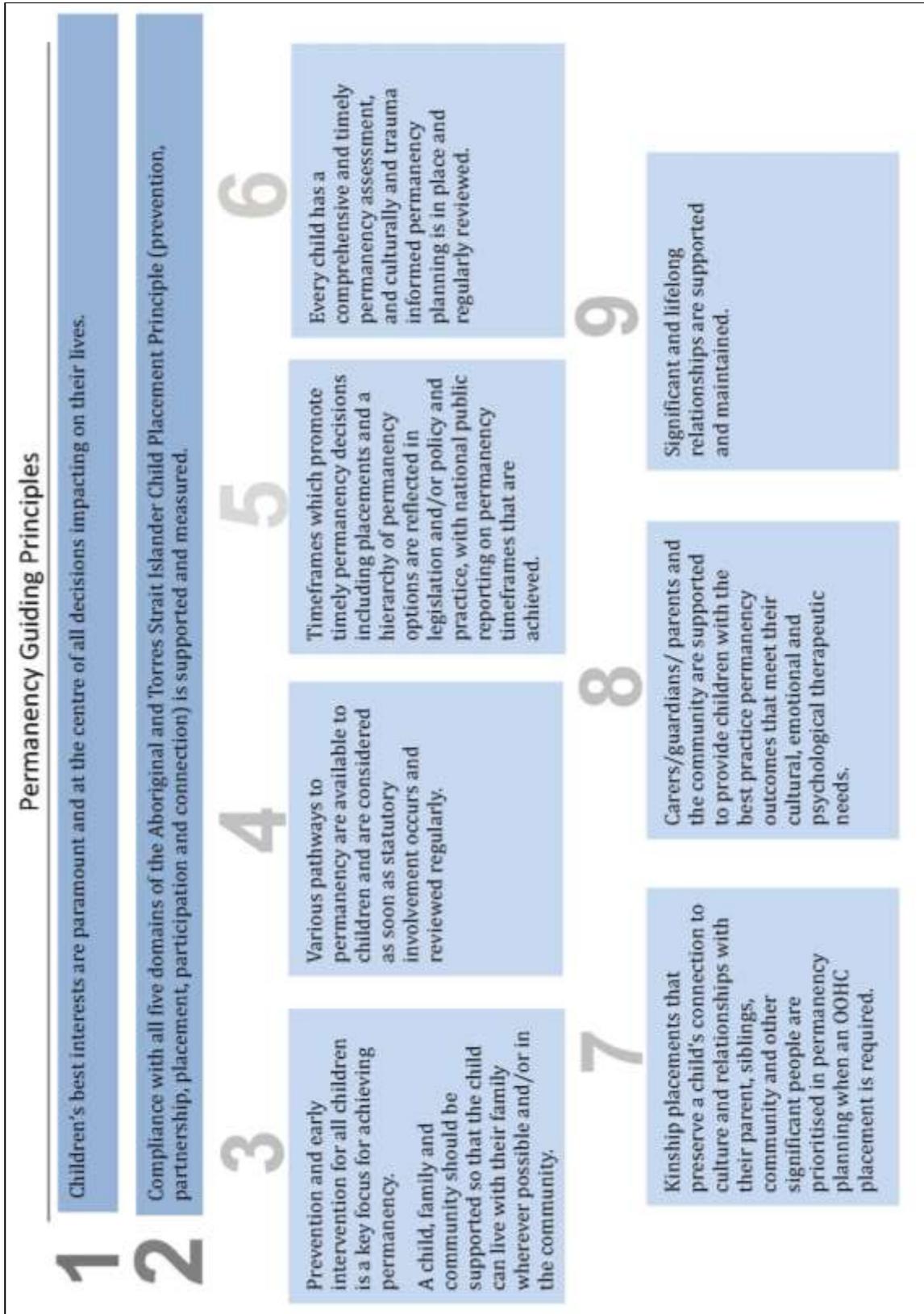
14 Department of Social Services, *Submission 40*, p. 4.

15 Department of Social Services, *Submission 40*, p. 4.

16 Department of Social Services, *Submission 40*, p. 4.

17 The Hon. Dan Tehan MP, the Hon. Jane Prentice MP and the Hon Dr David Gillespie MP, 'Community Services Ministers' Meeting Communique', 1 June 2018, <<https://formerministers.dss.gov.au/17966/community-services-ministers-meeting-communique-2>>.

Figure 2.1 Guiding Principles for Permanency Best Practice



Source Department of Social Services, Exhibit 10, p. 1.

- are supported to ensure culturally appropriate placements and supports for Indigenous children;
- promote timely and consistent decision-making for permanency;
- promote better permanency options, including consistent processes for family reunification to be explored and resolved as part of permanency planning; and
- develop an approach to recruitment, training and support of more permanent carers.<sup>18</sup>

## **Aboriginal and Torres Strait Islander Child Placement Principle**

- 2.18 As noted above, the second principle of the Guiding Principles for Permanency Best Practice is that compliance with all five domains of the Aboriginal and Torres Strait Islander Child Placement Principle (the Principle) is supported and measured. The Principle was accepted by the states and territories in 1986 and incorporated into legislation in various forms over the following decade.<sup>19</sup>
- 2.19 Fundamental to the Principle is the recognition that Aboriginal and Torres Strait Islander people have the knowledge and experience to make the best decisions concerning their children.<sup>20</sup>
- 2.20 The five domains of the Principle are:
1. Prevention: Protecting children’s rights to grow up in family, community and culture by redressing the causes of child protection intervention.
  2. Partnership: Ensuring the participation of community representatives in service design, delivery and individual case decisions.
  3. Connection: Maintaining and supporting connections to family, community, culture and country for children in out-of-home care.
  4. Participation: Ensuring the participation of children, parents and family members in decisions regarding the care and protection of their children.
  5. Placement: Placing children in out-of-home care in accordance with the following established placement hierarchy:

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18 Mrs Cath Halbert, Group Manager, Department of Social Services, *Committee Hansard*, Canberra, 21 August 2018, pp. 9-10.

19 Queensland Aboriginal and Torres Strait Islander Child Protection Peak Limited, *About the Aboriginal and Torres Strait Islander Child Placement Principle*, p. [1], <<http://atsichsbrisbane.org.au/wp-content/uploads/2010/09/About-the-Aboriginal-and-Torres-Strait-Islander-Child-Placement-Principle.pdf>> viewed 4 October 2018.

20 Department of Social Services, *Submission 40*, p. 5.

- i. with Aboriginal or Torres Strait Islander relatives or extended family members, or other relatives or extended family members, or
- ii. with Aboriginal or Torres Strait Islander members of the child's community, or
- iii. with Aboriginal or Torres Strait Islander family-based carers.
- iv. If the above preferred options are not available, as a last resort the child may be placed with a non-Indigenous carer or in a residential setting.
- v. If the child is not placed with their extended Aboriginal or Torres Strait Islander family, the placement must be within close geographic proximity to the child's family.<sup>21</sup>

2.21 During the course of the inquiry Commonwealth, state and territory Community Services Ministers met on 1 June 2018 and agreed:

- to implement 'active efforts' in jurisdictions to ensure compliance with all five elements of the Principle. This action recognises the rights of Aboriginal and Torres Strait Islander children to be raised in their own culture and the importance and value of their family, extended family, kinship networks, culture and community; and
- that it is important to support Aboriginal Community Controlled Organisations in having a role and responsibility towards their children.<sup>22</sup>

## Adoption law in the states and territories

2.22 State and territory legislative, policy and practice frameworks provide a number of permanent care options for children in out-of-home care. Options include:

- reunification with the child's family;
- legal orders that transfer guardianship or parental responsibility to a relative, carer or a third party; and
- adoption.<sup>23</sup>

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21 Australian Human Rights Commission, *Submission 103*, p. 19.

22 The Hon. Dan Tehan MP, the Hon. Jane Prentice MP and the Hon Dr David Gillespie MP, 'Community Services Ministers' Meeting Communique', 1 June 2018, <<https://formerministers.dss.gov.au/17966/community-services-ministers-meeting-communique-2>>.

23 Department of Social Services, *Submission 40*, pp. 2-3.

- 2.23 While all Australian states and territories have legislation allowing adoption from out-of-home care, the detail of the legislation varies between jurisdictions.<sup>24</sup>
- 2.24 The current key legislation governing adoption across the states and territories is as follows:
- *Adoption Act 1993* (ACT)
  - *Adoption Act 2000* (NSW)
  - *Children and Young Persons (Care and Protection) Act 1998* (NSW)
  - *Adoption of Children Act 1994* (NT)
  - *Adoption Act 2009* (Qld)
  - *Adoption Act 1988* (SA)
  - *Adoption Act 1988* (Tas)
  - *Adoption Act 1984* (Vic)
  - *Adoption Act 1994* (WA).<sup>25</sup>
- 2.25 Ms Elizabeth Hefren-Webb, Deputy Secretary, Department of Social Services advised that:
- Each state and territory has expressed a desire to maintain and improve their system as they see fit.<sup>26</sup>
- 2.26 However, Mrs Cath Halbert, Group Manager, Department of Social Services, also stated that:
- ... states are working to align permanency issues.<sup>27</sup>
- 2.27 Mr Luke Twyford, Executive Director, Strategy, Policy and Performance, Territory Families, Northern Territory Government stated that:
- A key part to achieving national consistency in a national framework is recognising that we each operate different systems in attempting to achieve the same outcomes.<sup>28</sup>

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24 Barnardos Australia, *Submission 52*, p. 6; Adopt Change Limited (Adopt Change), *Submission 77*, pp. 9-12.

25 NSW Government, *Submission 22*, p. 3; Australian Institute of Health and Welfare (AIHW), 'Appendixes A and B: Adoptions Australia 2016-17', 2017, pp. 1-12, <<https://www.aihw.gov.au/getmedia/c54bf6ea-00f1-4e7f-a203-4103b8efa10a/aihw-cws-61-appendixes-a-b.pdf.aspx>> viewed 4 October 2018.

26 Ms Elizabeth Hefren-Webb, Deputy Secretary, Department of Social Services, *Committee Hansard*, Canberra, 21 August 2018, p. 9.

27 Mrs Cath Halbert, Group Manager, Department of Social Services, *Committee Hansard*, Canberra, 21 August 2018, p. 10.

28 Mr Luke Twyford, Executive Director, Strategy, Policy and Performance, Territory Families, Northern Territory Government, *Committee Hansard*, Canberra, 22 June 2018, p. 14.

- 2.28 However, the Committee heard concern from many submitters and witnesses about the lack of uniformity in the national laws for adoption. The Royal Australian and New Zealand College of Psychiatrists submitted that:
- ... it is widely acknowledged that the legal requirements and processes for adoption in Australia can be confusing and vary substantially between States and Territories.<sup>29</sup>
- 2.29 Adopt Change Limited (Adopt Change) submitted that many children in out-of-home care are denied the opportunity of adoption by the lack of consistency and implementation of existing laws in Australia.<sup>30</sup>
- 2.30 Anglicare Sydney suggested that state and territory:
- ... laws be consistent across the Nation and serve the best interests of the child and young person in providing a stable and permanent home.<sup>31</sup>
- 2.31 Evidence to the inquiry suggested that a national law for adoption could be based on the New South Wales Government's legislative approach to adoption. (Key elements of the New South Wales legal framework are discussed further below.)
- 2.32 Barnardos Australia submitted that national consistency in adoption legislation could best be achieved by:
- ... aligning State and Territory legislation to the standards of NSW where the child's best interests are clearly prioritised over the birth family's consent.<sup>32</sup>
- 2.33 Ms Sue Madden, Manager and Principal Officer, Foster Care and Adoptions, Anglicare Sydney told the Committee that there are:
- ... pillars or foundations of practice within the New South Wales system that could be well replicated in other jurisdictions across Australia, but they're all at different points because they are state based legislations at the moment around adoption.<sup>33</sup>
- 2.34 The Centre for Independent Studies submitted:
- The NSW model should be emulated by policymakers in all states and territories as it is an implementable blueprint for genuine and overdue systemic change that will make child protection systems

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29 The Royal Australian and New Zealand College of Psychiatrists, *Submission 37*, p. [1].

30 Adopt Change, *Submission 77*, p. 9.

31 Anglicare Sydney, *Submission 67*, p. 12.

32 Barnardos Australia, *Submission 52*, p. 9.

33 Ms Sue Madden, Manager and Principal Officer, Foster Care and Adoptions, Anglicare Sydney, *Committee Hansard*, Canberra, 22 June 2018, p. 28.

more effective and accountable nation-wide. To advance this desirable objective, the federal government should be encouraged by the Committee to explore all available avenues to influence state and territory policy making in this direction.<sup>34</sup>

2.35 Additionally, the Committee heard from Dr Jeremy Sammut, Senior Research Fellow, The Centre for Independent Studies that:

If the national framework encourages states and territories to emulate the New South Wales model, as I recommend it should, embracing the same priorities as in New South Wales will achieve an appropriate and overdue rebalancing of the principles of family preservation and permanency to ensure that child protection systems nationwide operate in a child centred way. However, what this specifically and crucially does not mean is that adoptions will occur as the fast resort in Australia. Adoptions will only occur as the last, but timely, resort to achieve permanency in the best interests of children after the best efforts to assist families have been tried but not succeeded in enabling children to go home safely and permanently.<sup>35</sup>

## State and territory legislative reviews

2.36 There have been 39 inquiries, reviews and royal commissions in Australia in the last decade looking at how to prevent children suffering abuse and neglect.<sup>36</sup>

2.37 The Committee was advised that the Northern Territory intends to review all legislation related to children and families and amend its *Adoption of Children Act 1994* (NT) in 2019.<sup>37</sup> The Committee was also advised that the following state and territory reviews are underway or have been undertaken in recent times:

- Western Australia is currently undertaking a review of its legislation relating to adoption;<sup>38</sup>
- South Australia is in the process of implementing changes arising from the *Adoption (Review) Amendment Act 2016* (SA) in response to the review of the *Adoptions Act 1988* and *Adoption Regulations 2004*;<sup>39</sup>

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34 The Centre for Independent Studies, *Submission 15*, p. 5.

35 Dr Jeremy Sammut, Senior Research Fellow, The Centre for Independent Studies, *Committee Hansard*, Canberra, 29 May 2018, p. 2.

36 Hope For Our Children, *Submission 45*, p. 15.

37 Mr Luke Twyford, Executive Director, Strategy, Policy and Performance, Territory Families, Northern Territory Government, *Committee Hansard*, Canberra, 22 June 2018, pp. 3-4.

38 WA Department of Communities, *Submission 53*, p. 2.

- in 2017 the Victorian Law Reform Commission tabled its report on the Review of the *Adoption Act 1984* (Vic) in the Victorian Parliament;<sup>40</sup>
- in November 2016 the Queensland Parliament amended the *Adoption Act 2009* (Qld) in response to a review of the operation of the Act;<sup>41</sup>
- in 2016, the Australian Capital Territory Government's Cross-Directorate Domestic Adoptions Taskforce reviewed issues related to the timeliness of adoption in the Australian Capital Territory. The Australian Capital Territory Government is currently in the process of implementing these recommendations;<sup>42</sup> and
- in 2014 the *Children and Young Persons (Care and Protection) Act 1998* (NSW) was amended to prioritise that children are able to grow up in stable environments outside of the out-of-home care system.<sup>43</sup>

## Best interests of the child

- 2.38 Article 21 of the Convention on the Rights of the Child provides that 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration ...'<sup>44</sup>
- 2.39 The Australian Government's joint fifth and sixth report under the Convention on the Rights of the Child confirms that:
- Australia continues to consider the best interests of the child in policy, administrative and particular legal decisions relating to individuals, and in the systems established to meet children's needs. Legislation and case law in all jurisdictions and across a range of domains, including child protection, criminal justice and health, recognises the importance of the child's best interests being considered in decision-making.<sup>45</sup>

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39 South Australia Department of Child Protection, 'Adoption (Review) Amendment Act 2016', <<https://www.childprotection.sa.gov.au/adoption/adoption-review-amendment-bill-2016>> viewed 4 October 2018.

40 Victorian Law Reform Commission, 'Adoption Act', 7 June 2017, <<http://www.lawreform.vic.gov.au/all-projects/adoption-act>> viewed 4 October 2018.

41 Queensland Government Department of Child Safety, Youth and Women, 'Adoption', <<https://www.csyw.qld.gov.au/child-family/adoption>> viewed 4 October 2018.

42 ACT Government, *Submission 35*, pp. 2-3.

43 NSW Government, *Submission 22*, p. 4.

44 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 21 (entered into force 2 September 1990).

45 Australian Government, 'Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict for the reporting period June 2012-15 Jan 2018', p. 9,

- 2.40 Central to adoption legislation in all states and territories is the requirement that in all decision making, the best interests of the child are to be the paramount consideration.<sup>46</sup>
- 2.41 The Committee was informed that ‘there are many different perspectives on what is in a child’s best interests and thus no single agreed definition’;<sup>47</sup> and that ‘much has been written about the imprecise nature of the term “best interests of the child”’.<sup>48</sup>
- 2.42 In the Australian Capital Territory, New South Wales, the Northern Territory, Queensland and South Australia, adoption legislation includes provisions to guide decision makers in assessing the best interests of the child.<sup>49</sup> Although the extent to which guidance is provided varies between these states and territories, considerations include:
- the likely effects of the decision on the life course of the child;
  - the child’s physical, emotional and educational needs;
  - the child’s and parents’ views;
  - access to information about ethnic or cultural heritage;
  - relationships with parents, siblings other relatives, and with the adoptive parents; and
  - that alternative placement options have been considered.
- 2.43 Most jurisdictions, including New South Wales, provide in legislation that adoption is a service for a child, meaning (and in some cases specifying) that no adult has the (inherent) right to adopt a child.<sup>50</sup>

## Open adoption

- 2.44 Historically, under closed adoption, an adopted child’s original birth certificate was sealed and an amended birth certificate issued that

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<[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/AUS/5-6&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/AUS/5-6&Lang=en)> viewed 4 October 2018.

- 46 Australian Human Rights Commission, *Submission 103*, p. 9; *Adoption Act 1993 (ACT)*, s. 5; *Adoption Act 2000 (NSW)*, s. 7(a); *Adoption of Children Act 1994 (NT)*, s. 8; *Adoption Act 2009 (QLD)*, ss. 5(a), 6(1); *Adoption Act 1988 (SA)*, s. 3(1)(a); *Adoption Act 1988 (Tas)*, s. 8; *Adoption Act 1984 (Vic)*, s. 9; *Adoption Act 1994 (WA)*, s. 3(1)(a).
- 47 Victorian Adoption Network for Information and Self Help (VANISH Inc.), *Submission 56*, p. 12.
- 48 Institute of Open Adoption Studies, *Supplementary Submission 76.1*, Answer to Question on Notice, p. 3.
- 49 *Adoption Act 1993 (ACT)*, ss. 5(2), 6; *Adoption Act 2000 (NSW)*, s. 8(2); *Adoption of Children Act 1994 (NT)*, s. 8(2); *Adoption Act 2009 (QLD)*, ss. 6–7; *Adoption Act 1988 (SA)*, s. 3(2).
- 50 See *Adoption Act 1993 (ACT)*, s. 4(d); *Adoption Act 2000 (NSW)*, ss. 7(b), 8(1)(c); *Adoption of Children Act 1994 (NT)*, s. 8(1); *Adoption Act 1988 (SA)*, ss. 3(1)(b), 3(2)(d); *Adoption Act 1984 (Vic)*, s. 32; *Adoption Act 1994 (WA)*, s. 1(3).

established the child's new identity and relationship with their adoptive family.<sup>51</sup> This had profound, lasting and negative impacts on adoptees. Open adoption, on the other hand, acknowledges the origins of children and allows information sharing or contact between birth and adoptive families.<sup>52</sup>

- 2.45 EY (Ernst & Young) stated that open adoption:
- ... acknowledges the origins of children and connections with biological parents and extended families are encouraged. Links with the child's culture and identity are developed as part of the obligations of adoptive parents.<sup>53</sup>
- 2.46 Open adoption is now facilitated in all states and territories, although the degree to which this occurs varies across the jurisdictions.<sup>54</sup>
- 2.47 Open adoption is supported in New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and Victoria. In Western Australia all adoptions are in the 'spirit of openness' and in the Australian Capital Territory all adoptions have been considered open since 1993.<sup>55</sup>
- 2.48 The Committee understands that in all jurisdictions there may be exceptional circumstances in which open adoption is not considered appropriate. The Australian Institute of Health and Welfare (AIHW) reports that five of 246 adoptions in 2016-17 did not allow contact or information exchange between birth and adoptive families.<sup>56</sup>
- 2.49 Open adoption is further discussed in Chapters 3 and 4.

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51 Australian Institute of Family Studies, 'Forced Adoption National Practice Principles', April 2016, p. 6, <<https://aifs.gov.au/publications/forced-adoption-national-practice-principles>> viewed 4 October 2018.

52 EY, *Submission 51*, p. 3; Relationships Australia South Australia, *Submission 69*, p. 11; Berry Street, *Submission 70*, p. [3]; Institute of Open Adoption Studies, *Submission 76*, p. 6; Rainbow Families, *Submission 95*, p. 3.

53 EY, *Submission 51*, p. 3.

54 AIHW, 'Adoptions Australia 2016-17', 2017, p. 1, <<https://www.aihw.gov.au/reports/adoptions/adoptions-australia-2016-17/data>> viewed 5 October 2018.

55 AIHW, 'Appendixes A and B: Adoptions Australia 2016-17', 2017, pp. 13-14, <<https://www.aihw.gov.au/getmedia/c54bf6ea-00f1-4e7f-a203-4103b8efa10a/aihw-cws-61-appendixes-a-b.pdf.aspx>> viewed 5 October 2018.

56 AIHW, 'Adoptions Australia 2016-17', 2017, pp. 27-28, <<https://www.aihw.gov.au/reports/adoptions/adoptions-australia-2016-17/data>> viewed 5 October 2018.

## Adoption from out-of-home care

- 2.50 Out-of-home care is defined as:
- Overnight care for children aged 0–17, where the state makes a financial payment, or where a financial payment has been offered but has been declined by the carer.<sup>57</sup>
- 2.51 There are legislative requirements across the states and territories that certain options must be considered before adoption, for children in out-of-home care.
- 2.52 In Victoria and New South Wales a ‘hierarchy of long term alternatives’ must be considered before adoption. These include family preservation, restoration to parents or guardianship by kin. However, adoption is considered before permanent care (Victoria) or parental responsibility of the Minister (New South Wales).<sup>58</sup>
- 2.53 Queensland legislation allows for a case plan to be developed for each child that may include adoption. The Australian Capital Territory, Northern Territory, South Australia, Tasmania and Western Australia all allow for adoption to be considered along with other care orders if adoption is in the best interests of the child compared to other long-term care options.<sup>59</sup>
- 2.54 The Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Western Australia permit ‘foster to adopt’. Foster to adopt provides that where a child has been in the day-to-day care of a foster carer for a period of time (usually two years) and where the carer desires to adopt the child, the child can be adopted.<sup>60</sup>
- 2.55 Adoption from foster care can occur in some circumstances in Queensland, South Australia and Victoria, though the legislation is unclear about what is specifically required for an adoption to occur where the prospective adoptive parent(s) and the child already know each other.<sup>61</sup>
- 2.56 Table 2.1 illustrates the variability between jurisdictions in relation to adoption from out-of-home care.

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57 AIHW, *Submission 41*, p. 7.

58 Institute of Open Adoption Studies, *Submission 76*, Appendix 2, p. 4.

59 Institute of Open Adoption Studies, *Submission 76*, Appendix 2, p. 4.

60 Adopt Change, *Submission 77*, p. 6.

61 Adopt Change, *Submission 77*, p. 6.

**Table 2.1 Comparison of provisions for adoption of children from care in all jurisdictions**

<b>Jurisdiction</b>	<b>Provisions for adoption of children from care</b>
New South Wales <i>Adoption Act 2000</i> ; Adoption Regulation 2015.	Children may be adopted by their carers if: <ul style="list-style-type: none"> <li>• the birth parents consent</li> <li>• the Supreme Court dispenses with their parents' consent – including on the basis that the child is in care of foster parent/s and has established a stable relationship</li> <li>• the child consents (being aged over 12 years and, if the child has been with the carers for 2 years, this is the only consent required) and adoption is seen to be in the child's best interest, and if, all alternatives having been considered, adoption is preferable to any other order.</li> </ul> Adoption plans are required.
Victoria <i>Adoption Act 1984</i> ; Adoption Regulations 2008; <i>Adoption Amendment Act 2013</i> ; <i>Adoption Amendment Act 2015</i> .	No specific legislation related to carers; nor any capacity for consent of the child to their adoption. Legislation allows for dispensation of parent's consent grounds including neglect, ill-treatment and failure to discharge obligations of a parent but these grounds do not include the relationship of the child to carers.
<i>South Australia Adoption Act 1988</i> ; Adoption Regulations 2004.	Legislation allows for dispensation of parent's consent, including on the grounds of neglect, ill-treatment and failure to discharge obligations of a parent. Children over 12 years can give consent to their adoption. Grounds do not include the relationship of the child to carers. Same-sex adoption for 2016.
Western Australia <i>Adoption Act 1994</i> ; Adoption Regulations 1995; <i>Family Law Act 1975</i> ; <i>Family Court Act 1997</i> .	Carer adoptions can occur when it is considered that the best interests of the child are served by the child being adopted by eligible and approved carers. The carers must have had the full-time care of the child for at least 3 consecutive years. The Department for Child Protection must have arranged or approved the placement of the child with the carer and must be satisfied that the child will not return to live with the birth family or extended family. It is required that the birth parents give their consent to the adoption or that there is an order from the Family Court of Western Australia dispensing with consent. Unless dispensed with by the Family Court, an adoption plan is a legal requirement.
Northern Territory <i>Adoption of Children Act 1994</i> ; <i>Adoption of Children Amendment Act 2006</i> .	The Act allows for dispensation of parents' consent, including on the grounds of neglect, ill-treatment and failure to discharge obligations of a parent. The grounds do not include the relationship of the child to carers. There is no specific legislation related to adoption by carers, nor any capacity for consent of the child to their adoption.
Queensland <i>Adoption Act 2009</i> ; Adoption Regulations 2009.	Consent of parents can be dispensed with on a number of grounds, including that the parent is not, within an appropriate timeframe, willing and able to protect the child from harm and meet the child's need for long-term, stable care. The Court may also dispense with consent if it feels the parent is unreasonably withholding consent.  No specific legislation related to carers; nor any requirement for consent of the child to their adoption. The legislation has provision for adoption plans in certain situations, but these are not enforceable.
Australian Capital Territory <i>Adoption Act 1993</i> ; <i>Adoption Amendment Act 2009</i> .	Legislation allows for dispensation of parent's consent on grounds including neglect, ill-treatment and failure to discharge obligations of a parent. These grounds do not include the relationship of the child to carers. There is no capacity for consent of the child to their adoption.

Jurisdiction	Provisions for adoption of children from care
Tasmania <i>Adoption Act 1988</i> ; <i>Adoption Amendment Act 2007</i> ; Adoption Regulations 2016.	Allows for dispensation of parent's consent, including neglect, ill-treatment and failure to discharge obligations of a parent, but grounds do not include the relationship of the child to carers. A policy has been established regarding children in out-of-home care for whom adoption is considered to be in the child's best interests. The policy provides advice and clarifies the requirements regarding adoption by foster carers. All applications for an Adoption Order in favour of a foster carer adoption must be made through the Department of Health and Human Services. There is no requirement for consent of the child to their adoption.

Source *Barnardos Australia, Submission 52, pp.12-13.*

2.57 Associate Professor Amy Conley Wright, Director, Institute of Open Adoption Studies, told the Committee that:

One area of inconsistency [across state and territory legislation] is when adoption would be considered for children in out-of-home care. To particularly highlight the New South Wales example, there is a very clear process to follow when adoption would be considered, whereas in other states and territories it's less clear when adoption would be considered for children in out-of-home care.<sup>62</sup>

2.58 The permanency process, in order of preference, for children in out-of-home care followed by the New South Wales Government is:

1. returning them to parents or family/kin, where appropriate and safe.
2. arranging a permanent legal guardian, for Aboriginal children, or
3. supporting and facilitating adoption.

For a smaller number of children (over time), when preservation, restoration, guardianship or open adoption is not possible:

4. providing long-term foster care or residential care (Intensive Therapeutic Care) under parental responsibility of the Minister.<sup>63</sup>

2.59 Anglicare Sydney similarly commented that some states and territories do not presently have in place any legal basis for adoption from foster care.<sup>64</sup> Adopt Change submitted that adoption should be the default position for children for whom adoption is a suitable option and who have carers wishing to consider adoption.<sup>65</sup>

62 Associate Professor Amy Conley Wright, Director, Institute of Open Adoption Studies, Faculty of Arts and Social Sciences, University of Sydney, *Committee Hansard*, Canberra, 26 June 2018, p. 10.

63 NSW Government, *Submission 22*, pp. 7-8.

64 Anglicare Sydney, *Submission 67*, p. 12.

65 Adopt Change, *Submission 77*, p. 10.

2.60 With regard to consistency across jurisdictions on adoption from out-of-home care, Adopt Change advised:

The position in each state and territory in Australia differs in both the legislation, the implementation and the outcomes. NSW is leading the way in adoptions from foster care, and has paved the way for this with refinements to legislation and reform of practice.<sup>66</sup>

2.61 The Committee was informed that almost all jurisdictions refer to adoption, particularly if a child is in out-of-home care, as an open adoption.<sup>67</sup>

### **Consent in adoption**

2.62 The Committee was advised that consent is required from parents (Queensland, Tasmania, Victoria), persons with parental responsibility (New South Wales, Western Australia), or parents and guardians (Australian Capital Territory, Northern Territory, South Australia) for an adoption to occur.<sup>68</sup>

2.63 The Institute of Open Adoption Studies, in its review of Supreme Court case files of open adoptions from out-of-home care completed in 2017, found that of 89 adoption case files, 14 cases were contested by the birth parents in court. The files also indicate that in four of these contested cases, birth parents were no longer opposed to the adoption once they were satisfied with particular conditions after negotiations (for example, agreement on post-adoption contact with birth family and agreement on the child's name after the adoption order was made).<sup>69</sup>

2.64 Submitters' views about consent to adoption are discussed further in Chapter 4.

### **Dispensation of parental consent**

2.65 The Committee was advised that all Australian jurisdictions allow for the dispensation of parental consent to adoption on the grounds that the parents cannot be identified or located or are not capable of properly

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66 Adopt Change, *Submission 77*, p. 10.

67 Ms Barbara Bennett, Deputy Secretary, Department of Social Services, *Committee Hansard*, Canberra, 22 May 2018, p. 1.

68 Institute of Open Adoption Studies, *Submission 76*, Appendix 2, p. 4.

69 Institute of Open Adoption Studies, *Supplementary Submission 76.1*, Answer to Question on Notice, p. 1.

- considering the question of consent.<sup>70</sup> When parents do not consent to the adoption of their children, the process becomes more complex.<sup>71</sup>
- 2.66 Some jurisdictions give courts the ability to dispense with consent if parents are found to have abandoned, deserted or persistently neglected or ill-treated the child.<sup>72</sup>
- 2.67 New South Wales and Western Australia are the only states where a child's established relationship with their carer is a consideration for the dispensation of parental consent.<sup>73</sup>
- 2.68 The Australian Capital Territory Government, through a cross-directorate working group, is reviewing the dispensation of consent provisions to better respond to the complexity of out-of-home care situations.<sup>74</sup>
- 2.69 Adopt Change submitted that the New South Wales legislative approach would bring meaningful change to adoptions in Australia, in particular:
- ... the dispensation of consent to adoption where a known carer applies for adoption of a child. The legislation goes on to specifically allow parents' views on adoption to be overridden where there has been welfare concerns for the child and the court considers that adoption would be in the child's best interest.<sup>75</sup>
- 2.70 Barnardos Australia recommended that all states and territories should align their legislation to the standards of New South Wales where:
- ... children's consent and the new relationship with the carer is a ground for dispensation of parental consent.<sup>76</sup>

### **Children's participation**

- 2.71 The Committee heard that children's participation in adoption decisions is addressed in all state and territory legislation, to varying extents.
- 2.72 All jurisdictions include the principle in legislation that children's views, wishes or feelings must be considered and that children should have an opportunity to participate in the decision-making process.<sup>77</sup>
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70 Institute of Open Adoption Studies, *Submission 76*, p. 19; ACT Government Community Services Directorate, 'Final Report: Review of the Domestic Adoption Process in the ACT', February 2017, p. 32, <[https://www.communityservices.act.gov.au/\\_\\_data/assets/pdf\\_file/0006/1030875/Final-Report-Review-of-the-Domestic-Adoption-Process-in-the-ACT.pdf](https://www.communityservices.act.gov.au/__data/assets/pdf_file/0006/1030875/Final-Report-Review-of-the-Domestic-Adoption-Process-in-the-ACT.pdf)> viewed 25 September 2018.

71 Institute of Open Adoption Studies, *Submission 76*, p. 21.

72 For example, South Australia, see: *Adoption Act 1988* (SA), s. 18(c).

73 Institute of Open Adoption Studies, *Submission 76*, p. 20.

74 ACT Government, *Submission 35*, p. 2.

75 Adopt Change, *Submission 77*, p. 11.

76 Barnardos Australia, *Submission 52*, p. 7.

- 2.73 In New South Wales, the Northern Territory, South Australia and Western Australia, children over the age of 12 years are required to give consent to their adoption, if they are deemed competent to do so. The Australian Capital Territory, Queensland, Tasmania and Victoria have no provision within their legislation for a child to consent to their adoption, at any age.<sup>78</sup>
- 2.74 Parental consent may be dispensed with under certain circumstances if the child consenting to adoption is over 12 in New South Wales and over 16 in Western Australia.<sup>79</sup>
- 2.75 Associate Professor Amy Conley Wright, Director, Institute of Open Adoption Studies, informed the Committee that state and territory legislation:
- ... is inconsistent in terms of whether children are offered the opportunity to consent for their own adoption. New South Wales is the only jurisdiction where children who are aged 12 and older, if they have sufficient capacity, can provide sole consent to their own adoption; therefore, the consent of the birth parents is not needed.<sup>80</sup>

## **Adoption of Aboriginal and Torres Strait Islander children**

- 2.76 All states and territories have separate requirements for the adoption of Aboriginal and Torres Strait Islander children. Some state legislation recognises that adoption is not customary in Aboriginal communities (New South Wales, Queensland, Tasmania, Victoria and Western Australia) and will not be actively considered. However, legislation will allow for adoption after meeting appropriate safeguards.<sup>81</sup>
- 2.77 All jurisdictions have general provisions regarding the maintenance of cultural identity and connection when Aboriginal or Torres Strait Islander children are adopted, including a form of the Aboriginal and Torres Strait Islander Child Placement Principle (the Principle).

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77 Institute of Open Adoption Studies, *Submission 76*, p. 18; Australian Human Rights Commission, *Submission 103*, p. 9.

78 Institute of Open Adoption Studies, *Submission 76*, p. 18.

79 Institute of Open Adoption Studies, *Submission 76*, Appendix 2, p. 4.

80 Associate Professor Amy Conley Wright, Director, Institute of Open Adoption Studies, Faculty of Arts and Social Sciences, University of Sydney, *Committee Hansard*, Canberra, 26 June 2018, p. 10.

81 Institute of Open Adoption Studies, *Submission 76*, Appendix 2, p. 4.

- 2.78 However, evidence stated that implementation is inconsistent and ineffective, and that the Principle is misunderstood across jurisdictions.<sup>82</sup> The Institute of Open Adoption Studies submitted that there are considerable variations in the implementation of the Principle across jurisdictions and concerns about compliance with and monitoring of the Principle.<sup>83</sup>
- 2.79 All jurisdictions require that decisions to adopt Aboriginal or Torres Strait Islander children be made in consultation with the community.<sup>84</sup>
- 2.80 Adoption of Aboriginal and Torres Strait Islander children is discussed further in Chapter 3.

### **Timeframes for reunification with family**

- 2.81 On 1 June 2018, Commonwealth, state and territory Community Services Ministers recognised:
- ... that abused and neglected children deserve to grow up in a family that is permanent, safe and stable, if they cannot safely be reunified with their families within a reasonable time.<sup>85</sup>
- 2.82 Legislation in New South Wales, Tasmania and Victoria includes timeframes that seek to limit the period during which a child may be reunified with their birth parent(s). In Victoria the timeframe is up to 12 months, or 24 months in exceptional circumstances, and in Tasmania up to two years.<sup>86</sup>
- 2.83 New South Wales specifies that for children younger than two years of age, the Children's Court is required to make a decision, within six months of an interim order, and to accept the statutory department's assessment of whether there is a realistic possibility of restoration. For children aged two and older, the period is within 12 months of the interim order.<sup>87</sup>

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82 Secretariat of National Aboriginal and Islander Child Care (SNAICC – National Voice for our Children), *Submission 72*, p. [5].

83 Institute of Open Adoption Studies, *Submission 76*, pp. 23-24.

84 Institute of Open Adoption Studies, *Submission 76*, Appendix 2, p. 6; *Children's Protection Act 1993* (SA), s. 5; *Children, Young Persons and Their Families Act 1997* (Tas), s. 9.

85 The Hon. Dan Tehan MP, the Hon. Jane Prentice MP and the Hon Dr David Gillespie MP, 'Community Services Ministers' Meeting Communique', 1 June 2018, <<https://formerministers.dss.gov.au/17966/community-services-ministers-meeting-communique-2>>.

86 SNAICC, *Submission 72*, p. [12].

87 Institute of Open Adoption Studies, *Submission 76*, p. 21; *Children and Young Persons (Care and Protection) Act 1998* (NSW), s. 83(5).

- 2.84 On 1 June 2018 the Community Services Ministers also agreed to develop a nationally consistent approach to guide timely decision making so that children have a sense of stability as soon as possible.<sup>88</sup>
- 2.85 Timeframes for reunification are discussed further in Chapter 3.

## Birth certificates

- 2.86 As part of the adoption process, all states and territories issue new birth certificates with the adoptive parents named as parents of the child in lieu of the birth parents.<sup>89</sup>
- 2.87 Original birth certificates are kept on record and may be requested on application in all states and territories.<sup>90</sup>
- 2.88 Birth certificates that include the names of the birth and adoptive parents are referred to as 'integrated' birth certificates.<sup>91</sup>
- 2.89 South Australia is in the process of changing its adoption legislation to include the names of birth parents and adoptive parents on an 'integrated' birth certificate.<sup>92</sup>
- 2.90 The Australian Capital Territory, New South Wales, Northern Territory, Queensland and Victorian governments are in various stages of considering integrated birth certificates that recognise both birth parents and adoptive parents and maintain the identity and heritage of children who are adopted.<sup>93</sup>

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88 Ministers for the Department of Social Services: The Hon. Dan Tehan MP, the Hon. Jane Prentice MP and the Hon Dr David Gillespie MP, 'Community Services Ministers' Meeting Communique', 1 June 2018.

89 Institute of Open Adoption Studies, *Submission 76*, Appendix 2, p. 6.

90 Institute of Open Adoption Studies, *Submission 76*, Appendix 2, p. 7.

91 See for example: Berry Street, *Submission 70*, p. [4]; Adopt Change, *Submission 77*, pp. 20-21.

92 Ms Cathy Taylor, Chief Executive, Department for Child Protection, South Australian Government, *Committee Hansard*, Canberra, 22 June 2018, p. 10; South Australia Department for Child Protection, 'Adoption (Review) Amendment Act 2016, <<https://www.childprotection.sa.gov.au/adoption/changes-naming-and-birth-certificates>> viewed 5 October 2018.

93 ACT Government, *Exhibit 7*, p. 3, <<http://www.communityservices.act.gov.au/home/consultation-act-adoption-process/government-response-to-the-review-of-the-domestic-adoption-process-in-the-act>> viewed 5 October 2018; Ms Sarah Anderson, Senior Manager, Human Services Policy, Community Services Directorate, Australian Capital Territory Government, *Committee Hansard*, Canberra, 22 June 2018, p. 10; Ms Simone Czech, Executive Director, Child and Family, Commissioning, Department of Family and Community Services, New South Wales, *Committee Hansard*, Canberra, 22 June 2018, p. 10; Mr Mick Naughton, Director, Children and Families Policy, Children, Families, Disability and Operations Division, Department of Health and Human Services, Victoria, *Committee Hansard*, Canberra, 22 June 2018, p. 10; Mr Luke Twyford, Executive Director, Strategy, Policy and Performance, Territory Families, Northern Territory Government, *Committee Hansard*, Canberra, 22 June 2018, p. 10.

- 2.91 Concerns raised by submitters in relation to birth certificates are discussed in Chapter 4.

### **Eligibility to adopt**

- 2.92 The Australian Human Rights Commission is of the view that eligibility to adopt should be non-discriminatory and that adults should not be excluded from eligibility to adopt for reasons of their marital or relationship status, their sexuality or their age.<sup>94</sup>
- 2.93 Single people may be eligible to adopt in all states and territories.<sup>95</sup>
- 2.94 The Committee was advised that as of April 2018, adoption by same-sex couples via joint petition is legal in every state and territory.<sup>96</sup>

### **Discharge of adoption**

- 2.95 All jurisdictions have legislation to facilitate discharge of adoption in certain circumstances, although it varies between the states and territories.<sup>97</sup>
- 2.96 All jurisdictions allow for adoptions to be discharged on the grounds of fraud, duress, or other improper means.<sup>98</sup>
- 2.97 South Australia is in the process of amending its legislation to allow adoptees to apply for the discharge of an adoption order where it is in their best interests. This may include where an adopted person has been abused in the adoptive family, or has suffered a loss of identity or belonging as a result of the adoption.<sup>99</sup>
- 2.98 However, the Committee heard that the process for adult adoptees to discharge their adoption is onerous, costly, intrusive and emotionally taxing.<sup>100</sup>

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94 Australian Human Rights Commission, *Submission 103*, pp. 24-25.

95 *Adoption Act 1993* (ACT), s. 18(1); *Adoption Act 2000* (NSW), s. 27; *Adoption of Children Act 1994* (NT), s. 14(1); *Adoption Act 2009* (QLD), s. 68; *Adoption Act 1988* (SA), s. 12(3); *Adoption Act 1988* (Tas), s. 20(4); *Adoption Act 1984* (Vic), s. 11(3); *Adoption Act 1994* (WA), s. 38(2).

96 Rainbow Families, *Submission 95*, p. 5.

97 Adoptee Advocacy and Information Service, South Australia Inc. (AAISSA), *Submission 94*, pp. 6-7.

98 *Adoption Act 1993* (ACT), s. 39L(1)(a); *Adoption Act 2000* (NSW), s. 93(4)(a); *Adoption of Children Act 1994* (NT), s. 44(1)(a); *Adoption Act 2009* (QLD), s. 219(1)(a); *Adoption Act 1988* (SA), s. 14(1); *Adoption Act 1988* (Tas), s. 28(2)(a); *Adoption Act 1984* (Vic), s. 19(1)(a); *Adoption Act 1994* (WA), s. 77(2)(a).

99 South Australia Department for Child Protection, 'Adoption (Review) Amendment Act 2016, <<https://www.childprotection.sa.gov.au/adoption/adoption-review-amendment-bill-2016>> viewed 5 October 2018.

100 Name withheld, *Submission 57*, p. 8; Ms Sharyn White, *Submission 58*, p. [3].

- 2.99 A number of submissions recommended that it should be easier for adult adoptees to discharge their adoption.<sup>101</sup> This was notably a concern for people affected by past forced adoption policies and practices.

## Recognition of adoption planning in other jurisdictions

- 2.100 The Committee was advised that state and territory legislation does not recognise adoption planning undertaken in other states or territories.
- 2.101 Anglicare Sydney provided the following example:
- ... a child placed with carers through Anglicare Sydney's Foster Care Program with adoption identified on their case plan moved interstate, as the prospective adoptive father's work required relocation from Sydney to Melbourne. The barrier to an adoption order being sought in those circumstances was the fact that the prospective adoptive parents were domiciled outside the NSW jurisdiction. While the child resides in Victoria, the adoption cannot be pursued until they turn 18 years of age and may pursue adoption under Victorian State law.<sup>102</sup>
- 2.102 When prospective adoptive parents are required to permanently move interstate, assessments, reports and other adoption planning work completed in support of an adoption are not recognised. The different requirements of states and territories results in delays, and adds to the cost of adoption.<sup>103</sup>
- 2.103 This issue was highlighted in the Australian Capital Territory's *Final Report: Review of the domestic adoption process in the ACT*, which stated:
- Several responses commented on the value of nationally consistent adoption legislation, or at least transferable adoption procedures to reduce restrictions for people who express an interest in adoption in more than one jurisdiction. This is currently not facilitated as the *Adoption Act 1993* requires people expressing an interest in adoption to be a resident of the ACT.

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101 Name withheld, *Submission 5*, p. 4; Australian Adoptee Rights Action Group, *Submission 7*, p. 5; Association for Adoptees Inc., *Submission 19*, p. 17; Mr William Hammersley, *Submission 34*, p. [1,4]; Name withheld, *Submission 38*, pp. [4-5]; Name withheld, *Submission 57*, p. [1]; Ms Sharyn White, *Submission 58*, p. [3]; Name withheld, *Submission 88*, p. 2; Name withheld, *Submission 93*, p. 6; AAISSA, *Submission 94*, pp. 7-8; Ms Kay Hanning, *Submission 106*, p. [3].

102 Anglicare Sydney, *Submission 67*, p. 12.

103 NSW Government, *Submission 22*, p. 10.

Most jurisdictions (VIC, TAS, QLD and WA) do not facilitate cross-border adoptions. An applicant must be a resident of the jurisdiction to be eligible to adopt.<sup>104</sup>

## **Committee comment**

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

- 2.104 During the course of the inquiry, and as reflected in the evidence, the Committee was firmly of the view that permanency decisions must be made in the best interests of the child.
- 2.105 The Committee believes that it is essential that the best interests and safety of children are ensured, not just considered, in all decisions affecting their wellbeing.

### **National Framework and policy approaches**

- 2.106 The Committee acknowledges the work of Commonwealth, state and territory Community Services Ministers towards achieving stability and permanency for children in out-of-home care through the National Framework for Protecting Australia's Children 2009-2020 and Guiding Principles for Permanency Best Practice.
- 2.107 The Committee notes that Community Services Ministers from the Commonwealth, states and territories have agreed on actions to implement the five strategies of the National Permanency Work Plan, including to progress national consistency, by promoting:
- timely and consistent decision-making for permanency; and
  - better permanency options, including consistent processes for family reunification to be explored and resolved as part of permanency planning.
- 2.108 The Committee considers that this valuable work to strengthen national consistency in approaches to children in out-of-home care would be significantly advanced by the Commonwealth, states and territories agreeing to pursue nationally uniform adoption legislation.

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104 ACT Government Community Services Directorate, 'Final Report: Review of the Domestic Adoption Process in the ACT', February 2017, p. 26, <[https://www.communityservices.act.gov.au/\\_data/assets/pdf\\_file/0006/1030875/Final-Report-Review-of-the-Domestic-Adoption-Process-in-the-ACT.pdf](https://www.communityservices.act.gov.au/_data/assets/pdf_file/0006/1030875/Final-Report-Review-of-the-Domestic-Adoption-Process-in-the-ACT.pdf)> viewed 5 October 2018.

## Adoption law

- 2.109 The evidence received by the Committee demonstrates that adoption legislation varies between the states and territories. Inconsistencies in adoption law make adoption complex and confusing, creating unnecessary barriers to providing permanent, stable homes for children through adoption.
- 2.110 The approaches that are most inconsistent in relation to adoption from care relate to consent of the child, maximum timeframes for reunification and dispensation of parental consent.
- 2.111 The Committee agrees that the safety and best interests of the child should always be the paramount concern of decision makers. The Committee's view is that in upholding this principle, decision makers need to ensure that:
- permanency decisions are made in child-centric timeframes and not unnecessarily delayed by continued efforts towards family reunification where a positive outcome is unlikely;
  - children are not made to wait for permanent placements for reasons such as searching for a family with a particular cultural background where a suitable alternative placement is available; and
  - providing children with a permanent family and legal certainty is prioritised.
- 2.112 The Committee notes that the adoption law in New South Wales reflects an evidence-based approach, and that the New South Wales approach has resulted in an increase in the numbers of children finding safe, permanent homes through adoption.
- 2.113 The Committee was also supportive of the clarity in the New South Wales approach that specifies that where children cannot be returned to their birth parents or family/kin, open adoption is considered ahead of long-term foster or residential care.
- 2.114 The Committee notes the success of adoption reforms undertaken in New South Wales and is of the view that New South Wales' adoption legislation contains a number of useful elements that could inform a national law for adoption. A national law could be implemented either by conferral of the necessary constitutional power on the Commonwealth by the states and territories, or by agreement to and enactment of uniform (identical) legislation in all jurisdictions.
- 2.115 The Committee also notes that enacting a national law for adoption would ensure that completed adoption assessments are able to be recognised in other states and territories when prospective adoptive parents move interstate.

**Recommendation 1**

The Committee recommends that the Commonwealth work with state and territory governments to achieve agreement, through the Council of Australian Governments, to develop and enact a national law for adoption.

**Recommendation 2**

The Committee recommends that a national adoption framework be adopted as the model and starting point for a uniform national law.

Key elements of a national framework regarded as essential for a uniform national law for adoption should recognise that:

- the best interests and safety of the child are paramount and override all other considerations;
- returning a child to parents or family/kin must only be an option when it is appropriate and safe;
- adoption should be considered before long-term foster care or residential care;
- family preservation and cultural considerations are important, but not more important than the safety and wellbeing of the child;
- legal permanency is key in providing stability and permanency for children;
- adoption from foster care is a viable option where a child has an established and stable relationship with an authorised carer and adoption will promote the child's welfare; and
- decisions on whether a child may be able to safely return to their birth parent(s) must be made within a legislated timeframe, such as six months of an interim care order for children under two years old, or within 12 months for older children.