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Tuesday, 24 March 2015

Associate Professor Lorna Hallahan  
C/ - Adoption Act Review Secretariat  
The Department for Education and Child Development  
Level 17, 31 Flinders Street  
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Dear Associate Professor Hallahan

### **SUBMISSION TO THE REVIEW OF THE SOUTH AUSTRALIAN ADOPTION ACT**

We are grateful for the opportunity to make this submission to the Adoption Act Review.

We note the terms of reference cover a number of important issues. Our submission is restricted to your consideration of whether or not the *Adoption Act 1988* (SA) ('the Act') should be amended to allow for the discharge of adoption orders in certain circumstances.

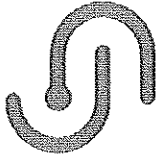
Our recommendation is that the Act should be amended to allow for the discharge of adoption orders in a wider range of circumstances. We believe it is particularly important that people who have been abused by adopters be allowed to make an application to discharge their adoption orders.

#### **Recent JusticeNet Examples**

We note from the background information to your terms of reference that the State Government is approached by a small number of people each year wishing to discharge their adoption orders. The majority of these people are adopted by a step-father and allege either abuse by their step-father towards them or their mother. The other significant group are those who were adopted as infants and allege abuse or neglect by their adoptive parents. This is consistent with the applications we have received at JusticeNet in relation to this issue. Recent examples include:

##### **Example 1**

The Applicant woman was adopted in South Australia in 1977. As a child she was repeatedly and severely abused by her adoptive parents and was removed from their care at the age of 14. She suffered further abuse while in State care. She does not recognise the people who adopted her as her parents and wishes to have the adoption order discharged.



The Applicant recently gave evidence at the Royal Commission into Institutional Responses to Child Sex Abuse. A Commissioner encouraged her to look into discharging the adoption order as a way of helping the healing process.

### **Example 2**

The female Applicant was adopted by her step-father. The relationship between her mother and step-father broke down and her mother moved out of the family home leaving the Applicant in the care of her step-father. The Applicant alleges she was abused by her step-father over a number of years. She does not consider her step-father to be her father and wishes to discharge the adoption order.

### **Current South Australian Law**

As you are aware the grounds on which an adoption order can be discharged in South Australia are very limited. Section 14 of the Act limits the grounds to 'fraud, duress or other improper means'. Case law in relation to section 14 has interpreted this section to mean that an application for the discharge of an adoption order is limited to the process of making adoption orders and not subsequent events. This means that, as it stands, it is not possible to discharge a South Australian adoption order where there has been abuse by an adoptive parent.

### **Discharging an Adoption Order in Other Australian Jurisdictions**

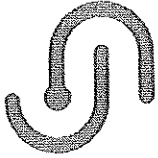
Many other jurisdictions within Australia have legislation allowing a court to discharge an adoption order for 'exceptional reasons' or words to that effect. Your terms of reference provide a brief account of the situation across Australia so we will not set out the specific legislation in other jurisdictions.

There has been little judicial interpretation in other jurisdictions on what constitutes an exceptional reason. The leading case on the issue is the New South Wales case of *Re Susan* [2009] NSWSC 592. In that case the 55 year old female plaintiff was successful in discharging an adoption order for repeated sexual abuse by her adoptive father.

In *Re Susan*, the Supreme Court of NSW felt that when determining if sexual abuse by an adoptive father satisfied the threshold of an exceptional reason under s93(4)(b) of the *Adoption Act 2000* (NSW), consideration should be given to whether the revoking of the adoption order would go some way to healing the injury that was caused as a result of the court made adoption. Justice Palmer found it was '*unreal to suppose that the trauma...suffered will be wiped away completely by revocation of her adoption*'.<sup>1</sup> However, he was satisfied in *Re Susan* that she met the threshold test of an exceptional reason as the revocation would go some way towards her healing.

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<sup>1</sup> *Re Susan*, [92]



## Law Reform

It is our view that the Act and in particular section 14 of the Act, should be amended to allow for the discharge of an adoption order for reasons other than that it was obtained by fraud, duress or other improper means.

Specifically, our recommendation is that the Act allow for the discharge of adoption orders where there is an 'exceptional reason'. While the Act could be amended in a number of ways, we refer you to the *Adoption Act 2000* (NSW) (Appendix A) for a good example of how this test has been included.

We also recommend that consideration be given to amending the principles which are applied when making decisions about adoption, contained in section 7(a) of the Act. This section currently requires that the welfare of the child be the paramount consideration. We believe this should be extended to include not just the child in childhood, but also in later life. We believe it is important for decision makers to consider the impact of an adoption order on a person not just during their childhood, but also when they are older. This approach has been taken in other jurisdictions including New South Wales. See section 8(1)(a) of the *Adoption Act 2000* (NSW) (Appendix B).

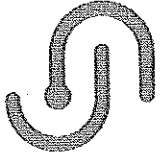
In order to ensure that an application to discharge an order is not made for improper purposes, we recommend the Act makes it clear that an application can only be brought if the welfare of the child is affected. See section 93(5) of the *Adoption Act 2000* NSW (Appendix A). This would for example, ensure that a person did not apply to discharge an adoption order for the purpose of pursuing an inheritance claim against a wealthy biological parent.

We do not support the inclusion in the Act of an exhaustive list of what constitutes an exceptional circumstance. We are however, particularly concerned that victims of abuse by adopters are given the opportunity to make an application to discharge their adoption order where there is evidence that the revocation would go some way to healing the injury caused by the adoption.

Your terms of reference set out a number of concerns in relation to widening the grounds for discharging adoption orders. We will deal with each of those concerns below.

### a) Adoptive and Biological families

In your terms of reference you raise a concern that there may be an equity issue if it becomes possible to discharge an adoption order. This is because the intent of the law is to equate, in legal terms adoptive families with families into which children are born.



While this is the intention of an adoption order, the relationship which exists between parents and children born into a family and children who are adopted is inherently different. This is because the adoptive relationship is a legal construct only. Children who are born into families not only have a legal connection but a further biological connection which cannot be undone. Due to this intrinsic difference in relationship, what the law can do for each is different, while preserving the intent to treat adoptive families and families into which children are born, equally.

Justice Palmer noted in *Re Susan*, that in NSW when a biological parent is found to have sexually abused his or her child, the child may be removed permanently from their care and, in some cases, placed for adoption,<sup>2</sup> therefore removing all legal ties to the biological parent(s). In South Australia it is possible for a court to make an order placing a child in the care of the Minister or other appropriate person until they are 18 years old. These are just two examples of how the law does all it can to put the welfare of children first.

In our view, there is a current equity issue as the law is not doing all it can to assist people who have been adopted to revoke the relationship with adopters in appropriate circumstances. This is particularly so where there has been abuse and the revocation of the order would go some way towards healing.

As the adoptive relationship is created by law only, there is the potential for the law to undo this relationship. As Justice Palmer noted in *Re Susan*, *'If sexual abuse can justify the severance in law of the biological relationship between the birth parent and child, how much more so does sexual abuse justify the severance of a parental relationship created by judicial act. What the court has done, the court can always undo'*.<sup>3</sup>

We do not believe the underlying presumption that adoption is a permanent arrangement is undermined by allowing for the order to be discharged in exceptional circumstances. This test creates a high threshold which ensures that adoption orders are not discharged on a regular basis. Rather, the court must be satisfied that the making of the order would promote the best interests of the adopted child. This is, in our view, consistent with the underlying principle of your review which is also contained in section 7(a) of the Act namely, that the welfare of the child must be the paramount consideration.

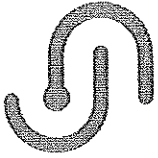
#### **b) Consequences of Discharging an Adoption Order**

In your terms of reference you pose a number of practical questions about how the legislation would operate. In particular you asked the following:

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<sup>2</sup> *Re Susan* [86]

<sup>3</sup> *Re Susan* [86]



- If the adoption order was discharged, what might be the status of the adopted person's legal parentage and how would the court address this?
- If the adopted person is legally severed from their adoptive parents, who would then become their parents?
- How would the birth parents be involved in this? What would the remedy be if the birth parent was opposed to becoming again the legal parent of their child?

In relation to the first two points above, the Act could be amended to make it clear that where an adoption order is discharged the rights, privileges, liabilities and relationships of the child and all other persons are to be the same as if the adoption order had not been made (with limited exceptions). This is the approach taken in section 93(8) of the *Adoption Act 2000* (NSW) (Appendix C). We think this is a very sensible approach as it alleviates any uncertainty about the issue and is likely to reduce argument in court about parentage issues.

We recommend your review consider whether it should be possible for an adopted person to discharge the adoption order in relation to one adoptive parent only. For example, a person who has been abused by one adoptive parent may wish to remain adopted by the other adoptive parent. If this was possible, it would seem logical that the only legal parent would be the remaining adoptive parent.

South Australian courts already have the discretion to make any consequential orders that may be necessary or desirable when considering whether to discharge an adoption order under the current legislation.<sup>4</sup> This general discretion should also apply to any additional grounds which are inserted into the Act.

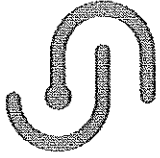
In the absence of the Act specifically setting out who is to be considered the parent after an adoption order is discharged, the courts could use this general discretion to make an order about parentage.

Birth parents could be involved in the court process if the court believes it is appropriate to give them notice of the application. This might also be true of siblings (adopted and biological) and other relevant people. While their views on the application could be taken into account by the court, the paramount consideration would remain the welfare of the child.

South Australia could also consider inserting a non-exhaustive list of matters the court can make consequential or ancillary orders about when hearing an application for the discharge of an adoption order. See section 93(7) of the *Adoption Act 2000* (NSW) for an example of such a list (Appendix D). As is the case for NSW, this could specifically cover issues such as the name of the child, the ownership or property, the parental responsibility for the child and the domicile of the child. These issues are particularly important if the adopted person is still a child at the time the order is discharged.

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<sup>4</sup> S 14(2) the Act.



### **c) Inheritance rights**

In your terms of reference you asked how the inheritance of rights of an adopted person might be affected by the discharge of an adoption order.

This could be dealt with by inserting a provision similar to section 93(8) of the *Adoption Act 2000* (NSW) (Appendix C). That section sets out that once an adoption order has been discharged the default position is that all rights, privileges, duties, liabilities and legal relationships revert back to the same as if the adoption order had not been made (subject to the listed exceptions).

This would mean that if a person's adoption order was discharged and the parentage reverted back to the birth parents that person would have the same inheritance rights as any other birth child.

We recommend a specific amendment be made to protect the position of an adopted person who has an unfulfilled claim under the *Inheritance (Family Provision Act) 1972* (SA). It may be that Section 93(8)(a) (Appendix C) covers this situation, however, we believe a specific amendment would make this clearer.

### **d) Intercountry Adoption**

JusticeNet does not have the expertise to comment on the citizenship and residency issues raised in your terms of reference.

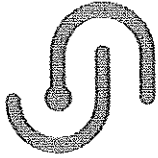
### **Conclusion**

We believe the Act should be amended to enable adoption orders to be discharged where there are exceptional reasons. This will be of particular benefit to people who have been abused by adopters. In this regard, the law should do everything that it can to remove the ties between the abuser and the abused, which for adoptive families may mean to discharge the adoption order. Allowing discretion to the courts to make consequential orders that are necessary or desirable in the circumstances of the case will enable appropriate oversight to ensure that only exceptional circumstances give rise to the discharge of an adoption order.

Yours sincerely

**Elizabeth Boxall**  
**Referrals Lawyer**

**Tim Graham**  
**Executive Director**

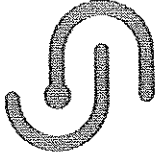


## APPENDIX A

### *ADOPTION ACT 2000 (NSW) Section 93*

#### **93 Discharge of adoption orders**

- (1) In this section:  
"concerned person" means the Attorney General, or any party to an adoption.
- (2) A concerned person may apply to the Court for an order discharging an adoption order (a "discharge order").
- (3) The Court is to give each concerned person (other than the applicant for the discharge order) notice of the application.
- (4) The Court may make a discharge order if it is satisfied that:
- (a) the adoption order, or any consent to adoption, was obtained by fraud, duress or other improper means, or
  - (b) there is some other exceptional reason why the adoption order should be discharged.
- (5) The Court must not make a discharge order if it appears to the Court that:
- (a) the making of the order would be prejudicial to the best interests of the child, or
  - (b) if the application for the order is made by the child-the application is motivated by emotional or other considerations that do not affect the welfare of the child arising out of a relationship formed because of the child's access to information or contact with a person under Chapter 8 (Adoption information).
- (6) If the Court makes a discharge order respecting a general consent, that consent remains effective for the purpose of a further application for an adoption order in relation to the same child, unless the Court orders otherwise.
- (7) If the Court makes a discharge order, it may, at the same time or subsequently, make such consequential or ancillary orders as it thinks necessary in the interests of justice or to promote the best interests of the child, including orders relating to the following:
- (a) the name of the child,
  - (b) the ownership of property,
  - (c) the parental responsibility for the child,
  - (d) the domicile of the child.
- (8) On the making of a discharge order, but subject to any order made under subsection (6) and to section 95 (4), the rights, privileges, duties, liabilities and relationships under the law of New South Wales of the child and of all other persons

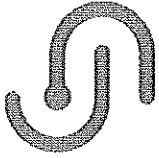


are to be the same as if the adoption order had not been made, but without prejudice to:

- (a) anything lawfully done, or
- (b) the consequences of anything unlawfully done, or
- (c) any proprietary right or interest that became vested in any person,

while the adoption order was in force.





## **APPENDIX B**

### **ADOPTION ACT 2000 (NSW) - Section 8**

#### **8 What principles are to be applied by persons making decisions about the adoption of a child?**

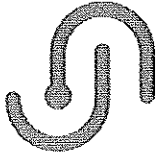
(cf AC Act s 17, AC Reg cl 35)

(1) In making a decision about the adoption of a child, a decision maker is to have regard (as far as is practicable or appropriate) to the following principles:

- (a) the best interests of the child, both in childhood and in later life, must be the paramount consideration,
- (b) adoption is to be regarded as a service for the child,
- (c) no adult has a right to adopt the child,
- (d) if the child is able to form his or her own views on a matter concerning his or her adoption, he or she must be given an opportunity to express those views freely and those views are to be given due weight in accordance with the developmental capacity of the child and the circumstances,
- (e) the child's given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved,
- (e1) undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare,
- (f) if the child is Aboriginal-the Aboriginal child placement principles are to be applied,
- (g) if the child is a Torres Strait Islander-the Torres Strait Islander child placement principles are to be applied.

(2) In determining the best interests of the child, the decision maker is to have regard to the following:

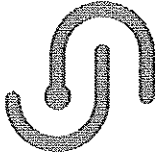
- (a) any wishes expressed by the child,
- (b) the child's age, maturity, level of understanding, gender, background and family relationships and any other characteristics of the child that the decision maker thinks are relevant,
- (c) the child's physical, emotional and educational needs, including the child's sense of personal, family and cultural identity,
- (d) any disability that the child has,
- (e) any wishes expressed by either or both of the parents of the child,
- (f) the relationship that the child has with his or her parents and siblings (if any) and any significant other people (including relatives) in relation to whom the decision maker considers the question to be relevant,
- (g) the attitude of each proposed adoptive parent to the child and to the responsibilities of parenthood,
- (h) the nature of the relationship of the child with each proposed adoptive parent,



(i) the suitability and capacity of each proposed adoptive parent, or any other person, to provide for the needs of the child, including the emotional and intellectual needs of the child,

(j) the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour,

(k) the alternatives to the making of an adoption order and the likely effect on the child in both the short and longer term of changes in the child's circumstances caused by an adoption, so that adoption is determined among all alternative forms of care to best meet the needs of the child.

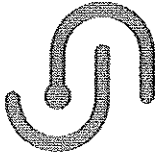


## **APPENDIX C**

### ***Adoption Act 2000 (NSW) Section 93(8)***

8) On the making of a discharge order, but subject to any order made under subsection (6) and to section 95 (4), the rights, privileges, duties, liabilities and relationships under the law of New South Wales of the child and of all other persons are to be the same as if the adoption order had not been made, but without prejudice to:

- (a) anything lawfully done, or
- (b) the consequences of anything unlawfully done, or
- (c) any proprietary right or interest that became vested in any person, while the adoption order was in force.



## **APPENDIX D**

### ***Adoption Act 2000 (NSW) Section 93(7)***

(7) If the Court makes a discharge order, it may, at the same time or subsequently, make such consequential or ancillary orders as it thinks necessary in the interests of justice or to promote the best interests of the child, including orders relating to the following:

- (a) the name of the child,
- (b) the ownership of property,
- (c) the parental responsibility for the child,
- (d) the domicile of the child.