

CHAPTER 18

ADOPTION AS A FORM OF SUBSTITUTE FAMILY CARE

18.1 Introduction

The family as a social unit is the foundation of our society. It provides security and a sense of identity for the child, and is the 'natural environment for the growth and well-being of all its members . . . particularly children'.¹ Where for some reason such relationship is unavailable or fails, society must provide systems and resources to safeguard the welfare of the child.

How we treat our children, especially those who lack adequate parental care, is a measure of our community. There have been major changes over the past last century, both in our society and in our perception of the significance of a child's personal status and of the role of the family. It is also evident that the lack of a coherent and principled approach to the placement, protection and care of children in South Africa whose birth families cannot or will not provide properly for them disadvantages these children. However, adoption cannot be viewed in isolation from the wider issue of the placement of children needing alternative care. Rather, it represents one end of a spectrum of available options.

We will deal with inter-country adoption in Chapter 22 below and will not cover that aspect in this Chapter.

18.2 Adoption as substitute family care

From the following table it appears that, in comparison to foster care, adoption as a form of substitute family care still has lots of potential to accommodate children.

Year	New adoptions registered
1993	2 117

¹ Preamble CRC.

1994	2 290
1995	2 587
1996	3 132
1997	3 048
1998	2 716
1999	2 736
2000	2 769

Source: The Registrar of Adoptions

Adoption, as it is practised today, embodies a deep sense of social purpose - the primary aim of which being the attempt to assuage the need to provide a stable home for a child. This enables a child to profit from an upbringing that he or she would not otherwise enjoy.² Adoption can therefore be described as a process by which society provides a substitute family for a child whose natural parents are unable to or unwilling to care for the child.³ It can therefore be seen primarily as a device for imitating nature in respect of the rearing of a child. This need not be the purpose, or at least the sole purpose, of adoption. It can, in theory at least, also be used simply as a means of altering legal relationships, particularly for the purposes of the law of succession.

18.3 **Current South African law and practice**

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² See also Divya Singh 'Adoption of children born out of wedlock' 1996 (29) **De Jure** 305; Anthony Dickey **Family Law** (third edition) Sydney: LBC Information Services 1997 423.

³ As was done in the **Final Report** (1977) of the Royal Commission on Human Relationships (Vol 4, para 2, p 98), quoted by Anthony Dickey **Family Law** (third edition) Sydney: LBC Information Services 1997 423.

The current South African adoption system is regarded as inadequate due to the small number of children who are placed in adoption annually.⁴ Concern was expressed in the White Paper for Social Welfare about the fragmentation and underutilisation of the adoption system, in particular because of its failure to meet the needs of abandoned children or children who will require care as a result of the predicted HIV/AIDS epidemic.

Although there have been several developments in policy in the child-care field during recent years, no effort has been made to formulate a comprehensive framework for adoption services. The Inter-Ministerial Committee on Young People at Risk, for example, acknowledged adoptive care as one of a range of care services available to children. However, it did not investigate factors related to the feasibility of the existing services. While the need for a system of subsidised adoption was recognised in the White Paper for Social Welfare, the Lund Committee, in its investigation of social security grants for families and children, failed to make recommendations regarding the implementation of such a grant.

The Department of Social Development drafted a policy document on the transformation of South African adoption practice which proposes the standardisation of adoption services, the formulation of minimum norms and standards, and the development of life skills programmes for prospective adoptive and birth parents. It highlighted the importance of awareness campaigns to promote adoption and urged that consideration be given to subsidized adoptions. It suggested that mechanisms to monitor the transformation of the adoption system in South Africa be developed and implemented, as well as indicators for the collection of quantitative and qualitative statistical data on the transformed adoption system.⁵ It is unclear how the Department plans to take the process of transformation forward, or to achieve any of the objectives outlined in its policy statement as no plan of action had been formulated.

In addition, recent policy proposals regarding the financing of developmental social services, create considerable confusion about the financing of specialist welfare services, such as adoption. In its Financing Policy, the Department of Social Development recommends that specialised services and

⁴ Petro Brink **An Exploration of South African Adoption Practice in Respect of Abandoned Children**, Master of Social Science's thesis, University of Natal, Durban, June 1999, p. 26.

⁵ Issue Paper 13, par. 5.12.

those directed at a particular problem area be phased out and be replaced with developmental and integrated services. These proposals, if implemented in their current format, could have a detrimental effect on adoption services in South Africa.⁶

⁶ Petro Brink, Master's thesis, p. 27.

The law relating to adoption is contained in Chapter 4 of the Child Care Act, 1983. Its provisions are designed to promote the welfare of the child by admitting him or her to authentic family relationships, while at the same time safeguarding the interests both of the natural and of the adoptive parents.⁷

18.3.2 Requirements for adoption

Adoption in terms of the Child Care Act, 1983 is a formal process by means of which parental power over a child is terminated, and vested in another person or persons, namely the adoptive parent(s).⁸

Section 17 of the Act provides that a child may be adopted by a husband and his wife jointly,⁹ by a widower or widow or unmarried¹⁰ or divorced person, or by a married person whose spouse is the

⁷ Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 437.

⁸ Barnard, Cronjé and Olivier **The South African Law of Persons and Family Law** 279.

⁹ Married persons can adopt a child only jointly. See also the wide definition of 'marriage' in section 1 of the Child Care Act, 1983.

¹⁰ Tshepo Mosikatsana 'Comment on *The Adoption by K and B, Re* (1995) 31 CRR (2D) 151 (Ont Prov Div)' 1996 (12) **SAJHR** 582 at 583 - 4 argues that the inclusion in section 17 of an 'unmarried' person as one of the classes of persons qualified to adopt a child clearly includes single gays and lesbians as prospective adoptive parents. See, however, John B 'Prejudice passed off as screening' (February / March 2000) **ChildrenFIRST** 9.

parent of the child.¹¹ Before making an adoption order, the court must be satisfied that the person or persons who are qualified to adopt a child in terms of section 17 meet the following requirements:¹²

- * They must possess adequate means to maintain and educate the child,¹³
- * They must be 'of good repute' and be fit and proper persons to be entrusted with the custody of the child;
- * The proposed adoption must serve the interests and be conducive to the welfare of the

¹¹ In terms of the amendments brought about to the Child Care Act, 1983 by the Adoption Matters Amendment Act 56 of 1998, the natural father of a child born out of wedlock can now adopt his child.

¹² Prescribed by section 18(4) of the Child Care Act, 1983.

¹³ Section 18(4)(a). Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 448, footnote 64, point out that section 18(4)(a) is consistent with the provisions of article 27 of the UN Convention on the Rights of the Child, which recognises every child's right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. 'Though the parents bear the primary responsibility to provide for the child, the state, in terms of article 27(3) of the UN Convention read with section 28(1)(c) of the final Constitution, carries the obligation to assist the parents in meeting the child's needs. This suggests that indigent families should be given assistance in the form of government subsidies and tax breaks to enable them to raise their children'.

child;

- * That necessary consent(s) to the adoption must have been given.¹⁴

The adequate means test mentioned above is particularly problematic.¹⁵ In the drafting process leading up to the Child Care Amendment Act 96 of 1996, the removal of the requirement that the prospective adoptive parents should have the means to support and educate the child was seriously considered - presumably because it discriminates against poor people who may be suitable adoptive parents. It was suggested that the proposal, designed to increase the pool of possible adoptive parents, should nevertheless be accompanied by some mechanism to ensure that the adopted child does not suffer undue deprivation. This was not done. Sloth-Nielsen and Van Heerden¹⁶ show that a far better, and more constitutionally correct, option would involve establishing whether prospective adoptive parents were willing and able to carry out their parental responsibilities, if necessary with appropriate State aid. This would then not necessarily preclude adoption by poor families and would be in line with the provisions of the CRC and of the Constitution.

¹⁴ See section 16.3.3 below.

¹⁵ See Julia Sloth-Nielsen and Belinda van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' 1996 (12) **SAJHR** 247 at 254.

¹⁶ Julia Sloth-Nielsen and Belinda van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' 1996 (12) **SAJHR** 247 at 255.

In considering an application for adoption the children's court is enjoined to 'have regard to' the child's cultural and religious¹⁷ background of the child and of the natural parents, as compared with that of the proposed adoptive parent or parents.¹⁸ This directive constitutes the legal basis for 'matching' a particular child to particular adoptive parents, and has been developed into a sophisticated set of criteria by social workers engaged in adoption work.¹⁹ These considerations are not, however, decisive of whether a particular adoption order should be made. Unlike the issues on which a court must be satisfied, these are merely matters to which it must have regard.²⁰

There are, however, no legal barriers to trans-racial adoptions.²¹

The Children's Act of 1960 stipulated age requirements that were stringent and complex: their object was to achieve an age difference between parent and child similar to that found in nature, and to discourage sexual malpractices as far as possible. Thus, no person under the age of 25 years could adopt a child unless he or she or (in the case of a joint adoption) his or her spouse was

¹⁷ Although the Child Care Act, 1983 lays down no religious requirement as such for an adoptive parent, the **Guide to Adoption Practice** at 61 expresses the view that '[t]he home should provide opportunity for the religious instruction and spiritual development of the child adoption'. If this implies that lack of any religious affiliation is per se a disqualification, Van Heerden et al **Boberg's Law of Persons and the Family** 442, footnote 30 argue that it goes too far: 'There is no warrant at all for the view that the legislature disapproved of atheists or agnostics in the role of adoptive parents. This view is reinforced by s 15 of the final Constitution, which protects believers and atheists alike'. Quite different considerations arise when a child who comes from a certain religious group has to be 'matched' with particular adoptive parents. But even in this context the courts have stressed that religious background is of little or no importance in the case of a newly born or very young child. See in this regard **C v Commissioner of Child Welfare, Wynberg** 1970 (2) SA 76 (C) at 87D-F, 88 B-H.

¹⁸ Section 18(3), read with section 40, of the Child Care Act, 1983.

¹⁹ See the **Guide to Adoption Practice** 81, from which it appears that even 'physical likeness' of the child to his or her proposed adoptive parents is considered relevant, though not decisive. Other factors are 'education' and place of residence.

²⁰ Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 449.

²¹ The requirement of 'race matching' was done away with in 1991 in terms of the Child Care Amendment Act 86 of 1991. For a discussion of the concept of race matching and the practice of trans-racial adoptions, see J Heaton 'The relevance of race and classification in terms of the Population Registration Act 30 of 1950 for adoption in South Africa' (1989) 106 **SALJ** 713; D J Joubert 'Interracial adoptions: Can we learn from the Americans?' (1993) 110 **SALJ** 726; N Zaal 'Avoiding the best interests of the child: Race-matching and the Child Care Act 74 of 1983' (1994) 10 **SAJHR** 372; T Motsikatsana 'Transracial adoptions: Are we learning the right lessons from the Americans and Canadians? - A reply to Professors Joubert and Zaal' (1995) 112 **SALJ** 606, 'Examining class and racial bias in the adoption process and the viability of transracial adoptions as a policy preference: A further reply to Professors Joubert, Pakati and Zaal' (1997) 13 **SAJHR** 602. Heaton, Joubert and Zaal argue that trans-racial adoptions may meet the child's best interests, while Motsikatsana is opposed to such adoptions, arguing that they are not in the best interests of the child concerned.

the natural parent of that child. Further restrictions depended on the child's age.²² However, there are no legal requirements regarding the age of the adoptive parents or the age difference between the adoptive parents and the child under the Child Care Act, 1983. This is left to the discretion of the adoption agency and of the children's court considering the adoption application.²³

18.3.3 Consent to adoption

In terms of the Child Care Act, 1983 consent to an adoption must be obtained from:

²² See further Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 443.

²³ The **Guide to Adoption Practice** 56 stipulates its policy in this regard as follows:

[t]he age range for adopters should ideally be within the span that is normal for natural parenthood. As a general rule the adoptive mother should not be more than 40 years older than the child, and the adoptive father not more than 45 years older. It is generally accepted that there are optimum times in life for various life tasks including parenting of a newborn infant. The late 30's are regarded as the upper limit for this important life task. Simultaneously it is not a good idea for a person in their late 50's or early 60's to be parenting an adolescent.

- (a) both parents of a legitimate child;²⁴
- (b) if the child is born out of wedlock, by both the mother and the natural father of the child, 'whether or not such mother or natural father is a minor or married person and whether or not he or she is assisted by his or her parent, guardian or in the case of a married person, spouse, as the case may be: Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known . . .';²⁵
- (c) the child must also consent to the adoption if the child is over 10 years of age and if the child understands the nature and import of such consent;²⁶
- (d) the foster parent where the child is in foster care and the foster parent has not himself or herself made an application for the adoption.²⁷

Consent must be in writing and must, if given in the Republic, be signed by those giving the consent in the presence of a commissioner of child welfare who must attest the consent.²⁸ Before the commissioner attests the consent he must inform the person granting the consent of the legal consequences of the adoption.²⁹ The person concerned may withdraw the consent in writing before

²⁴ Section 18(4)(d) of the Child Care Act, 1983.

²⁵ Section 18(4)(d) of the Child Care Act, 1983, as amended following the **Fraser** judgment by the Adoption Matters Amendment Act 56 of 1998.

²⁶ Section 18(4)(e) of the Child Care Act, 1983.

²⁷ Section 18(4)(g) of the Child Care Act, 1983.

²⁸ Section 18(5) of the Child Care Act, 1983.

²⁹ Regulation 19(2).

any commissioner at any time during a period of up to 60 days after having such consent³⁰ and the children's court cannot make any order of adoption before the expiration of this 60 day period.³¹

³⁰ Section 18(8) of the Child Care Act, 1983; Regulation 19(2)(b). See also **Re J (an infant)** 1981 2 SA 330 (Z) as to the withdrawal of consent by a father and **Y v Acting Commissioner of Child Welfare, Roodepoort** 1982 4 SA 112 (T) as to the withdrawal of consent by a mother.

³¹ Section 18(9) of the Child Care Act, 1983.

Previously, in the case of a child born of a South African citizen, the applicants also had to be South African citizens and thus resident in the Republic, or if they were not South African citizens they must have qualified for citizenship and have already made application in this connection.³²

In **Fraser v Children's Court, Pretoria North**,³³ the Constitutional Court declared section 18(4)(d) of the Child Care Act, 1983, which in its form at that time denied unwed fathers the right to consent to or veto the adoption of their natural children, to be unconstitutional in that it discriminated unfairly against unwed fathers on the basis of their gender and marital status and it also discriminated unfairly against fathers in non-Christian marriages. Parliament was given a period of two years to amend the law to bring it in conformity with the constitutional imperative of equality contained in section 9(3) of the Constitution. The Adoption Matters Amendment Act 56 of 1998, which inter alia amends section 18(4)(d) of the Child Care Act, 1983 so as to require the natural father's consent to his child's adoption in certain instances, takes into account the Constitutional Court's decision in **Fraser**.³⁴

³² This particular requirement was held unconstitutional by the Constitutional Court in **Minister for Welfare and Population Development v Fitzpatrick** 2000 (3) SA 422 (CC). See further 3.2.4 above.

³³ 1997 (2) SA 261 (CC).

³⁴ Ibid. See also T L Motsikatsana 'Is papa a rolling stone? The unwed father and his child in South African law - A

comment on *Fraser v Naudé* (1996) 29 **CILSA** 154 and Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 397 et seq. See further C J Davel and R A Jordaan 'Het die kind se belange uiteindelik geseëvier?' 1997 **De Jure** 330; R A Jordaan and C J Davel 'Die Fraser trilogie' 1997 **De Jure** 394; Carol A Gorenberg 'Fathers' rights vs. children's best interests: Establishing a predictable standard for California adoption disputes' (1997) Vol. 31 No. 2 **Family Law Quarterly** 169.

No consent will be required in the case of a child whose parents are dead and for whom no guardian has been appointed;³⁵ nor from any parent who is as a result of mental illness incompetent to give any consent;³⁶ nor from a parent who deserted³⁷ the child **or**³⁸ whose whereabouts are unknown;³⁹ nor from a parent who has assaulted, ill-treated or abused the child or allowed the child to be so assaulted, ill-treated or abused;⁴⁰ nor from a parent who has caused or conduced to the seduction, abduction or sexual exploitation of the child or the commission of immoral acts by the child;⁴¹ nor from a parent who is withholding consent unreasonably.⁴²

Section 19(b) of the Child Care Act, 1983 was amended by section 5(b) of the Adoption Matters Amendment Act 56 of 1998. In addition to the grounds listed above, no consent to adoption will be required from a parent

- (vii) who, in the case of a child born out of wedlock, has failed to acknowledge himself as the father of the child or has, without good cause, failed to discharge his or her parental duties with regard to the child;
- (viii) whose child, in the case of a child born out of wedlock, was conceived as a result of an incestuous relationship between himself and the mother of the child; or
- (ix) who, in the case of a child born out of wedlock -
 - (aa) was convicted of the crime of rape or assault of the mother of the child; or
 - (bb) was, after an enquiry by the children's court following an allegation by the mother of the child, found, on a balance of probabilities, to have raped or assaulted the mother of the child: Provided that such a finding shall not constitute a conviction for the crime of rape or assault, as the case may be;

³⁵ Section 19(a) of the Child Care Act, 1983.

³⁶ Section 19(b)(i) of the Child Care Act, 1983.

³⁷ Luanda Hawthorne 'Children and Young Persons' in Schäfer **Family Law Service** argues that 'desertion' in this context must be given a restrictive meaning more akin to abandonment rather than mere neglect. Thus, a father who has failed to maintain his children in terms of a court order could not be said to have deserted his children: **Van Rooyen v Van Staden** 1984 1 SA 800 (T).

³⁸ Before its amendment by the Adoption Matters Amendment Act 56 of 1998, the consent of the parent who deserted the child **and** whose whereabouts were unknown could be dispensed with. These now form two separate criteria for dispensing with consent: the 'and' was changed to an 'or'.

³⁹ Section 19(b)(ii) of the Child Care Act, 1983.

⁴⁰ Section 19(b)(iii) of the Child Care Act, 1983.

⁴¹ Section 19(b)(iv) of the Child Care Act, 1983.

⁴² Section 19(b)(vi) of the Child Care Act, 1983. See also **SW v F** 1997 (1) SA 796 (O). In paragraph 7.2.10 of the First Issue Paper mention is made of the view of some social workers that commissioners in the children's courts are reluctant to use this ground especially if the parent who is withholding consent is represented by a lawyer. See also question 72 posed on page 86 of the First Issue Paper.

- or
- (x) who, in the case of a child born out of wedlock, has failed to respond, within 14 days, to a notice served upon him as contemplated in section 19A.⁴³

⁴³

For the procedure that must be followed before a children's court can dispense with a natural parent's consent to the adoption of his or her child on any of the grounds set out in section 19(b) of the Act, see regulations 21(4) - (6).

The Adoption Matters Amendment Act 56 of 1998 also inserted a new section 19A in the Child Care Act, 1983. This new section provides for the natural father of a child to be given notice of consent given by the mother for the adoption of their child born out of wedlock.⁴⁴ It further provides for notification of a parent of consent given by the other parent for the adoption of their child born out of wedlock and affords the natural father the opportunity to acknowledge paternity prior to making an order for adoption of his child born out of wedlock so as to enable him to exercise his rights regarding the adoption of the child.⁴⁵ A person who wishes to acknowledge himself as the father of a child born out of wedlock can now apply to have the registration of the birth of such child amended by the recording of an acknowledgement of paternity and having his particulars entered in terms of section 11 of the Births and Deaths Registration Act, 1992.

Non-disclosure adoptions, that is where the parents of the child are not allowed to know who the prospective adoptive parents are, nor what the child's destination is to be after the adoption, are regulated by section 18(6) of the Act and can only take place if the children's court is satisfied that this will serve the best interests of the child.⁴⁶ To ensure this secrecy, a parent is not allowed to be present during the proceedings of the children's court unless the court is of the opinion that the parent's presence will serve the best interests of the child.⁴⁷

18.3.4 Adoption procedure

The person or couple wishing to adopt a child must apply on Form 11 in respect of each child they want to adopt.⁴⁸ The application must be lodged with the clerk of the children's court in the district where the child resides together with the identity documents or birth certificates of each prospective adoptive parent and each child being adopted. In the case of the adoption of a foster child the written statement of the child's foster parent(s) that he or she does not wish to adopt the child must be lodged. Where applicable, the written consent of the parent and of the child must be

⁴⁴ In terms of the new section 19A(1).

⁴⁵ In terms of the new section 19A(7).

⁴⁶ In 1981, 25% of all adoptions were of this type: Van der Vyver and Joubert **Persone- en Familiereg** (2nd edition) Cape Town: Juta 1985 604.

⁴⁷ Regulation 21(3).

⁴⁸ Regulation 18(1).

submitted.⁴⁹ A report from a social worker that the applicant is a potentially suitable adoptive parent, must also be lodged. An adoption is effected by an order of the children's court of the district in which the child is living.

18.3.5 **Effect of an adoption**

⁴⁹ As is required by sections 18(4)(d) and 18(4)(e).

An adoption order terminates all the existing rights and obligations between the child and his or her pre-adoption parent(s), and the relatives of the parent(s),⁵⁰ and an adoptive child is for all purposes whatever deemed in law to be the legitimate child of the adoptive parent 'as if he (or she) was born of that parent during the existence of a lawful marriage'.⁵¹ Even in the interpretation of a will, unless the context otherwise indicates, an adopted child shall be regarded as being born from his or her adoptive parent(s) and, in determining his or her relationship to the testator or another person for the purposes of a will, as the child of his or her adoptive parent(s) and not as the child of his or her

⁵⁰ Section 20(1) of the Child Care Act, 1983, read together with sections 1(4)(e) and (5) of the Intestate Succession Act 81 of 1987. If, however, a child is adopted by a married person whose spouse is the parent of that child (i.e. a stepparent adoption), then the adoption order does not terminate any rights and obligations existing between the child and such parent: section 20(1), read together with section 17(c), and with section 1(4)(e)(ii) of the Intestate Succession Act 81 of 1987.

⁵¹ Section 20(2) of the Child Care Act, 1983. See also **Venter v Die Meester** 1971 (4) SA 482 (T); **Cohen v Minister for the Interior** 1942 TPD 151 at 153-4.

natural parent(s) or any previous adoptive parent(s).⁵² An adoption order will have retrospective effect and will confer the surname of the adoptive parent on the adopted child.⁵³ Adoption does not, however, extinguish any rights the adopted child may have against third parties. Thus, the adopted child can still sue a third party who has caused the child loss by the wrongful killing of his or her natural parent despite the fact of his or her subsequent adoption.⁵⁴

⁵² Except in the case of a natural parent who is also the adoptive parent of the child concerned and who was married to the adoptive parent of the child concerned at the time of the adoption: Section 2D(1)(a) of the Wills Act.

⁵³ Section 20(3) of the Child Care Act, 1983. However, the opposite can be provided for.

⁵⁴ **Constantia Versekeringsmaatskappy v Victor** 1986 1 SA 601 (A).

Adoption can obviously not do away with the legal consequences of blood relationship. Thus section 20(4) of the Child Care Act 1983 provides that 'an order of adoption shall not have the effect of permitting or prohibiting any marriage or carnal intercourse (other than a marriage or carnal intercourse between the adoptive parent and the adopted child) which, but for the adoption, would have been prohibited or permitted'. This means that impediments to marriage based on blood relationship which existed before the adoption of the child, persist in spite of the adoption and also that no further impediments to marriage are created by the adoption of the child, other than that the adoptive parent and the child may not marry one another.⁵⁵

Finally, an adoption order terminates an order by the children's court or a criminal court concerning the custody of the child.⁵⁶

18.3.6 Rescission of an adoption order

An order of adoption can be rescinded.⁵⁷ This can be done on application to the children's court by the adoptive parents, the person who was a parent or guardian of the child at the time of the making of the order, and the assistant of the children's court which originally issued the order, if he or she has the consent of the Minister to do so.⁵⁸ The child himself or herself cannot make such an application.⁵⁹ Application for the rescission of an adoption order can be made on the grounds that:

- (a) the adoption is detrimental to the child;⁶⁰
- (b) the parent of the child did not consent to the adoption, and such consent was necessary for the adoption;⁶¹

⁵⁵ Barnard, Cronjé and Olivier **The South African Law of Persons and Family Law** 282.

⁵⁶ Section 20(5) of the Child Care Act, 1983.

⁵⁷ Section 21 of the Child Care Act, 1983. The procedure to be followed in making application for rescission is set out in Regulation 26. For a criticism of section 76 of the 1960 Children's Act (the equivalent of the present section 21), see Edwin Spiro 'Remedies against null and void adoption orders' (1974) 91 **SALJ** 168.

⁵⁸ Section 21(1) of the Child Care Act, 1983.

⁵⁹ See Van der Vyver and Joubert **Persone- en Familiereg** (second edition) Cape Town: Juta 1985 607 for a possible procedure which the child can follow in the event that the child becomes dissatisfied with the adoption.

⁶⁰ Section 21(1)(c) of the Child Care Act, 1983.

⁶¹ Section 21(1)(a) of the Child Care Act, 1983.

- (c) at the time of making the adoption order the adoptive parent did not qualify in terms of section 17 of the Child Care Act, for obtaining an adoption order.⁶²

The adoptive parent can apply for the rescission of the adoption order on the grounds that:

- (a) the child is mentally disordered and was already so at the time the adoption order was made;
- (b) the child suffered from a serious congenital disorder or injury at the time the adoption order was made; or

⁶² Section 21(1)(d) of the Child Care Act, 1983.

- (c) the adoptive parent was persuaded to adopt the child by means of fraud, misrepresentation or *justus error*.⁶³

Section 21(2) of the Child Care Act 1983 lays down different periods in time within which application must be made for the rescission of an adoption order, depending upon the person by whom such an application is made.

The effect of the rescission of an adoption order is regulated by section 21(8) of the Act. It provides as follows:

On the rescission of an order of adoption ... , the child concerned shall for all purposes be restored to the position in which it would have been if no order of adoption had been made: Provided that the rescission of the order shall not effect anything lawfully done while the order of adoption was in force.⁶⁴

18.3.7 Appeal

Appeal to the High Court against decisions of the children's court lies as follows.⁶⁵

⁶³ Section 21(1)(b) of the Child Care Act, 1983. Section 21(3) of the Act provides that adoptive parents can only succeed in having an adoption order rescinded on the ground of a congenital disorder or mental illness in the child if they were unaware of the existence of such problems at the time the order was made, and that their ignorance cannot be ascribed to their neglect to either examine the child with reasonable care or having the child so examined.

⁶⁴ After rescission of an adoption order in **S v Kommissaris van Kindersorg** 1967 (4) SA 66 (SWA), the court held, in a sequel to this decision, **S v M** 1968 (1) PH M3 (SWA), that the child had to be restored to the custody of his natural mother.

⁶⁵ Section 22 of the Child Care Act, 1983.

- (a) an appeal against an order of adoption may be brought by the child's natural parent or his or her guardian at the time when the order was made;
- (b) an appeal against the rescission of an adoption order may be brought by the child's parent, guardian or adoptive parent, provided that he or she did not apply for such rescission;
- (c) an appeal against the refusal of an application for rescission of an order of adoption may be brought by the disappointed applicant.

The Act does not provide for an appeal to the High Court against the commissioner's refusal to make an adoption order. The matter may, however, be taken on review.⁶⁶

18.3.8 **Review**

The commissioner exercises his or her judicial discretion in granting or refusing an adoption order. As already pointed out, when hearing an application for adoption, a children's court functions as a court of law and, except where a departure is specifically authorised, is bound to observe the ordinary rules of evidence and procedure no less strictly than a magistrate's court. Therefore, what would amount to a reviewable irregularity in a magistrate's court would have the same effect if it took place in the children's court.⁶⁷

⁶⁶ Van Heerden et al Boberg's **Law of Persons and the Family** (2nd edition) 454.

⁶⁷ Per Marais J in **Napolitano v De Wet NO** 1964 (4) SA 337 (T) at 344.

The High Court has exercised a power of review in a number of cases.⁶⁸ Various bases for this review jurisdiction, and for the commissioner's *locus standi* to bring the application, have been suggested. Common to all the decisions, however, is the need for proper notice to be given to all interested parties, the natural parents (where known) and the commissioner who made the order.⁶⁹ In the exercise of its general powers of review, the High Court will entertain, at the instance of a prospective adoptive parent, an application for review of an refusal to make an adoption order on the ground that the proceedings were grossly irregular or that the commissioner misdirected himself or herself of a matter of law. An irregularity must, however, have prejudiced the applicant.⁷⁰

18.3.9 Record and registration of adoption

The adoption order confers the surname of the adoptive parent on the child, unless otherwise provided in the order. The adoptive parent(s) may apply for the adoption of the child and the change of surname to be recorded on the births register. A birth certificate in the surname of the adoptive parent may then be issued in respect of the child.⁷¹

The clerk of the children's court must keep an adoptions record book in which all the particulars of applications for adoptions, the orders of the court, and any rescission of and appeals against such orders must be entered. No one except an officer of the court or an authorised person may inspect or have access to the adoptions record book.⁷² The clerk of the children's court must as soon as

⁶⁸ For authority on this point, see Van Heerden et al **Boberg's Law of Persons and the Family** (2nd edition) 455, footnote 103.

⁶⁹ See especially **Ex parte Commissioner for Child Welfare: In re adoption of Volczer** 1960 (2) SA 312 (O) at 313 - 314; **Ex parte Kommissaris van Kindersorg: In re Van Wyk** 1964 (4) SA 601 (GW) at 602; **Ex parte Kommissaris van Kindersorg, Krugersdorp: In re JB**; **Ex parte Kommissaris van Kindersorg, Oberholzer: In re AGF** 1973 (2) SA 699 (T) at 705H, 709H; **Ex parte Kommissaris van Kindersorg: In re B** 1985 (2) SA 137 (SWA) at 140E; **Ex parte Commissioner of Child Welfare, Durban: In re Kidd** 1993 (4) SA 671 (N) at 647B-C.

⁷⁰ Thus in **Napolitano v De Wet NO** 1964 (4) SA 337 (T), confirmed *sub nom Napolitano v Commissioner of Child Welfare, Johannesburg* 1965 (1) SA 742 (A), although the court found that the commissioner had acted irregularly in telescoping an inquiry as to whether a child was in need of care and an application for the child's adoption into a single proceeding, it refused to set his decision aside because neither the applicant nor the child had been prejudiced by the irregularity.

⁷¹ Sections 20(3), 25 and 26 of the Child Care Act 1983.

⁷² Regulation 23.

possible after an adoption order has been issued see to it that the order is registered by submitting the necessary documentation to the registrar of adoptions situated in the national Department of Social Development.⁷³ The registrar must keep a register in which the following must be entered: the registration number allocated to the adoption; the personal particulars of the adopted child, his parents and adopted parents; particulars of successful appeals against and rescission of adoptions; and generally all other information the register considers necessary and expedient.⁷⁴

⁷³ Regulation 25.

⁷⁴ Regulation 24.

Subject to the provisions of Regulations 28(3)⁷⁵ and (6)⁷⁶ and the instructions of the registrar, the record of the adoption proceedings shall lie for inspection during normal office hours in the office of the registrar. The record may be inspected by an adoptive parent from the date on which the child concerned reaches the age of 18 years,⁷⁷ by an adopted child from the date on which he or she attains the age of 21 years,⁷⁸ and by a natural parent or a previous adoptive parent of the adopted child, with the written consent of the adoptive parent(s) and of the adoptive child, from the date on which the child concerned reaches the age of 21 years.⁷⁹

The Registrar of Adoptions may require an adoptive parent, a natural parent, or a child to receive counselling from a social worker before allowing that adoptive parent, natural parent, or child access to the adoption records.⁸⁰

⁷⁵ In terms of this regulation the registrar may require an adoptive parent, a natural parent, a previous adoptive parent or the adopted child to receive counseling from a social worker before allowing that parent or child to inspect the record concerned or to obtain a copy thereof.

⁷⁶ In terms of this regulation the registrar may for good reason refuse any person access to the record and register. There is, however, an appeal to the Minister against such decision.

⁷⁷ Regulation 28(1)(a).

⁷⁸ Regulation 28(1)(b).

⁷⁹ Regulation 28(1)(c).

⁸⁰ Regulation 28(3).

18.3.10 Giving or receiving considerations for adoptions

Nobody may, except as prescribed under the Social Work Act, 1978 give, undertake to give, receive or contract to receive any consideration in cash or kind, in respect of the adoption of a child.⁸¹ Contravention of this provisions constitutes a criminal offence and offenders will be liable to a fine not exceeding R 8 000 or to imprisonment for a period of two years or to both the fine and imprisonment.⁸²

⁸¹ Section 24(1) of the Child Care Act 1983.

⁸² Section 24(2) of the Child Care Act 1983.

In *C v Commissioner of Child Welfare, Wynberg*⁸³ it appeared that the adoptive parents had paid the mother's confinement expenses. Holding that in the circumstances no weight could be attached to the mother's consent to their adopting her child, Steyn J deplored this practice when he said:

In fact, our Children's Act, which is a model and highly commendable legislation, has been designed to discourage bartering of children whether directly or indirectly. It may be that applicants have been driven to desperation by reason of the frustrating inability to qualify as adoptive parents; nevertheless, their conduct in placing the mother of the child in a position where she was financially beholden to them is not to be commended.⁸⁴

It is also important to point out that the social worker's report submitted to the children's court dealing with the adoption application must include a disclosure statement itemising all monies paid or estimated to be or have been paid in cash or in kind, either directly or indirectly, by or on behalf of the applicant for services rendered, professional fees and disbursements, other fees and other costs incurred or to be incurred in respect of the adoption or for the care of the child, including prenatal, delivery and postnatal medical expenses, housing, food, clothing, travel and hospital costs and legal fees and fees to the messenger of the court.⁸⁵

18.3.11 Section 10 of the Child Care Act 1983 and private placements of children

⁸³ 1970 (2) SA 76 (C).

⁸⁴ At 89A-B.

⁸⁵ Regulation 21(1)(b)(iii).

This issue was dealt with in the First Issue Paper and the reader is again referred to the relevant part.⁸⁶ Section 10(1) of the Child Care Act 1983 provides that no person other than the managers of a maternity home, a hospital, a place of safety, or a children's home shall receive any child under the age of seven years or any child 'for the purpose of adopting him or her or causing him or her to be adopted' and care for that child apart from his or her parents or guardian for longer than 14 days. However, if a person has applied to adopt the child or has obtained the written consent of the commissioner of the district in which the child was living such person may receive and maintain the child apart from his or her parents for longer than 14 days.⁸⁷ Where the child is under the age of seven years, a grandparent, brother, sister, half-brother or sister, uncle or aunt or a 'designated relative' of the child may receive and care for the child apart from his or her parents, provided such person is older than 18 years.⁸⁸ The Minister may determine that the spouse of certain relatives⁸⁹ or a person related to the child in the third degree of affinity or consanguinity is a 'designated relative' for the purposes of this section.⁹⁰

This section and its amendments have been criticised.⁹¹ One criticism is that where a child is below the age of seven years, a parent cannot place his or her child with a third party (except with certain specified relatives), for any purpose whatsoever for longer than 14 days without the written consent of the local Commissioner of Child Welfare. This could mean, as the authors show,⁹² that one would not be allowed to leave one's five year old with a good friend for more than 14 days while attending a conference overseas, or send one's six year old on a camp or to boarding school for more than two weeks without the permission of the relevant Commissioner. If this is indeed the intention of the

⁸⁶ Paragraph 7.2.6 of the First Issue Paper.

⁸⁷ Sections 10(1)(b)(i) and (ii) of the Child Care Act 1983.

⁸⁸ Section 10(1)(b)(iii) of the Child Care Act 1983.

⁸⁹ The grandparents, brothers or sisters, half-brothers or half-sisters, uncles or aunts of the child referred to in section 10(1)(b)(iii) of the Child Care Act.

⁹⁰ Section 10(4) of the Child Care Act 1983.

⁹¹ Julia Sloth-Nielsen and Belinda van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' 1996 (12) **SAJHR** 247 at 253.

⁹² Julia Sloth-Nielsen and Belinda van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' 1996 (12) **SAJHR** 247 at 253.

legislature, then it is a rather impractical scheme, especially in a country where child arrangements differ widely according to social and cultural settings. Of course parents should not be free to leave their children in the care of unsuitable persons who will ill-treat, abuse or exploit them, but the necessary protection for these situations is to be found in the provisions relating to children in need of care, who can be removed from the care of such persons if need be.

In this regard, Sloth-Nielsen and Van Heerden⁹³ submit:

... with a clear objective in mind, the present drafting gymnastics would be obviated: the provision should simply apply to all children under the age of eighteen years who are left with persons for a period longer than 14 days for the purpose of adoption. Whether consent has been given or not by the parent does not seem to affect the issue.

⁹³

Julia Sloth-Nielsen and Belinda van Heerden 'Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa' 1996 (12) **SAJHR** 247 at 254.

At present, parents may place a child with prospective adoptive parents without the assistance of a social worker. Such prospective adoptive parents may then maintain the child apart from his or her parents for an indefinite period, provided that a formal application for the adoption of the child has been made. As Sloth-Nielsen and Van Heerden⁹⁴ point out, the problem is that ‘screening’ of the prospective adoptive parents by the social workers apparently only takes place after the formal application is made and the necessary consent to adoption has been obtained. The authors continue:⁹⁵

In practice, then, a child may be placed with persons who are not suitable adoptive parents, but by the time the reports establishing this lack of suitability have been obtained, and the adoption is heard, the child may have forged close bonds with the applicants. If the application is refused by the Children’s Court and the child removed, breaking these bonds may cause lasting emotional damage to the child. The alternative to removal in such cases, viz granting the adoption despite the unsuitability of the applicants, is also not a satisfactory solution.

18.3.12 Adoption in customary law

A process which has the same legal consequences as adoption in terms of the common law is also found in customary law.⁹⁶ According to Bekker,⁹⁷ both male and female children may be given up for adoption according to customary law. Adoption takes place in public and both the relatives of the adopted child and adoptive parents are involved because the adoption entails the alteration of the status of the child.

⁹⁴ Julia Sloth-Nielsen and Belinda van Heerden ‘Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa’ 1996 (12) *SAJHR* 247 at 252.

⁹⁵ Julia Sloth-Nielsen and Belinda van Heerden ‘Proposed Amendments to the Child Care Act and Regulations in the Context of Constitutional and International Law Developments in South Africa’ 1996 (12) *SAJHR* 247 at 252 - 3.

⁹⁶ I P Maithufi ‘Recent case law: *Metiso v Road Accident Fund* Case no 44588/2000 (T)’ (2001) 34 *De Jure* 390 at 391.

⁹⁷ **Seymour’s Customary Law in Southern Africa** 236.

Maithufi describes the adoption process and the requirements for it as follows:⁹⁸

The relatives are called to a meeting where the envisaged adoption is to take place. After this meeting, the adoption has to be reported to the traditional leader of the area or his or her representative. The formalities relating to the agreement between the families of the adopted child and the adoptive parent(s), as well as the report to the traditional leader or his or her representative are aimed at indicating that the adopted child has been formally transferred from one family to another. . . . Even in cases where the adoption was not reported to the traditional leader, the adoption would still be valid if due publicity was given to the process and there was agreement between the families of the adopted child and adoptive parent(s). The validity of an act of adoption in terms of customary law largely depends upon the agreement between these families. A traditional ceremony which may involve the slaughtering of small livestock is normally held to mark the adoption.

There are various reasons for adopting children in customary law. One such reason is the acquisition of an heir by the person who does not have children of his or her own to inherit his or her property at death and the perpetuation of the deceased's family name. Another reason may be to strengthen the adopting family with more children and to safeguard the interests of children in the case where the biological parent(s) of such children cannot afford to maintain them.

⁹⁸ (2001) 34 *De Jure* 390 at 391 - 392.

Maithufi points out that adoption normally occurs between persons who are related to each other by blood but it is also not uncommon between non-relatives.⁹⁹ He says adoption should be distinguished from fostering in terms of customary law: 'Fostering does not effect the status of the child whereas adoption does, in the sense that the adopted child becomes a member of the family of the adoptive parent(s)'. Bekker¹⁰⁰ captures the distinction as follows:

Children may be sent to live with relatives, neighbours or close friends for various reasons: the child's parent may be too poor to raise it; there may be no woman available to look after a child on break-up of marriage; the foster parent might be lonely or might need help to run a household. In all these cases it is understood that the child will eventually return to its own parents, so there is no intention to sever relationships with the biological family, which typifies adoption. Hence the child does not usurp rights of succession, or indeed acquire any rights at all in the foster parent's family.

⁹⁹ (2001) 34 *De Jure* 390 at 392.

¹⁰⁰ *A Sourcebook of African Customary Law in Southern Africa* 377 - 378.

The child adopted becomes, for all intend and purposes, the child of the adoptive parent(s). Upon adoption, the adoptive parent(s) become(s) responsible for the maintenance of the adopted child.¹⁰¹ Previously, only heads of families, who were normally male, could adopt children according to customary law.¹⁰² Presently, both males and females, married or unmarried, and even persons married according to civil rites may adopt children in terms of customary law.¹⁰³ The normal consequence of a marriage accompanied by the *lobolo* contract is that the husband, irrespective of whether he is the biological father of children born before the marriage, is responsible for their upbringing and maintenance according to customary law.¹⁰⁴ In the same manner, African spouses married by civil rites cannot be regarded as having, without reservation, contracted out of duties or rights peculiar to or known in customary law, or waived any of their rights arising from customary law.¹⁰⁵

Bekker¹⁰⁶ has expressed the opinion that the customary law procedure for adoption should also comply with the provisions of the Child Care Act, 1983. He said:

It may be argued that the customary law procedure alone should no longer be recognised by the courts, unless the parties also comply with the provisions of Chapter 4 of the Child Care Act. Section 18(1)(a) of this Act provides: “The adoption of a child shall be effected by an order of a children’s court of the district in which the child concerned resides.

Nevertheless, he mentions that the effect of adoption in customary law and the statutory law is the

¹⁰¹ Maithufi (2001) 34 **De Jure** 390 at 392.

¹⁰² Bennett **A Sourcebook of African Customary Law in Southern Africa**, 375.

¹⁰³ As a consequence, a duty of support or maintenance arising as a result of a valid customary law adoption is enforceable and not against public policy or the principles of natural justice: **Zimnat Insurance Co Ltd v Chawanda** 1991 (1) SA 825 (ZS); **Kewana v Santam Insurance Co Ltd** 1993 (4) SA 771 (Tk); **Metiso v Road Accident Fund** Case No 44588/2000 (T).

¹⁰⁴ **Thibela v Minister van Wet en Orde** 1995 (3) SA 147 (T).

¹⁰⁵ Cf. **Ngake v Mahahle** 1984 (2) SA 216 (O).

¹⁰⁶ ‘Children and young persons in indigenous law’ in Robinson (ed) **The Law of Children and Young Persons in South Africa**, 194.

same as the adopted child 'would for all intents and purposes become the child of its adoptive parents'.¹⁰⁷

¹⁰⁷

Ibid, 193.

Whether the procedure laid down by customary law for a valid adoption should also incorporate some of the requirements prescribed by the Child Care Act, 1983 was dealt with by the court in **Kewana v Santam Insurance Co Ltd**¹⁰⁸ where the court a quo held that ‘ . . . because the child was not adopted under the Children’s Act 33 of 1960, there was no duty of support’. The Transkei Appellate Division, in deciding this issue, said the following:¹⁰⁹

Adoption which played a great role in Roman law, was obsolete in Roman-Dutch law. It was first introduced by the Adoption of Children’s Act 1923 (see Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* at 358). This legislation therefore introduced a right which did not exist. It filled a vacuum in the common law, but there is no basis for holding that it also modified or replaced adoption under customary law which remains enforceable under s 53 of the Constitution while adoption under the Children’s Act is governed by the provisions of that Act. It cannot be said that only adoption under the Children’s Act is recognised in Transkei. A child adopted according to the law of any country, say England or Germany, would not be precluded from enforcing a right to be maintained by his adoptive parent in Transkei.

In the **Metiso**-case, the biological mother of the adopted children and her family were not involved in the process leading to the adoption in question. The court, by invoking the ‘best interests of the child’ standard, indicated that this omission could be used to invalidate the process as this could be against the interests of the children, even in the case where it was proved that the mother and her family were to be consulted. Maithufi¹¹⁰ takes it one step further and argues that due to the publicity that accompanies adoptions in customary law, the adoption should be regarded as valid even in cases where there is no court order of the magistrate’s court of the district in which the child resides:

¹⁰⁸ 1993 (4) SA 771 (Tk) at 776A-B.

¹⁰⁹ Ibid, 776B-D.

¹¹⁰ (2001) 34 **De Jure** 396.

‘Obtaining such an order would, of course, facilitate proof of the adoption, but should not be regarded as a *sine qua non* for a valid customary law adoption’.¹¹¹

¹¹¹ For the response to question 90 of Issue Paper 13, see section 19.3 below.

18.4 **Comments and submissions received**

18.4.1 **Introduction**

The Commission consulted widely on adoption as a form of substitute family care. Besides several questions posed in Issue Paper 13 and those presented to the children in the adult consultation process, the Commission had the advantage of holding a dedicated two-day focus group discussion on adoption and foster care in Bantry Bay, Cape Town on 27 and 28 June 2000.¹¹² The comments and submissions from these consultative processes are summarised in this section. For ease of reference, we follow the sequence adopted above in the analysis of the current legal position.

18.4.2 **The concept of adoption**

Respondents at the focus group discussion were asked the following questions in regard to the concept of adoption:¹¹³

What does adoption mean in different local contexts? What would an indigenous South African model or models of adoption look like? What do you understand under the concept 'adoption'?

Miss R van Zyl, a social worker at SKDB, Cape Town pointed out that the meaning of 'adoption' differs from one indigenous group to another. She said this causes confusion and she proposes that one uniform legal model be accepted by all. Mr André Viviers of the Department of Social Development, Free State said adoption should be broadened to take into account indigenous practices and the role of the extended family. He said adoption should be seen as a form of permanency planning for a child. However, Mrs Eileen Jordaan, an adoption consultant and social worker in private practice, said that it would be difficult to formulate an indigenous South African

¹¹² The research paper on adoption was prepared by Professor Tshepo Motsikatsana and the paper on foster care by Mrs Petro Brink. The Commission gratefully acknowledges their contributions to the debate.

¹¹³ Question 1.

model of adoption as the transfer of parental rights from one set of parents to another is a legal process that cannot be changed.

Mrs Krawitz and Mrs Stander, two Johannesburg based social workers in private practice, linked adoption to permanency planning for children and suggested that an indigenous model should not depart too much from the current model provided for in the Child Care Act, 1983.

Group 3 saw no need to move away from the term ‘adoption’. It defined adoption as the transfer of parental rights and responsibilities from one set of parents to another. The Group proposed one adoption model which allows for either adoption with or without a subsidy. The South African Association of Social Workers in Private Practice (SAASWIPP),¹¹⁴ the Children’s Placement Centre in Cape Town, Mrs Jean Allen of the Catholic Women’s League, and the Adoption Coalition¹¹⁵ defined adoption as a formal process by means of which parental power over a child is **terminated** with the birth parents and vested in the adoptive parents. Ms Sue Padayachee of Lawyers for Human Rights, Pietermaritzburg defined adoption as the **termination** of the rights of the biological parent(s) to a child.

Mrs Anne Tudhope, chairperson of the National Adoptive Parents’ Institute, defined adoption in broader terms to mean the legal **transfer**¹¹⁶ of parental rights from one set of parents to another with or without the severing of ties to others who have played a significant role in the life of the child concerned. She said the purpose of adoption is to provide permanency and stability for a child where this has not proved possible either within or outside of the child’s kinship system.

In her submission, Mrs Francis Prinsloo of DEAFSA said adoption is a legal undertaking to take care of a child ‘as your own child - in terms of love, care, physical and emotional upbringing, security, educational development as well as stability’. Mr John Bradshaw, an adoptive father, saw the essence of adoption as the commitment of an adoptive parent to nurture and care for a non-

¹¹⁴ The submission was signed by Mrs Mendelle Mendelow.

¹¹⁵ A partnership of formal Welfare organisations in Pretoria doing adoption work.

¹¹⁶ Mrs M Hattingh of the CMR Pretoria also defined adoption as the **transfer** of parental rights.

biological child.

SAASWIPP saw adoption as a way of family building and a way of ensuring a healthy society made up of healthy families. The Association believed that there should be a place in the legal framework for the professionals or organisations involved in the adoption to allow the biological parents and the adoptive parent(s) to enter into individual agreements which are then made part of the adoption order in respect on non-disclosed adoptions and also family adoptions. This would concern inheritance from and to biological parents and contact with the biological parents, provided it is in the best interests of the child concerned.

Johannesburg Child Welfare Society, in a very comprehensive submission, approached the question from both the perspective of the social worker and the adoptive parent(s). From the perspective of a social worker, the Society said adoption is a way of providing a child with a permanent home and a family.¹¹⁷ The Society continued:

In South Africa, we have a need to find homes for large numbers of children - the numbers of children needing to be adopted outnumbers the number of prospective adoptive parents coming forward to adopt. One therefore needs to look at ways of broadening or increasing a child's options for placement and therefore, in South Africa, we have moved quite a long way from the traditional 1st World model of adoption to include a range of options for children e.g. single parents, families with biological children, gay and lesbian parents, transracial placement, etc. We have also had to develop our own criteria to accommodate the profile of prospective adoptive parents who were approaching the agency to adopt e.g. increased age limits, informal employment, customary marriage, polygamous marriages, etc. We have adopted a flexible 'user friendly' model of adoption in order to find the best possible home for the many children coming into the system.

From the perspective of the adoptive parent(s), the Society said adoption is primarily still seen as an option for childlessness. Infertility is not always, however, the main reason, as many single applicants are not usually infertile as is the case with families who have several biological children but wish to adopt a child. The Society is frequently given the following motivations: '(a) to provide

¹¹⁷ This was also the view of Ms Jacqui Gallinetti of the South Peninsula Legal Aid Clinic.

an 'heir' to inherit property; (b) to provide someone to care for them in their old age; (c) to ward off loneliness'. The Society said the need to have someone to inherit your home and possessions is very strong amongst Black adoptive parents.

Mrs U F Ledderboge, a senior social worker attached to Durban's Child and Family Welfare Society, saw adoption as permanent family care. In the indigenous context, she said adoption is seen as providing for a heir, status (vs infertility), marriage-ability, help and old age care. Mrs Ledderboge identified community prejudices about abandonment as a stumbling block to adoption (fear of incest and apprehension of 'bad' genes). She raised the possibility of a community as an entity adopting a child (i.e. accepting the responsibility to bring-up the child into adulthood) as a possible solution to the HIV/AIDS epidemic.

Ms L Kaba, in a Northern Province provincial input through the Provincial Committee on Child Abuse and Neglect, pointed out that communities need to be educated in respect of adoption as this still has a stigma attached in some communities.

◦ **The present constitutional and legal frameworks and their weaknesses**

Respondents at the focus group discussion were also asked to identify and discuss the present constitutional and legal frameworks and their weaknesses in respect of adoption.¹¹⁸ In this context, Mrs Francis Prinsloo of DEAFSA highlighted the discriminatory practices deaf children and deaf parents face as a result of wrong interpretations of the present legislation. However, she did not elaborate on what those discriminatory practices are.

At the focus group discussion, Group 3 highlighted the lack of consistency in and uniformity of approach by the courts in their application of the present adoption legislation. This was a recurring theme.¹¹⁹

¹¹⁸ Question 2 as per the worksheet.

¹¹⁹ See, for instance, the submissions by Mrs Eileen Jordaan; Miss R van Zyl; Ms U F Ledderboge; the Pretoria

In its submission, the Johannesburg Child Welfare Society highlighted two particular sections of the Child Care Act, 1983. The Society said it welcomed the removal of section 18(4)(f) (the requirement of South African citizenship for adoptive parents), but warned that its removal must go hand in hand with safeguards and controls. The Society also referred to sections 18(4)(d) and 19A of the Child Care Act, 1983. In this context, the Society said that it accepts that fathers should have a say in the adoption of their children. However, there seemed to be confusion regarding the implementation and interpretation of these sections by most courts, and this causes problems in the adoption process.

The Children's Placement Centre in Cape Town identified the following problems with the present legal framework:

- lack of clarity around religious and cultural marriages;
- the rights of birth fathers 'seem to supersede the rights of the child';
- difficulties are experienced when consent to an adoption is signed in another country in a different format.

Miss R van Zyl also identified as a weakness the different interpretations of the Child Care Act, 1983 by different Commissioners of Child Welfare. She said the language and terminology used in the Act and regulations are vague and suggested that the regulations be amended to provide policy guidelines on the role of social workers and accredited social workers in adoption proceedings. Miss Van Zyl also identified the accessibility of the High Court as problematic.

Mrs U F Ledderboge, a senior social worker at Durban Child and Family Welfare Society highlighted the discretionary nature in which Commissioners of Child Welfare deal with the following aspects as problematic:

- Withholding consent and dispensing with consent;
- Delays caused by the natural father exercising his rights;¹²⁰
- Dispensing with natural father's consent where he does not visit, pay maintenance, insists upon his name being registered, etc.;
- Bonding of the infants within the 60 day period and the return of the mother / parent in the case of abandonment;
- Rescission many years after finalising on medical grounds;
- Long waiting periods (2 - 4 years) in foster care before infant becomes adoptable;¹²¹
- The dichotomy between a formal legal adoption process in terms of the Child Care Act, 1983 and the informal customary community based adoption processes.

In addition to highlighting problems with the 60-day waiting period and the difficulties related to obtaining the consent of the natural father, Mrs Jean Allen of the Catholic Women's League

¹²⁰ SAASWIPP and Ms Sue Padayachee of Lawyers for Human Rights, Pietermaritzburg pointed out that the rights accorded to unmarried fathers in certain circumstances are causing delays in finalising adoption proceedings and are leading to the abandonment of infants (i.e. denies the unmarried mother her right to privacy).

¹²¹ She said once people get used to the foster care grant, they will tend to keep things that way.

identified inter-country adoption in the wake of the **Fitzpatrick** judgment as particularly problematic.

Mrs Krawitz and Mrs Stander saw as weaknesses of the present system the restriction placed on certain persons (e.g. same-sex couples) from adopting, the absence of any form of adoption subsidies,¹²² and the focus on parental rights rather than parental responsibilities.

The Pretoria Adoption Coalition identified as a weakness the lack of clear legal guidelines regarding the necessary expertise and specialised knowledge on adoption required by social workers in the public sector.

◦ **The inter-relationship between family care by relatives, by non-relatives and through adoption**

Respondents were also asked to explain the inter-relationship between family care by relatives, by non-relatives and through adoption. In addition, respondents were asked whether clear legal boundaries can be set between the various forms of substitute family care.¹²³

Ms Jacqui Gallinetti of the South Peninsula Legal Aid Clinic pointed out there are legal boundaries as family care less than adoption has legal restrictions. She questioned whether this position should remain as it can lead to a hierarchy of status for a child and said maybe the inter-relationship should be based on moral instead of legal grounds.

¹²² This was also a recurring theme.

¹²³ Question 3 of the worksheet.

The Children's Placement Centre in Cape Town was of the view that family care by relatives, by non-relatives and through adoption are all inter-related and that clear legal boundaries between the various forms of substitute family care should not be set especially in the light of the HIV/AIDS crisis. It was argued that procedures need to be in place to protect children as legalised placements will not be able to deal with the sheer number of AIDS orphans. Mrs Krawitz and Mrs Stander supported the view that there exists an inter-relationship between family care by relatives, non-relatives and through adoption. They distinguished between formal and informal processes and said that the formal legal process should take over once the informal process breaks down.

On the other hand, Mrs Jean Allen of the Catholic Women's League, while recognising the inter-dependence, said clear legal boundaries should be set between the various forms of substitute family care. She pointed out that although adoption is an extreme measure, it is often easier for a relative to apply for the adoption of a child (which can be done in the children's court) than to get a guardianship order (which must be obtained in the High Court). She concluded by arguing that step-parents and grandparents should be able to get guardianship and custody (in the children's court) rather than to adopt the child. In a similar vein, Mrs M Hattingh of CMR, Pretoria, pointed out that there is not much difference in practice in the day-to-day care of children in these circumstances. She said clear legal boundaries must be set between the various forms of substitute family care and that the implications of each legal placement must be defined clearly in the new children's statute.

Mrs U F Ledderboge saw the different forms of substitute family care as forming part of a continuum of care. This continuum is influenced by the amount of bonding developed, co-operation required, and who has final responsibility (and say) in respect of a particular child. She warned that over-regulation might prevent a well adapted individual fit and argues strongly in favour of the need of the child to experience stability. Mr André Viviers of the Department of Social Development, Free State opined that clear legal boundaries can be set between the different forms of substitute family care as the 'dynamics' of these options are different.¹²⁴

¹²⁴ This is also the view of the Pretoria Adoption Coalition.

Mrs Eileen Jordaan, an adoption consultant and social worker in private practice, said adoption by relatives and non-relatives differs only in that provision is made for the non-disclosure of the identity of adoptive parents in the case of adoptions by non-relatives. She said at present substitute family care through the children's court is either through adoption or foster placements, 'but other forms will need to be found to deal with the large number of AIDS orphans who will be requiring placement'. Mrs Jordaan pointed out that the State will not be able to afford paying the present foster care grant based on these numbers and argues for the introduction of a form of subsidized adoption in order to find homes for these children.

In its submission, SAASWIPP said fewer regulations should apply with regard to family care by relatives, unless the child is reported as being neglected or ill-cared for. It said family care by non-relatives should be formalised through the courts.

Mrs Francis Prinsloo of DEAFSA pointed out that the inter-relationship between these forms of substitute family care is based on the responsibility to care for a child and to provide for such child's basic needs. She said with relatives the obligation is moral in nature, while it is a voluntary commitment by non-relatives. Miss R van Zyl, a social worker from SKDB, Cape Town, said there is a definite difference between adoption, foster care and kinship care and that there are clear legal boundaries between different positions of substitute family care. She argued the boundaries are defined by different degrees of permanency and different levels of contact with the biological family.

The Johannesburg Child Welfare Society opined informal adoption of children by relatives and non-relatives is still being practised within the Black community and most of these remain 'informal' with the child maintaining links with his or her biological family and eventually returning to them in the late teens or early adulthood. The Society pointed out that the preferred choice of many urban, middle class Black families is the formal adoption of a non-related baby or child. The Society said these families do not want to raise a 'family child' with the prospect of having to give that child back to the birth family, but want a child who will be permanently and legally theirs.

18.4.3 **The purpose of adoption**

Adoption, as it is practised today, embodies a deep sense of social purpose - some see the primary aim of it being the attempt to assuage the need to provide a stable home for the child. In this regard, the worksheet used at the focus group discussion in Bantry Bay posed the following questions:¹²⁵

Is this a valid premise to base adoption on? What do you think should be the purpose of adoption?

Ms Eileen Jordaan pointed out that adoption was at one time seen as a means of providing a child for childless couples.¹²⁶ However, adoption is now seen as a means of providing a child with stability and security within a family context. She said the greater openness about adoption has taken away much of the image of adoption as 'imitating nature'. Mrs Krawitz and Mrs Stander also argued that the imitation of nature is not a valid premise on which to base adoption.¹²⁷

SAASWIPP said it is the right of every child to be placed in the best permanent alternative care. Ms U F Ledderboge also defined the purpose of adoption from a child's rights perspective. She said it is purpose of adoption to give effect to the child's right 'to a family, to a home and loving care, to matter to a primary care giver, to adequate medical, physical, intellectual care, to socially belong'. She said this right goes beyond 'imitation of nature' in respect of the rearing of a child.

Ms Jean Allen and the Children's Placement Centre said the purpose of adoption is to safeguard the best interests of the child,¹²⁸ not the needs of the adoptive parents. In its submission, the Johannesburg Child Welfare Society stated that the purpose of adoption should be to provide a stable, permanent home and family for a child whose biological parents are unable or unwilling to do so. In other words, to provide a caring substitute permanent family for the child. Mrs Anne Tudhope defined the purpose of adoption as to provide a child with a permanent stable home within his or her extended family or with non-relatives if the former proves impossible. Mrs Hendré Dippenaar saw the purpose of adoption as establishing families which form the building stones of a community, society and country. She said the best place for a child is within a family.

Miss R van Zyl said the purpose of adoption is to protect the welfare of children. This can be done through adoption by providing a child in need of care with special protection and a meaningful relationship with significant others with whom the child can identify. She said adoption should provide a secure loving environment where the physical and psycho-social needs of the child are

¹²⁶ This view is still held in some circles. See the submission by Ms Sue Padayachee.

¹²⁷ Ms Jacqui Gallinetti, Ms Jean Allen and the Adoption Coalition shared this view.

¹²⁸ Ms L Kaba, Northern Province Provincial Committee on Child Abuse and Neglect.

met.¹²⁹

18.4.4 **Section 17 qualifications for adoption (Who may adopt?)**

- **Married couples**

¹²⁹ This view was shared by Mr André Viviers.

The worksheet used at the focus group discussion in Bantry Bay posed several questions on who may adopt a child. The first of these reads as follows:¹³⁰

Do you think the existence of a marriage (which seems to underlie the assumption that adoption is a device for imitating nature in respect of the rearing of a child) is a necessary requirement for adoption?

Most respondents were of the view that the existence of marriage, at least in the traditional (Christian) sense, between the prospective adoptive parents should not be a requirement.¹³¹ Some respondents, however, called for guidelines which should taken into account the duration of the marriage or same-sex relationship. Some stated that marriage is the ideal, but not necessarily a requirement.¹³² However, Ms Eileen Jordaan stated that if two parties wish to assume parental responsibility for a child, it is important that there be some agreement or contract, whether a marriage contract or not, whereby the interests of the child are protected should the relationship break down.

◦ **Same-sex couples**

Another questions deals with the exclusion of couples in a same-sex relationship as prospective

¹³⁰ Question 13.

¹³¹ Johannesburg Child Welfare Society; Ms Blanché Verster; Ms L Kaba, Northern Province Provincial Committee on Child Abuse and Neglect; Ms U F Ledderboge; Mrs Hendré Dippenaar; Children's Placement Centre; Miss R van Zyl; Mr André Viviers; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; the Adoption Coalition; Ms Jean Allen; Ms Anne Tudhope.

¹³² Ms Francis Prinsloo; Johannesburg Child Welfare Society; Mrs M Hattingh.

adoptive parents. This question reads as follows:¹³³

Do you think partners in a long-term same sex relationship as a couple should be excluded as prospective adoptive parents? When does a relationship become long-term? Please give reasons for your answer.

Again most respondents were of the view that partners in a long-term same-sex relationship should not be excluded as prospective adoptive parents.¹³⁴ This position was taken despite the difficulties recognised in defining long-term relationships. Implicit in their support was the recognition that such partners should be allowed to adopt **jointly**.

SAASWIPP said minimum guidelines for all prospective adoptive partner(s), irrespective of marital status, should apply. It said screening policies and rules concerning adopters should exist across the board and suggests that section 17 of the Child Care Act be repealed.

Ms U F Ledderboge suggested that only persons (also married couples) who have been in a stable relationship for at least two years should be allowed to adopt children. She referred to the fact that other factors such as life-style and age need to be considered in determining suitability as adoptive parents. Ms Ledderboge mentioned that our existing law is inadequate when it comes to the breakdown of long-term relationships and argued for joint adoption and the introduction of procedures similar to those used in divorce to deal with issues such as custody and access to the children from such unions. Miss R van Zyl also highlighted the need for changes to the marital law if same-sex relationships were to receive legal recognition.

¹³⁴ Ms Jean Allen; the Adoption Coalition; Ms Jacqui Gallinetti; Johannesburg Child Welfare Society; Ms Blanché Verster; Ms L Kaba, Northern Province Provincial Committee on Child Abuse and Neglect; Ms U F Ledderboge; Ms Sue Padayachee; Mrs Hendré Dippenaar; Children's Placement Centre; Mr André Viviers; Ms Eileen Jordaan; Mrs Krawitz and Mrs Stander; Mrs M Hattingh.

Respondents gave different time frames for determining when a relationship becomes long-term: These ranged from two,¹³⁵ three¹³⁶ to five years.¹³⁷ Usually no distinction was made between married persons, persons in a heterosexual relationship¹³⁸ or persons in a same-sex relationship in this regard.¹³⁹ Mrs Krawitz and Mrs Stander pointed out, however, that the length of a relationship has no bearing on its stability and they argue for an objective assessment in terms of the best interests of the child.

It is interesting to contrast the responses of the focus group discussion in Bantry Bay with the earlier responses to Issue Paper 13 on the same issue. Issue Paper 13 posed the following question in this regard:

Question 74: Should there be more specific guidance in the law on the adoption or fostering of children by homosexual persons and couples?

While some respondents argued that there is no need for more specific guidance in the law on the adoption of children by homosexual persons and couples,¹⁴⁰ the majority did agree on such need,¹⁴¹ while others fell back on the best interests of the child standard.¹⁴²

The National Council of Women of South Africa stated that homosexual people should not think in

¹³⁵ Mr André Viviers.

¹³⁶ Mrs Hendré Dippenaar.

¹³⁷ Ms Sue Padayachee suggested that in determining whether a relationship is a 'long-term relationship' an assessment must be done. She said a long-term relationship should have been in existence for at least three or more years. Mrs M Hattingh, Mrs Francis Prinsloo, Ms Jean Allen and the Adoption Coalition suggested a minimum period of five years.

¹³⁸ Ms Jean Allen argued persons in a hetero-sexual relationship should also be allowed to adopt jointly.

¹³⁹ Johannesburg Child Welfare Society.

¹⁴⁰ Mrs J Smith; NICC.

¹⁴¹ Phoenix Child and Family Welfare Society; Durban Child and Family Welfare Society; the Cape Law Society; Mr D S Rothman.

¹⁴² S A National Council for Child and Family Welfare; ATKV.

terms of parentage. It said nature is against them and adoptions by such persons or couples would not be in the best interests of the child as the security of the mother and father of different sexes would be missing and there is the danger of the child's peers despising the adopted child.

In a similar vein, Mrs K Freed said that gay parents do not have a balanced outlook on life and do not have the ability to reflect old fashioned values. While recognising that same-sex couples may be able to give love to a child, Mrs Freed completely rejected the notion of gay adoptive parents.

The Cape Law Society held the view that homosexual persons and couples should be entitled to jointly adopt and said this situation should perhaps be covered by a separate Act which clearly details that the rights of homosexuals include the right to marry, etc. The Durban Committee submitted that there should be no discrimination against any person on the same grounds as those set forth in the Constitution and that any suitable person who is in a position to look after the best interests of the child should be entitled to adopt.

Mr DS Rothman commented that more guidance in the law will be necessary if these adoptions are to be encouraged, but foresaw serious moral objections against this. He remarked that legal requirements, provided they have uncomplicated practical applicability, do make it easier for the court and other role-players to wade through many complex considerations.

◦ **Step-parents**

The worksheet used at the focus group discussion in Bantry Bay posed the following question:¹⁴³

Is step-parent adoption always the best way to cement the relevant relationship? Is an alternative approach such as a form of guardianship for step-parents, shared with the non-custodial parent or otherwise, not more appropriate? Please give reasons for your answers.

Most respondents did not see step-parent adoptions as the best solution in all situations.¹⁴⁴ Mrs

¹⁴³ Question 15.

¹⁴⁴ Johannesburg Child Welfare Society; SAASWIPP; Ms M Hattingh; Ms Anne Tudhope; the Adoption Coalition; Ms

Eileen Jordaan pointed out that step-parent adoptions often have the effect of denying contact to one of the biological parents, the grand-parents and other relatives on that side of the family. The Johannesburg Child Welfare Society added: 'Step-parent adoption is often a way of excluding the biological father from the child's life. Children are often adopted by the step-parent before they are really able to give an opinion on the matter and in later life, may resent the fact that they were adopted by the step-father and their biological father is no longer part of their life. Biological fathers are also often willing to give consent to a step-parent adoption as a way of getting out of their financial responsibilities towards the child'.

There was also general support for the view that an alternative approach such as a form of shared guardianship or shared parental responsibility for step-parents would be more appropriate.¹⁴⁵ However, Ms Jacqui Gallinetti questioned the need for such an alternative approach. The point was also made that the High Court is inaccessible for most persons wishing to pursue the option of shared guardianship.¹⁴⁶ Rather than to support something such as shared guardianship, Ms Anne Tudhope proposed that an open adoption agreement may be best for a child if the natural parent still plays an important part in the life of the child.

◦ **Disabled persons**

In representations to the Commission, the disability sector highlighted difficulties experienced by disabled persons in adopting children. The worksheet used at the focus group discussion in Bantry Bay therefore posed the following question:¹⁴⁷

How can the issue of the status of persons with disabilities vis-a-vis their eligibility to adopt be addressed in the new child care legislation?

Almost all respondents were of the view that it would be unconstitutional to exclude persons from adopting children simply because they are disabled.¹⁴⁸ In its submission, the Johannesburg Child Welfare Society stated that there should be no discrimination against disabled persons who wish to adopt, 'provided that the particular disability does not prevent them from fulfilling their parenting tasks, e.g. if a single, quadriplegic or paraplegic wished to adopt, they would need a very committed support system to help them cope with the care of a child on a daily basis. One would also have to be very aware of the prospective adopter's motivation to adopt e.g. wanting to adopt an older child

¹⁴⁵ SAASWIPP; the Adoption Coalition; Mrs Krawitz and Mrs Stander; Mrs Hendré Dippenaar; Miss R van Zyl; Mr André Viviers; Ms Blanché Verster.

¹⁴⁶ Mrs Jean Allen.

¹⁴⁷ Question 20.

¹⁴⁸ Johannesburg Child Welfare Society; Mrs Jean Allen; The Adoption Coalition; Mrs Eileen Jordaan; Mrs Krawitz and Mrs Stander; Ms M Hattingh; SAASWIPP; Mrs Hendré Dippenaar; Miss R van Zyl; Mr André Viviers; Ms L Kaba; Ms Sue Padayachee.

to help them in some way'.¹⁴⁹

¹⁴⁹ This argument was also advanced by Ms L Kaba.

Mrs Jean Allen and Mrs Eileen Jordaan pointed out, however, that some (private) adoption agencies do have their own adoption criteria and some of these agencies do consider the disability of the prospective adoptive parents as one of the factors that will be considered in the screening process. It was also pointed out that too many second marriages also end in divorce.¹⁵⁰ Ms Blanché Verster said adoption by disabled persons can be approved on condition that the adoption is in the child's best interest: 'The adoptive parents must fulfil the needs of the child - not the other way around'.¹⁵¹

Mrs Francis Prinsloo of DEAFSA highlighted the need for training and awareness creation around disability as a means of addressing the difficulties faced by disabled persons in the adoption process. Ms U F Ledderboge pointed out that the difficulties are practical in nature and she cite as an example where a deaf couple wishes to adopt an infant with no hearing problems. In such an instance, it might not be in that child's best interest to be adopted by such couple.

18.4.5 **Who may be adopted?**

◦ **Adoption of older children**

Some practitioners maintain that effective permanency planning requires that adoption be the first choice of arrangement for a significant portion of older children who have no parents (e.g. due to their having died from HIV/AIDS) or whose parents have been unable to succeed in making the changes necessary to resume care of their children within the time frame specified for reunification.¹⁵² In this regard, the worksheet used at the focus group discussion in Bantry Bay posed the following question:¹⁵³

Do you agree with this assessment regarding the adoption of older children? Please give

¹⁵⁰ The Adoption Coalition.

¹⁵¹ This argument was also put forward by Ms Sue Padayachee.

¹⁵² See also S R Churchill, B Carlson and L Nybell (eds) **No Child is Unadoptable** London: Sage 1979; R A C Hoksbergen (ed) **Adoption in the Worldwide Perspective** Berwyn: Swets North America Inc 1986.

¹⁵³ Question 7.

reasons for your answer.

There was general agreement with the assessment regarding the adoption of older children.¹⁵⁴ The view was expressed that permanency planning should always be the first priority for a child who has no parents or whose parents are unlikely to ever be able to resume the care of the child.¹⁵⁵ Ms Eileen Jordaan made the point, however, that it would be to the benefit of the adoptive child - particularly the older child - to have contact with family members. She added that post-adoption counselling of adult adoptees makes one very aware of their need to know their roots, to re-establish contact with birth parents and siblings, and the importance of the blood-tie. Several respondents also made the point that the views of the (older) child in this regard should be a primary consideration.

Mrs Anne Tudhope argued that placement stability and early permanency planning with a view to ensuring a stable family life for the child must be the top priority rather than multiple attempts at family reunification or rehabilitation. She questioned the philosophy that child abuse stems from temporary family problems and suggested that foster carers be trained as prospective adoptive parents. She said that following the training and early (initial) placement in foster care, such placement should lead to adoption if the attempts in the first year at family reunification fail. This one year period should be the maximum as it is usually evident within three months that rehabilitation is not working.

However, some respondents did not agree with the adoption of older children.¹⁵⁶ The Children's Placement Centre said,¹⁵⁷ for instance, that (older) children happily placed in foster care are not to be moved even if they become available for adoption. Mr André Viviers said older children should

¹⁵⁴ Mrs Francis Prinsloo, DEAFSA; Mrs Hendré Dippenaar; Mrs Krawitz and Mrs Stander; Ms Jean Allen; Mrs Anne Tudhope; Ms Blanché Verster; Ms L Kaba, Northern Province Provincial Committee on Child Abuse and Neglect; Ms Sue Padayachee.

¹⁵⁵ SAASWIPP; Johannesburg Child Welfare Society; Group 3; Ms Eileen Jordaan; Ms U F Ledderboge.

¹⁵⁶ Miss R van Zyl;

¹⁵⁷ The Centre did not deal with adoption placement of older children.

only be adopted when they have no parents.

A particular concern regarding challenged children was raised by Ms U F Ledderboge. She referred to instances where adoptive parents had not followed up on the medical care required for challenged children and later come back to the placing agency saying that the child is not ‘what they hoped for ...’. To address this issue, she suggested the use of some legal form of ‘informed consent’ to record the fact that the adoptive parents are aware of the difficulties faced by a challenged child.

◦ **Adoption of persons older than 18 years**

The worksheet used at the focus group discussion in Bantry Bay posed the following question:¹⁵⁸

Should a person over the age of 18 years be adoptable? If so, under what circumstances should this be allowed? Would the adoption of a person over 18 who has been raised or maintained by the applicant(s) constitute a reasonable exception?

Most respondents supported the idea that a person older than 18 years can be adopted.¹⁵⁹

Ms Blanché Verster said a physical or mentally retarded person over the age of 18 years should be adoptable as ‘adoption will ensure that the people who raised or maintained the person will not just ‘give up’ on the disabled person, but will accept long-term responsibility’. Ms L Kaba, presenting the provincial input through the Northern Province Provincial Committee on Child Abuse and Neglect, said a person over the age of 18 years can only be adopted if that person is in school and in need of assistance.

¹⁵⁸ Question 9.

¹⁵⁹ Mrs M Hattingh; the Adoption Coalition; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Miss R van Zyl; Ms Sue Padayachee; Ms Blanché Verster; Ms U F Ledderboge; Ms Hendré Dippenaar. However, some respondents at the focus group argued for a consistent approach and linked the eligibility for adoption to age of majority.

Ms U F Ledderboge said persons in the 18 to 21 year old category should be adoptable and she cited the following reasons in support: It can create a sense of belonging, establish family bonds, provide for heirs, allow access to medical aid (in the case of a physical or mentally disabled person), and allow the person to complete his or her education. The Johannesburg Child Welfare Society cited as another reason the expressed wishes of the young person to carry the name of the prospective adopter who may have cared for him or her for several years.

Ms Jean Allen, Mr André Vivier and the Children's Placement Centre saw no point in providing for the adoption of an adult person. Ms Anne Tudhope also said a person in the age category 18 to 21 years should not be adoptable unless that person has been cared for by the applicant. She pointed out that persons so adopted could be exploited by the adoptive family (by living off their salaries or relying on their labour) and that the process can be abused to acquire citizenship.

18.4.6 **Section 18(4) requirements**

In terms of section 18(4) of the Child Care Act, 1983, an application for adoption must not be granted unless the court is satisfied that the applicant(s) is qualified to adopt the child and possessed of adequate means to maintain and educate the child; that the applicant(s) is of good repute and a person fit and proper to be entrusted with the custody of the child; that the proposed adoption will serve the interests and conduce to the welfare of the child; and that the necessary consent to the adoption has been given.

◦ **The use of the section 18(4) requirements**

The worksheet used at the focus group discussion in Bantry Bay posed the following question:¹⁶⁰

Are these requirements being applied in ways that are not appropriate? Are extraneous issues being allowed to impede adoption being used more frequently as a means of substitute family care? Please give reasons for your answer citing relevant examples where

¹⁶⁰ Question 16.

appropriate.

Mrs Krawitz and Mrs Stander, in a joint submission, were of the opinion that the section 18(4) requirements are being applied in appropriate ways. They also did not see the use of the provisions of this section as impeding adoptions.¹⁶¹ The Adoption Coalition shared this view, but added that adoption should be handled by a specialist adoption agency.

¹⁶¹

This was also the view of Ms Jean Allen.

Ms Anne Tudhope regarded the provisions of section 18(4) as ‘extremely problematic’. She said birth fathers are not acknowledging themselves in writing which may indicate that such fathers do not wish to play a significant role in the lives of their children yet the courts are placing an unreasonable burden on social workers to find such fathers. She further identified the consent provision,¹⁶² the 60 day ‘cooling-off’ period, and the first right of refusal of foster parents¹⁶³ problematic.¹⁶⁴

The sentiments above were also raised at the report back sessions at the focus group discussion. Group 2 pointed out, for instance, that the following extraneous issues impede adoption being used more frequently:

- The loss of the foster care grant when foster parents adopt the child;
- The fact that consent is sometimes unreasonably withheld by the biological parents;
- The reluctance of some commissioners of child welfare to dispense with the required consent in such circumstances;
- The lack of weight given to the wishes of the (older) child;
- The wide discretion given to social workers and commissioners of child welfare to determine whether the proposed adoption will inter alia ‘serve the interests and conduce to the welfare of the child’;
- Judicial prejudices, notably against gay and lesbian adoptions.

While not experiencing practical problems with the criteria listed in section 18(4), Ms U F Ledderboge did suggest some improvements to the present wording. She suggested, inter alia, that in order to determine whether a person is ‘of good repute’¹⁶⁵ references should be called for and

¹⁶² Section 18(4)(d).

¹⁶³ Section 18(4)(g).

¹⁶⁴ These aspects were also identified by other respondents such as Miss R van Zyl.

¹⁶⁵ Section 18(4)(b).

criminal records checked) and that in the case of a foster parent adoption¹⁶⁶ bonding issues should be considered.

Ms L Kaba, Mrs M Hattingh and Ms Eileen Jordaan ascribed the inappropriate application of the requirements of section 18(4) to the different interpretations given to the section by commissioners of child welfare.

◦ **The adequate means test**

¹⁶⁶ In terms of section 18(4)(g).

The worksheet used at the focus group discussion in Bantry Bay posed the following question:¹⁶⁷

Should the ability of the prospective adoptive parents to maintain and educate the child remain a criterion to be considered by the children's court in adoption proceedings? Should the criterion not rather be whether the prospective adoptive parents are willing and able to carry out their parental responsibilities? What kind of State support can encourage poor families to adopt children?

Mrs Krawitz and Mrs Stander argued for the retention of the adequate means test, provided subsidised adoptions are recognised.¹⁶⁸ Ms Jacqui Gallinetti took a contrary position and said the adequate means test should make way for the willing and able test. She identified income tax rebates and subsidised health and educational services for persons who adopt children as forms of State support that will encourage poor families to adopt children. The Adoption Coalition also seemed to support the move to the willing and able tests and said financial ability on its own should never be the only criterion.¹⁶⁹ The Coalition supported the idea of subsidies for poor families who adopt children.

Ms Anne Tudhope said it is important that prospective adoptive parents should have the means to provide for the education and maintenance of the children they wish to adopt. She acknowledged, however, that the means test may not always be appropriate and suggests a community based means test. She also supported subsidised adoptions. Mrs Hendré Dippenaar was of the view that both the adequate means test and the willing and able test should apply.

¹⁶⁷ Question 17.

¹⁶⁸ Mrs M Hattingh supported this view, but said parents should not be solely dependent upon the subsidy. She said the adoption subsidy should be a supportive rather than an enabling mechanism.

¹⁶⁹ This approach was supported by Ms Jean Allen; Ms Eileen Jordaan; Ms Blanché Verster; Ms L Kaba; Ms U F Ledgerboge; Ms Sue Padayachee; Ms Francis Prinsloo; Miss R van Zyl; Mr André Viviers.

In its submission, the Johannesburg Child Welfare Society stated that the move from the adequate means test to the willing and able test is really a case of semantics: “the ability of the prospective adoptive parents to maintain and educate the child” is really not that different to “are willing to meet the child’s needs” or “willing and able to carry out their parental responsibilities”. The Society mentioned that, at the moment, it screens applicants who are not in formal employment, but who are working as street hawkers, running tuck shops or spaza shops from home. It also screens many domestic workers. The Society pointed out that in all of these cases, incomes are low - often as low as R500 per month. The Society contended that the adequate means test still applies to these applicants because ‘they plan their finances to accommodate the addition of a child’. The Society then posed the following question:

If you considered anyone earning below R500-00 per month, or not earning at all, you would be expecting them to virtually live on ‘state support’ and would this not then be open to abuse, e.g. “If we adopt a child, we will get a grant from the state and that will help the whole family survive”?

◦ **South African citizenship**

Non-citizens are now allowed to adopt children in South Africa. This aspect has been covered extensively in another chapter¹⁷⁰ and we leave matters there.

18.4.7 **Consent to adoption**

◦ **Informing persons granting consent of the legal consequences of adoption**

The consent to adoption must be in writing and must, if given in the Republic, be signed by those giving the consent in the presence of a commissioner of child welfare who must attest the consent. Before the commissioner attests the consent he or she must inform the person granting the consent of

¹⁷⁰ See 22.2 below.

the legal consequences of the adoption. In this regard, the worksheet used at the focus group discussion in Bantry Bay posed the following question:¹⁷¹

Are problems being experienced in practice in informing persons granting consent of the legal consequences of adoption? If so, what are these? What can be done to address such concerns?

In its submission, the Johannesburg Child Welfare Society submitted that few problems are being experienced in practice in informing persons granting consent of the legal consequences of adoption.¹⁷² The Society pointed out that apart from the social workers informing the consenting birth parents of the legal consequences of adoption during the counselling sessions, the commissioners of child welfare generally also explain the consequences of signing the consent form. The Society said the commissioners at the Johannesburg Magistrates' Court are particularly sensitive and professional in this area.

To overcome the problem of persons not being informed properly regarding the legal consequences of adoption, Ms Francis Prinsloo suggested that persons giving the consent be required to spell out the consequences of them giving consent to adoption in writing and under oath. Ms Sue Padayachee said social workers should state in their reports to the children's court that the consequences of giving consent have been explained to the persons giving the consent and this should so become part of the court record.

◦ **Consent to the adoption by the child concerned**

Section 18(4)(e) of the Child Care Act, 1983 requires the child to be adopted, if over the age of ten years, to consent to the adoption and to understand the nature and import of such consent. The worksheet used at the focus group discussion in Bantry Bay posed the following question in this regard:¹⁷³

Is it appropriate to set arbitrary age limits (presently ten years) for a child to consent to his or

¹⁷² This seemed to be the general view. See the submissions by Group 2; Group 3; Ms Hendré Dippenaar; the Children's Placement Centre; Ms Eileen Jordaan; Ms Blanche Verster; Ms L Kaba; Mrs Krawitz and Mrs Stander; Ms Jean Allen; Ms Anne Tudhope.

¹⁷³ Question 18.

her adoption? Should the consent of a child who is mature enough to understand the nature and import of such consent not rather be the requirement?

While some respondents questioned the arbitrary age limit of 10 years for a child to consent to his or her adoption, most respondents agreed, despite and regardless of what age is decided upon, that:

- the maturity of the child should be the deciding factor;
- the views of the child need to be considered,
- the child needs to understand the nature and import of such consent, and
- there is a need for proper counselling.¹⁷⁴

There was also some support for lowering the age to six¹⁷⁵ or seven years.¹⁷⁶ However, some respondents preferred the legal certainty an age determination brings and questioned the subjectiveness of a maturity (as opposed to an age limit) requirement.¹⁷⁷

Ms Eileen Jordaan suggested that social workers should be required to state in their reports whether the child has been consulted and that the wishes of the child have been taken into account.

◦ **Consent to adoption by the unmarried natural father**

In the worksheet used at the focus group discussion in Bantry Bay the following questions were posed:¹⁷⁸

¹⁷⁴ Group 1; Group 3; Johannesburg Child Welfare Society; Ms Hendré Dippenaar; Miss R van Zyl; Ms Eileen Jordaan; Ms Blanché Verster; Ms Sue Padayachee; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Ms Anne Tudhope; Ms M Hattingh.

¹⁷⁵ SAASWIPP.

¹⁷⁶ Mr André Viviers; Ms L Kaba; Ms U F Ledderboge (provided the child is assessed by a social worker).

¹⁷⁷ See, for instance, the submission by Ms Jean Allen, Ms Francis Prinsloo, the Adoption Coalition and the Children's Placement Centre. The last respondent argued that evaluating a child's maturity is a time consuming and arbitrary affair.

¹⁷⁸ Question 21.

Do you think unmarried natural fathers should get a ‘first right of refusal’ when their children are given up for adoption? Have the law since the *Fraser* judgment not given the unmarried natural father too much say in the adoption of his children? Have you experienced practical problems with the implementation of the Adoption Matters Amendment Act with regard to the involvement of unmarried fathers? Please motivate your answer.

Most respondents supported the involvement of the unmarried natural father of a child in the adoption process.¹⁷⁹

Group 3, Mr André Viviers, and Mrs Krawitz and Mrs Stander, in their joint submission, maintained that unmarried birth fathers should not get a first right of refusal when their children are given up for adoption. They added that in their opinion the law has given unmarried fathers too much say in the adoption of their children. The Adoption Coalition and Mrs Hendré Dippenaar, on the other hand, took a different position and said the unmarried birth father should have the first right of refusal should such father be in a position to care for the child. In support of the position taken by the Adoption Coalition, Ms U F Ledderboge said unmarried natural fathers should get a first right of refusal in all instances except where such children are born from rape or incest. Ms Ledderboge further suggested that other indicators such as acceptance of paternity, fatherly involvement, visits made, and financial contributions also be taken into account.

¹⁷⁹

SAASWIPP; Ms Blanché Verster; Ms L Kaba; Ms Anne Tudhope; Ms Eileen Jordaan; Mrs Krawitz and Mrs Stander; Ms Jean Allen; the Adoption Coalition; Ms U F Ledderboge; Ms Sue Padayachee; Groups 1, 2 and 4, Mrs Hendré Dippenaar; the Children’s Placement Centre.

Ms Jean Allen, while recognising the right of both biological parents to consent to the adoption of their child, said too much responsibility has been placed on the social worker involved to trace missing parents (especially the unmarried fathers). She and the Johannesburg Child Welfare Society maintained that the courts are not applying the proviso¹⁸⁰ to section 18(4)(d) consistently¹⁸¹ and are expecting social workers to find natural fathers who have not acknowledged themselves in writing to be the father of the child and have not made their identity and whereabouts known. This causes unnecessary delays in finalising the placement of the child. Group 4, Ms Anne Tudhope and Ms Eileen Jordaan also referred to the inconsistent approach adopted by commissioners of child welfare. They said commissioners sometimes institute searches for ‘unknown’ fathers, demand paternity testing for fathers who have denied paternity, disregard social worker reports recommending adoption, and that the 60-day waiting period causes unnecessary delays. Ms Tudhope recommended that foster parents be given the first option to adopt the child in their foster care.

In its submission, the Johannesburg Child Welfare Society further said that the provisions of the Adoption Matters Amendment Act works well where both the biological mother and biological father of a child born out of wedlock are available and in agreement about the adoption and sign consent together or within a few days of one another. The 60-day period then runs almost concurrently for both the biological parents, at the end of which one can confidently place a two-month old baby or finalise the adoption if the child is already placed. The Society pointed out,

¹⁸⁰ The proviso reads as follows: ‘Provided that such natural father has acknowledged himself in writing to be the father of the child and has made his identity and whereabouts known ...’.

¹⁸¹ The Johannesburg Child Welfare Society explains the inconsistency as follows:

The birth mother makes an affidavit at the time of signing consent to the effect that she does not know the whereabouts of the birth father. Some courts accept this and know that if his whereabouts are unknown, he cannot be notified. Other courts insist we advertise for the birth father in three newspapers informing him about the pending adoption. Who takes responsibility for these adverts? Who pays for them, as placing ads in the newspapers is an expensive exercise. Nowhere in the Act does it say that you have to advertise for a birth father if his whereabouts are unknown. At what point does the birth father acknowledge himself in writing to be the birth father? Added to this problem is the fact that most courts only decide to notify the father when there is an adoption application and as this usually only happens after the 60 days have elapsed. We are now being requested to advertise for a birth father, 2 months after the birth mother has signed consent. The baby could have been with a prospective adoptive family for nearly 2 months as well. Should the birth father respond to an advert and come forward, and he decides to sign consent, he then also gets another 60 days, so the adoption finalisation is then delayed another two months. Should he decide he does not want this child to be adopted, the court will set dates for hearings and this further delays the adoption and in the meantime the baby becomes more firmly bonded to the adopters and vice versa.

however, that problems arise where the natural father of a child born out of wedlock is not available at the time the biological mother signs consent and she makes an affidavit to court about the biological father. Should she supply details of the biological father, including his name and address and the fact that he is aware of the pregnancy, it was expected that the court would inform the biological father of an adoption consent having been given, within a period of 14 days from the time of the biological mother signing consent, affording him the opportunity to give or withhold consent, advance reasons why his or her consent should not be dispensed with or to apply for the adoption of the child, if he is the natural father of the child. The Society maintained this is not happening in practice.

In practice, the Society said, the court is only informing the natural father at the time when application for adoption is made and this is usually only after the birth mother's 60 days have expired or even later. Should the biological father then decide he wants to sign consent, another 60 days has to be given to him to exercise his rights, thus delaying the finalization of the adoption even further. The Society said this causes anxiety for all concerned and could have been avoided if the natural father had been informed within 14 days of the biological mother giving consent. Should the natural father be informed only after the birth mother's 60 days have expired and then decide to withhold his consent and adopt the child himself, the whole adoption process has to be put on hold while court hearings are held, postponements are granted, investigations done, etc. The Society pointed out had the natural father been informed after the 14 day period, his intentions would be known early on and possibly before the baby has been placed with a prospective adoptive family.

The Society highlighted another problem being experienced with section 18(4)(d) of the Child Care Act, 1983. This relates to situations where a birth mother makes an affidavit in court at the time of signing consent, stating the birth father's name but alleges that he has abandoned her, has denied paternity and whose present whereabouts are unknown. As the section reads, one understands that consent should not have to be obtained from the natural father who has not acknowledged himself in writing or whose whereabouts are unknown. However, as the Society pointed out, the Act does not say where and to whom the natural father should acknowledge himself in writing to be the child's

father. The Society continued: ‘Does this imply that the birth father should have added his name to the birth registration at Home Affairs? ... If it is not the birth register, where else should the birth father be “acknowledging himself in writing”’.

Ms M Hattingh pointed out that in order to circumvent the provisions of the **Fraser**-judgment, birth mothers refuse to divulge the identity of the natural father or make false affidavits in this regard.¹⁸² This is not necessary in the best interests of the child. She (and SAASWIPP) further highlighted the dichotomy that the consent of the natural father is required for the adoption of his child while no such requirement applies when the birth mother wishes to terminate her pregnancy.

18.4.8 **Dispensing with consent to adoption**

- **Dispensing with consent in terms of section 19**

¹⁸² This problem was also mentioned by Ms U F Ledderboge; Ms Sue Padayachee; the Children’s Placement Centre.

In practice, problems are experienced because courts are very hesitant to dispense with consent despite the provisions of section 19 of the Child Care Act, 1983. In South Africa this is an issue which is simply left up to the individual magistrate, who may not be knowledgeable about attachment and bonding or about children's needs for permanency.¹⁸³ There is no agreement as to the conditions under which a child will be regarded as having been 'deserted', and some courts refuse to allow an abandoned child to be adopted for up to two years.

The worksheet used at the focus group discussion in Bantry Bay posed the following question:¹⁸⁴

Under what circumstances should it be possible to dispense with the consent of the parents?

Some respondents regarded the grounds for dispensing with consent in terms of section 19 of the Child Care Act, 1983 as covering all the most likely circumstances where this would be needed.¹⁸⁵ Most respondents also related problems experienced in the application of the section to inconsistency in approach by commissioners of child welfare, especially when it comes to determining when consent is being withheld 'unreasonably'.¹⁸⁶ Some of these respondents also argued that this criterion (unreasonably withholding consent) should be defined or alternatively be replaced with the best interests of the child criterion. Other possible criteria mooted for dispensing with consent was the absence of a parent / child relationship and the abuse of another child.

Mrs Krawitz and Mrs Stander, in a joint submission, said it should be possible to dispense with the consent of a parent if the parent has failed to take responsibility for the child or failed in his or her duty of care. They proposed that courts be provided with more guidelines on what 'unreasonably

¹⁸³ See Elizabeth Cooke 'Dispensing with parental consent to adoption - a choice of welfare tests' (1997) Vol. 9 No. 3 **Child and Family Law Quarterly** 259.

¹⁸⁴ Question 25.

¹⁸⁵ Mrs Jean Allen; Ms Anne Tudhope; Ms M Hattingh; Groups 2 and 3; Ms Blanché Verster; Ms Hendré Dippenaar; the Children's Placement Centre.

¹⁸⁶ Mr André Viviers; Ms Francis Prinsloo; Mrs Krawitz and Mrs Stander; Ms M Hattingh, Ms Anne Tudhope; Ms Eileen Jordaan; Groups 2 and 3; Ms Blanché Verster; the Adoption Coalition.

withholding consent' in section 19(b)(vi) of the Child Care Act, 1983 means. The Adoption Coalition also pleaded for clearly defined criteria. In addition to the criteria listed in section 19 of the Child Care Act, 1983, Ms Blanché Verster recommended the inclusion of the following ground for dispensing with consent: Where the parent has not supported a child for a period of one year although able to do so.

SAASWIPP said that dispensing with the consent of the parents should apply to children who have been deserted. The Association further said criminal proceedings should not be instituted against desperate women who abandon their children. The National Adoptive Parents' Institute supported this view and put forward the following recommendations in this regard:

1) DECLARATION OF ABANDONMENT/ DESERTION

A child is to be declared a foundling [deserted] if the child:

- a) has been expressly abandoned (by one or both birth parents) into the care of a hospital, children's home, place of care or safety, a department of welfare or a social worker, or left in a public place where the child could be found and cared for (eg under a tree, near a path, in a public toilet, at the station / taxi rank).
- b) after its details of date and place of birth or time, date and place of finding and physical characteristics have been put on a Central Register / Search Register and no family member has claimed a child; and / or
- c) after its details of date and place of birth or time, date and place of finding and physical characteristics have been put in the local press / made known on local radio stations, and no family member has claimed a child;
- d) deserted in the manner described in section (1)(a) if not reclaimed within a period of 30 days.

2) NON DECLARATION OF A CHILD AS ABANDONED / DESERTED

A child is not to be declared a foundling where the child:

- a) has been left in the care of family members who claim that the child was abandoned with them. Appropriate safeguards must be put in place to assure that parents' whereabouts are timeously found. Extended family members must be counselled that the child may be adopted locally or sent overseas for adoption if the whereabouts of the child's parents remain unknown. Adoption proceedings entered into without parental consent when it is suspected that extended family members may know their whereabouts is a problematic area. The best interest of the child to a stable permanent family environment is to be the prime consideration.
- b) if the child's family has not been found within a period of 30 days, or does not wish to reclaim the child, the child may be placed for adoption without the express consent

of the parents.

- 3) A CONTACT REGISTER is to be set up.

Ms Sue Padayachee was however of the view that it should only be possible to dispense with the consent of the parents under extreme conditions. She suggested that the onus be placed on the biological parent why consent should not be dispensed with.

◦ **Dispensing with consent on the basis of unreasonableness**

Issue Paper 13 posed the following question:

Question 72: Should section 19(b)(vi) of the Act be amended to identify situations in which refusal of parental consent may be regarded as 'unreasonable,' or should the ground be changed to allow for dispensing with parental consent when this is 'in the best interests of the child'?

The SA National Council for Child and Family Welfare answered the question in the affirmative and supported the motivation advanced by the Project Committee in Issue Paper 13.¹⁸⁷ This position was supported by the Durban Child and Family Welfare Society with a view to permanency planning. The Society added that permanent foster care or subsidised adoption should be legalised and that in cases of abandoned children immediate adoption should be possible.

The NICC contended that section 19(b)(vi) of the Act should be retained and that the best interests of the child should underlie all decisions. It could also be included as a specific clause in section 19 but the unreasonableness clause should not be withdrawn. The Cape Law Society, supported by the Durban Committee, believed that the main focus should be the best interests of the child. The Durban Committee added that one should guard against removing too much parental responsibility.

Phoenix Child and Family Welfare Society and the Natal Society of Advocates answered the

¹⁸⁷ This view was supported by Professor C J Davel, Mrs J Smith and the National Council of Women of South Africa.

question in the negative, with the latter respondent adding that the court should have a wide discretion as to what constitutes the term ‘unreasonable’.

The Johannesburg Institute of Social Services contended that the problem with the application of section 19(b)(vi) of the Act is that commissioners of child welfare are scared for whatever reason to apply this provision in the interests of the child. The Institute submitted that this is a serious issue and can far better be handled by higher ranking courts. If the country could have a regional Family Court and a Family Appeal Court there would be no need to alter this clause. The Institute submitted that the problem is not in the legislation but in the legal system.

Mr DS Rothman did not take kindly to the suggestion that commissioners are reluctant to use the ground referred to in section 19(b)(vi) ‘especially because the parent is represented by a lawyer’. He pointed out that many social workers have little or no understanding of the way in which evidence adduced is weighed up and evaluated, the admissibility of evidence, credibility factors, etc. The respondent remarked that it is in the first place not the commissioner who should use this or other grounds, but the court assistant. He conceded that section 19(b)(vi) is unclear and should be reformulated. Mr Rothman cautioned that although the identification of specific situations will make the task of the court much easier, no list will be exhaustive and that the real test for reasonableness takes place when it is weighed up against the best interests of the child.¹⁸⁸

The worksheet used at the focus group discussion in Bantry Bay did not include any specific questions on section 19 of the Child Care Act, 1983.

◦ **Notice of consent to adoption (section 19A)**

In terms of section 19A(1) of the Child Care Act, 1983 if only one parent has given consent to an adoption, where the other parent is not available to give consent or where such parent’s consent is

¹⁸⁸ In a letter with enclosures dated 6 June 2001 the Children’s Placement Centre also highlighted practical problems with the circumstances in which consent to adoption may be dispensed with.

not required, the commissioner for child welfare must cause notice to be served on the other parent within a period of 14 days informing such parent of the consent that has been given and affording him or her the opportunity to also give or withhold consent, or advance reasons why his or her consent should not be dispensed with, or, in the case of a natural father of a child born out of wedlock, to apply for the adoption of the child.

The worksheet used at the focus group discussion held in Bantry Bay posed the following questions in this regard:¹⁸⁹

How is section 19A of the Child Care Act, 1983 working in practice? What could be done to make it clearer and more effective?

¹⁸⁹

Question 23.

Mrs Krawitz and Mrs Stander, in a joint submission, and Groups 1 and 3 stated that section 19A is causing problems in practice.¹⁹⁰ They said it is often difficult to find one parent and this causes delays in the process. It is also unclear whose responsibility it is to trace the missing parent. They referred to the inconsistency in approach by commissioners regarding the application of the 14 day period. Ms Jean Allen said some commissioners of child welfare do not apply the provisions of section 19A and insist that the consent of the father be obtained.¹⁹¹

The Adoption Coalition, on the other hand, stated that the problem does not lie with the section, but with its implementation by commissioners of child welfare. The Coalition therefore recommended training of commissioners and standardisation of procedures.¹⁹²

In its submission, the Johannesburg Child Welfare Society also pointed out that the problem seems to be the different interpretations given to section 19A by different children's courts. On one reading of the section, if only one parent has given consent to an adoption where the other parent is not available to give consent or where such parent's consent is not required in terms of section 19, the commissioner must cause notice to be served on the other parent within 14 days, informing such parent of the consent that has been given and affording such parent the opportunity to also give consent or advance reasons why his or her consent should not be dispensed with or, in the case of the unmarried natural father, to apply for the adoption of the child. The Society then posed the question

¹⁹⁰ Ms Eileen Jordaan and the Children's Placement Centre shared this view.

¹⁹¹ This point was also made by Ms Blanché Verster.

¹⁹² Mrs M Hattingh shared this view.

why the commissioner must ‘cause notice to be served on the other parent’ when the other parent ‘is not available to give consent or where such a parent’s consent is not required’. Does this section imply that notice must be served even if consent is not required, asked the Society.

The Society pointed out that the section provides that notice must be served on the other parent within a period of 14 days informing such parent of the consent that has been given. The Society averred that this is not happening in practice as the courts are not notifying the other parent after the consent has been given, but prefer to wait until there is an application for adoption. This application may come long after the 60-day cooling off period has expired for the parent who did consent.

18.4.9 **Withdrawing consent**

In terms of sections 18(8) and (9) of the Child Care Act, 1983, the parent of a child may withdraw his or her consent to the adoption in writing before any commissioner at any time during a period of up to 60 days after having giving such consent and the children’s court cannot make any order of adoption before the expiration of this 60-day period.

At the focus group discussion in Bantry Bay the following questions were posed in this regard:¹⁹³

Is there any merit in retaining this 60-day ‘cooling off’ period? What alternatives do you suggest?

Most respondents categorically stated that there is no merit in retaining a ‘cooling-off’ period of 60 days, and most argue for a much shorter period such as 30 days.¹⁹⁴ Respondents argued that the uncertainty caused by the delay is traumatic to the adoptive parents and birth parents alike and

¹⁹³ Question 24.

¹⁹⁴ Groups 1 and 3; Ms Blanché Verster; SAASWIPP; Ms Jean Allen; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; the Adoption Coalition; Ms Anne Tudhope; Ms U F Ledderboge; Ms Sue Padayachee; Johannesburg Child Welfare Society; Ms Hendré Dippenaar.

hampers the bonding between the prospective adoptive parents and the child. Ms Anne Tudhope said that if the counselling to birth parents facing a crisis pregnancy is done thoroughly, the decision to give the baby up for adoption is a considered one and then there will be no withdrawal of consent. Mrs M Hattingh shared this view and pointed out that some commissioners of child welfare place the baby in a place of safety during this 60-day period. This has obviously a negative impact on the bonding process and aggravates the position regarding availability of beds in places of safety.

Mr André Viviers, Ms Eileen Jordaan, the Children's Placement Centre and Ms L Kaba argued for the retention of the 60-day period. Ms Jordaan said it is important in the placement of babies to observe the placement and to establish whether or not bonding has taken place. Ms Jordaan further pointed out that the circumstances of the birth mother might also change and cause her to withdraw her consent. She said adoption is a lifetime decision and what is best for the child and not the adoptive parents is important. The Children's Placement Centre said their adoptive parents are counselled to accept this risk and the period gives them sufficient time to observe bonding and evaluate the success of the placement prior to finalisation.

18.4.10 **The effect of adoption**

The worksheet used at the focus group discussion in Bantry Bay posed the following questions:

Is it necessary in law to link adoption to the termination of parental responsibilities? If so, does it need to be shown that everything possible was done to assist the parents who give a child up for adoption to fulfil their parental responsibilities?

Most respondents saw a need to link adoption and the termination of parental responsibilities and to show that everything possible was done to assist the parents who give up the child for adoption to fulfil their parental responsibilities.¹⁹⁵ Mrs Eileen Jordaan said that one of the main reasons why

¹⁹⁵ Ms Eileen Jordaan; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti, the Adoption Coalition, Pretoria; Mrs Jean Allen; Mrs M Hattingh; SAASWIPP; Mrs Blanché Verster, SAVF; Mrs Linda Kaba; Mrs Hendré Dippenaar; the Children's Placement Centre; Mr André Viviers.

children are placed in adoption is the inability of the single parent to maintain the child because she is unemployed, has no accommodation, and because there is no support from the father of the child.

Mrs Jean Allen argued, however, that it is not always necessary to show that everything possible was done to assist the parent(s) to keep the child. She pointed out that not all children are given up for adoption because of financial reasons or lack of support systems.

Mrs Anne Tudhope, chairperson of the National Adoptive Parents' Institute, preferred the phrase 'transference of parental responsibility' to 'termination of parental responsibility'. She said adoption is to be invoked in cases where there is a lack of parental responsibility. Mrs Tudhope suggested that in such an instance the child be placed with trained foster parents who will become the adoptive parent if attempts to rehabilitate the family fail. Rehabilitation of the family is to take place at the same time and should be limited to a period of three months. She said children are not to be removed from families suffering a short-term crisis.

The National Adoptive Parents' Institute submitted in a separate submission that legislation must provide parents of children born out of wedlock who wish to place their children for adoption with accredited social worker counselling or mediation facilities before the matter is brought to court. It suggested that a social worker's report should be required before a father of a child born out of wedlock gains parental responsibility in respect of his child and that adopted persons, adoptive parents and birth parents wishing to make contact do so through an intermediary in the person of a trained social worker. The Institute further suggested that post-adoption services be made available to adoptive and foster families where needed.

Mrs Krawitz and Mrs Stander strongly supported the separation of the termination of parental responsibilities from the issuing of an adoption order. The Adoption Coalition, Pretoria pointed out that the termination of parental rights before adoption in a separate process is dangerous if there is no one to adopt the child. On the other hand, Mrs Jean Allen said that the law should allow for the termination of parental responsibilities separately from the issuing of an adoption, such as for

children in long-term foster care.

Mrs Ledderboge also saw adoption and termination of parental responsibilities as two different issues. She said a parent who wishes to relinquish parental responsibility should do so separately of the next step regarding substitute care, provided there are community resources. She raised the interesting option of a parent giving up his or her child for adoption, but wishing to retain some aspects of parental responsibility in respect of that child. She said in such an instance, a clearly specified agreement is vital.

The submission of the Johannesburg Child Welfare Society was informative and is quoted in full:

This is an issue which raises mixed reaction from adoption social workers. While we are aware that many birth mothers sign consent to their newborn babies' adoption with the expectation that the baby will be placed in adoption shortly after this legal requirement has been completed, in reality, this is not always the case and many babies can remain in institutions or temporary foster care for many, many months before being placed in adoption. Should the birth mother remain responsible for the child during this period? Should she be involved in visiting the child, buying things for the child?

The feeling amongst the ± 10 adoption social workers at this agency is that the mother's responsibility towards her child should be terminated at the time of consent and not only when an adoption order is made. The rationale behind this feeling is that the mother "gave up" her child because she could not fulfil her parental responsibilities due to her circumstances. Should we then force this on her because of not being able to find suitable adopters or because of the child's special problems delaying his adoption? E.g. HIV + children.

Adoptive placements of older "hard-to-place" children is a separate issue. For some such children, the termination of parental rights would increase the chances of recruiting suitable adoptive parents.

18.4.11 **Post-adoption contact**

At the focus group discussion the Commission pointed out that there are now many variations in adoption practice along a continuum ranging from completely 'open' to completely 'closed'. This

has come about in part because so many older children with pre-existing relationships with biological family members and others are being adopted. It might well be necessary to make provision for the court to allow for parental contact to be maintained under certain conditions in particular cases - especially where older children are involved. The question was therefore posed as to whether the law should provide for some measure of post-adoption contact by adopted children with their biological parents, biological family members or significant others.¹⁹⁶

Most respondents were in favour of the law providing some measure of post-adoption contact by adopted children with their biological parents, biological family members or significant others.¹⁹⁷ In this regard, most respondents added the proviso that such contact should be in the best interests of the child concerned.

Mrs Eileen Jordaan opined that it would be helpful, if at the time of the making of the adoption order, a contract was entered into in which post-adoption contacts were agreed to by the adoptive parents and the birth parents. She pointed out that this would be particularly important in step-parent adoptions which often mean that a child is deprived of contact with the consenting birth parent, grand-parents and the extended family. Mrs Jordaan further argued that in the case of open adoptions, a contract should also be entered into in which post-adoption contact between the birth parent and the child is agreed to. She said such contracts may later be found not to be in the child's

¹⁹⁶ Question 5.

¹⁹⁷ Mrs Krawitz and Mrs Stander; Mrs Jean Allen; Mrs Anne Tudhope, chairperson of the National Adoptive Parents' Institute; Mrs M Hattingh; SAASWIPP; Mrs Blanché Verster; Mrs U F Ledderboge; Mrs Sue Padayachee; Mrs Francis Prinsloo; Mrs Hendré Dippenaar; Mr André Viviers.

best interests and provision should therefore be made for the contract to be amended.

The Adoption Coalition, Pretoria qualified its support for post-adoption contact to instances where there has been a pre-existing relationship. It also said such contact should be facilitated by a specialist adoption worker or agency and should form part of an agreement or the court order. This was also the view of Mrs M Hattingh of CMR, Pretoria, who said in addition that step-parent adoptions more readily allow for sustainable contact once the adoption proceedings have been finalised.

SAASWIPP restricted its support for post-adoption contact to cases of non-disclosed and family adoptions of older children. It did not support post-adoption contact in the case of baby non-disclosed adoptions of babies. It said where older children are adopted, provision must be made in the adoption order for the maintenance of contact between the adoptee and his or her siblings. This view was supported by Mrs Sue Padayachee of Lawyers for Human Rights, who added that the court should be informed by a social worker's report. Mrs L Kaba submitted that the rule should be no contact in non-disclosed adoptions. Miss R van Zyl also differentiated between open disclosed adoptions and closed non-disclosed adoptions. She said in the case of the former, contact should be maintained provided it is in the best interests of the child, while in the latter contact should be through the agency that handled the adoption.

Mrs U F Ledderboge cautioned that in those instance where a child has been removed because of abuse, 'distance' between such child and his or her parent(s) may be necessary as such a child can be easily manipulated by the abusive parent(s).

On the issue of open adoptions, the National Adoptive Parents' Institute submitted that open adoption arrangements should not be mandatory in all cases: 'Contact is not suitable for all children or families'. It therefore suggested that open adoption arrangements need to be flexible, and able to change with time according to needs, particularly of the child concerned. The Institute raised the possibility of entering into an agreement regarding contact during the adoption process. This

agreement should provide for possible (later) changes and should provide for possible contact between a child and any member of his or her extended family who has played a significant role in the life of the child, or where such contact would benefit the child. The Institute said contact could take the form of letters, the exchange of photos or personal contact under the supervision of, and/or the consent of the adoptive parents. On the other hand, Ms Jacqui Gallinetti argued that the law should not provide for post-adoption contact by adopted children with their biological parents. She said that if any type of family reunification is still possible, then adoption should not be resorted to.

The Children's Placement Centre submitted that if ongoing contact with the biological parents is deemed to be in the best interests of the child then adoption is not appropriate. The Centre said infants available for non-disclosed adoption would be very difficult to place if there was face to face post-adoption contact and that most adoptive parents only want limited post-adoption contact via the agency.

In its submission, the Johannesburg Child Welfare Society pointed out that there is presently nothing legally binding to regulate or enforce post-adoption contact between birth parents, the child and the adoptive family. The Society further highlighted the difficulties in enforcing such contact orders.¹⁹⁸

The Society then said that in terms of the law, it would be helpful to have something 'legally binding' in the Child Care Act regarding adopters maintaining contact with the agency or birth

¹⁹⁸ 'The child is legally adopted - the adopters suddenly decide that they no longer want to have contact with the birth parents and they stop all contact - what will the penalty be? Do you bring them back to court for another hearing? Most adoption cases are closed once the adoption is finalised. Would a court order with regard to 'ongoing' contact mean that files would remain open for years in order to ensure that this contact was being maintained?'

parents, via the agency in the case of adoption of a newborn or toddler. The Society also pointed out the difficulties encountered with open adoptions:

In terms of ‘open adoption’, adopters sometimes meet with birth parents at the time of placement. During this meeting, certain expectations with regard to future contact between the birth parents (via the agency) and the adopters (via the agency) are expressed. The adopters promise to write letters to the birth mother on the child’s progress (via the agency) once a year or ‘regularly’. The birth mother goes away, happy in the knowledge that this promise has been made to her and that she will hear news of her child from time to time.

Generally, it goes well initially, maybe for the first year or two, sometimes less, and then the adopters refuse to have any further contact with the birth mother (via the agency). The birth mother cannot understand how the adopters could go back on their ‘promise’ to her and she feels let down, resentful and bitter about her decision, etc. Her previous positive feelings about the adopters become very negative.

Adoption social workers are at a loss to do anything ‘legally’ about the situation. They have to accept the adopters’ decision to stop all further contact, sometimes not so long after the child has been placed. The adopters know very well that they are under ‘no legal obligation’ to provide letters or photos for the birth family and therefore feel free to make the decision of no future contact. So, once again, it would be good to have some form of legal duty, should this be an expectation of both the birth mother and adopters (it should not be forced on anyone), but the question again arises as to how this would be ‘enforced’. Adopters often move to other countries, do not let you know where they are, etc. Who is going to enforce this ‘order of contact’ and what would the penalty be for not maintaining the contact? ...

Perhaps social workers should include a subheading in their section 18 finalization report covering ‘**Expectations regarding ongoing contact or Agreement regarding ongoing contact**’, so that at least adopters see it as part of the adoption proceedings and not just a verbal promise made in the social worker’s office to the birth mother or conveyed to the birth mother via the social worker.

18.4.12 **Prohibition of consideration in respect of adoption**

Nobody may, except as prescribed under the Social Work Act, 1978 give, undertake to give, receive or contract to receive any consideration in cash or kind, in respect of the adoption of a child.¹⁹⁹ Contraventions of this provision constitutes a criminal offence and offenders will be liable to a fine

¹⁹⁹ Section 24(1) of the Child Care Act, 1983.

or to imprisonment or to both.

It is well known that this provision has hardly ever been implemented, mainly due to arguments as to what constitutes a ‘consideration’. However, it often happens, though not exclusively, in placements managed by social workers in private practice (and some agencies) that e.g. arrangements are made for a particular applicant couple to pay the hospital fees and other expenses of a particular mother, who then consents to the adoption of her child by those applicants rather than anyone else.

The worksheet used at the focus group discussion in Bantry Bay posed the following questions in this regard.²⁰⁰

Should the position as to what will and what will not constitute a ‘consideration’ be addressed in the regulations to the Social Work Act 1978? If so, should the current prohibition in the Child Care Act be repealed? If not, how can the current section 24 of the Child Care Act 1983 be made more effective?

Most respondents agreed that the position as to what constitutes a ‘consideration’ needs to be clarified in the regulations to the Social Work Act, 1978.²⁰¹ In this regard, Group 3 suggested that valid ‘considerations’ be limited to confinement expenses, medical care, and accommodation of the birth mother in need. It defined ‘consideration’ as anything that pertains to the welfare of the child - all expenses related to the birth and the health of the mother during the pregnancy. The Group made the valid point that ‘clients are not empowered to complain’ about the fact that they had to pay some consideration.

Group 2 suggested that the prohibition on giving or receiving any consideration in respect of the adoption of a child should be retained in the new children’s statute. In order to make the prohibition more effective, the Group suggested that consideration be defined as any benefit (exchange) received by the birth parents in respect of the adoption of their child. The Group mentioned that there must be adequate disclosure on considerations given or received in the social worker’s

²⁰⁰ Question 32.

²⁰¹ Ms Jean Allen; Ms Blanché Verster; Miss R van Zyl; Mr André Viviers; Groups 2 and 3; the Children’s Placement Centre; Ms Eileen Jordaan; Ms U F Ledderboge.

report.²⁰²

²⁰²

SAASWIPP, Ms Sue Padayachee, Ms Eileen Jordaan and Mr André Viviers supported the idea that the social worker's report should disclose all financial matters involved in the adoption to the children's court. See also Regulation 21 to the Child Care Act, 1983.

The Children's Placement Centre also supported the retention of the prohibition on giving or receiving considerations in section 24(1) of the Child Care Act, 1983, but argued for stricter enforcement. The Centre said fees should be standardised and upper limits set. Fees should be broken down into its components (e.g. interviews, visits, reports) and a sliding scale should apply so that not only the wealthy are able to afford to adopt. The Centre proposed a narrow definition of confinement to perhaps only cover the confinement, paediatric expenses, and not the 'rumoured "love gifts" such as study fees, jewellery, cars, etc'.²⁰³

Ms L Kaba said social workers in private practice should not deal with adoption and that no form of payment should be made in respect of an adoption. She pointed out that payment is often construed as 'buying the child'.

Mr André Viviers, Ms Sue Padayachee, and Ms Eileen Jordaan proposed a dual approach. They said the position as to what will constitute a 'consideration' should be addressed in the regulations to the Social Work Act, 1978, while the current section 24(1) Child Care Act prohibition should be included in the new children's statute.

Ms Anne Tudhope said adoptive parents 'mainly' pay for the professional services of social workers. Fees are often matched to the adoptive parents' ability to pay. She submitted that payment of the confinement costs (private hospitalization of mother and child) benefits the child as the services provided in State hospitals have dropped substantially. She maintained there is inadequate protection for the prospective adoptive parents in these situations as the birth mother might still change her mind and keep the baby despite the costs incurred by the prospective adoptive parents.

It has been argued that the fact that private social workers in private practice are paid directly by the prospective adoptive parents creates a potential conflict of interests, as such social worker is being paid by the person(s) being assessed for their suitability to adopt. The worksheet used at the focus

²⁰³ This view was shared by Ms U F Ledderboge.

group discussion at Bantry Bay posed the following questions in this regard:²⁰⁴

Should the new child care legislation prohibit social workers from receiving directly payment by the prospective adoptive parents? How otherwise can private social workers be reimbursed for their work? How can legislation ensure that the best interests of the child are considered?

Should the regulations under the Act be amended to provide policy guidelines on the role of social workers in order to minimise or avoid conflict of interests in situations such as those described above? Please give reasons for your answer.

In response to the first question, some respondents argued that the regulations to the Social Work Act adequately regulate the conduct of social workers. Such respondents saw no need to prohibit social workers from receiving a consideration in respect of adoptions, especially if such consideration relates to professional services rendered.²⁰⁵ Some respondents suggested that payment be channelled through some kind of central fund or authority.²⁰⁶ In response to the second question posed above, most respondents indicated that they would welcome greater clarity and guidelines on the role of social workers in conflict of interests situations.²⁰⁷

Ms Eileen Jordaan argued strongly that adoptions should only be handled by licensed adoption agencies because of potential conflict of interests. She said the person who pays the fees becomes the social worker's client while the client in adoption work should always be the child. Ms Jordaan said social workers in private practice should be 'contracted' to an adoption agency or state department and be paid according to the work undertaken by them. She saw the present system whereby social workers in private practice are required to work in a system of at least two social workers as totally inadequate and mere window dressing as in many cases the two social workers

²⁰⁵ Ms Anne Tudhope; Mrs Krawitz and Mrs Stander; Ms Sue Padayachee; Ms Blanché Verster; Mr André Viviers; Groups 2 and 3. Contra Ms L Kaba.

²⁰⁶ Ms Jean Allen; Ms Jacqui Gallinetti; Ms Eileen Jordaan.

²⁰⁷ Ms Anne Tudhope; Ms Jean Allen; Ms Jacqui Gallinetti; Mrs Krawitz and Mrs Stander; Ms M Hattingh; Ms Sue Padayachee; Ms Blanché Verster; Mr André Viviers; Miss R van Zyl; Ms Francis Prinsloo; Groups 1, 3 and 4; Mrs Hendré Dippenaar; Ms U F Ledderboge.

within the system are miles apart and seldom confer.²⁰⁸ Ms Jordaan continued:

If social workers in private practice are to continue to do adoption work they should be required to charge fees according to a sliding scale based on the income of the client; the reports should reflect clearly a breakdown of the fees charged; and there should be a limit to what fees can be charged. ... The present state of affairs has as a result that only persons who can afford the sometimes exorbitant fees can adopt.

Ms U F Ledderboge, Ms Jacqui Gallinetti, and Mrs M Hattingh seemed not to exclude the possibility of social workers in private practice receiving direct payment by the prospective adoptive parents, provided the payments are fee-structured and maximum tariffs apply. Ms Gallinetti and Mrs Hattingh said the financial matters related to adoption need to be covered in the new children's statute.

Mrs Krawitz and Mrs Stander saw no need for a prohibition on receiving direct payment for professional services rendered in respect of an adoption. They said professional fees are charged for professional services, the outcome of which may or may not be a favourable recommendation. The respondents believed there are sufficient checks on who may become an accredited social worker in the legislation.

²⁰⁸ SAASWIPP pointed out that it is now necessary under the Social Work Act 1978 for social workers involved in adoption work to register a speciality which has conditions of experience and also the condition that the social worker must operate in a system. SAASWIPP itself has additional requirements for its members practising adoption work. At this stage, until such time as the Council for Social Work finalise their regulations concerning the procedure of adoption work and the tariff, it is necessary for the social workers in private practice to be accredited in adoption work by SAASWIPP.

Ms Anne Tudhope pointed out that the Department of Social Development does not have the funding, resources or manpower to process, monitor and provide pre- and post-adoption services for all adoptions. She said social workers in private practice have very high standards, but conceded that the system of accreditation needs to be refined. She proposed the following possibilities:

- Standardisation of fees in private practice;
- Welfare organisations to charge fees on a sliding scale based on a means test;
- Social workers in private practice to work in a system to prevent conflict of interests.

In its submission, the Johannesburg Child Welfare Society pointed out that trafficking of children and the sale of infants is more likely to occur when independent adoption agents are involved because there is an opportunity for improper financial gain at each stage of the adoption process.

The Children's Placement Centre said direct payment to social workers can easily lead to a conflict of interests: 'The person who pays becomes the client instead of the child'. The Centre mentioned that it has come to its attention that some social workers in private practice pay agents to recruit pregnant women: 'Once she takes up the offer of a private hospital confinement (she usually has no medical aid) she is subtly pressured to relinquish her baby for adoption and expenses drawn'.

In its submission, the Children's Placement Centre said ideally there should be definite conditions for accreditation before a social worker should be allowed to do adoptions. The Centre supported guidelines, limits on the fees charged, and the monitoring and investigation of professional conduct of such accredited social workers. Miss R van Zyl shared these views.

Mr André Viviers said social workers in private practice should work within a 'structure' and preferably have an external consultant when dealing with adoptions.

18.4.13 **Subsidized adoptions**

Issue Paper 13 posed the following question:

Question 68: Should subsidised adoption (i.e. state grants payable to impoverished adoptive parents) become an option in South Africa?

The SA National Council for Child and Family Welfare considered the introduction of subsidised adoption as most essential, stating that Child Welfare Societies have been asking for subsidised adoptions for years. This was also the contention of the Johannesburg Institute of Social Services, Disabled People South Africa, Mr D S Rothman, Phoenix Child and Family Welfare Society, and the Cape Law Society, supported by the Durban Committee. Referring to tax free adoptions which are in existence in the United States as an incentive for the adoption of abandoned children or children with special needs, the NICC answered the question in the affirmative.

The Durban Child and Family Welfare Society, in similar fashion, added that subsidized adoption would be useful for cases of kinship care or placement of abandoned babies. The Society was concerned, however, that more people would apply for adoption with a financial motive and that certain organisations might not apply stringent screening procedures. It was suggested that a means test would need to be applied, but said that the motivation of the family in applying for adoption is more important than financial circumstances.

The Natal Society of Advocates submitted that the issue of subsidised adoption might possibly work in an ideal society. There are, however, many less altruistically-minded persons than materialistic persons in the world and orders of this nature might not operate in the best interests of the child. It was submitted that this option at present is not practical.

The Department of Developmental Social Welfare of the Northern Cape Province submitted that the concept of subsidised adoption should be investigated to determine if it is cost effective and in the best interests of children.

The ATKV contended that subsidised adoptions should not be considered. It said the reality is that Government cannot afford to pay parents for caring for a child and there are too many children who need care to allow this. It was further submitted that paying parents to care for children may give rise to even more abuse of situations and worse misdeeds.

The worksheet used at the focus group discussion in Bantry Bay posed the following question:²⁰⁹

What form should such subsidized adoption take? Who should be responsible for providing the incentive? If the State, should it be grant based or not? Should there be criteria for receiving such assistance? If so, what should these criteria be?

The idea of subsidised adoption received overwhelming support at the focus group discussion in Bantry Bay.²¹⁰ Most respondents supported a means-tested-State (monthly)²¹¹ grant.²¹² These respondents said the grant should be reviewed biennially.²¹³ Some respondents coupled the subsidy to the provision of tax rebates, free education and medical care,²¹⁴ while others suggested that the adoption subsidy should involve the provision of such services, rather than a cash grant.²¹⁵ Some respondents placed the onus to apply for the subsidy on the adoptive parent(s).²¹⁶

Mr André Viviers, while supporting the principle of subsidised adoptions, said the adoption subsidy should be in the form of a **time-limited** (e.g. for a period of two years only) State grant.

Ms Sue Padayachee and SAASWIPP seemed to suggest that children in foster care who are adopted should benefit from the adoption subsidy. This was also the view of Ms Blanché Verster. As for the criteria to be adopted, Mrs Francis Prinsloo and Mrs Krawitz and Mrs Stander, in a joint submission, stated that the criteria for receiving such assistance should be based on the child's needs (e.g. being HIV positive) and not on the prospective adoptive parents' resources. Ms Anne Tudhope agreed that the subsidy should be based on the child's particular needs and said the subsidy should be used to provide for the 'special' care of that child. SAASWIPP, Ms Hendré Dippenaar, and Ms

²¹⁰ Groups 1, 2, 3 and 4; Ms Francis Prinsloo; Ms Blanché Verster; Ms Eileen Jordaan; Ms Anne Tudhope; Ms Jacqui Gallinetti; Mrs M Hattingh; SAASWIPP; Mrs Krawitz and Mrs Stander; the Adoption Coalition; Ms Sue Padayachee; Ms Hendré Dippenaar; Miss R van Zyl. However, Ms Jean Allen said she does not totally agree with the idea of subsidised adoption. She preferred long-term foster care because there is supervision of the placement. The Children's Placement Centre said there would be no need for subsidised adoption if the child care grant was made available to all children. The Johannesburg Child Welfare Society's adoption team was also generally not in favour of subsidised adoption, fearing that such system would be open to abuse. The Society as a whole, however, was strongly in favour of subsidised adoption for AIDS orphans, children in long-term foster care, and children with special needs.

²¹¹ Ms U F Ledderboge did not favour a single 'once-off' adoption grant as she believed this will not be used in the child's best interests.

²¹² Groups 1, 2, 3 and 4; Ms Francis Prinsloo; Ms Sue Padayachee; Ms Blanché Verster; Ms Eileen Jordaan; Ms Anne Tudhope; Mrs M Hattingh; SAASWIPP; Mrs Krawitz and Mrs Stander; the Adoption Coalition; Miss R van Zyl.

²¹³ Groups 2 and 3; Ms Eileen Jordaan; Mrs M Hattingh; SAASWIPP; Mrs Krawitz and Mrs Stander.

²¹⁴ Ms Hendré Dippenaar; Ms Sue Padayachee; Mrs M Hattingh; SAASWIPP; the Adoption Coalition.

²¹⁵ Ms U F Ledderboge; Ms Jacqui Gallinetti; Ms L Kaba.

²¹⁶ Miss R van Zyl; Group 3; Ms Eileen Jordaan.

Gallinetti said the criteria should be based on the child's new family.

At the close of the focus group discussion in Bantry Bay the following resolution on the introduction of financial support to adoptive parents was adopted unanimously:

Noting:

- (1) That long-term foster care
 - is a contradiction in terms
 - exists extensively because no financial support exists for adoptive parents;
 - deflects attention, finances and effort from the chief purpose of foster care, i.e. family reunification;
 - leaves both the foster-child and foster parents without the security which a permanent placement provides;
 - allows too easily for the breakdown of the relationship between the foster parents and the foster child when there are problems in this relationship.
- (2) That it is in the best interests of the child who cannot be returned to his/her parents to be placed in adoption.
- (3) That adoptive parents who require financial support should be eligible to receive this support so as to provide secure long-term care in the best interests of the child.
- (4) Failure to provide financial support for adoptive parents who require such support disqualifies poor and overwhelmingly Black people from providing a secure home for children.
- (5) Changes to the Child Care Act will still take a considerable time before being put into effect.
- (6) The lack of financial support for adoptive parents delays the sense of security which children and parents engaged in long-term care need.

Calls upon the State to urgently introduce financial support for adoptive parents requiring this support.

The resolution was presented to the Minister for Social Development in July 2000.

18.4.14 **Access to information in adoption register**

Closely linked to the issue of 'open' versus 'closed' adoptions, are issues related to access to

information in the adoption register, the need for a contact register, etc.

Mrs K Freed, commenting on the issue of adoption, submitted that the details of the real parent should always be available to the adopted child if asked for from the age of 18 years onward. The respondent further submitted that once it is proved that the adoptive parents have provided a loving family home and the child regards them as its parents, the child must never be taken away, and that the child can decide, at the age of 18 years, to make contact with the real parents.

Reverend AW Doyer, in a well motivated and researched memorandum, called upon the Commission to consider the effects of the secrecy clauses in the Regulations to the present Child Care Act regarding adoption records against the background of certain principles contained in the CRC, namely the best interests of the child, the participation of the child in decisions affecting him or her and the development of the child which would include cognitive, emotional, social and cultural development. The respondent contended that the present legislation does not take these principles into account, and made out a strong case that the historic basis of secrecy of the identity of an adopted child's natural parents²¹⁷ is detrimental to the adopted child, his or her adoptive parents as well as the child's natural parents.

Reverend Doyer *inter alia* referred to the work of Ivan Boszormenyi-Nagy and Murray Bowen who point out that there is an unbreakable bond between any individual and his or her ancestors which continues even after separation of child and parent.²¹⁸ The authors submit that even in the case of adoption immediately after birth, the justified claim of the child to the origin of his or her existence remains. If the adoptive parents acknowledge and integrate this fact into their relationship with the child, both the adoptive parents and the child will benefit. It is further submitted that the well-being

²¹⁷ Previously, only an adoptive parent (after the adoptive child reached the age of 18 years), and the adopted child (after reaching the age of 21 years) could have access to adoption records to investigate his or her ancestry. With the promulgation of the new Regulations to the Child Care Act on 1 April 1998, open adoptions have been taken a step further with the provision that the natural parents or previous adoptive parents may also have insight into the records, as long as the written consent of the adoptive parents and of the adopted child has been obtained, and the adopted child is over the age of 21 years. Despite this relaxation, it is evident that the concept of secrecy is retained.

²¹⁸ See also the discussion on the right of the child to an identity in Chapter 8 above.

of the child requires the freedom to explore the foundations of his or her existence, which would include the adoptive parents never denying either the origins of the adopted child, or the child's right to learn more about his or her natural parents.

According to the respondent the present secrecy clause severely impacts upon an adopted child in the following ways: the child's voice is silenced, his or her emotional development is inhibited and interests are ignored. Moreover, adoptive parents are encouraged by the present system of adoption to maintain a closed family unit (with no place for the original parents) in which they are compelled to live a lie, in which the sufficiency of their own parenthood is threatened and in which the relationship with their children is placed under pressure. Reverend Doyer, referring to the concept which implies that it takes a whole village to raise a child, contrasted the exclusivist view of the family with an open, systemic approach in which the adoptive family is viewed as part of a network of relationships which would contribute to the support of the child and of which the natural parents would form an integral part.

The respondent regarded it as paramount that an adopted child should grow up in the knowledge of and having the experience of two sets of parents. It was contended that an adopted child's natural mother should not be required to sign off the child, as this causes separation anxiety, the effect of which severely threatens the child's emotional development. This was also the personal testimony of Mrs Estelle Williams from Lydenburg.

Reverend Doyer viewed the challenge as one of allowing for a much more flexible system in which each case is judged on its own merits in order to give expression to the best interests of all parties involved. To achieve this, the present rigid system which neither takes account of individual circumstances and requirements nor allows any form of discretion, discussion and the conclusion of mutually acceptable agreements should be abolished.

The worksheet used at the focus group discussion at Bantry Bay posed the following questions in

this regard.²¹⁹

Given the provisions of the Promotion of Access to Information Act, 2000, will it still be possible to conduct ‘secret adoptions’?²²⁰ Is there still a need for secret adoptions?

In its submission, the Johannesburg Child Welfare Society maintained there is definitely still a need for non-disclosure adoption in some instances as it provides protection for the child, the adoptive parents, and in some cases, the birth parents. This view was shared by most respondents.²²¹ The Society said that with the advent of ‘open’ adoptions, many non-disclosure adoptions eventually evolve into open or disclosed adoptions where this is in the child’s best interests and where all parties concerned are comfortable with their personal or identifying details being disclosed. However, in many instances disclosure adoption would not be in the child’s best interests and most adopters, particular in the Black community, are more comfortable with a closed, non-disclosure adoption. The Society averred that there is still a tremendous amount of secrecy surrounding adoption in the Black community and adopters would go to great lengths to avoid members of the community and even family knowing about the adoption.²²² The Society said this situation may change with time, but argued that the pool of prospective Black adoptive parents would shrink if non-disclosure adoption was not a possibility.

²¹⁹ Question 44.

²²⁰ Most respondents drew the Commission’s attention to the unsuitability of the phrase ‘secret adoption’ and suggested the phrase ‘non-disclosed adoption’.

²²¹ Groups 1, 2, and 3; the Adoption Coalition; Mrs Hendré Dippenaar; the Children’s Placement Centre; Miss R van Zyl; Mr André Viviers; Ms Eileen Jordaan; Ms U F Ledderboge; Ms Sue Padayachee; Mrs M Hattingh; Ms Jacqui Gallinetti; Ms Jean Allen; Ms Anne Tudhope. Contra Ms Blanché Verster and Ms L Kaba.

²²² The Children’s Placement Centre shared this experience and said Black adoptive parents want absolute secrecy.

Some respondents argued that the Promotion of Access to Information Act, 2000²²³ and the provisions on non-disclosed adoptions in the Child Care Act, 1983 need alignment.²²⁴ The Johannesburg Child Welfare Society, for instance, pointed out that the Act has the potential to cause welfare agencies serious trouble. The Society said that the Act is not designed with an eye to the special features of organisations which, as part of their core business, handle vast quantities of personal information which is shared on the clear understanding that it will remain confidential. This is also information which is very emotionally laden and sometimes potentially explosive, and which has implications for multiple third parties. The Society maintained the administrative burden and the counselling tasks which would be involved in seeking out and consulting all these persons would be beyond the resources of most welfare organisations, as would the time and costs involved in the internal and High Court appeal processes which are provided for in the Act.²²⁵

Also relevant are questions 42 and 43. These read as follows:

²²³ Before being enacted this Act was known as the 'Open Democracy Bill'. The Act is intended to enable persons to access information which they need in order to exercise and protect their rights. It sets out detailed procedures whereby an application can be made for such information, and for the management of such applications and the granting or refusal of access to records. Provision is also made for the notification of third parties who stand to be affected if information is divulged, and who are given an opportunity to raise their objections - which may or may not be upheld. It also lays down requirements as to the substantial administrative infrastructure which 'public bodies' holding information will have to put in place and maintain so as to facilitate access to information.

²²⁴ Groups 3 and 4; Ms Eileen Jordaan.

²²⁵ See also the letters written by the Johannesburg Child Welfare Society to Mr Cas Saloojee, MP dated 10 January 2000 and to the Office of the President dated 29 January 2000 in this regard.

Given the enactment of legislation such as the Promotion of Access to Information Act, 2000, should the new child care legislation require the adoptive parents to keep the information on the adoption register up to date to facilitate tracing of the child by the (biological) parents later?

Should the new child care legislation place a duty on the parents who give the child up for adoption to keep their contact details on some kind of register up to date to enable the child to later exercise his or her so-called ‘birth rights’? How is such a system to be implemented?

Some respondents equated the issues of keeping the contact information of the adoptive and birth parents current with the right of the birth parents to maintain contact with the adopted child.²²⁶ These respondents then either stated that the adopted child may not have contact with his or her birth parents before a certain age or that it should be the decision of the adopted child whether he or she would like to see his or her birth parents.

Some respondents were of the opinion that the new child care legislation should **not** require either the adoptive parents or the birth parents to keep their (contact) information current, although it should be encouraged on a voluntary basis.²²⁷ The Children’s Placement Centre, for instance, said it would not be fair to impose on adoptive parents the duty to keep their contact details current and opined that such a duty ‘could adversely affect their sense of entitlement to the child and thereby the child’s security and development’. Mr André Viviers was of the opinion that the right to access of information provided for in the Constitution and in the Promotion of Access to Information Act 2000 is to have access to information which was provided at the time of the adoption.

Other respondents argued for the imposition of such a duty on adoptive and birth parents alike.²²⁸ In its submission, the Johannesburg Child Welfare Society stated that the new children’s statute should impose a duty both on the adoptive parents and the birth parents to regularly update their contact

²²⁶ Groups 1 and 2.

²²⁷ The Adoption Coalition; Ms Jacqui Gallinetti; Mrs Krawitz and Mrs Stander; Mrs Hendré Dippenaar; the Children’s Placement Centre; Mr André Viviers; Ms Eileen Jordaan; Ms U F Ledderboge.

²²⁸ SAASWIPP; Ms Jean Allen; Ms Sue Padayachee; Ms L Kaba; Miss R van Zyl; Ms Blanché Verster; Ms Anne Tudhope.

details either at the placement agency or registrar of adoptions. The Society said this could be built into the social worker's section-18-finalisation report under a heading 'Expectations for ongoing contact or updates'. The Society said that if the adoptive and birth parents knew it was a legal requirement, they would be more inclined to update their details, thus making the search for them easier. In the experience of the Society, adopted children (and birth parents) request information about their birth parents (and adopted children) at various times through the years from the agency involved. Sometimes it is impossible to trace the adoptive parents (and therefore the adopted child). This causes much frustration and disappointment on the part of the adopted child and the biological parents, 'who seem to have the expectation that the agency was "supposed" to keep in touch with the adopters and the adopters with the agency'.

The National Adoptive Parents' Institute is in favour of open adoptions. The Institute suggested that contact be through a third party ie a social worker. This should be made mandatory. However, the Institute said open adoption arrangements must not be made a duty in the legislation in all cases as contact is not suitable for all children or families. The Institute maintained that open adoption arrangements must be flexible, able to change with time according to needs, primarily of the child. Contact may be between a child and any member of his extended family who has played a significant role in the life of the child, or where contact will continue to be relevant for the child and may be in the form of letters, photos or personal contact under the supervision of, and or the consent of the adoptive parents. The Institute recommended that the new children's statute should provide for counselling or mediation facilities for adoptive children, adoptive parents and birth parents before and after contact is made.

The Institute proposed that a contact register be created. Such register must be kept by the Registrar of Birth, Deaths and Marriages, who must ensure that information is held concerning the child's origin, in particular information concerning the identity of his or her biological parents, as well as the medical history. Adoption agencies and social workers in private practice must provide the Registrar with case histories. The Registrar must ensure that information held concerning the child's origin, in particular information concerning the identity of his or her parents, as well as the medical

history, is preserved. Accredited social workers who are searching for birth relatives or adoptees must have access to this information - not only the social worker or agency who placed the child for adoption.

The Institute stated that an adopted person over the age of 21 and birth parents who placed children for adoption may register an interest in contacting each other. The Registrar of Birth, Deaths and Marriages must ensure that the adopted person, his or her adoptive parents and birth parents have access to such information, under appropriate guidance. Counselling services should be mandatory for all parties prior to contact.

The Institute suggested that the Contact Register be divided into two parts: One containing the names and addresses of adopted people and the other that of birth parents. If a match occurs between the two parties the Registrar will notify the accredited social workers of the interested parties of the name and address of the birth relative, or accredited social workers shall have access to such information. An application form must be completed and a fee paid for registration

However, some respondents seriously questioned the ability of the law to enforce a duty to keep contact details current and suggest that little more can be done than to expect social workers to encourage the parties to keep their contact details up to date.²²⁹ The Johannesburg Child Welfare Society pointed out that adoptive (and birth) parents know very well that there is no legal obligation on them to update their contact details with the agency and in some cases deliberately disappear in order to avoid any further contact. The Society also conceded that it would be impossible to impose penalties on the adoptive (and birth) parents for their failure to regularly update their contact details.

18.4.15 **Section 10 of the Child Care Act, 1983 and private placements**

We have seen that section 10 of the Child Care Act, 1983, provides that no person other than the managers of a maternity home, a hospital, a place of safety, or a children's home may receive any

²²⁹ Groups 1, 2 and 3; Mrs M Hattingh.

child under the age of seven years or any child of whatever age for purposes of adopting such child and care for such child apart from his or her parents or custodian for a period longer than 14 days. However, if a person has applied for the adoption of that child or has obtained the written permission of the commissioner of child welfare the 14 day restriction does not apply.

In this regard, the following questions were posed in Issue Paper 13:

Question 58: Does the fundamental underlying protective purpose of section 10 justify its continued existence or should it be replaced? If section 10 is to be retained, should it be limited to situations where the child is placed for adoption purposes? And is it appropriate to include sanctions, other than providing that care of a child in contravention of this provision is a ground for removal?

In response, the SA National Council for Child and Family Welfare considered section 10 to be a very important section and calls for its retention with possible amendments to meet the current situation.

The NICC answered all three parts of the question in the affirmative.

The ATKV, Durban Child and Family Welfare Society, Phoenix Child and Family Welfare Society, and the Cape Law Society, supported by the Durban Committee, submitted that section 10 should be limited to situations where the child is placed for adoption purposes only. The Johannesburg Institute of Social Services contended that section 10 should be limited to situations where a child is placed in adoption but that the present loopholes should be closed. The Natal Society of Advocates and Disabled People South Africa called for the replacement of section 10 since, in relation to rural areas, it would appear that the underlying protective purpose of this section no longer justifies its continued existence.

Mr DS Rothman, quoting substantial reasons, believed that section 14(4)(aB)(vii), together with most of section 10 should be scrapped.

The worksheet used at the focus group discussion in Bantry Bay basically repeated the question posed in Issue Paper 13:²³⁰

What are the different opinions on the effectiveness of section 10 as a mechanism inter alia to prevent trafficking in children? Should section 10 in its current form be retained in the new child care act legislation?

In a well motivated submission, the Johannesburg Child Welfare Society argued for the retention of section 10 as it does provide an interim court order from the time a child is placed with its prospective adopters until the final section 18 report is submitted, finalising the adoption, when a child is being placed in another magisterial district.

The Children's Placement Centre said section 10 applications or applications to adopt should not be accepted by commissioners of child welfare unless accompanied by a social worker's report.²³¹ The Centre pointed out that at present these are allowed without a report and only many months later the full investigation reveals that perhaps the placement might not be in the best interests of the child but by then the child has settled.

²³⁰ Question 45.

²³¹ Ms Eileen Jordaan is of the same view. She also argues that the age referred to in section 10(1)(a) should be 10 years to correspond with the age at which a child has to sign the consent form to his or her adoption

Most of the other respondents to this question also supported the retention of section 10 in its current form.²³² Miss R van Zyl was one of those who do question the effectiveness of section 10. She said section 10 affords little protection and requires too little to prove. She therefore recommended that section 10 be repealed and that section 13, which involves a court process, rather be used.

The Commission is aware of situations where third parties (often for a substantial but undisclosed fee) arrange for a small child to be placed with caregivers who may or may not be suitable. By the time these caregivers apply to adopt the child, a *fait accompli* situation exists where the court either has to formalise the situation or break a bond which has already developed. Thus what may happen is that a short-cut to adoption is created by people who wish to circumvent the normal procedures. In this regard, the following question was posed at the focus group discussions in Bantry Bay.²³³

What safeguards could be built into the new child care legislation to prevent the *fait accompli* situation from arising? Will a provision merely requiring that a placement of a child may not be made without the permission of the children's court if it is for the purpose of adoption solve this problem?

Ms Eileen Jordaan, Mrs M Hattingh and Ms Jean Allen said section 10 should require a social worker's report before consent to placement of a child is given. Ms Krawitz and Ms Stander said a section 10 placement is essential, but argued that it should be time limited. They were of the opinion that the new children's statute should limit the duration of a section 10 placement before an adoption

²³² Group 1; Group 2; Group 3; Ms Hendré Dippenaar; Children's Placement Centre; Ms U F Ledderboge; Ms Eileen Jordaan; Mrs Krawitz and Ms Stander; Ms Jean Allen.

²³³ Question 46.

hearing or children's court enquiry.

In its submission, the Johannesburg Child Welfare Society pointed out that it would be very difficult to prevent 'fait accompli' situations even if there was a provision requiring that a placement of a child may not be made without the permission of the children's court, if it is for the purpose of adoption. In the experience of the Society, the situation usually arises where a birth mother places her child with a family she knows, not always initially with the intention of adoption, but as a private arrangement. The placement could turn into an adoption several weeks, months or even years later, when the birth mother decides she cannot cope with the care of the child and signs consent for the family to adopt the child. In many instances, the birth mother has disappeared and cannot be traced. These situations are usually only reported a long time after the child was left with the family initially. The Society said it would be unaware of these situations anyway, until approached by the family to do the adoption and by then the child is already bonded.

Ms L Kaba emphasised the need for educating the community on the proper role of adoption and suggested that screening of possible adoptive parents must be done prior to any placement.

Ms Ledderboge said that where a child is placed with a person who is not a blood relative, such person should be required to inform the social worker in that region of the placement. The social worker should then monitor the placement. Ms Ledderboge argued that such a mechanism would help to maintain statistics on the number of placements and place an onus on 'prospective adoptees' to prove that their reasons for adoption are justified.

18.5 **Transracial adoptions**

The following question was posed in Issue Paper 13:

Question 73: Should there not be more guidance in the law concerning in what situations trans-racial or transcultural placements should be encouraged, and when they should generally be avoided?

The SA National Council for Child and Family Welfare stated that all the arguments for and against placement of children across cultural, racial and language differences are valid. However, the Council said one must not overlook the fact that in the past, although the term 'have regard to' may have been vague, this was the only loophole that non-white social workers used to place a child with persons of different religion or language group. The Council strongly recommend that the clause 'have regard to' should be retained in the Act. It said the clause gives social workers scope to plan what is best for a child in the absence of proposed adoptive parents or for that matter foster parents meeting all the criteria regarding culture, religion and language or racial requirements. A social worker would naturally look for these criteria but it is in cases where these cannot be met that the problem will be posed. Therefore this clause was carefully selected as it is not rigid and allows for some flexibility.

The NICC and Phoenix Child and Family Welfare Society called for more guidance in the law but adds that this issue requires policy decisions based on research and local conditions. The Durban Child and Family Welfare Society agreed that more guidance is needed. The Society said bonding of the child with the care-giver is regarded as critical. If it is not possible to place the child within his or her own culture, race or religion, the placement family's sensitivity to the child's cultural heritage should be considered.

The National Council of Women of South Africa submitted that transcultural adoptions should be avoided in the interest of the united family after the adoption, but where a person of another culture has cared for the child, given it affection and gained the confidence and affection of the child, then such adoption should be allowed. Disabled People South Africa commented that children should be placed, if possible, in their communities as a first resort. It said trans-racial and transcultural adoptions should be based on informed decisions.

The Natal Society of Advocates contended that guidance in legislation should be avoided lest the guidelines become prescriptive. Each case should be decided on its own merits and in the discretion

of the proposed panel of experts comprising the children's court. The overriding principle should always be that which is in the best interests of the child. The Cape Law Society was of the view that there should still be greater guidance in the law, while the Durban Committee maintained that the main focus should be on the best interests of the child.

The Johannesburg Institute of Social Services cautioned that not everything can be written into an Act. There should be competent presiding officers who can use their expert knowledge and discretionary powers. It was submitted that if any party is then not satisfied, an appeal should be possible.

Regarding mixed race adoptions, Mrs K Freed agreed that such adoptions can work very well because it is always a question of quality of parenting. The ATKV submitted that trans-racial or transcultural adoptions will depend on the particular circumstances of the child and the facts of the matter. Mr DS Rothman opined that until such time as there are more certainty on the success or otherwise of such placements, guidelines may seem to be premature. He favoured the neutral approach of allowing matters to develop naturally around the best interests of the child.

The worksheet used at the focus group discussion in Bantry Bay posed several questions on the social and cultural concerns related to adoption. The first of these reads as follows:²³⁴

Please describe how the law could be modified to reflect more accurately the cultural and social realities of South African family life.

Some respondents were of the view that the law should **not** be modified to reflect more accurately the cultural and social realities of South African family life, for fear of over-regulation.²³⁵ However, Mr André Viviers suggested that the law should be modified to allow for the whole family to adopt a child instead of only married persons and some individuals. His view was shared by Ms L Kaba and

²³⁴ Question 26.

²³⁵ SAASWIPP; Group 3; the Children's Placement Centre; Ms Eileen Jordaan; Ms Sue Padayachee; Ms Jacqui Gallinetti.

Ms U F Ledderboge who argued for a broader definition of family life which should include recognition of different family models such as ‘stable unions’ and polygamous marriages. Ms Jacqui Gallinetti and SAASWIPP said kinship care should be acknowledged and promoted and acknowledged the importance of keeping children within their family and or their kinship. Mrs Krawitz and Mrs Stander, in a joint submission, argued for the recognition of rights of grandparents as part of the contemporary South African family structure.

Another question posed at the focus group discussion reads as follows:²³⁶

How relevant to adoptions is the requirement [in section 40 read with section 18(3) of the Child Care Act, 1983] that regard must be had to the cultural and religious background of the child concerned? Should there be any specific requirements for agencies who arrange placements across religious or cultural boundaries, or for care-givers who accept children from a cultural or religious background different from their own?

Most respondents regarded it relevant that regard must be had to the religious and cultural background of the child concerned and of his or her parents as against that of the person in or whose custody that child is to be placed or transferred. These respondents therefore effectively supported the retention of the current section 18(3) read with section 40 of the Child Care Act, 1983.²³⁷ They said the advantage hereof is a more suitable placement for children, while a disadvantage is a more time consuming process. Most of these respondents also supported specialisation of adoption agencies as a requirement.

Some respondents pointed out that the religious and cultural ‘matching’ of the child often depends upon the age of the adopted child concerned and that such ‘matching’ is more important for the older child.²³⁸ Other respondents said social work ethics do take religious and cultural factors into account.²³⁹

Miss R van Zyl said that when placing a child trans-culturally, the following factors are important: the age of the child; the number of interventions prior to the adoption; previous trauma suffered by the child; and the cultures involved. She suggested cross-cultural matching as a measure of last resort. Ms Anne Tudhope said the main consideration should be whether the prospective adoptive parents can provide a permanent family home as opposed to institutionalisation. Ms Tudhope also regarded screening and post-adoptive support as very important.

Ms U F Ledderboge suggested that social workers and agencies that do arrange trans-cultural placements should involve the **extended family** of the prospective adoptive family in the screening process; a training, education, and parenting programme; and in the post-adoption support groups.²⁴⁰

²³⁷ The National Adoptive Parents’ Institute; the Adoption Coalition; SAASWIPP; Group 3; the Children’s Placement Centre; Mr André Viviers; Ms Eileen Jordaan; Ms Blanché Verster; Ms Sue Padayachee; Ms U F Ledderboge; Mrs M Hattingh; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Ms Jean Allen; Ms Anne Tudhope.

²³⁸ Ms Anne Tudhope; Mrs Hendré Dippenaar; Ms Eileen Jordaan; Ms U F Ledderboge.

²³⁹ SAASWIPP; Group 3; the Children’s Placement Centre.

²⁴⁰ Ms Anne Tudhope and Ms Jacqui Gallinetti support proper screening, training, and support pre- and post-adoption for the adoptive parents. Ms Gallinetti says this can include a court order to provide for the teaching of the child’s mother tongue to the child.

She made the important point that culture is acquired and always in a state of flux. Ms Ledderboge further highlighted the differences between urban and rural South Africa and even amongst different metropolitan centres. She said:

Trans-racial placements work better in metropolitan centres. There is a marked difference between Johannesburg, Cape Town and Durban. In Durban, Blacks are predominately positive!

Ms Ledderboge mentioned that the 'local community' is becoming a reference group. She said section 40 of the Child Care Act, 1983, means in practice **ethnic considerations** and should be labelled as such. She continued:

In terms of placement considerations, racially compatible role models should be available as well as a commitment to acknowledge the child's ethnic roots. This, however, is part of the screening and selection process which must include an educational / training component. ... [W]henver, there was a proper screening / training process, the children are fine, have a positive self image, are well adjusted and well aware of their roots. The progress of these children should be seen against the impact of institutionalisation and the child's right to a family and to belong.

While accepting the importance of cultural matching, Mr André Viviers suggested that religious matching is no longer that important and should be done away with. He was perhaps of this view given the fact that discrimination based on religious belief is far less of a problem in contemporary South Africa than discrimination based on colour or race.²⁴¹ On the other hand, SAASWIPP said religious beliefs must be considered. In this regard, the Association proposed that a written contract be concluded in terms of which the adoptive parents agree to promote the original culture, language and religion of the child. This contract should form part of the court order and should involve some post-adoption monitoring.

Another question posed at the focus group discussion in Bantry Bay reads as follows:²⁴²

²⁴¹ Contra Ms Sue Padayachee.

²⁴² Question 28.

Should a duty be imposed on agencies to conduct a ‘diligent search’ for same-race adopters before using trans-racial placement? What are the advantages and disadvantages of imposing such a duty?

Most respondents agreed on the need for a (time limited) ‘diligent search’ for same-race adopters and pointed out that there is an existing professional duty to match the child and his or her adoptive family as closely as possible (who may or may not be of the same race and or culture as the adopted child).²⁴³ However, such search should not indefinitely delay the placement of a child. It was pointed out that efforts to find a suitable same-race placement are reflected in the social worker’s report. In addition, Ms Eileen Jordaan said the social worker’s report should also reflect what guidance, counselling and support the prospective adoptive parents have received on the importance for the adopted child of maintaining his or her cultural links. She believed the adopted child should grow up with the full knowledge of his or her biological background, and should ideally have contact with those who are of the same race and culture, thus enabling such child to grow up with a full appreciation of his or her cultural identity.

Ms Anne Tudhope regarded the early placement of a child into the care of a family as the top priority and identified the following disadvantages of imposing a diligent search duty for same-race adopters:

- the child could get lost in the system (foster care with multiple placements);
- institutionalisation with great danger that child acquires no self-esteem; no cultural ties; experience language difficulties, permanent developmental delays, and permanent emotional trauma.

Mr André Viviers took a different position and said no duty to conduct a ‘diligent search’ for same-

²⁴³

The Adoption Coalition; SAASWIPP; Group 3; Mrs Hendré Dippenaar; the Children’s Placement Centre; Ms Eileen Jordaan; Ms Blanche Verster; Ms L Kaba; Ms U F Ledderboge; Ms Sue Padayachee; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Ms Jean Allen; Ms Anne Tudhope.

race adopters should be imposed on social workers or agencies as the imposition of such a duty will result in 'forced' adoptions. He stated prospective adoptive parents should rather be supported and encouraged to adopt children in order to find suitable homes for all the homeless and orphaned children.

The Adoption Coalition and Mrs M Hattingh proposed the establishment of a national adoption register which should contain the names of approved adoptive parents. Listing on the register would then facilitate the search for adoptive parents.²⁴⁴

²⁴⁴ SAASWIPP supported the idea of a central register of screened adopters.

The worksheet used at the focus group discussion at Bantry Bay also asked the following question:²⁴⁵

Should the biological parents be given a right to express a choice or preference for placing their child for adoption with adoptive parents professing a particular religion or living in accordance with a particular culture?

Most respondents believed the birth parents should be given the right to express a choice or preference for placing their child for adoption with adoptive parents professing a particular religion or living in accordance with a particular culture.²⁴⁶ Mr André Viviers put it nicely: ‘They [the biological parents] can state their wishes; not give instructions’. Ms Anne Tudhope suggested open adoptions as a possible solution.

Mrs M Hattingh said the birth parents should consent to the adoption of their child by adoptive parents of a different cultural or religious background.

Without giving reasons, Ms L Kaba stated that the biological parents should have no right to express a choice or preference for placing their child with adoptive parents professing a particular religion or living in accordance with a particular culture.

The worksheet used at the focus group discussion in Bantry Bay posed the following question in respect of management structures and practices needed to attract more Black persons to adopt children. It reads as follows:²⁴⁷

What kind of structures and management practices need to be put in place to attract more black people to adopt children? Could or should these structures or practices be built into

²⁴⁵ Question 29. See also the responses to question 27 above.

²⁴⁶ The Adoption Coalition; SAASWIPP; the Children’s Placement Centre; Mrs Hendré Dippenaar; Mrs M Hattingh; Group 3; Miss R van Zyl; Ms Sue Padayachee; Ms Eileen Jordaan; Mr André Viviers; Ms Blanché Verster; Ms U F Ledderboge; Mrs M Hattingh; Mrs Krawitz and Mrs Stander; Ms Jacqui Gallinetti; Ms Jean Allen; Ms Anne Tudhope.

²⁴⁷ Question 30. See also the responses to the question on non-disclosure adoptions (Question 44) above.

the legal framework? If so, how?

While some respondents agreed that structures and management practices need to be changed to attract more Black persons to adopt children, this need not be done through legislative intervention.²⁴⁸ The Children's Placement Centre and Ms Jean Allen, for instance, recommended that the adoption process be simplified and recruitment efforts be intensified. The Centre believed this can be built into the legal framework without negatively impacting on the child and causing more delays. SAASWIPP believed there should be a campaign for South Africans to adopt South African children. The Association said this will require a great deal of community awareness and media involvement, such as radio and television promotion. The Association stated that the first choice in adoption for a child would be parents of the same race, culture and religion. The second option for adopters would be different culture, race or religion, but still South Africans, while the third option would be inter-country adoption.

The National Adoptive Parents' Institute agreed that welfare agencies need to urgently address the need to find prospective adopters in all communities, particularly in those communities where there are a large number of children in need of care. The Institute said welfare agencies need to address their own structures so that prospective adopters from disadvantaged communities are not prejudiced or alienated during the screening process. It said welfare agencies also need to address the beliefs, and sometimes prejudices, that exist in certain communities that are obstacles in the way of an acceptance of adoption 'not only as an appropriate option, but as **a positive and desirable option**, for children in need of care'.²⁴⁹

Several respondents said subsidised adoptions and a less formidable legal process will attract more prospective adoptive parents.²⁵⁰

²⁴⁸ The Adoption Coalition; SAASWIPP; Groups 1 and 3; Ms Eileen Jordaan; the Children's Placement Centre; Ms Blanché Verster; Ms L Kaba; Ms Sue Padayachee; Ms U F Ledderboge; Mrs M Hattingh; Mrs Krawitz and Mrs Stander; Ms Jean Allen.

²⁴⁹ Emphasis in the original.

²⁵⁰ SAASWIPP; Ms U F Ledderboge; Ms Eileen Jordaan; Ms Sue Padayachee; Ms Blanché Verster; Mrs M

However, Mr André Viviers stated that structures, whether in a legal framework or not, will make no difference to the size of the pool of prospective Black adoptive parents.

Professor Tshepo Motsikatsana of the Wits Law School prepared the research paper on adoption which served as the basis for deliberations at the focus group discussion in Bantry Bay. He is of the view that trans-racial adoptions are not conducive to the welfare of the child, as a child who is trans-racially adopted may suffer racial prejudice. In addition, he maintained that trans-racial adoptees may also suffer identity crises resulting from loss of racial or cultural identity, which is important in a race-conscious society. Respondents at the focus group discussion were asked whether they agreed with this central thesis of Professor Mosikatsana and to give reasons for their answers.²⁵¹

Most respondents agreed with the central thesis of Professor Motsikatsana and said that trans-racial adoptions may not be conducive to the welfare of the child in the long term as such a child may experience racial prejudice.²⁵² Despite a new constitutional order and legislation and policy aimed at eradicating discrimination on the basis of race, some said racial prejudice (to children adopted across the colour line) is unfortunately still the reality in South Africa.²⁵³ However, most respondents were of the view that the placement a child in a family, despite the potential racial prejudice, is far better than placing a child in an institution.²⁵⁴ In this regard Ms Eileen Jordaan and the Children's Placement Centre said that although cross-cultural placements should never be the first choice, the reality is that there are at present not sufficient Black adoptive applicants to meet the needs of the Black children in need of placement.

Ms U F Ledderboge did not agree with Professor Motsikatsana's central thesis. She warned of the dangers inherent in equating the concepts nationhood, race, ethnicity and culture as this will make South Africa a multi-national and not a rainbow nation. She referred to the high number of abandoned babies and posed the question as to how one would determine the nationality, culture or religion of such a child. She pointed out that in present day South Africa mixed race children fall

²⁵¹ Question 31.

²⁵² Groups 1 and 3; Mrs Hendré Dippenaar; the Children's Placement Centre; Miss R van Zyl; Mr André Viviers; Ms Eileen Jordaan; Ms Blanché Verster; Mrs M Hattingh.

²⁵³ Mrs M Hattingh;

²⁵⁴ Mrs Krawitz and Mrs Stander; Groups 1 and 3; Mrs Hendré Dippenaar; the Children's Placement Centre; Miss R van Zyl; Mr André Viviers; Ms Eileen Jordaan; Ms Blanché Verster; Mrs M Hattingh; Ms Jean Allen.

into the crack - nobody thinks such children fit into their family. Ms Ledderboge cited cases where birth mothers acknowledged that they abandoned their babies because their families rejected their children.

Ms Sue Padayachee did not agree with Professor Motsikatsana.²⁵⁵ She said the prospective adoptive parents should commit themselves to bring up the child in such a way as to maintain the child's cultural identity. Ms Jacqui Gallinetti also did not agree with Professor Motsikatsana. She and Ms Jean Allen said we should be culturally and not race sensitive and that an approach such as that of Professor Motsikatsana will perpetuate racial discrimination.

Ms Anne Tudhope also did not agree with Professor Motsikatsana's central thesis. She said a child who spends his or her childhood in an institution will be deprived of more than his or her culture. She questioned the worth of culture (and religion) in the absence of personal self-worth and pointed to research conducted in the USA which shows that trans-racially adopted children are caring individuals who really understand cultural differences and have few racial prejudices themselves - 'an ideal to which we should all aspire'. She further referred to a Johannesburg based trans-racial support group where the evidence seems to suggest that the trans-racially adopted children are well adjusted and happy. However, Ms Tudhope did call for more South African research on this issue.

The Adoption Coalition also called for more research on the outcome of trans-racial adoptions in the South African context and registered its concern that by adopting Professor Motsikatsana's central thesis race consciousness might be perpetuated.

In a very comprehensive submission the National Adoptive Parents' Institute took issue with the central thesis adopted by Professor Motsikatsana. It said:

The permanency of placement of children in adoption should be seen as of paramount importance in terms of their emotional development.

²⁵⁵

Mrs Krawitz and Mrs Stander, in a joint submission, shared this view.

The research paper contends, however, that black children who are placed with white parents will almost certainly have identity problems and psychological difficulties to such an extent that such placements are always to be considered undesirable. The author [Professor Motsikatsana] contends that South African society is still largely racist, and that until this changes, trans-racial adoption should not be considered, and the courts should be empowered to disallow such placements. He also concludes with the statement that the outcome in trans-racial adoptions in other countries has been found to be negative in terms of the psychological difficulties that adoptees have encountered in identity formation. We wish to re-iterate our agreement with same race/same culture placements where possible. However, a review of research carried out in the USA and Britain indicates that the developmental outcome (overall adjustment in terms of educational attainment, peer relations and behaviour) for trans-racially adopted children is no worse than for same-race adoptions. It has been found that trans-racially adopted children who grow up in a racially integrated society and attend racially integrated schools, do the best, but overall, the developmental outcomes in this group are acceptable and better than for children raised institutionally.

In talking about the best interests of the child, what appears to be of paramount importance in terms of the emotional and psychological development of children is the formation of permanent attachments from birth. In fact, it is felt that this attachment needs to be formed with one (or a few/small number) of care-givers. Where it is not possible for children to remain with a biological parent, for whatever reason, then the best interests of the child are served by permanent placement with a loving care-giver as early as possible in the child's life. If one has to weigh up the importance of this process (and the proven psychological difficulties that result from the disruption of early attachment and bonding), with the possible psychological difficulties that may arise in children who are trans-racially adopted, there cannot be any doubt really which is more crucial to the healthy development and happiness of the child involved. Compare this also with recent studies on outcomes of institutional care in Britain, where a policy of prohibiting trans-racial adoptions was adopted, and where the majority of children placed in residential care/institutions were black, showed increased psychological and psychiatric problems and a higher incidence of contact with the criminal justice system.

The reality in South Africa is that there are, and will continue to be, large numbers of children in need of care. The majority of these children come from disadvantaged communities, where the number of known prospective adopters is currently very low. There is an urgent need to find solutions to this problem, and there is no time for these children to wait for sufficient same race and same culture placements. If the choice is between a white family or an institution (if the child is lucky) for such a child, then surely trans-racial adoption must be accepted as the preferred option and not disallowed for theoretical and political reasons?

It is estimated that by the year 2005 South Africa will have more than 1 million AIDS orphans. One of the options that has been proposed to deal with this problem, is "child-

headed families". This is where children, whose parents may have died of AIDS, will remain with each other in their homes, and be clustered with similar families within their communities, and supervised by care-givers. How this option can be considered to be superior to adoption (whether trans-racial or not) defies the imagination. In what way is the hour-by-hour role modelling and character formation provided by an unformed child, itself denied time to access the school system by the responsibilities and selected serendipity by unfortunate circumstance of having lost her parents? In what way are "child-headed families" superior to a stable, economically independent household headed by mature, screened, selected and willing adults - whatever their colour?

In addition, consideration should be given to the effect that such situations will have on the children who will be heading such families. How will such a situation and responsibilities affect the psychological development of these children?

To argue against trans cultural placement is to sacrifice each child's individualism, his rights and dignity on the altar of some mid-twentieth century ideal of a static racial and cultural purity dividing and separating the race of man.

...

The assumption that Professor Mosikatsana makes regarding South African society; that it is essentially made up of two groups: affluent whites and poor blacks, and that these groups are polarized, with totally different cultures and ways of relating to the world, also should be challenged. South Africa, like many countries in the world is a rapidly urbanizing country, with increasing mixing of cultures, "deculturation" in the urban areas, and "enculturation" in terms mainly of many black people abandoning their traditional beliefs and practices, as they adapt to a dominant western mode of life in urban areas. While this may not necessarily be desirable, it is a reality, and many black people living in urban areas today, are faced with similar issues of identity that our black trans-racially adopted children will face. The paper does not at all address the point that many children in need of care do not have a single biological heritage, and often are from mixed and sometimes even unknown backgrounds.

Accordingly, the National Adoptive Parents' Institute came to the following conclusions and made the following recommendations:

- Adoption is a viable option in terms of providing substitute family care for children in need of care. It should be promoted in all communities, and people should be educated about the positive nature of adoption, as there is still much ignorance and prejudice about adoption in all communities.

- Placement agencies should make special efforts to promote adoption in disadvantaged communities, and develop appropriate screening and training programmes for prospective adopters.
- Placement agencies should attempt to match adoption placements for children as closely as possible to the race and culture of the children's biological families/backgrounds.
- In the event that such a placement cannot be found **expeditiously**, trans-racial placements must be considered. This would be in preference to having children waiting for the slim chance of a same-race placement while in an institution or in foster care for more than a short period of time. Placement for adoption should occur as soon as possible to avoid prolonged disruption of attachment and the consequent results.
- Placement for adoption should occur as soon as possible to avoid prolonged disruption of attachment and the consequent results.
- Placement agencies and institutions must have incentives to place young children and babies expeditiously, so as to serve each child's best interests and to increase the rate at which placements are handled. This will give more children the opportunity of some greater personal growth and development than the status quo provides and should aim to remove all children from the life-threatening experiences commonplace within the present system. The present system of support provides incentives to organisations to maximise revenue and minimise the workload by extending and delaying the placement process with structural inefficiencies and specious rationalisations regarding the difficulties of parent/child matching.
- Parents who adopt trans-racially should be encouraged to reflect on the challenges that their children face, to join support groups and to assist and encourage their children to learn about their birth heritage, and to develop a sense of pride in their biological as well as their adoptive roots. They should take an active stand against racism of any kind that they encounter.
- A duty should be placed on placement agencies, and funding made available, to provide post adoption services whenever the need arises.

18.6 Evaluation and recommendations

18.6.1 The need for adoption

Internationally, in the review of adoption laws, the need for adoption has been questioned. However, while suggestions to modify the law have been commonplace, there has been little support for the removal of adoption altogether. In support of its retention, it has been argued that adoption is a familiar, well-understood and uniquely valued concept accepted both nationally and internationally. 'Long experience has shown that adoption is a successful way of caring for a child away from his or her birth parents. It appears to have worked well for many adopted people and their adoptive parents. No other form of permanent placement has demonstrated that it can be more beneficial than the established system of adoption. . . . to abolish adoption would remove the legal expression of a valued family commitment'.²⁵⁶

An argument strongly advanced in favour of adoption is that, for the child, a sense of security and belonging is founded in the adoptive parent's sense of entitlement and commitment. A child's need for security is provided for within a nurturing, protective and permanent family who feel free to treat the child as their own. 'Family' in this context has usually been defined very narrowly and it is the perceived legality, finality and exclusivity of adoption that is said to encourage adoptive parents to treat the child as if he or she were their own. However, the development of open adoption challenges the way in which adoption has been traditionally perceived and diminishes the strength of this argument. The argument continues that unlike, for example, the insecurity of foster care, adoption provides a level of security and commitment which is said to be fundamental to the child's upbringing. This argument was made very strongly even in submissions that acknowledged and supported the concept of open adoption, which ultimately challenges the finality and exclusivity of traditional adoption. It was argued or assumed in such submissions that the perception of adoption as irrevocable, and the resulting sense of commitment and security continue even though the child

²⁵⁶

New South Wales Law Reform Commission **Discussion Paper 34: Review of the Adoption of Children Act 1965 (NSW)**, April 1994, par. 3.5.

may be encouraged to acknowledge that it is a member of two families.

A closely related argument is the claim that adoption provides a psychological boost to a child's sense of personal identity. The sense of belonging which is enhanced by a solid family environment is invaluable to the child's self-esteem. It was argued that the disruption rate for children who are adopted is dramatically less than for children in other forms of care. Disruption and lack of continuity in children's lives cause emotional problems, whereas secure family membership enhances self worth.

While most people do not want to see adoption abolished, many expressed the view that appropriate modifications could be made to meet changes in social patterns and values. Many submissions referred to the current practice of 'open adoption' and felt that it should be incorporated, to a greater or lesser degree, in the new children's statute.

The thrust of many of these comments was that, in the past, problems had been caused by the 'conspiracy of silence', and that adoption does not have to involve secrecy if all parties acknowledge the reality of the adoption. Nor does adoption necessarily involve the complete severing of a child's existing family relationships; it is flexible enough to accommodate continued involvement of the birth parents and adoptive parents in the child's life where appropriate.

Some submissions to the review contained criticisms of adoption as it is now practised and called for radical changes in adoption law. One view is that adoption should simply be abolished. Those who supported the abolitionist argument stated that the concept of adoption is so fundamentally flawed that no statutory amendments to the Child Care Act could overcome this essential fault.

Adoption has been criticised as being fundamentally flawed for the following reasons:

- adoption differs from all other legal orders for care in that it purports to change the personal identity of the child by altering historical, genealogical and biological facts about the child. It

thus creates a legal fiction about the child's parentage. This legal fiction is gradually being eroded by developments in social work policy, particularly those regarding openness in adoption;

- in order to support the legal fiction that the adoptive parents are the child's only parents, children have been denied access to information about family origins and the circumstances of their birth. The social work objective, to encourage openness and honesty in adoption, runs contrary to the aim of the adoption legislation which is to deny birth parents any relationship with their child;
- adoption treats children as the property of their parents. The legal rights of birth parents and adoptive parents prevail over biological reality and the process has more in common with laws relating to the transfer of property than family law;
- the process of adoption treats children as a homogenous group rather than as separate beings with individual rights;
- critics of adoption also argue that the traditional concept of adoption has already been greatly compromised by developments such as 'open adoption', increased access to information and the declining numbers of adoptions. They conclude that abolishing adoption would represent a culmination of these trends rather than a radical change in direction; and
- medium or long-term care-givers of children can be given the powers and responsibilities necessary to carry out their task (ie the rights and responsibilities of biological parents) without any need to pretend that they are the biological parents of the child and that the child's birth family have ceased to exist.

The role of non-parental care-givers could be recognised by giving the new Child and Family Court ample powers to make orders about some or all the matters now associated with adoption, including the issuing of a new birth certificate and changes in support obligations and inheritance rights.²⁵⁷

The argument is that, instead of making a single inflexible order for adoption, the Court would be able to assemble a package of legal orders which would be designed to suit members, and the fact

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See also the Commission's recommendations in Chapter 8 above where provision is made for the possibility to allocate certain components of parental rights and responsibilities to different individuals by court order.

that many South African children experience a variety of other family forms. This would include recognition of modern families in a multicultural society.

It is clear from the preceding paragraphs that arguments both for and against adoption provide a valuable source of ideas for change and improvement in the way adoption is practised.²⁵⁸ **The Commission is not persuaded at this stage, however, that it would be desirable to abolish adoption.**

There are two reasons for taking this position. First, although adoption can be seen as having some or even all of the negative connotations described by its critics, it also has some positive features. These include the idea that adoption involves a complete commitment to the welfare of the child, and a complete acceptance of the child into one's family. It should be remembered, in this context, that adoption was originally resisted in part on the ground that children born to 'undesirable' parents were destined to failure, because of their circumstances of birth. It might be argued that the abolition of adoption could discourage people from providing unqualified love and care for children, and might lead us to forget the positive lessons that adoption appears to have taught. It is possible that if adoption is reformed, the connotations which are seen as negative, such as ownership of the child, deception, and an excessive preoccupation with the traditional nuclear family structure would be greatly weakened, and the positive connotations retained or strengthened.

Second, there seem no prospects at this stage that a recommendation to abolish adoption would have any chance of success in the present climate of opinion. As noted earlier, it is well established in many countries, and its abolition does not appear to have been seriously considered by any

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See also Nigel Lowe 'The changing face of adoption - the gift/donation model versus the contract/services model' (1997) Vol. 9. No. 4 **Child and Family Law Quarterly** 371.

legislature. The CRC contemplates the continued existence of adoption, although it is fair to say that the main concern of the Convention is to guard against abuses of adoption. It is clear from the submissions and the focus group discussion that there is a great deal of community support for the continuation of adoption. It is difficult to imagine that a recommendation to abolish adoption would have any chance of gaining political acceptance unless there was a very significant shift in community opinion. This is not of course decisive, but it does suggest that the Commission should recommend abolition of adoption only if it were convinced that this was really necessary.

It is the Commission's recommendation that the concept of adoption be maintained but that the criticisms underlying the abolitionist position need to be kept carefully in mind when approaching particular aspects of the law and practice. Adoption law can be modified to remove negative aspects and retain the positive features in order to promote the welfare of children. It is important that:

- there be no infringement of the human rights of birth parents either prior to the consideration of any kind of alternative parental care for children or at any stage of the adoption process;
- adoption be recognised as the most extreme form of order for children in need of permanent care and that it is only used where the circumstances of the particular child dictate that it is necessary;
- adoption be considered critically against all other possible arrangements for each particular child;
- it is recognised that adoption is not always a suitable long-term alternative care plan for a child. In each case, the system should ensure, as far as possible, that thoughtful and informed decisions are made in relation to the needs of each child. This refers not only to the needs in existence at the time the adoption order is made but also to those that may arise later in the child's life;
- the focus of adoption be on the needs of children who require permanent care. This refers not only to needs in existence at the time that the adoption order is made but also to those that may arise later in the child's life;

- children be recognised as individuals who have valuable ties with people, by virtue of their birth, that cannot be eradicated. The assessment of the best interests of a child should be made in relation to each child and not in relation to children in general.

18.6.2 **Who may be adopted?**

No provision is made in terms of the current Child Care Act, 1983 for the adoption of persons older than 18 years of age. This aspect is evaluated by the Commission in this section and **it is concluded that *children only may be adopted***. The Commission has pointed out earlier that adoption practice internationally has swung heavily towards the adoption of older children and that several respondents are of the opinion that effective permanency planning requires that adoption be the first choice of arrangement for a significant portion of older children who have no parents or who could not be reunified with their families. This aspect will also be evaluated in this section. Lastly, the Commission will conclude by making recommendations regarding the possibility of adopting married persons or persons in de facto relationships.

- **The adoption of older children**

From the submissions it is clear that there is general support for the contention that effective permanency planning requires that adoption, as a form of substitute care, be the first choice of arrangement for a significant portion of older children who have no parents or where family reunification efforts have failed. However, the Commission does not regard it necessary to embody this principle in the new children's statute as a *legal* principle. The Commission believes this principle should form the basis of the assessment and permanency planning process. Obviously, the adoption of older children goes hand in hand with the push to more open adoptions. This aspect is dealt with below.

- **The adoption of adults**

The Child Care Act, 1983 only provides for the adoption of children: It does not provide for the adoption of persons older than 18 years of age. Several overseas jurisdictions, however, allow for such adoptions in special circumstances.²⁵⁹ The Australian Capital Territory, for instance, has dealt with adult adoptions in section 10 of its Adoption Act, 1993 as follows:

An adoption order shall not be made if the child has attained the age of 18 years unless the Court is of the opinion that-

- (a) the applicants are persons of good repute; and
- (b) there are exceptional circumstances that justify the order.

Section 18(1)(b) of the New South Wales Adoption Act 1965 allows the court to make an order for the adoption of a person who has attained the age of 18 years provided he or she has been brought up, maintained and educated by the applicant(s) as their child or has been a ward in the care or custody of the applicant(s).²⁶⁰ The application must be made with the consent of the Director-General or by the principal officer of a private adoption agency. Section 21(1)(c)(ii) of the NSW Adoption Act requires the court to consider a report from the Director-General concerning the proposed adoption and satisfy itself that:

- the applicant or each of the applicants is of good repute; and
- in the particular circumstances of the case it is desirable that the person²⁶¹ should be adopted by the applicants; and
- in either case, the welfare and interest of the person to be adopted will be promoted by the adoption.

²⁵⁹ See section 72 of the UK Adoption Act, 1976; section 10 of the Victoria Adoption Act, 1984; section 66(2) of the Western Australia Adoption Act, 1994; section 12 of the Northern Territories Adoption Act, 1995.

²⁶⁰ Pursuant to section 18(4) of the Act, the court cannot make an order for the adoption of a person who is or has been married.

²⁶¹ Awkwardly, the Act uses the word 'child' for adult adoptees.

Pursuant to section 26(6) of the New South Wales Adoption Act, the consents of certain persons required to all other adoptions are not required to the adoption of an adult.

In practice, adult adoptions are rare in New South Wales and mostly not considered appropriate by either the Supreme Court of New South Wales or the relevant Department. The reason for this approach is explained as follows²⁶²

The Court is always very careful to see that adoption is used for the purposes contemplated by the [Adoption] Act and not for any collateral purposes. As Selby J said in **Re Lee Yen Chum** (1963) 4 FLR 269 at 299: “The Court looks with disfavour upon what are sometimes called ‘accommodation’ adoptions, that is to say, adoptions which are sought for a motive other than an intention to establish a parental relationship between the applicants and the person sought to be adopted. In such cases, the Court, in the exercise of its discretion, has refused to make the order asked”.

In considering this issue, the New South Wales Law Reform Commission²⁶³ said that adult adoption lies at the outer margin of adoption. ‘To allow the adoption of an adult who has never been parented by the applicant(s) *as a child*²⁶⁴ is too far removed from the fundamental purpose of the [Adoption] Act’. The New South Wales Commission accordingly recommended that adoptions of adults only be allowed where a parenting relationship has been established for at least five years prior to that adult being adopted has attained the age of 18 years.²⁶⁵

The recommendation of the New South Wales Commission in respect of adult adoption was given effect to in the Adoption Act 75 of 2000.²⁶⁶

²⁶² See **Re K and the Adoption of Children Act 1965** (1988) 12 FLR 263 at 264.

²⁶³ **Report 81: Review of the Adoption of Children Act 1965 (NSW)**, March 1997, par. 4.20.

²⁶⁴ Emphasis in the original.

²⁶⁵ Recommendation 25.

²⁶⁶ See sections 24(1)(b) and (2) of the NSW Adoption Act 75 of 2000.

The New Zealand Law Commission took a different view and said that it saw no need for adult adoption.²⁶⁷

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Report 65: Adoption and its Alternatives, September 2000, par. 330.

While the Commission recognises that some adults wishing to be adopted are motivated by emotional or sentimental reasons, or to cement their sense of identity, the Commission is also acutely aware of the potential misuse the recognition of adult adoptions can cause. In particular we fear that adult adoption may open the door to unsubstantiated requests for citizenship or, more worrisome, trafficking in persons. On the other hand, we do want to give legal recognition to adoptions according to customary law. As we will see,²⁶⁸ the attainment of adulthood in customary law is not linked to the attainment of a particular age, but a process which may only end way after the person involved has passed the age of 21 years (the current age of majority).²⁶⁹ If the Commission's recommendation regarding lowering the age of majority for all persons, including those living under customary law, to 18 years of age is not accepted, **then legislation (but perhaps not the new children's statute) should allow for the adoption, according to customary law, of persons older than 18 years of age.** With this proviso in mind and in the confidence that the Commission's recommendation regarding the lowering of the age of majority is a sound one, **the Commission is not in favour of adult adoptions.**

- **Adoption of married persons**

If the adoption of persons over the age of 18 years is allowed according to customary law or otherwise, then a determination will be necessary as to whether a married person could be the subject of an adoption order. As stated previously, the Child Care Act, 1983 only allows for the adoption of a child. Marriage, also in terms of customary law, has as one of its consequences the fact that the person (even a person under the age of 18 years) attains majority status upon marriage. Unless we wish to radically change our present matrimonial system, **the Commission sees no need to depart from the general principle that only children may be adopted. In the light of this recommendation the possibility of adopting a married person is effectively excluded.**²⁷⁰

²⁶⁸ See Chapter 19 below.

²⁶⁹ See also our recommendations regarding the lowering of the age of majority in section 5.3.4. above.

²⁷⁰ The New Zealand Adoption Act 1955 allows married persons to be adopted. See also the recommendation by the New Zealand Law Commission **Report 65: Adoption and its alternatives**, September 2000, par. 333.

18.6.3 Section 17 qualifications for adoptions (Who may adopt)

The Commission has carefully considered the position of who should be allowed to adopt children and who should be allowed to adopt children jointly. The following categories of prospective adoptive parents were considered:

* **Married persons jointly**

The present position is that married persons may only adopt a child jointly. A married person on his or own may not adopt a child. The Commission sees no need to depart from this established position. However, given the fact that the Commission is recommending that parental rights and responsibilities or components thereof may be assigned to different persons, the possibility does arise that a single spouse may wish to adopt a child without involving the other spouse. Obviously the adoption of a child by one spouse has major implications for the other spouse and not a step one spouse would likely take on his or her own. **It is for this reason that the Commission recommends that married persons should only be allowed to adopt children jointly.**

• **Gay and lesbian couples jointly**

At present, section 17(b) of the Child Care Act 74 of 1983 permits persons (including gay and lesbian persons) to adopt children individually, but only spouses may at present adopt children jointly. This means that couples in gay and lesbian relationships cannot adopt children jointly.²⁷¹ Further, the same prohibition would apply to heterosexual couples who are living in a domestic partnership, without their having formalised a civil marriage, a customary union or a marriage by

²⁷¹

See also Elsa Steyn 'Women who love women - A female perspective on gay family law' 2001 **TSAR** 340 at 347. For an international perspective, see the Report of the Swedish Commission on the Situation of Children in Homosexual Families, Stockholm 2001; the Information Sheet prepared by the International Social Service Resource Centre for the Protection of Children in Adoption, 2000.

religious rites.²⁷²

Issue Paper 13 raised the matter of adoption of children by gay or lesbian couples jointly, and asked whether legislation should provide more specific guidance in this regard. There were divided responses to this question from respondents, with more or less the same level of support for gay and lesbian adoption as there was disagreement with this possibility. Many respondents from both camps, however, referred to the best interests of the child as the paramount consideration in adoption matters.

²⁷² See in this regard the definition of 'marriage' in section 1 of the Child Care Act 74 of 1983.

There is no recorded South African case law which specifically addresses the issue of gay and lesbian adoption. However, in **Van Rooyen v Van Rooyen**²⁷³ the access rights of a lesbian mother to her two minor children were restricted because of her homosexual lifestyle. Flemming DJP held that the interests of the children had to be protected and the court order couched in such terms that they would not be exposed to 'wrong signals' as to human relationships. Though the **Van Rooyen** decision dealt with the issue of access, it may serve as a useful indicator of judicial attitudes towards gay and lesbian adoptions because the best interests standard applies equally to adoptive placements, custody and access issues.

Flemming DJP's decision in the **Van Rooyen** case has been criticized for promoting homophobic bias by basing its findings on false stereotypes or perceived community intolerance.²⁷⁴

²⁷³ 1994 (2) SA 325 (W).

²⁷⁴ For a discussion of the **Van Rooyen**-decision, see Elsje Bonthuys 'Awarding Access and Custody to homosexual parents of Minor Children: A Discussion of *Van Rooyen v Van Rooyen* 1994 (2) SA 325' (1994) 3 **Stellenbosch LR** 298; Pierre de Vos 'The Right of a Lesbian Mother to Have Access to her Children: Some Constitutional Issues (1994) 111 **SALJ** 687.

However, the constitutional assurance of equality for same-sex couples has recently been the subject of several Constitutional Court decisions, which have a bearing on law reform in this area. Notably, in **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs**,²⁷⁵ the Constitutional Court held that the exclusion of cohabiting couples of the same gender from the benefits conferred upon spouses by section 25(5) of the Aliens Control Act 96 of 1991 was inconsistent with section 9(3) of the Constitution in that it constituted unfair discrimination against same-sex life partners. The Court agreed²⁷⁶ that the word 'spouse', and the use of the word 'marriage' in a related section of the Act indicated that only marriages ordinarily recognised by our law would confer the benefit of an exemption from the usual requirements for the granting of an immigration permit. Noting that our statute law has in recent years accorded express and implied recognition to same-sex partnerships,²⁷⁷ the Court held that the section constituted discrimination both on the ground of sexual orientation, and on the ground of marital status.

Reviewing the impact of such discrimination, the Court held that under South African common law, a marriage 'creates a physical, moral, and spiritual community of life, a *consortium omnis vitae*' which includes duties of co-habitation and fidelity,²⁷⁸ companionship, love, affection, comfort, mutual services and sexual intercourse.²⁷⁹

Gay and lesbian persons 'are likewise capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships . . .'²⁸⁰ and of constituting a family, whether nuclear or extended. Even though it was argued before the Court that government has a strong and legitimate interest in protecting family life, the Court found no rational connection between this

²⁷⁵ 2000 (1) BCLR 39 (CC).

²⁷⁶ At par 25 and 27.

²⁷⁷ At par 31.

²⁷⁸ Sinclair assisted by Heaton **The Law of Marriage** Vol 1 (1996) 423.

²⁷⁹ **Grobbelaar v Havenga** 1964 (3) SA 522 (N) at 525E.

²⁸⁰ **National Coalition for Gay and Lesbian Equality v Minister for Home Affairs** par 47.

interest and the exclusion of same-sex couples from the benefits of section 25(5) of the Aliens Control Act.²⁸¹

By way of analogy, it seems fairly trite to state that the present provision in the Child Care Act 74 of 1983 which disallows gay and lesbian couples from adopting jointly would, in the light of the reasoning of the Constitutional Court, constitute unfair discrimination on the ground of sexual orientation and on the ground of marital status. Indeed, a legal challenge to the offending section of the Child Care Act was instituted in the first half of 2001 by a lesbian couple who sought to effect a joint adoption of their children, and its likely unconstitutionality conceded by the Minister for Social Development.²⁸² This matter is still pending before the Constitutional Court.

The Commission therefore proposes that the restriction upon persons in same sex relationships as regards joint adoption be removed.

The issue of joint guardianship by a same-sex couple who are the joint adoptive parents of children obviously will arise only once the court has found that partners in a ‘permanent same-sex life partnership’ can jointly adopt children.

²⁸¹ See also **Langemaat v Minister of Safety and Security** 1998 (3) SA 312 (T) on access to medical aid.

²⁸² **Du Toit and another v Minister for Welfare and Population Development and others** (Notice of motion 23704/2000, High Court of South Africa, Transvaal Provincial Division).

In terms of the common law, although the parental power over legitimate minor children was shared by both parents, the father's authority was superior to that of the mother, the mother being confined to participation with the father in the custody of the child's person and the care and control of the child's daily life. In the event of a difference of opinion between the parents, the father's word was decisive. This position was altered by the Guardianship Act 192 of 1993, in terms of which parents of a child born in wedlock now have *equal* guardianship of the child, and are entitled to exercise their rights and powers and carry out their duties arising from guardianship independently of each other. This equal, but independent, guardianship is subject to the requirement that the consent of both parents be obtained for certain specified acts, including the marriage of the child, the adoption of the child by third party, the removal of the child from South Africa by one of the parents or a third party and the alienation of immovable property or any right to immovable property belonging to the child.²⁸³

Section 1(2) of the Guardianship Act 192 of 1993 makes no provision for the joint guardianship of same-sex couples who are the joint adoptive parents of their children. If the court should allow the joint adoption of children by partners in a permanent same-sex life partnership, then common sense would dictate that such partners be granted joint guardianship. This would then in turn entail an amendment to the Guardianship Act 192 of 1993. **The Commission therefore recommends that persons who jointly adopt children should be granted joint guardianship of those children.**

- **Persons in a domestic partnership jointly**

²⁸³ See further Belinda van Heerden and Brigitte Clark 'Parenthood in South African law - Equality and Independence? Recent developments in the law relating to guardianship' (1995) 112 **SALJ** 140.

Further to this, the question arises as to whether heterosexual persons in domestic partnerships²⁸⁴ should also be allowed to adopt jointly, and whether prospective adoptive 'parents' need even be partners in a conjugal relationship as described above. Joint adoption might be sought by siblings who share a common household, by a mother and her son or daughter, or by persons unrelated by ties of consanguinity who can provide appropriate nurture to an adopted child.

As regards the first point raised above, it is arguably illogical to permit same-sex couples who are living in a permanent domestic relationship to adopt a child jointly, but to deny this benefit to heterosexual persons who are regarded as constituting a family, 'of furnishing emotional and spiritual support and of providing physical care, financial support and assistance in running the common household'.²⁸⁵ Further, insofar as life partnerships between persons of the opposite sex are concerned, denial of the right to adopt jointly could constitute unfair discrimination on the grounds of marital status.

The Commission therefore recommends that joint adoption by persons who are living in a heterosexual marriage-like relationship, but who have not concluded a civil, customary or religious marriage, should be permitted by law.

The matter of joint adoption by persons who, although they live in a common household, are not living in a conjugal relationship, is not necessarily on the same footing as the above situation. The **National Coalition** decision clearly applied to partners in a permanent same-sex relationship. In the instance of other relatives or persons sharing a household, there can be no argument that discrimination on the grounds of marital status would arise, for these persons are not living in a marriage-like relationship.

²⁸⁴ For the English position, see Victor Smith 'Adoption and unmarried couples' [1998] **Fam Law** 83.

²⁸⁵ *Ibid.*

The *consortium omnis vitae* that may exist in this type of household setting excludes the aspect of sexual intercourse²⁸⁶ which has been held to be an element of the invariable consequences of marriage at common law. The Constitutional Court's decision in the **National Coalition For Gay and Lesbian Equality** case could support the notion that sexual intercourse is indeed a defining characteristic of the type of relationship that was accorded relief in this particular instance.²⁸⁷ However, the judgment also refers to couples who commence a relationship at an age when they no longer have the desire for sexual relations, which rather suggests that the defining characteristic is the duty of fidelity that flows from the *consortium omnis vitae*.

The question to be posed, however, is whether a marriage-like or conjugal relationship, with the related aspects pertaining to sexual intercourse or to fidelity, should be a pre-requisite for adoption. In this regard, it is submitted that the decision in **Fitzpatrick v Minister for Welfare and Population Development**²⁸⁸ gives some guidance. Ruling the absolute proscription on adoption by persons who are not South African citizens or persons who qualify for naturalisation but have not applied therefore, previously contained in section 18(4)(f) of the Child Care Act 74 of 1983, to be unconstitutional, the Court placed a great deal of emphasis upon the paramountcy of the best interests of the child, as required by section 28(2) of the Constitution. The Court explained that the 'reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)'.²⁸⁹ Alluding to the historical development of the best interest standard,

²⁸⁶ In **National Coalition for Gay and Lesbian Equality v Minister for Home Affairs** supra, the Constitutional Court held that the *procreative* potential of a relationship is not a defining characteristic of conjugal relationships, as this would be deeply demeaning towards couples who are incapable of procreating, or couples who commence a relationship at an age when they no longer have the desire for sexual relations, as well as towards couples who voluntarily decide not to have children (at par 45).

²⁸⁷ See also **Dawood and others v The Minister of Home Affairs** (case CCT 35/99) which too repeats the view that marriage as a community of life includes 'reciprocal obligations of cohabitation, fidelity and sexual intercourse' as well as 'joint responsibility for the guardianship and custody of children born of the marriage' (par 33).

²⁸⁸ 2000 (7) BCLR 713 (CC).

²⁸⁹ At par 17.

the Court opined that the standard has been applied beyond custody cases, and in a variety of other circumstances.

The best interest of the child test is apposite in the consideration of whether persons who share a household, but who are not living in a conjugal relationship, should be permitted to adopt jointly. It is submitted that the best interest criterion should outweigh the consideration of the particular type of relationship between the two parties *inter se*.

Since the provisions of the Child Care Act already envisage that a child may be adopted by a widower or widow or unmarried or divorced person,²⁹⁰ none of which persons are necessarily living in a conjugal relationship, nor indeed in any family setting at all, it cannot be said that present policy demands that an adopted child be assimilated into a conjugal or marriage-like family unit. Further, there would appear to be no logical reason why two or more persons who can provide a nurturing environment in which a child can develop appropriately, would necessarily require that such persons be living in a marriage-like relationship.

- **Family members jointly**

Finally, in a country in which the growth of HIV/AIDS infection rates is alleged to be spiralling, there are cogent practical reasons for permitting joint adoption by persons - such as members of the extended family or kinship group - in the interests of securing the future of such child, lest a single caregiver later be affected by HIV/AIDS.

Thus, given the primacy of the child's best interests and other considerations elaborated above, the Commission concludes that the existence of a conjugal relationship should not be required for adoption by two or more persons jointly. It is, for instance, conceivable that the husband (head of the kraal) and his three or four wives in a customary setting may wish to adopt a child jointly, in a practical application of the spirit of *ubuntu*.

²⁹⁰ Section 17(b) of the Act.

The Commission therefore proposes that persons other than married couples be permitted to adopt a child jointly, provided that the overriding criterion should remain that such adoption will serve the interests and conduce to the welfare of the child.

* **Step-parents**

Much of the modern literature on adoption combines the treatment of step-parent adoptions and relative adoptions in one category, termed intra-familial adoptions. There is a significant amount of overlap between the two categories, although there are distinct considerations attaching to each which require separate treatment. Step-parent and relative adoptions differ from other types of adoptions in that agencies do not select the adoptive parents. Instead, the issues are whether the existing care arrangement should be transformed into an adoption and whether provision should be made for a simpler, faster adoption process in intra-familial adoptions.

In some foreign jurisdictions, such as New South Wales, the applicants in either a step-parent adoption or a relative adoption may apply directly to the court for an adoption order without the need to obtain first the consent of the Director-General and without the application needing to proceed through an agency.²⁹¹ Section 51(2) of this Act excludes step-parents and adoptions by relatives from the operation of section 51(1), which makes it an offence for a person other than the Director-General or the principal officer of a private adoption agency, or someone authorised to act on their behalf, to arrange an adoption. In New South Wales the courts have dispensed with the requirement for the Director-General to submit a report in step-parent and relative adoptions.²⁹²

Adoption legislation in all Australian states and territories permit an adoption order to be made in favour of a step-parent solely.²⁹³ The Australian Capital Territory legislation adds the proviso that

²⁹¹ Section 18(3).

²⁹² As required by section 21(1A)(c) of the NSW Adoption of Children Act, 1965.

²⁹³ Section 11(5) of the Victoria Adoption Act, 1984; section 15(3) of the Adoption of Children Act, 1994 (NT); section 20(7) of the Adoption Act, 1988; section 67 of the Adoption Act, 1994 (WA); section 18(2) of the Adoption Act, 1993 (ACT); section 9 of the Adoption Act, 1988 (SA); section 12(3) of the Adoption of Children Act, 1964

the step-parent and the custodial parent must have lived together, whether married or not, in a heterosexual relationship for at least three years. Whilst the formulations differ from Act to Act, each one achieves the result that the relationship between the child and the parent with whom the adopting step-parent is cohabiting is not affected by the adoption order. This overcomes the problem of the custodial parent having to adopt jointly with the step-parent.

Pursuant to the South Australian and Queensland legislation an adoption order will only be made in favour of a relative if, in the former Act, the court is satisfied that adoption is clearly preferable to guardianship in the interests of the child,²⁹⁴ or, in the latter Act, if a guardianship or custody order is not more appropriate.²⁹⁵ In terms of the Victoria, the Northern Territory and Tasmania legislation the court must not grant an adoption order in favour of a relative unless it is satisfied of the same three provisos as it must be satisfied of in relation to step-parent adoptions. Under the ACT legislation, the requirements which have to be satisfied before an adoption order can be made in favour of a relative include the same requirements as those for step-parent adoptions. However, there is a further requirement to be met in relative adoptions: There must be circumstances why the relationships within the family of the child should be redefined as such an order would do.

Step-parent and intra-familial adoptions represent a majority of adoptions made today.²⁹⁶ Concern has been expressed that step-parent adoption is often used, perhaps inappropriately, to sever the relationship between the child and the non-custodial parent. The Commission does recognise that the traditional step-parent adoption is not the ideal situation. Sometimes, the parent who consents to the adoption does so to escape his or her financial responsibilities as the new step-parent will now assume those. As a consequence such parent disappears out of the life of the child involved. In this process the adopted child loses out on the opportunity to maintain meaningful contact with such parent (and or the extended family).

With this qualification, and given our recommendation on the sharing of parental rights and responsibilities amongst more than one person, the Commission concedes that there will always be situations where it is in the best interests of the child to be adopted by his or her stepparent. In some instances, if not most, such adoptions will give legal recognition to the existing de facto position of the child. **We therefore recommend the retention of the present section 17(c) of the Child Care Act, 1983 which allows for the adoption of a child by a married person whose spouse is the**

²⁹⁴ Section 10 of the Adoption Act, 1988 (SA).

²⁹⁵ Section 12(5) of the Adoption of Children Act, 1964 (Qld).

²⁹⁶ In 1999 and 2000, step-parent adoptions respectively constituted 37% and 35% of all adoptions.

parent of the child.

The Commission did consider the possibility of a two-tier system where adoptions by step-parents and other relatives would be treated differently from adoptions by non-family members. Step-parent and adoptions by relatives differ from other types of adoptions in that agencies do not select the adoptive parents. Instead, the issues are whether the existing care arrangement should be transformed into an adoption and whether provision should be made for a simpler, faster adoption process. However, the Commission accepts that it is necessary to impose the same threshold upon eligibility for step-parent and adoption by relatives as for other adoptees and therefore **does not recommend the introduction of a parallel system for intra-familial adoptions.**

- **Disabled persons**

In terms of section 18(4)(c) of the Child Care Act, 1983, a proposed adoption must serve the interests and conduce to the welfare of the child. This gives effect to the view that the purpose of an adoption is to find the best possible parents for a child and not to find the best possible child for (prospective parents). While disabled persons should not be discriminated against, the disability of a prospective adoptive parent is certainly a factor that needs to be considered when screening adoptive parents. It would, for instance, be difficult to place a baby with a single paraplegic mother unless she has access to a good support system. With the proviso that the adoption should always be in the best interest of the child concerned, the Commission sees no point in disqualifying disabled persons from adopting children.

- **Age qualifications**

There were calls for the reintroduction of minimum age differences between the child and the applicant, as was provided for in the 1960 Children's Act. Requiring such age differences is not uncommon internationally and usually adoption laws provide that applicants must be a minimum

age, say 21 years of age, before being eligible to adopt. Often an upper age limit is also prescribed after which age persons are not considered eligible to adopt. Adoption Guidelines also often prescribe upper and lower age limits of ‘preferred applicants’.

The Commission is convinced that the ‘best interests of the child’ are not solely dependent on the age of the prospective adoptive parents *per se* so as to exclude all other considerations. While the Commission concedes that the age of the prospective adoptive parents is a factor to be considered, clearly placement agencies should consider a wide variety of would-be parents, so that the wide range of children relinquished for adoption should find the best families to suit their individual needs, experiences and circumstances. This applies especially in cases involving the adoption of ‘special needs’ and older children.

The Commission therefore does not recommend the reintroduction of the requirement of minimum age differences, as was provided for in the 1960 Children’s Act.

- **Trans-racial adoptions**

While the Commission unfortunately has to concede that racial prejudice is still alive in South Africa, it wishes to state categorically that existing racial prejudices, as also applied to children placed trans-racially, should not be tolerated. If racial prejudices are not eradicated, then all future South African generations will continue to live in a race-conscious society. **The Commission therefore does not exclude the possibility of trans-racial adoptions, provided it is in the best interests of the child concerned, and sees no need to tamper with the existing provisions of section 18(3) read with section 40 of the Child Care Act, 1983.**²⁹⁷

To give effect to our recommendations regarding eligibility to adopt, the Commission recommends the inclusion of the following provision in the new children’s statute:

²⁹⁷

See also Alan Rushton and Helen Minnis ‘Annotation: Transracial family placements’ (1997) Vol. 38 No. 2 **Journal of Child Psychology and Psychiatry** 147; Suzanne Hoelgaard ‘Cultural determinants of adoption policy: A Columbian case study’ (1998) 12 **International Journal of Law, Policy and the Family** 202.

Persons who may adopt a child

A child may be adopted -

- (1) by a husband and his wife, partners in a domestic conjugal life-partnership, or other persons sharing a common household and forming a family unit, jointly;
- (2) by a widower, widow, unmarried or divorced person;
- (3) a married person whose spouse is the parent of the child;
- (4) by the natural father of a child born out of wedlock.

To further give effect to an earlier recommendation²⁹⁸ the Commission has made in regard to section 10 of the Child Care Act, 1983, **it is recommended that no person other than the manager of a maternity home, a hospital, a place of safety or a children's home may receive any child *under three years of age* for the purposes of adopting such child or causing him or her to be adopted and care for that child apart from his or her parents or care-giver for a period longer than 14 days unless such person has applied for the adoption of the child or has obtained the consent in writing of a commissioner of child welfare.** In considering the application for consent, the commissioner must have regard to the religious and cultural background of the child concerned and of his or her parents as against that of the person in or to whose custody such child is to be placed or transferred.²⁹⁹

The provision to give effect to this recommendation could look as follows:

²⁹⁸ See 6.4.4. above.

²⁹⁹ Sections 10(2) and (3) read with section 40 of the Child Care Act, 1983.

Care of certain children apart from their parents

(1) No person other than the manager of a maternity home, a hospital, a place of safety or a children's home shall receive any child under three years of age for the purposes of adopting such child or causing him or her to be adopted and care for that child apart from his or her parents or care-giver for a period longer than 14 days, unless such person-

- (a) has applied to court for the adoption of the child; or
- (b) has obtained the consent in writing of the commissioner of the district in which the child was residing immediately before he or she was received.

(2) The commissioner shall, in considering any application for the said consent, have regard to the religious and cultural background of the child concerned and of his or her parents as against that of the person in or to whose custody such child is to be placed or transferred.

(3) Any consent mentioned in subsection (1) shall be subject to the prescribed conditions and to such other conditions as may be determined by the commissioner in any specific case.

18.6.4 Consent to adoption

The Commission notes that the section 18(4) requirements are causing some problems in practice. These problems mainly relate around the difficulties with birth fathers having to acknowledge themselves in writing, the consent provisions and the 60-day cooling off period, and the different interpretations given to and applications of the said requirements by commissioners of child welfare.

In this regard, the **Commission recommends a move away from the adequate means test to a willing and able test (section 18(4)(a)). The Commission further recommends that the requirement that the prospective adoptees must be of good repute and fit and proper to be entrusted with the custody of the child (in section 18(4)(b)) be strengthened by requiring proper screening of applicants.**

The Commission notes that few problems are being experienced in practice with informing the persons giving the consent of the legal consequences of adoption. In this regard the Commission supports the contention that most problems related to consent are averted when proper pre- and post-adoption counselling is provided.

Section 18(4)(e) of the Child Care Act requires the consent to his or her adoption of a child older than 10 years of age. In the Commission's opinion, the views of a child, where a child has the ability to express such views, must always be considered. **The Commission therefore recommends that the 10 year age requirement be done away with and be substituted with the following requirement: the child must consent to being adopted if he or she is of sufficient maturity to understand the implications of being adopted and giving consent to such adoption.**

Since the *Fraser* judgment, it is clear that unmarried fathers have certain rights in respect of their children. The Commission acknowledges this fact and wishes to encourage unmarried fathers to play a far greater role in the upbringing of their children. It is clear, however, that difficulties are being experienced in tracing unmarried fathers and serving notice on such fathers that the mother has consented to the adoption of their child (in terms of section 19(A)). Again the problem seems to be not so much with the existing provisions of the Child Care Act, 1983, but rather their interpretation and application by different commissioners of child welfare. In this regard, the Commission wishes to point out that section 19A(1) needs amendment as it in its present form requires the commissioner to cause notice to be served on a parent 'where [such] other parent is not available to give consent or where such parent's consent is not required', which hardly makes sense.

The Commission recommends the retention of the 60-day cooling off period provided for in sections 18(8) and (9) of the Child Care Act, 1983. This allows the parent of a child who has given consent to the adoption of his or her child the right to withdraw such consent up to 60 days after such consent has been given. In this regard, the Commission was convinced by those respondents who pointed out that proper pre- and post-adoption counselling should prevent any difficulties with

parents later wishing to withdraw consent.

- **Dispensing with consent to adoption**

Section 19 of the Child Care Act, 1983 allows for consent to adoption to be dispensed with in certain circumstances. Section 19(b)(vi), which allows for dispensing with consent of a parent who withholds his or her consent unreasonably, is particularly problematic as some commissioners of child welfare are apparently reluctant to make such a finding. Again, however, the problem seems not to be so much with the law, but with its interpretation and application.

18.6.5 **The effect of adoption and post-adoption contact**

At present, an order of adoption terminates all the rights and responsibilities existing between the child and any person who was his or her parent immediately prior to such adoption, and that parent's relatives (section 20(1)). **The Commission maintains this position and recommends that adoption should terminate all the parental rights and responsibilities existing between the child and all persons who held such rights and responsibilities immediately prior to such adoption.**³⁰⁰ In this regard it must be recalled that the Commission has recommended that parental rights and responsibilities, or components thereof, in respect of a child, may be assigned by the court to more than one person. The Commission would also like to point out that its proposals regarding the allocation and sharing of parental rights and responsibilities should address those needs currently covered by the call for post-adoption contact where ties with the pre-adoption parents, family, and community can be maintained.

18.6.6 **Prohibition of consideration in respect of adoption**

It was brought to the Commission's attention that the prohibition of considerations as provided for in

³⁰⁰ See also Murray Ryburn 'In whose best interests? Post-adoption contact with the birth family' (1998) Vol. 10 No. 1 **Child and Family Law Quarterly** 53; Bridget Lindley 'Open adoption - Is the door ajar?' (1997) Vol. 9 No. 2 **Child and Family Law Quarterly** 115..

section 24 of the Child Care Act is regularly flouted with impunity. Among those alleged to be involved, along with prospective adoptive parents and biological parents consenting to adoption of their children by them, are medical practitioners, private clinics, lawyers and social workers in private practice. It also appears that greater clarity is needed as to what should be considered to constitute a 'consideration'. **The Commission recommends that the prohibition against considerations be maintained; also that the Regulations to the new children's statute provide clear guidance to adoption practitioners and the courts as to what will constitute a 'consideration'.**

18.6.7 Subsidized adoption

The Commission unequivocally supports the introduction of some form of means-tested State grant for adoptive parents. The Commission believes this will provide a greater sense of security to especially those children currently in long-term foster care.

18.6.8 Access to information

Access to adoption information is a thorny issue.³⁰¹ The central question is the extent to which the State ought to be able to control access to one's own personal information. It also raises significant privacy concerns; the right of individuals to access information about themselves must be balanced against the extent to which such information can be accessed by others and the extent to which individuals might be required to produce such information to others. It also raises questions as to the priority that should be assigned to the desire for confidentiality of the parties involved.

The Commission recommends that the following persons should be permitted to have access to the information contained in the adoption register:

³⁰¹ See, for instance, Geraldine van Bueren 'Children's access to adoption records - State discretion or an enforceable international right?' (1995) 58: 1 **Modern LR** 37.

- the adopted child from the date on which the child concerned reaches the age of 18 years;³⁰²
- the adoptive parent from the date on which the child concerned reaches the age of 18 years;
- the natural parent or a previous adoptive parent of the adoptive child, with the written consent of the adoptive parent(s) and of the adopted child, from the date on which the child concerned reaches the age of 18 years;
- subject to the conditions the Director-General: Social Development may prescribe, by any person for official and bona fide research purposes.³⁰³

The Commission further supports the present Regulation 28(3) in terms of which the Registrar of Adoptions may require an adoptive parent, a natural parent, a previous adoptive parent or a child who wishes to access the adoption records to receive counselling from a social worker designated by the Registrar before allowing that parent or child to inspect the record concerned or to obtain a copy thereof.

An alternative approach would be not to restrict access to information in the adoption register, unless it is in the best interests of the adoptive child concerned. This can be done without much difficulty by accessing the population register. However, the Commission wishes to point out that access to information should not be equated with unlimited contact with the child. In this regard, the Commission is of the view that the court must in certain circumstances prescribe or even prohibit contact with the child.

18.6.9 **Facilitating open adoptions**

³⁰² The new suggested age of majority; see 4.5 above.

³⁰³ These provisions are currently contained in Regulation 28.

It has long been accepted that it is highly desirable for adoptive children to be told at an early stage about their adoptive status and to be told in general terms some characteristics of their birth families and the circumstances of their adoption. It is therefore not surprising that one of the most distinctive features of recent thinking and practice in adoption is the view that adoption law should not facilitate deception or secrecy, but should promote honesty and openness. This mode of thinking developed from research into the long-term effects of adoption and the needs of consumers of adoption services. Research and experience show that openness is in the best interests of the child and should, therefore, be encouraged.

The Commission endorses the position that adoption placements should provide for openness. The issue for consideration here is therefore not whether there should be openness at all in adoption, but the extent to which ‘open adoption’ practices should be implemented in the legislation and the manner in which this should be done. This can include situations such as the following:³⁰⁴

- adoptive parents who recognise and are comfortable with the fact that the adopted child is also a member of his or her birth family and are able to discuss issues surrounding the adoption with the child;
- a simple exchange of information and photographs between the birth and the adoptive parents, that may or may not involve the child;
- the situation where the birth parents select the adoptive parents from agency profiles and have an initial meeting with them, which may or may not be followed by subsequent exchanges of information and photographs or actual contact;
- informing the birth parents if the child dies;

³⁰⁴

There is no universally accepted definition of open adoption. See further New South Wales Law Reform Commission **Discussion Paper 34: Review of the Adoption of Children Act 1965 (NSW)**, April 1994, par. 4.20.

- situations where a close relationship develops between birth families and the adoptive family.

Each of the situations above provides a snapshot of the way in which an open adoption arrangement may work at a particular time, rather than describing fixed categories of open adoption. The openness of an adoption may change and develop in accordance with the changing needs of the parties involved. Birth and adoptive families may change residences. Adoptees may feel the need for different levels of contact throughout their lives. Adoptive children who have experienced trauma before or during a separation from their birth family may need a period of attaching to their adoptive parents before they are able to benefit from contact with the birth parents. Children who are adopted when they are older may have quite different short and long-term needs with regard to contact, particularly if they have developed relationships with members of their extended birth family.

From the above it is clear that some degree of flexibility is needed in open adoption arrangements so that people can design an arrangement that they feel comfortable living with on a day-to-day basis. Allowing for flexibility also acknowledges that individual children will have differing needs at various times in their lives.

There are a number of legislative schemes for openness in adoption. The most notable of these is the scheme for negotiated adoption plans provided for in the Adoption Act, 1994 (Western Australia).³⁰⁵ This Act provides that an adoption plan is to be negotiated, if possible, between the birth parents who have consented to the adoption, the prospective adoptive parents, and if the Director-General believes it to be appropriate, a child's representative. The Act sets out some of the matters that may be provided for in the adoption plan but does not set out requirements as to content. Schedule 2, entitled 'rights and responsibilities to be balanced in adoption plans', sets out rights and responsibilities of adoptive parents, birth parents and the child, divided into the four stages of the

³⁰⁵ The Adoption Act 1994 (WA) implemented the recommendations of the Western Australian Adoption Legislative Review Committee's **Final Report: A New Approach to Adoption**, February 1991.

adoptee's life, namely: infancy, childhood, adolescence, and adulthood. Persons who negotiate an adoption plan are to have regard to these rights and responsibilities.

The Director-General is required to provide assistance and mediation services to persons in the process of negotiating an adoption plan. If the Director-General is of the opinion that no adoption plan can be agreed upon, he or she may allow further time for the selection of an adoptive parent or for the negotiation process, apply to the court for an order regarding any disputed matter that is preventing agreement to the adoption plan, place the child with other suitable prospective adoptive parents, or cause notice to be given that it is not possible or desirable to place the child for adoption.³⁰⁶

Several child welfare agencies in Illinois in the USA have systems for negotiation of open adoption agreements. Foster parents and birth parents, or any other relatives, meet with a representative of the agency that has responsibility for the child. If open adoption is agreed upon, the details are drafted into a written agreement. The agreement then covers aspects such as locations for future contact, the means and nature of correspondence and the involvement of the child welfare agency. All parties are informed that the agreement is subject to the needs of the child and should be altered in accordance with those changing needs. Adoptive parents, as the legal guardians and day-to-day carers of the child, are considered the appropriate parties to indicate that circumstances require a change to the original agreement. The agreement is negotiated prior to the completion of the adoption.

A Canadian review by a Special Committee recommended that the adoption legislation in Ontario be amended to allow rights of access to coexist with an adoption order, although not in relation to step-parent adoptions. The proposed amendment took the following form:³⁰⁷

³⁰⁶ Two points have emerged from the experience in Western Australia. First, the agreement will be more likely to succeed if it is one with which all parties are completely satisfied; secondly, parties must recognise the need for change over time: New South Wales Law Reform Commission **Report 81: Review of the Adoption of Children Act, 1965 (NSW)**, March 1997, par. 7.35.

³⁰⁷ M Bernstein, D Caldwell, G Bruce Clark and R Zisman 'Adoption with access or "open adoption"' (1992) 8 **Canadian Family Law Quarterly** 283 at 294.

The Court shall not make an order for contact ... unless the Court is satisfied that :

- (a) It is in the best interests of the child to be adopted and to maintain ties with members of his or her birth family.
- (b) Where there is a meaningful relationship between the child and the proposed contact person, and a disruption of that relationship is likely to be detrimental to the child. Regard should be given to the child's physical, mental and emotional development, and the child's views and preferences, where such can be ascertained.
- (c) Where there is a prospective adoptive family, the prospective adoptive parents consent to the contact order.
- (d) The proposed contact person accepts that the child will be adopted.
- (e) The contact person and the prospective adoptive parents, if any, are committed to placing the needs and the stability of the child as a first priority, and to making genuine efforts not to undermine the implementation of the contact order.

While the Commission recognises that there are a number of forceful arguments in favour of a legislative scheme for open adoption agreements, the Commission has concluded that these are overwhelmed by the undesirability of creating legally enforceable rights in the context of such family relationships. Therefore, **the Commission does not recommend that there be a legislative scheme for open adoption agreements. The Commission does, however, support a system of *voluntary* agreements as to openness in adoption.**

In this regard, the Commission wishes to point out that there are a number of practices which agencies can follow which have the potential of increasing the chances of a successful open adoption: These are as follows:

- allowing birth parents to participate in the selection of adoptive parents;
- encouraging adoptive parents and birth parents to meet prior to placement; and
- providing certain post-adoptive services.

Another factor, rather than a practice, which can affect the success of open adoption arrangements is the extent to which birth parents have made a fully informed decision to relinquish their child and have a realistic understanding of what adoption will mean for themselves and for the child.

18.6.10 **Adoption services**

In conclusion, the Commission recommends an end to the current situation in which provision for, and the regulation of, adoption services are fragmented between the Child Care Act and the Social Work Act.³⁰⁸ It is further recommended that all adoption services ultimately be provided by individuals and agencies accredited by the Department of Social Development for this purpose in terms of the new children's statute.³⁰⁹ It is recognised that an interim arrangement will be necessary to enable the Department of Social Development, child and family welfare organisations and accredited social workers to continue to deliver these services until a system of accreditation is fully operational. Regulations should cover the manner in which applications for accreditation may be made, refused or withdrawn; procedures for appeal and review; annual reporting obligations and so forth. Regulations must, in addition, provide for fee structures and mechanisms for fee payment in respect of adoption services which are designed to preserve the impartiality of the relevant assessment and decision-making processes. Hence there must be no direct payment by any interested party in an adoption application to the social worker dealing with the matter or any person who is in a position to influence the outcome of the process, and no direct or indirect financial incentive for an adoption social worker to recommend adoption by a specific applicant, or to pursue adoption of a child in preference to another appropriate solution. Reimbursement of social workers in private practice, medical practitioners or other service providers should therefore be undertaken through contracting of their services to the Department of Social Development or an accredited agency, or through a centralised fund.

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³⁰⁸ See, for instance, the Regulations relating to the Registration of a Speciality in Adoption Work issued in terms of section 28 of the Social Work Act, 1978, and published in Government Gazette No. 19930 of 16 April 1999.

³⁰⁹ See also the letter with enclosures of the Children's Placement Centre dated 6 June 2001 in which changes to the present system of accreditation for social workers doing adoption work are suggested.