



**Government of South Australia**

Office of the Guardian  
for Children and Young People

## **Response to DECD Families Adoption Review**

### **Review of the South Australian Adoption Act 1988**

**February 2015**

To: Associate Professor Lorna Hallahan  
Chair, Review Committee  
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## 1. Introduction

- 1.1 Among other statutory functions, the Guardian for Children and Young People acts as an advocate for the interests of children and young people under the guardianship, or in the custody, of the Minister for Education and Child Development. It is in this capacity that the following submission is made.
- 1.2 This submission is based on the experience of the Office of the Guardian (GCYP) in advocating for children and young people, monitoring the provision of services, talking with young people about their experiences and with other experts in the provision of care and services.
- 1.3 GCYP welcomes the opportunity to comment on matters relevant to the South Australian law on adoption of children.
- 1.4 This response is limited to the third term of reference for the review, that is, **the interface between adoption and children in the child protection system requiring permanent care.**

## 2. General

- 2.1 **The significance to children of belonging and feeling connected to family, however family is defined, cannot be overstated.** The experience though is not always a positive one and not always protective of children. In some cases, the 'state' intervenes, on behalf of the community, to protect the child from his or her family or to provide care when the parent/s is temporarily or permanently incapable of providing it.
- 2.2 In many of these cases children are placed in the care of other adults, who may or may not be relatives of the birth parents. The 'alternative' family must help create the sense of belonging for the child but usually without severing the links to the child's immediate birth family.  
  
**In most cases, the child or young person will want to identify with both families,** albeit in very different ways. Contrary to common wisdom, ongoing contact with their family of origin is usually a protective factor that improves placement stability. (Tilbury and Osmond, 2006)
- 2.3 The significance to Aboriginal children of belonging to family, broadly defined, is not only in the child's interests but also in the interests of the child's community to which the child was born. Time and again, the point is made by Aboriginal people to child welfare decision-makers that the **strong connection with the child's own specific community** is critical to the child's present and future wellbeing. This is not satisfied by connection with any Aboriginal community or family.

This principle is supported in S 11 of the *Adoption Act 1988* (the Act), which says that an adoption order will usually not be made except in favour of a member of the child's Aboriginal community who has the correct relationship with the child in Aboriginal customary law. **There is no explicit requirement for an independent view by an Aboriginal representative on an application for an order or the requirements of the order.** An explicit requirement should be considered in the review of the legislation.

- 2.4 In accord with local and international agreements and law, decisions about children, such as adoption, should be determined in the **best interests of the child and take the child's views or perspective into account.** This should be the paramount principle. (See 7.1)

Additionally, **all decisions must be individualised, timely and culturally appropriate.**

- 2.5 Children who are in formal out of home care have the right to:
- know who they are and their history,
  - to understand where their family is,
  - know about their culture and their community,
  - to keep in contact with people who help them feel good about themselves and
  - to be involved in what is decided about their lives and care (*Charter of Rights for Children and Young People in Care*).

**These rights should equally apply to children who have been in care and are subsequently adopted.**

- 2.6 The **evidence is not strong for favouring adoption over long-term foster care placements to achieve good outcomes for children** and the risk of disruption is similar. The Victorian Inquiry into Protecting Vulnerable Children (Cummins, Scott and Scales, 2012, 229) reported,

“A recent UK study suggests that the main factors influencing outcomes in care are age, pre-placement adversity and delay in placement (that is, exposure to adversity). Where adversity levels are similar, children in stable foster care and adopted children had similar needs and outcomes when they arrived at the placements at similar ages. Overall there were no significant differences in outcomes between children in stable foster care and children who were adopted. (Beek et al, 2011 [sic], pp 2-4)”

Tilbury and Osmond's (2006, citing Sellick and Thomson 2002) literature review suggests that temporary foster placements that become permanent deliver as good outcomes as other permanent arrangements, including adoption. Long term foster care is a positive experience for most children. (Barber and Delfabbro, 2005)

This does not mean that adoption should *not* be an option, but only that it need not be the preferred option. The decisions should be individualised.

Additionally, **there should be minimum periods of fostering a child before adoption orders can be sought or granted**, to ensure that the child and family are familiar with each other and established relationships are able to be assessed as part of the application process.

### 3. Retention of the child's birth name

- 3.1 Legislative change to the provisions for the **'name of child' should give greater prominence to the views and best interests of the child**, regardless of age. The situation at present is that the Court need only take into account any wishes expressed by the child and, if the child is over the age of 12 years, the child must consent to the change unless the child is intellectually incapable of consenting. While the discussion paper provides generic arguments for retention of names, as legislated in other Australian jurisdictions, the decisions should always be individualised.

**Even very young children are capable of giving their views** and a skilled independent advocate will ensure that the child understands the implications. If the child is an infant or has the developmental age of an infant, a best interests test can still be applied by an independent person. This is done routinely in care and protection court decisions and should be applied in decisions about change of name.

### 4. Same-sex couples and adoption

- 4.1 The legislation should be changed to allow same sex couples to adopt. There are children and young people (in care) living in long-standing same-sex couple 'carer' arrangements, who are provided with stability, identity and a strong sense of belonging. Whether or not a child is adopted **should not be determined by the marital status or sexuality of the prospective adopting parent/s**.

### 5. Single persons and adoption

- 5.1 The legislation should be changed to remove the requirement for 'special circumstances' to justify adoption of a child by a single person. As above, there are children and young people (in care) who **are provided with stability, identity and a strong sense of belonging by sole carers**.

### 6. Discharge of adoption orders in certain circumstances

- 6.1 In considering whether the grounds on which adoption orders can be discharged should be broadened, the Review Committee should discuss **what would be done if a minor who had previously been under the guardianship of the Minister wanted to**

**discharge an adoption order.** What responsibility to the minor does the Minister have when the Minister has previously been the guardian?

If provisions for 'exceptional circumstances' are re-inserted in the Act, and the child has, prior to adoption, been under a care and protection order (guardianship of the Minister) do the birth parents resume legal custody and guardianship? If this is not desirable, does the Minister resume guardianship without need for further demonstration of incapacity of the birth parents to safely care for the minor?

## 7. Other issues

- 7.1 Similar to the points made in section 3 above (retention of the child's birth name) the **views and best interests of the child should be the paramount principle in deciding on adoption orders.** The Act says that as a general principle, "the welfare of the child to whom the proceedings relate must be regarded as the paramount consideration." This should be strengthened to require explicit consideration of views and best interests of the child. Those views or representation of best interests should be presented to the court by an independent advocate (guardian ad litem) in the circumstances where a child is incapable or unwilling to do so themselves. Section 8A requires the Court to interview children aged five years or older but not in the presence of any other party to the adoption. There is an opportunity in this review to recommend that this be **strengthened so that views and best interests of the child are required in the decision about the order and all subsequent Court decisions related to the order.**
- 7.2 In the experience of GCYP staff, the motivation for adults in fostering a child is of a different nature to those who want to adopt a child, and this can lead to problems with shared decision-making and meeting agreements for contact with birth parents and siblings. However, this should not preclude foster parents from considering adoption or being considered as prospective adopting parents. It is rather an issue for recruitment, assessment and training of foster carers.
- 7.3 At present, if another person accepts the legal guardianship of a child under the provisions of the *Children's Protection Act 1993* (s.38 (1) (c) and (d)), the Department continues to provide agreed payments and services for the wellbeing of the child. If a child is adopted from the guardianship of the Minister, **would any services or payments continue or be provided in the future? Would the child have a say** in whether the department remained involved? Similar to adoption programs in some other countries, the provision of services and payments would be negotiated and agreed as part of the adoption order.
- 7.4 While there is provision in adoption orders for birth family contact (s.26A) the views of the child are only sought when the [adult] parties to the adoption seek the order or variation to the order. There is no provision for a minor who is adopted, to change the formal arrangement. There is also **no specific mention of contact with siblings**, which in children's views, can be more significant than ongoing contact with their birth

parents. The child is not a legal party to the arrangements associated with the adoption.

If GCYP can be of further assistance in either clarifying or expanding on the comments above please contact Pam Simmons, Guardian. It is GCYP's practice to make its submissions available to the public. Please let the Guardian know if you have any concerns about this.

## References

Barber, J and Delfabbro, P, (2005) 'Children's adjustment to long-term foster care' *Children and Youth Services Review*, v 27, pp 329-340

Beek, M, Biehal, N, Sinclair, I, Baker, C & Elison, S (2010) *Belonging and performance: outcomes in long-term foster care and adoption*, summary 1, Adoption Research Initiative, York.

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Sellick, C and Thoburn, J (2002) Family placement services, In McNeish, D, Newman, T, and Roberts, H (eds) *What Works for Children? Effective Services for Children and Families*, Open University Press, Buckingham, pp 13-36

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