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Adoptions Taskforce
Community Services Directorate, Human Services Policy
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By email: adoptionstaskforce@act.gov.au

**Review of the domestic adoption process in the ACT (Final Report), Recommendation 3 –
Adoption Act 1993 - proposed reform of dispensation of consent provisions**

Relationships Australia (National Office) thanks the Adoptions Taskforce for the opportunity to comment on proposed reform of dispensation of consent provisions in the *Adoption Act 1993* (the Act) and, in particular, to respond to the Discussion Paper released on 19 December 2018.

The work of Relationships Australia

Relationships Australia is a federation of community-based, not-for-profit organisations with no religious affiliations. Our services are for all members of the community, regardless of religious belief, age, gender, sexual orientation, lifestyle choice, cultural background or economic circumstances.

Relationships Australia provides a range of family services to Australian families, including counselling, dispute resolution, children's services, services for victims and perpetrators of family violence, and relationship and professional education. We aim to support all people in Australia to live with positive and respectful relationships, and believe that people have the capacity to change how they relate to others.

Relationships Australia has provided family relationships services for 70 years. Relationships Australia State and Territory organisations, along with our consortium partners, operate around one third of the 66 Family Relationship Centres (FRCs) across the country. In addition, Relationships Australia Queensland operates the national Family Relationships Advice Line and the Telephone Dispute Resolution Service.

The core of our work is relationships – through our programs we work with people to enhance and improve relationships in the family, whether or not the family is together, with friends and colleagues, and within communities. Relationships Australia believes that violence, coercion, control and inequality are unacceptable.

We respect the rights of all people, in all their diversity, to live life fully within their families and communities with dignity and safety, and to enjoy healthy relationships. These principles underpin our work.

Relationships Australia is committed to:

- Working in rural and remote areas, recognising that there are fewer resources available to people in these areas, and that they live with pressures, complexities and uncertainties not experienced by those living in cities and regional centres.
- Collaboration. We work collectively with local and peak body organisations to deliver a spectrum of prevention, early and tertiary intervention programs with elders, men, women, young people and children. We recognise that often a complex suite of supports (for example, drug and alcohol services, family support programs, mental health services, gambling services, and public housing) is needed by people affected by family violence and other complexities in relationships.
- Enriching family relationships, including providing support to parents, and encouraging good and respectful communication.
- Ensuring that social and financial disadvantage is not a barrier to accessing services.
- Contributing its practice evidence and skills to research projects, to the development of public policy and to the provision of effective supports to families.

This submission draws upon:

- our experience in delivering programs in a range of communities, including culturally and linguistically diverse, Aboriginal and Torres Strait Islander people, people who identify as part of the LGBTIQ community, and adoption, post-adoption and forced adoption support services
- evidence-based programs and research, and
- our leadership and policy development experience.

Current legislative arrangements

The *Adoption Act 1993* (ACT) provides that adoption of a child can occur only if each person with parental responsibility for the child gives informed and voluntary consent (Division 3.3, Part 3 of the Act). That consent can be revoked: s 31, and the court may refuse to make an adoption order if it finds that a purported consent is defective: s 34. These provisions reflect the gravity of adoption orders. Section 35 allows the court to dispense with the requirement of consent by each person with parental responsibility for the child. This can occur only if the court is satisfied of one (or more) of the matters listed in section 35. With the exception of paragraph 35(1)(e), these matters relate to the conduct and/or circumstances of a person whose consent would otherwise be required.

Impetus for reform

Relationships Australia acknowledges that the Act needs to be modernised, to better reflect and accommodate:

- contemporary recognition of children as rights-bearers
- the evolving nature and composition of Australian families
- evolving domestic and international adoption practices
- emerging complex needs of Australian families
- contemporary understanding of family dynamics, including unhealthy and unsafe dynamics arising from family violence, as now understood
- contemporary awareness of the nature and effects of trauma (including intergenerational trauma) on children and their families
- enhanced and emerging recognition of the rights of people with disability, and
- lessons from inquiries into the experiences of cohorts such as the Stolen Generation, the Forgotten Australians, and those affected by forced adoption policies.

Relationships Australia further acknowledges that

the absence of guidance for the [Supreme] court and the existing structure of provisions for dispensing with consent make it difficult to incorporate the best interests considerations, particularly when the provisions are primarily directed at the conduct of adults.¹

The principal concerns underlying recommendation 3 of the Final Report appear to be that:

- the legislative arrangements for child protection and for adoption do not align and that this has led to inconsistent interpretation and application of the Adoption Act
- individual judges in the ACT Supreme Court take differing approaches in deciding whether the requirements of section 35 have been met, and
- section 35, which focuses on matters related to the conduct and/or circumstances of adults, does not adequately accommodate or support consideration of children's best interests.² Rather, the structure of section 35 accommodates consideration of a child's 'best interests' only impliedly, through the 'catch all' of paragraph 35(1)(e). This impairs certainty of application of the Act and, arguably, undermines the paramountcy of children's best interests.

¹ Discussion Paper, 5.

² As required by both the public international law of human rights and domestic law – including section 5 of the Act.

The Convention on the Rights of the Child

The status of the Australian Capital Territory as a human rights jurisdiction reinforces the need to consider international human rights instruments as a touchpoint in law reform discussions.

It is well-settled that

Children's rights are indivisible, and the Convention [on the Rights of the Child] should be interpreted in a holistic way, meaning that [a] right should not be seen separately or in isolation from each other. (K Sandberg, 2018).³

It is, therefore, inappropriate to conceptualise various rights recognised in the Convention as existing in a hierarchy or in competition with each other.

Convention rights that are engaged in considering the dispensation of consent provisions in the Act include:

- Article 3(1) – a child's best interests are a primary consideration
- Article 6(2) – the rights to survival and development
- Article 8 – the right to identity (including nationality, name and family relations)
- Article 12 – the right to be heard
- Article 16 – the right to private life (including freedom from arbitrary or unlawful interference with privacy, family and home), and
- Article 24 – the right to health.⁴

Dispensation of consent could, foreseeably, infringe each of these Articles, and must be approached with a level of caution commensurate with the importance of the interests they reflect. More broadly, the impact of adoption on a child's rights and interests could not be more pervasive or enduring. It is therefore appropriate that adoption remain highly regulated, and that reforms be solidly grounded in the paramountcy of the best interests of children.

Need for children's independent advocate

It is anachronistic that children and young people do not, as a matter of course, have access to an independent advocate in adoption matters. In this connection, we draw attention to:

- the contemporary recognition of children as rights bearers (see, in particular, Article 12 of the Convention on the Rights of the Child), and
- the gravity of adoption decisions, and their pervasive and long-term impacts.

³ Kirsten Sandberg is a member and former chair of the UN Committee on the Rights of the Child.

⁴ Relationships Australia acknowledges the relevance of other international instruments in this context, as noted in the Discussion Paper.

Relationships Australia would support legislation requiring that a children's advocate be appointed in all adoption matters coming before the Supreme Court of the Australian Capital Territory.

Legal Aid Commissions often make their staff available to be appointed as Independent Children's Lawyers under section 68L of the *Family Law Act 1975* (Cth). The ACT Legal Aid Commission could well be a source of independent advocates for adoption matters. That might require some additional resourcing for the Commission but, given the low number of cases involved, this would not be significant - particularly relative to the importance of hearing children's voices in matters affecting them.

Such a mechanism would be consistent with the proposals made by the Australian Law Reform Commission (ALRC) in its Discussion Paper 86 on the Review of the Family Law System, released in October 2018 (its Final Report will be published in March 2019). The ALRC noted the importance of hearing children's voices in all family law proceedings involving a child. As noted in Relationships Australia's submission responding to Discussion Paper 86, we support the appointment of children's advocates in all court proceedings affecting children, and note extensive evidence that children want to be heard, involved and informed, as age-appropriate.

Reform proposal

Section 35 could be amended along the following lines:

35(1) On application, the court may, by order, dispense with the requirement for consent of a person to the adoption of a child or young person only if the court is satisfied that:

- (a) it is in the best interests of the child or young person to do so
- (b) the person cannot, after reasonable inquiry, be identified or located, or
- (c) the person does not have the capacity to make decisions about the child's best interests.

(2) For the purposes of paragraph (1)(a), the court must take into account:

- (a) the person's compliance, or non-compliance, with any court orders affecting the child, and
- (b) whether the person has been convicted of neglect or abuse of any child.

(3) For the avoidance of doubt, the court cannot be satisfied that paragraph (1)(c) applies if, with support, the person could make decisions about the child's best interests.

(4) The court must inform itself as to the child's best interests by receiving submissions from a children's advocate, appointed for the purposes of this Act.

If the Legislative Assembly were minded to be more prescriptive, it could consider amending the Act to either require or expressly invite the Court to consider the matters listed at p 12 of the Discussion Paper. Otherwise, simplification along these lines would overcome the problem, noted at p 15 of the Discussion Paper, that section 35, as currently formulated, hinders the application of the best interests of the child as the paramount consideration.

Relationships Australia notes the current reliance on advice from the ACT Government Solicitor as to what is meant by 'reasonable inquiry'. It may be preferable to legislate explicitly to define 'reasonable inquiry', as has been done in other jurisdictions. Consideration should also be given to whether other kinds of searches (beyond referred to at p 9 of the Discussion Paper) should also be required (eg of social media).

Relationships Australia considers that the existing reference to the 'physical or mental condition of the person' is out of step with contemporary recognition of the rights and capacities of persons with disability, and the value of supported (not substitute) decision-making in protecting those rights.⁵ In light of greater recognition of the potential of people with disability to be involved in making decisions affecting their children, physical or mental impairments are less likely to withstand scrutiny as a basis for dispensing with consent requirements of the kind contemplated by the Act. Relationships Australia notes the observation that

...the Court has noted its discomfort with the incompatibility of the provision with contemporary understanding of disability and mental health.⁶

Consultation and timing

Relationships Australia notes the timeline that has preceded release of the Discussion Paper:

- a motion in the ACT Legislative Assembly - August 2016
- a Final Report into the *Review of the domestic adoption process in the ACT* – March 2017
- establishment of a working group to explore recommendations 3 and 6 - 2018
- commencement of the consultation on the Discussion Paper – 19 December 2018
- final date for submissions – 28 February 2019.

The timing (over the Christmas break/school holidays) and brevity of the consultation period are incongruous, and do not reflect the importance of the matters under consideration.

Relationships Australia notes the lengthy period that preceded commencement of the consultation period, and the importance of the matters under consideration. Relationships Australia further notes that the Discussion Paper seeks views of people with lived experience, who may not be in a position (or, understandably, disposed) to prepare a submission over the Christmas break/school holidays. We would urge the Taskforce to seek from the responsible Ministers an extension of the consultation period.

Concluding remarks

Thank you again for the opportunity to respond to the Discussion Paper. Should you require any clarification of any aspect of this submission, or need information on the services that

⁵ See, for example, Report 124 of the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Chapter 4. See also Article 12 of the United Nations Convention on the Rights of Persons with a Disability.

⁶ Discussion Paper, 10.

Relationships Australia provides, please contact me or Dr Susan Cochrane, National Policy Manager, Family Law, Relationships Australia.

Yours sincerely,

A handwritten signature in black ink that reads "P Mance," with a large, stylized initial "P" and a comma at the end.

Paula Mance
Acting National Executive Officer