

[Act 2000 No 75]



New South Wales

Adoption Bill 2000

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

This Bill repeals and replaces the *Adoption of Children Act 1965* and the *Adoption Information Act 1990*. The Bill gives effect in general to the principal recommendations of the New South Wales Law Reform Commission in its Report No 81 entitled *Review of the Adoption of Children Act 1965 (NSW)*. The objects of this Bill are, in particular:

- (a) to emphasise that the paramount consideration in adoption law and practice is to act in the best interests of the child concerned,
- (b) to make it clear that adoption is to be regarded as a service for the child concerned,
- (c) to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage,
- (d) to recognise the changing nature of practices of adoption,

* Amended in committee—see table at end of volume.

- (e) to ensure that equivalent safeguards and standards apply to children adopted from overseas to those that apply to children from New South Wales,
- (f) to ensure that adoption law and practice complies with Australia's obligations under treaties and other international agreements,
- (g) to encourage openness in adoption,
- (h) to allow access to certain information relating to adoptions,
- (i) to provide for the giving in certain circumstances of post-adoption financial and other assistance to adopted children and their birth and adoptive parents.

For the purposes of comparison, a number of clauses contain bracketed notes in headings, drawing attention ("cf") to equivalent or comparable (though not necessarily identical) provisions of Acts and other laws. Abbreviations in the notes include:

AC Act: Adoption of Children Act 1965
AC Reg: Adoption of Children Regulation 1995
AI Act: Adoption Information Act 1990
AI Reg: Adoption Information Regulation 1996.

Outline of provisions

Chapter 1 Preliminary

Chapter 1 contains clauses 1–5. It sets out the name of the proposed Act, provides for its commencement on a day or days to be appointed by proclamation, provides for the definition of certain words and expressions used in the proposed Act to have the meanings given in the Dictionary at the end of the proposed Act, defines "Aboriginal" and "Torres Strait Islander" for the purposes of the proposed Act and provides that explanatory notes in the proposed Act do not form part of the Act.

Chapter 2 Objects and adoption principles

Chapter 2 contains clauses 6–9. It sets out the key objects of the proposed Act and the adoption principles that should guide the Supreme Court, the Director-General of the Department of Community Services and other persons and bodies in making decisions about the adoption of a child and administering the proposed Act. The principles stated recognise the importance of having regard to needs of the child, including taking into account the ascertainable wishes of the child and the child's cultural heritage or aboriginality. It also establishes the principle that a child should be able to participate in decisions made under the proposed Act that will have a significant impact on the child's life.

Chapter 3 Adoption service providers

Chapter 3 contains clauses 10–21. It makes the Director-General of the Department of Community Services responsible for the provision of adoption services (as defined in the Dictionary) and for the accreditation of organisations as adoption agencies that may provide adoption services. The adoption services concerned include services relating to the intercountry adoption of children. The Chapter makes it an offence for a person other than the Director-General or an accredited adoption agency to provide such services. It also makes provision for the procedures for accrediting, and requirements for accreditation of, adoption agencies, including provision for the imposition of conditions on the accreditation, notice requirements and the appointment of principal officers to act on behalf of the agencies. It specifically imposes a condition on the accreditation of agencies in relation to the intercountry adoption of children to prevent them from being involved in fund raising, sponsorship or the sending of aid to countries with which they have intercountry adoption programs.

Charitable organisations that are private adoption agencies under the *Adoption of Children Act 1965* on the commencement of the proposed Act will automatically be accredited for 12 months for the purposes of the proposed Act (see clause 3 of Schedule 3 to the Bill). The organisations that are currently private adoption agencies include Centrecare Catholic Community Services, Anglican Adoption Agency and Barnados Australia.

Chapter 4 The adoption process

Chapter 4 contains clauses 22–101. It covers each aspect of the process by which a child is adopted.

Part 1 General

Part 1 contains clauses 22–31. It confers jurisdiction on the Supreme Court (*the Court*) to hear and determine proceedings for the making of adoption orders and to make other orders under the proposed Act. The Part describes the children who may be adopted and the persons who may adopt them and sets out the consent and other requirements that must be satisfied before the Court can make an adoption order in favour of one person, a couple, a relative or a step parent, or for the adoption of a non-citizen child.

It confers power on the Court to make an order for the adoption of a child who is present in New South Wales in favour of one person, or a couple, who are resident or domiciled in the State (clause 23). For the purposes of the proposed Act, a couple includes a man and woman who are married or who have a de facto relationship and Aboriginal and Torres Strait Islanders who are living in relationships recognised as marriages by their respective communities.

An adoption order can be made in relation to a child who is less than 18 years of age, or a child who is 18 or more years of age, when the application for the adoption order is made. A child who is 18 or more years of age may be adopted only if the child has been cared for by the applicant or applicants for the adoption order for a period of 5 years in total before the application is made or has been in the care or custody of the applicants as a ward.

Part 2 Placement of children for adoption

Part 2 contains of clauses 32–40. It sets out principles that are to be applied in placing children for adoption. It ensures that in placing a child other than an Aboriginal or Torres Strait Islander child the culture, disability, language, religion and sexuality of the child will be taken into account and provides that the child's given name, identity, language, cultural and religious ties should, as far as possible, be preserved (clause 32). Provision is made to ensure that Aboriginal and Torres Strait Islanders are able to participate in decisions about the placement for adoption of Aboriginal and Torres Strait Islander children (clauses 33 and 37, respectively). The Part also establishes principles to be followed in placing such children (clauses 35 and 39). The Aboriginal child placement principles provide that an Aboriginal child should if possible be placed with a prospective adoptive parent or parents from the same Aboriginal community as the child's birth parents or another Aboriginal community. An Aboriginal child is to be placed with a non-Aboriginal only if the person has the capacity, and is able and willing to maintain, the child's heritage. An Aboriginal child is not to be placed unless the principle is properly applied and the applicant has the capacity, and is able to maintain, the child's cultural identity and heritage. The Torres Strait Islander child placement principles (clause 39) make similar provision in relation to Torres Strait Islander children. It also provides for the Director-General to make certain reports before a child from New South Wales is placed for adoption in another country (clause 40).

Part 3 Selection of prospective adoptive parents

Part 3 contains clauses 41–45. It provides for the Director-General and principal officers of accredited adoption agencies to assess the suitability of, and select, prospective adoptive parents of a child, other than step parents or relatives, who have expressed an interest in adopting a child.

Part 4 Adoption plans

Part 4 contains clauses 46–51. It provides for two or more parties to the adoption of a child to agree to an adoption plan before an order is made for the adoption of the child. An adoption plan can contain provision for such matters as exchange of information between the parties about a child's development and important events in the child's life, the means and nature of continuing contact between the parties and ways to foster the child's cultural identity. The Court is required to take any adoption plan into account in making an adoption order (clause 90). The parties may register an adoption plan (clause 50). If they do so it has effect as if it were part of the adoption order.

Part 5 Consents to adoptions

Part 5 contains clauses 52–74. It sets out the consents that are required before an order can be made for the adoption of a child. The consent of the parents or guardians of a child who is less than 18 years of age and of the child must (except in specified circumstances) be obtained before the making of an adoption order (clauses 52, 54, 55 and 56).

The Part describes the ways consent can be given, when it can be given, the form it is to take, the need for it to be appropriately witnessed and the requirements that must be met for it to be effective (clauses 53 and 57–65). Provision is made to require a person to be given mandatory written information, and to be counselled, before giving consent (clauses 59 and 63). It includes certain additional requirements for consent to the adoption of Aboriginal and Torres Strait Islander children is to be effective.

The Part enables the Court to by order (a *consent dispense order*) dispense with the requirement for the consent of a person other than the child or of the child in specified circumstances (clauses 67 and 69, respectively). Provision is made for the giving of notice of consent dispense orders and for their revocation.

The Part also provides for the revocation of consents (clauses 73 and 74).

Part 6 Guardianship of children awaiting adoption

Part 6 contains clauses 75—79. It provides for the Director-General to be the guardian of citizen children in the period between the giving of consent to adoption (or the dispensing of consent) and the making of the adoption order or taking of certain other action in relation to the child (clause 75) and for the Director-General to be the guardian of non-citizen children who are awaiting adoption in certain circumstances (clause 77). It enables the Director-General to renounce guardianship in certain circumstances if the child leaves New South Wales (clause 76). The Director-General is required to report to the Court if the Director-General remains guardian of the child for a year or more (clause 78). The Director-General's guardianship ceases on the making of an adoption order or happening of certain other events (for example, revocation of consent to the adoption or the placing of the child in the care of another person) (clause 79).

Part 7 Preliminary hearings

Part 7 contains clauses 80–83. It enables a preliminary hearing to be held with respect to certain matters that are prescribed by the regulations before a full hearing for an order for adoption or before an Aboriginal or Torres Strait Islander child is placed for adoption.

Part 8 Interim orders

Part 8 contains clauses 84–86. It enables the Court to postpone the determination of an application for an adoption order and to make interim orders concerning the care of the child concerned. The duration of interim orders is limited to a period in total of 2 years. The Part also provides for the discharge of interim orders.

Part 9 Adoption orders

Part 9 contains clauses 87–91. It sets out the prerequisites to the making of an adoption order by the Court. An order cannot be made unless the application for it was made with the consent of the Director-General, on behalf of the applicant or applicants by the Director-General or a principal officer of an accredited adoption agency, by a step parent or relative of the child or by a child who is more than 18 years of age, and notice was given of its making. Before making the order, the Court is required to be satisfied as to specified matters, including that the best interests of the child will be promoted and that the wishes and feelings of the child have so far as possible been considered. The Part also requires the making of certain reports to the Court before an adoption order in relation to a child who is less than 18 years of age may be made.

Part 10 Procedures after application dealt with

Part 10 contains clauses 92–94. It enables the Court to make orders for the care of a child when it refuses an application for an adoption order and for the discharge of adoption orders.

Part 11 Effect of adoption orders

Part 11 contains clauses 95–101. It describes the general effect of the making of an adoption order and the legal status of the adopted child and parents (clause 95). It also describes its effect on the existing guardianship and any previous adoption of the child concerned, property rights and dispositions of property and on the relationship of the adopted child to other children of the adoptive parent or parents (clauses 96–99). It describes the liability of trustees and personal representatives in relation to adopted persons (clause 100).

The Part also provides for the Court to specify the names by which a child is to be known after the making of an adoption order when making the order. The Court is required to take into account the wishes of the child in this respect. The Court is not to approve a change in a given name of a child who is more than one year old or a non-citizen child except in specified circumstances (clause 101).

Chapter 5 Recognition of adoptions

Chapter 5 contains clauses 102–117. It provides for the recognition of adoptions in places outside New South Wales.

Part 1 provides for the automatic recognition of adoptions in other States and Territories.

The *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* and the *Family Law (Bilateral Arrangements–Intercountry Adoption) Regulations 1998* of the Commonwealth provide for the recognition throughout Australia of adoptions:

- (a) in countries mentioned in Schedule 2 to the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (a copy of which is set out in Schedule 1 to the Bill) or in certain other countries in which the Convention is in force, and
- (b) in the People’s Republic of China and in certain other countries (being prescribed overseas jurisdictions within the meaning of the *Family Law (Bilateral Arrangements–Intercountry Adoption) Regulations 1998*),

and for intercountry adoptions between Australia and those countries.

The Commonwealth Regulations preserve the application of provisions of State law that have effect, or comparable effect, to the Commonwealth. Part 2 (other than Division 4) enacts such State provisions. Adoptions overseas in accordance with the laws of the countries concerned will in general be automatically recognised. Provision is also made for a child from New South Wales to be adopted in this State by an adoptive parent or parents from a country described in paragraph (a) if the Court is satisfied as to certain specified matters (clause 106) and for adoptive parents in New South Wales to adopt a child from overseas (clause 107).

Division 4 (clauses 116 and 117) provides for the recognition of certain adoptions in other overseas countries by parents who have been resident in those countries for 12 months or more or who were domiciled in those countries.

Chapter 6 Proceedings

Chapter 6 contains clauses 118–129. The Chapter specifies the procedures that are to be followed in proceedings before the Court under the proposed Act. It enables the Court to permit persons (including, in certain circumstances, the birth father) to appear or be joined as parties to the proceedings for an adoption order and for the Director-General to appear in proceedings. Court hearings under the proposed Act will generally be heard in closed court. The Chapter provides for the attendance of persons in proceedings for an adoption order, rights of appearance and legal

representation, the appointment of guardians ad litem and the right to be accompanied by support persons. It enables the Court to take into account matters whether or not they would be admissible as evidence. The Chapter also requires the Court to take into account the wishes of the child and sets out the ways in which the Court can inform itself as to the wishes of the child.

Chapter 7 Records of adoptions

Chapter 7 contains clauses 130–132. It provides for the recording of adoption orders and various other orders for the purposes of the proposed Act.

Chapter 8 Adoption information

Chapter 8 contains clauses 133–175. The Chapter incorporates (generally without substantive change) the provisions of the *Adoption Information Act 1990* (the **1990 Act**) that are to be repealed by the proposed Act. It contains provisions that:

- (a) give adult adopted persons access to information concerning their origins, and
- (b) give the birth parents and adoptive parents of adult adopted persons access to information concerning their children, and
- (c) preserve controls adoptive parents have over the access of adopted children to information concerning their origins while recognising the paramount interests of adopted children, and
- (d) give the relatives of adopted persons, birth parents and other persons access to information concerning adopted persons' origins in special circumstances, and
- (e) protect the privacy of adopted persons and birth parents through a system of vetoes against contact with persons identified through access to information concerning persons adopted before the date of assent to the 1990 Act, and
- (f) limit the disclosure of information concerning the personal affairs of persons that might unduly intrude on their privacy, and
- (g) retain the Reunion and Information Register which facilitates reunions between adopted persons, birth parents and other persons (if desired by the persons concerned) and facilitates exchange of messages between persons concerned in or affected by an adoption.

Under the 1990 Act two main categories of information are recognised—birth certificates and prescribed information. It requires a person in most instances to obtain a birth certificate before being entitled to access information because contact vetoes are to be endorsed on the certificate. Chapter 8 of this Bill enables a person to instead obtain an authority to supply adoption information from the

Director-General. Such an authority will also be endorsed with a contact veto if one has been lodged. This change recognises the need to enable the parties to intercountry adoptions (who may not have access to a birth certificate) to be able to obtain adoption information.

Chapter 8 also expands the applications for personal information that could be the subject of an advance notice request under the 1990 Act to include application for authorities to supply adoption information.

Chapter 8 also provides for a person to enter his or her name on the Reunion and Information Register with a view to another person being contacted to obtain information about the person's health or welfare.

Some of the incorporated provisions of the 1990 Act (for example, sections 4 (Definitions), 28 (Veto on contact-offences) and 36 (Appeals to Community Services Appeals Tribunal)) are located in other Chapters of this Bill. Section 28 has been modified to make it an offence to contact a person by use of an authority to supply adoption information endorsed with a contact veto and to make it clear that it is only an offence to use adoption information in respect of which a contact veto is lodged to contact a person if the information is obtained after lodgment of the contact veto (see clause 188).

Chapter 9 Offences

Chapter 9 contains clauses 176–188. It creates offences relating to:

- payments in consideration of or in relation to an adoption or provision of an adoption service
- prohibited forms of advertising relating to the adoption of a child
- making available or supplying prohibited adoption advertising on an on-line service
- publishing without authority the names of parties to an adoption
- making false statements in applications and other documents under the proposed Act
- impersonating certain persons
- presenting a forged consent or other document or one with a signature or certification obtained by fraud or duress to the Court
- using force or threats to induce or influence parties to an adoption to offer a child for adoption or to give or revoke consent to an adoption
- improperly witnessing a consent

- an applicant for an adoption order contacting a birth parent before a child is allocated
- contacting or attempt to contact a person contrary to a contact veto and using information supplied under the proposed Act to intimidate or harass a person who lodged a contact veto.

Chapter 10 Review of decisions

Chapter 10 contains clauses 189–193. It provides for the review of certain decisions of the Director-General and other relevant decision makers under the proposed Act. It also enables the Administrative Decisions Tribunal to review some of those decisions following such an internal review.

Chapter 11 Miscellaneous

Chapter 11 contains clauses 194–213. It makes provision for various matters relating to the administration and enforcement of the proposed Act. It includes provisions restricting access to certain records and provisions providing for the approval of Aboriginal and Torres Strait Islander adoption consultative organisations, the giving of notice under the Act, the representation of disabled persons for the purposes of applications under the Act, the imposition of fees and charges and the liability of trustees.

It also repeals the *Adoption of Children Act 1965* and the *Adoption Information Act 1990* and the regulations made under those Acts and requires the Minister to review the proposed Act as soon as possible after the period of 5 years from the date of assent to the Act and to table a report of the review in Parliament.

Schedule 1 Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

Schedule 1 contains a copy of the text of the Convention as set out in the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998* of the Commonwealth. The Convention was ratified by Australia on 25 August 1998 and entered into force for Australia on 1 December 1998.

Schedule 2 Amendment of other laws

Schedule 2 makes consequential amendments to a number of Acts and a regulation.

Amendments to the *Birth, Deaths and Marriages Registration Act 1995* enable an adoptive parent of a child to register a note of the intention of another person to adopt the child jointly with the adoptive parent if the other person dies after the making of an application to adopt but before an adoption order is made. Provision is also made to enable the Registrar to issue one certificate (an *adopted person's birth record*) containing information currently supplied separately on original and amended birth certificates if the person is 18 or more years of age or before the person reaches 18 with the approval of the Director-General.

Schedule 3 Savings, transitional and other provisions

Schedule 3 enacts savings, transitional and other provisions.

Dictionary

The Dictionary defines words and expressions used in the Act.