



Children's rights in the context of open adoption from out-of-home care

Across Australia, recent legislative reforms have focused on long-term care options for children in out-of-home care (OOHC), including adoption.

Child welfare systems face the challenge of making decisions about a child's current and future safety and well-being. These decisions should be made in children's best interests and reflect the principles set out in the United Nations Convention on the Rights of the Child (UNCRC), to which Australia is a signatory.

UNCRC is a human rights instrument that sets out the basis for children's rights, and their entitlement to have these fulfilled. Such rights are assigned on the basis of personhood: because children are human, they are assured foundational protection, irrespective of differences in their maturity, place of birth, ethnicity or family¹.

UNCRC describes conditions to which children are generally entitled and identifies contexts in which children should be provided special protection. Notably, the UNCRC sets out that children should have a voice in any matters that affect them, appropriate to their age and maturity, and their views should influence decisions.

Each Australian jurisdiction has its own legislative and policy framework regulating adoption from OOHC. Examining these frameworks helps us to understand how welfare systems recognise and respond to people as well as social problems, and to consider if the implemented measures reflect a rights-based approach^{2,3}. Examining the differences between jurisdictions can bring greater understanding to the inconsistency in permanency planning and adoption across Australia and whether jurisdictions adequately respond to the rights of children.

¹ Melton, G. B. (2010). It's all about relationships! The psychology of human rights. *American Journal of Orthopsychiatry*, 80(2), 161-169.

² Fox Harding, L. (2013). *Perspectives in child care policy* (2nd ed.). New York, USA: Routledge.

³ Hetherington, R. (2002). Learning from difference: Comparing child welfare systems. Paper presented at Positive Systems of Child Welfare Conference.

Adoption legislation in Australia

Adoption Act 2000 (NSW)
Adoption Regulation 2015 (NSW)
Adoption Act 1984 (VIC)
Adoption Regulations 2008 (VIC)
Adoption Act 2009 (QLD)
Adoption Act 1994 (WA)
Adoption Act 1988 (SA)
Adoption Regulations 2004 (SA)
Adoption (Review) Amendment Act 2016 (SA)
Adoption Act 1988 (TAS)
Adoption Regulations 2016 (TAS)
Adoption Act 1993 (ACT)
Adoption Regulation 1993 (ACT)
Adoption of Children Act 2011 (NT)
Adoption of Children Regulations 2016 (NT)

Source: Austlii, 2018

Key Findings

Examining Australian adoption legislation highlights the differences between:

- which rights are protected
- the extent to which jurisdictions protected, respected and fulfilled these rights
- the conditions that determined the adoption processes and supports available.

The table on page 6 identifies rights-based provisions in legislation. It was noted that some jurisdictions lack mechanisms to adequately adhere to rights relating to:

- enabling children's and birth parents' participation in the adoption process
- preserving identity including name, culture and family relationships
- supporting children and families ongoing well-being.

Participation and support for parents

Adoption from OOHC is complex as it involves many parties whose interests may be in opposition, and there are different cultural attitudes as to who has the right to influence decision making⁴. Decision makers may focus on the wishes and desires of birth parents; foster carers or case workers who are acting as the agent for the child; or on broad societal aims imposed by the state. Therefore, unless the interests of children and stakeholders are unified, there is reduced focus upon children's interests⁵. Balancing competing interests to ensure children's rights are upheld is difficult.

Children's rights related to adoption - Article 21

Adoption shall ensure that the best interests of the child are the paramount consideration. Adoption should be regulated and ensure that the child's parents/relatives/guardians are considered, and informed consent has been given by those required.

Source: United Nations, 1989

Parental consent

Every jurisdiction requests parental consent when the proposed adoptee is a child. Each jurisdiction outlined that the process of giving informed consent: required information being provided; counselling offered or received; and the signing of consent witnessed.

Five states (NSW, QLD, WA, SA and ACT) included additional requirements to be met for birth parents who had not reached adulthood. All states have a process for revoking of consent, within a certain timeframe (usually 28 days).

Dispensation of parental consent

Every jurisdiction has provisions for dispensing with parental consent. Most provisions were based on circumstances where the birth parents could not give informed consent (e.g., unable to be located) or concerns related to the child's welfare or safety. In instances when a birth parent was not able to give informed consent, Victoria and Tasmania required evidence that "the person is, and is unlikely to cease to be" capable of considering question of consent.

New South Wales and Western Australia are the only states that specifically provide dispensation on the basis of the child's established relationship with their carer. This acknowledges that the child's relationship with their alternative family was important to their well-being and part of determining their best interests. The Australian Capital Territory is currently considering whether legislative changes

should be made to amend the conditions for dispensation of consent, to allow greater consideration of the best interests of children.

Children's rights related to adoption - Article 9

Where it is determined necessary for children to be separated from their parents, all interested parties should be given the opportunity to participate in the proceedings and make their views known.

Source: United Nations, 1989

Participation and support of birth parents

Every jurisdiction (except WA) includes provision for birth parents to express preferences for specific features of the child's upbringing within the adoptive family. Most commonly this includes matters relating to the child's religious upbringing or maintaining links with their cultural background.

There are, however, limited provisions within legislation to support birth parent's participation during legal proceedings. Queensland and the Australian Capital Territory outline that parties should understand the proceedings without specifying how this should be supported in practice. Western Australia requires underaged birth parents to have legal representation in proceedings. New South Wales allows for special support to assist birth parents unable to give proper legal instruction.

Most jurisdictions (except ACT and TAS) have provisions to *notify presumptive father's of a proposed adoption and establish paternity*. Their involvement in the adoption process was often dependent on their paternity being established.

Every jurisdiction allowed for birth parents to express their wishes regarding post adoption contact and information exchange. Some states (NSW, VIC, ACT, WA and SA) also have provisions which allow birth parents to request variations to arrangements after the adoption.

Impact of whether consent is given

There are many reasons why a parent may not wish to consent to adoption, including not wanting to be seen as giving their child away. In some jurisdictions, birth parent consent impacts on the degree to which they are involved in the adoption process. That is, parents can only express their preference for ongoing contact if they consent to the adoption (VIC, WA and NT).

In Victoria and Northern Territory parents are not seen as parties to the adoption and are limited to contesting adoption or dispensation hearings.

Participation and support for children

Children's rights related to adoption - Article 12

Children have the right to express their views in relation to matters that affect them, including during the process of judicial and administrative hearings, and these should be "given due weight in accordance with the age and maturity of child".

Source: United Nations, 1989

Children's views

Most jurisdictions (TAS, NT, WA and SA) specify that children's views should be sought in relation to the adoption application and proposed name changes (NSW, VIC, SA, TAS and ACT). Some jurisdictions also specified that children's views should be sought on:

- their placement (NSW)
- ongoing birth family contact (NSW and QLD)
- dispensation of parents consent (QLD).

Support in legal proceedings

Most jurisdictions identify instances when children should be given legal representation. For example:

- NSW - children must be legally represented when a guardian ad litem is appointed.
- Victoria - requires children to have representation when an adoption order is contested; parental consent is being dispensed with; or an order is being discharged.
- Queensland - legal representation must be given when children over the age of 12 years are called to give evidence.

Five jurisdictions (NSW, VIC, WA, ACT and NT) also state that the court may order representation if the child appears to need legal counsel. Tasmania and South Australia, however, do not stipulate any legal representation for children during the adoption process.

To enable children's right to participate in decisions that affect them, jurisdictions should consider broadening the range of decisions in which children must be involved and how they can better support children to participate in legal proceedings.

Children's consent

Several jurisdictions (NSW, NT, WA and SA) require children over 12 years of age to give consent to their adoption. In New South Wales children are able to give sole consent to being adopted by their carers, if they have been in their care for at least 2 years.

Jurisdictions stipulate that children should be provided with written information and offered, or be required to receive, counselling when giving consent. Only New South Wales and South Australia offer culturally specific counselling for Aboriginal and Torres Strait Islander children. Lack of culturally appropriate counselling may be a barrier to some children's participation in the adoption process.

Children's rights related to adoption

Support to ensure survival and development - Article 6

Support for parents and legal guardians to raise the child - Article 18

Support for children with disabilities - Article 23

Support to ensure good health - Article 24

Support to ensure an adequate standard of living - Article 27

Support to promote the recovery for those who have experienced neglect and abuse - Article 36

Source: United Nations, 1989

Post-adoption Support

Studies from the US and UK have shown post-adoption support improves family stability, child behavior, parental confidence and also reduces the incidence of post-adoption breakdown⁶. In contrast, the lack of post-adoption support caused some families to experience financial difficulties in caring for children after an adoption order was made⁷. Providing post-adoption support for all children adopted from OOH is important to supporting their long-term outcomes.

Every jurisdiction has provisions for financial support after adoption, including when adoptive families required additional support to raise the child. However, half of the jurisdictions (VIC, QLD, NT, and SA) only provide post-adoption support in circumstances where children had complex care needs (such as a disability).

Most jurisdictions (VIC, QLD, TAS, NT) identify that other types of support may be provided, but do not stipulate what this may include. From July 2017, NSW has offered a means tested adoption allowance.

⁴ Fox Harding, L. (2013). *Perspectives in child care policy* (2nd ed.). New York, USA: Routledge.

⁵ Dwyer, J. G. (2006). *The relationship rights of children*. Cambridge: Cambridge University Press.

⁶ Beauchamp, T. (2014). *Post-adoption support services: A critical element in successful and permanent adoptions*. Silverwater, NSW: Social Justice Unit UnitingCare Children.

⁷ Sturges, W., & Selwyn, J. (2007). Supporting the placements of children adopted out of care. *Clinical Child Psychology and Psychiatry*, 12(1), 13-28.

Children's identity and relationships

In contrast to past adoption practices that promoted lifelong secrecy and held that the adoptee's family of origin was unimportant⁸, current legislation largely reflects an emphasis on children's right to an identity, which includes the right to, and protection of, a nationality, name and family relations. Adoption in Australia is considered to reflect an 'open' model which includes openness about the reasons why children came into care and sharing of information between families⁹.

Children's rights related to adoption

Right to identity, which includes the right to a nationality, name and family ties - Article 7

Right to protection of their identity - Article 8

Substitute care arrangements must consider how continuity of the child's cultural and religious background will be supported - Article 20

Source: United Nations, 1989

Culture

The majority of jurisdictions (NSW, VIC, QLD, TAS, ACT, and NT) take religion and culture into account when making placement decisions. Most jurisdictions assess adoptive parents on their attitude towards children maintaining their cultural heritage (NSW, VIC, QLD, WA, SA and TAS), however in South Australia this was only specified where prospective adoptive parents had expressed a wish to adopt a child from a particular racial background.

Only half of the jurisdictions (NSW, VIC, QLD and ACT) require an adoption plan that specifies how children will be supported to develop and maintain their cultural identity after the adoption.

Name

Four jurisdictions (NSW, QLD, ACT, and WA) stipulate that children must retain their given name, with New South Wales specifying this requirement for children over one year old. Five jurisdictions (NSW, VIC, QLD, ACT, and TAS) provide for adoptees to retain their surname or use their adoptive parent(s) surname at the time of adoption. Most jurisdictions also required that children's wishes and feelings regarding any proposed name changes be ascertained.

Birth certificate

South Australia is the only state that has implemented the use of an integrated birth certificate. The birth certificate is up-dated to include the names of the birth and adoptive parents, the child's full name given by birth parents and name after the adoption.

Other jurisdictions cancel an adoptee's original birth certificate and issue a new one with the adoptive family name. NSW is currently considering the use of integrated birth certificates.

Access to pre-adoption identifying information

Most states restricted adoptee's access to identifying information until adulthood (16 years of age in the NT), with earlier access requiring permission from birth and/or adoptive parents. Western Australia does not have an age restriction and New South Wales allows access to birth family information from the date of the adoption order.

Family relations

Six jurisdictions (NSW, VIC, QLD, ACT, NT and WA) assessed proposed adoptive parents on their willingness and capacity to facilitate contact with the birth family, however, three states only include this for Aboriginal and Torres Strait Islander children (ACT, NT and WA).

Only two jurisdictions (QLD and WA) specify consideration must be given to placing children with their siblings in adoptive families.

Points for consideration:

Dwyer (2006) argued that sibling relationships are "the most important relationships in the lives of some children and central to the lives of most" (p. 59). Yet consideration of sibling co-placement is only legally mandated in two states.

Ongoing contact and exchange of information

Contact helps children to maintain relationships, a sense of security and identity with Kin and culture. Most jurisdictions (NSW, VIC, QLD, ACT and WA) have formal post-adoption contact arrangements. In four jurisdictions (NSW, QLD, ACT, and WA) contact arrangements are a necessary requirement of adoption, lodged with the court as part of the adoption plan, which can be enforced if breaches occur. In two jurisdictions (VIC and ACT) contact arrangements can be made as specific and enforceable conditions to the adoption order.

In contrast, three jurisdictions (TAS, NT and SA) did not require that ongoing contact be addressed in the preparation of an adoption order, and ongoing arrangements agreed upon between birth and adoptive parents are not enforceable.

⁸ Higgins, D. (2010). *Impact of past adoption practices: Summary of key issues from Australian research*. Melbourne: ALFS.

⁹ Tobin, J. (2008). The development of children's rights. In G. Monahan & L. Young (Eds.), *Children and the law in Australia*. Chatswood, NSW: LexisNexis Butterworths.

Aboriginal and Torres Strait Islander Children

Aboriginal and Torres Strait Islander people have had a long history of forced separation and discrimination, including through the processes of adoption. The *Bringing Them Home* report highlighted how Indigenous ‘protection’ policies in Australia have been used to separate Aboriginal and Torres Strait Islander people from their identity, instill European values and assimilate them into non-Indigenous society¹⁰.

Children’s rights related to adoption - Article 30

Members of minority groups have the right to take part in their culture, to practice religion and to use their language

Source: United Nations, 1989

In response to past practices, Aboriginal advocacy groups have been central to the development of the Child Placement Principles that aim to protect Indigenous children’s links and connection to their culture. In order of priority, Indigenous children in out-of-home care should be placed:

- within family and kinship networks
- with non-related carers in the child’s community
- with carers in another Aboriginal community.

If none of these options is available, children are placed with non-Indigenous carers as a last resort¹¹. Considering these principles alongside the legislation yields a number of observations, described in the next section.

Child Placement Principles

Established through:

- **recognising** Aboriginal and Torres Strait Islander children’s right to be raised in their own family and community;
- **partnering** with the community by ensuring they are represented in all child welfare matters;
- **prioritising** child placements with family members or those within the Indigenous community, in the form of kinship care;
- **recognising** the right of Aboriginal and Torres Strait children, parents and family members to participate in child protection decisions; and
- **supporting** children in OOHC to maintain connection to “their family, community and culture, especially children placed with non-Indigenous carers”

Source: Child Family Community Australia, 2015¹¹

Application of adoption

Most jurisdictions (except TAS and NT), specify that adoption is only appropriate for Aboriginal and

Torres Strait Islander children where there is no other suitable option.

Differences in cultural groups

Most states (with the exception of NSW and QLD), simplified their approach to Aboriginal and Torres Strait Islanders by reducing them to a collective group. These jurisdictions made an overarching statement that adoption is not a concept that exists in their culture and Aboriginal and Torres Strait Islander’s were subject to the same guiding principles.

New South Wales and Queensland acknowledge differences between Aboriginal and Torres Strait Islander cultures. These differences are considered in the provisions relating to placement and selection of adoptive parents.

Additionally, Torres Strait Islanders practice a form of adoption, traditionally as a way of family formation, where children are raised by family or close friends. However, no jurisdictions specify any provisions to enable this cultural custom.

Community and family involvement in adoption process

The adoption legislation in most jurisdictions (with the exception of TAS and SA) identify that adoption requires consultation with the child’s community and organisations with which they are involved. During the consent process, four jurisdictions (NSW, VIC, QLD and SA) offer counselling specifically designed for Aboriginal and Torres Strait Islander birth parents.

During the court process, New South Wales also has provision for a suitably qualified Aboriginal person to offer advice to families or kinship groups.

Placements

There was consensus that placements for Aboriginal and Torres Strait Islander children should preference placement with kin or their community. This is not included in Tasmania’s adoption legislation, however, it is reflected in their OOHC policy.

Victoria is the only state where birth parents can give conditional consent on the provision that at least one of the proposed adoptive parents are members of consenting parents community and members of child’s Aboriginal community have right of access to the child.

¹⁰ Human Rights and Equal Opportunity Commission. (1997). *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. Canberra: Human Rights and Equal Opportunity Commission.

¹¹ Child and Family Community Australia (2015) Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle. Melbourne: AIFS

Conclusion and summary

Protecting the rights of children as set out in the UNCRC means that institutions must not interfere with children obtaining their rights, and respect and support their fulfillment¹². This table identifies Australian adoption that establishes conditions supporting rights-based practice during the adoption process.

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT
Participation & support for birth parents (page 2)								
Did not limit non consenting birth parent(s) involvement in adoption process	✓	x	✓	x	✓	✓	✓	x
Required to notify presumptive birth father and establish paternity	✓	✓	✓	✓	✓	x	x	✓
Provides legal support for birth parents (in specific conditions)	✓	x	x	✓	x	x	x	x
Participation & support for children (page 3)								
Allows children to consent to their adoption from age 12 years	✓	x	x	✓	✓	x	x	✓
Provides children with legal representation (in specific conditions)	✓	✓	✓	✓	x	x	✓	✓
Children's identity and relationships (page 4)								
Must consider placing siblings together	x	x	✓	✓	x	x	x	x
Adoption order must address ongoing contact and exchange of information	✓	✓	✓	✓	x	x	✓	x
Adoption order must address ongoing connection to culture	✓	✓*	✓	x	x	x	✓	x
Birth certificates contain both pre and post adoption name and parentage	x	x	x	x	✓	x	x	x
Enables access to pre-adoptive identifying information at age:	Open	18	18	Open	18	18	18	16
Post adoption support when adoptive families require additional financial support to raise the child	✓	x	x	✓	x	✓	✓	x
Aboriginal and Torres Strait Islander adoption (page 5)								
Requires cultural consultation as part of the adoption process	✓	✓	✓	✓	x	x	✓	✓
Culturally specific counselling for birth parents when giving consent	✓	✓	✓	x	✓	x	x	x
Culturally appropriate support can be provided during court process	✓	x	x	x	x	x	x	x

* Specific to Aboriginal children - if consent is subject to a condition that members of the Aboriginal community or relative have a right of access to the child

¹² Tobin, J. (2008) The development of children's rights. In G. Monohan & I. Young (Eds), *Children and the law in Australia*. NSW: LexisNexis Butterworths.

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