

A GAP IN THE ADOPTION ACT 2009 (QLD): THE CASE FOR ALLOWING ADULT ADOPTION

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Adults who wish to be adopted do so to regularise legal affairs within the family and to resolve issues of identity. Blanket bans on adult adoption prevent people from enjoying these practical and emotional benefits over an entire lifetime, by mere accident of age. Queensland's new Adoption Act provides a model of an arbitrary ban on adult adoption that is contrasted with several more liberal approaches in other common law jurisdictions. Additionally, adult adoption provides a unique perspective from which to consider the theoretical limits of 'the child' in the 'best interests of the child' principle underpinning most adoption statutes.

Adult adoption is fertile ground for exploring issues of identity, law reform, and the theoretical limits of the 'best interests of the child' paramountcy principle. Despite this, it is under-examined by legislatures and academics alike. Yet for the handful of people over 18 years of age who wish to be adopted, the age restriction is arbitrary and unjustified. Adoption is often the best or only means of ensuring stable legal relations within a family, for example, by resolving issues of inheritance law. Adults who are barred from availing themselves of these benefits of adoption may have no other recourse to avert or resolve certain legal issues, giving rise to gaps in the law as it applies to adults. Moreover, a disjuncture can arise between relationships as they exist in fact and as they exist in the eyes of the law. Indeed, for some, the legal recognition of relationships is central to the construction and consolidation of an identity as someone's child, the repercussions of which extend beyond childhood and throughout life.

Queensland is the latest Australian jurisdiction to overhaul its adoption regime. The failure of the Queensland Parliament to adequately consider overturning the ban on adult adoption provides a catalyst for examining these issues afresh. However, the arguments presented in this article in favour of allowing adult adoption are equally applicable in jurisdictions elsewhere. Thus, while the position in Queensland is the primary focus of this article, comparisons are drawn with adoption laws throughout the common law world. The article also places particular emphasis on the adoption of adults by step-parents. The reason for this focus is that a step-parent is involved in the

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majority of adult adoptions, and the debates in the Queensland Parliament surrounding adult adoption concentrated on adoption by step-parents. Furthermore, step-parent adoption and adult adoption have been treated as mutually exclusive categories of adoption by legislatures in other jurisdictions, and this has resulted in unintended overlaps with unjust outcomes.

This article first explains the relevance of adult adoption by step-parents through three case vignettes, judicial commentary, and psychological evidence in related fields. The ways in which the new *Adoption Act 2009* (Qld) falls short of the ideal envisaged by some adult step-children is then analysed. Legislation in other jurisdictions will then be compared to show that adult adoption is common elsewhere. Thereafter the ‘best interests of the child’ principle, which has come to represent the theoretical basis of adoption, will be explicated to confirm that adult adoption is not beyond the theoretical scope of the *Adoption Act 2009* (Qld). It is submitted that the prohibition on adult adoption interferes with the human right not to be subject to arbitrary interference in family matters.¹ Therefore the state ultimately bears the onus of demonstrating why adult adoption should not be permitted. Queensland has failed to discharge this burden, but moreover this article offers sound reasons as to why Queensland can, and should, allow step-parents to adopt their adult children under certain circumstances.

I A NOTE ON TERMINOLOGY

For the purposes of this article, it is important to stress that ‘child’ can have two meanings. It can refer to someone below the age of majority, or to a son or daughter regardless of their age. This article uses ‘minor’ to refer to a child in the first narrow sense. ‘Adult adoption’ refers to the adoption *of* adults, and ‘step-parent adoption’ refers to adoption *by* step-parents. While obfuscating the subject and object of adoption, these terms are most widely used in their respective fields of literature and are retained for that reason.

II RELEVANCE OF THE DEBATE OVER ADULT ADOPTION

There is a paucity of literature on adult adoption.² Of the precious few journal articles that exist, none have any application to Australia.³ Academic interest in step-parent

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976); *Universal Declaration of Human Rights*, opened for signature 10 December 1948, GA Res 217A, art 12; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222, art 8 (entered into force 3 September 1953); for domestic instruments see *Human Rights Act 2004* (ACT) ss 11, 12(a); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 13(a), 17.

² For example, B Moe, *Adoption* (ABC-CLIO Inc, 2nd ed, 2007) 33 where there is just one paragraph devoted to adult adoption.

³ For example, A Ashman, ‘What’s New in the Law’ (1981) 67(6) *American Bar Association* 776 (case developments of adoption of adult homosexuals); Anonymous, ‘Developments in the Law: Sexual Orientation and the Law’ (1989) 102(7) *Harvard Law Review* 1508, 1626-8 (adult adoption as response to law’s treatment of homosexuals); T Bryant, ‘Sons and Lovers: Adoption in Japan’ (1990) 38(2) *The American Journal of Comparative Law* 299, 300 (primarily concerned with adult adoption, but only because 2/3 of adoptions in Japan are of adults); R Volkmer, ‘Status of Adult Adoptees as Remainder Beneficiaries’ (2009) 36(8) *Estate Planning* 42 (regarding inheritance

adoption waned in the early 1980s.⁴ This article considers adult adoption by step-parents and thus provides original analysis of an unexplored issue. However, the fact that the issue has not previously been investigated means that this article must first demonstrate the relevance of the debate over whether to allow the adoption of adults by step-parents.

In 2008-09, 8.7 percent of Australian adoptions involving a pre-existing relationship were of people aged 18 years and over.⁵ Of these, 89 percent were adopted by a step-parent,⁶ significantly higher than the step-parent adoption rate of all known adoptions (whether above or below the age of 18) of 64 percent.⁷ It is possible that these figures are distorted by the prohibition on adult adoption in Queensland and South Australia, but it is conceded the figure would in any case remain low. Adult adoption is not widely desired by either step-children or step-parents⁸ and is probably only appropriate in rare cases, such as where the adoptee has never known their biological parent or the relationship has been irreparably damaged by abuse.⁹ While statistically, very few adults wish to be adopted, as the following case vignettes demonstrate, those that are adopted may receive ongoing benefits over their entire life course, most notably in the form of a fortified sense of belonging and identity.

A Three Case Vignettes

In *Re DG and the Adoption Act 2000 (NSW)*,¹⁰ DG was a 35 year old woman who considered herself the 'child' of her step-father, Mr G. She had never known her biological father who lived in Greece, and Mr G had fulfilled a father role towards her since she was 4 years old. Although fully independent and twice divorced, at 35 years

issues in Georgia and Nebraska); D Cohen, 'Adult Adoption May Qualify One as a Beneficiary' (1992) 19(2) *Estate Planning* 88 (regarding inheritance in US context).

⁴ For discussions published in the 1970s and 1980s see for example F Hopkins and J Benson, 'Adoption by Parent and Step-Parent' (1978) April 6 *New Law Journal* 339, 339-42 (regarding changes to UK legislation); A Khan, 'Adoption by Parent and Step-Parent' (1978) 8(5) *Family Law* 146-9 (regarding UK legislation from an Australian perspective); I Johnston, 'Adoption by Parent and Stepparent' (1981) 11 *New Zealand Law Journal* 349-54 (NZ context); C Williams, 'Step-parent Adoptions and the Best Interests of the Child in Ontario' (1982) 32(2) *University of Toronto Law Journal* 214-30 (Canadian context); Law Institute, 'Legal Options for Step-Parents and Relatives Caring for Children' (1988) 62(3) *Law Institute Journal* 157-9 (regarding changes to Vic legislation).

⁵ Australian Institute of Health and Welfare, *Adoptions Australia 2008-09*, Child Welfare Series No 48 (2010) 41 <<http://www.aihw.gov.au/publications/cws/36/10858.pdf>> at 14 July 2010.

⁶ Ibid 41, 54.

⁷ Ibid 53.

⁸ In 2006 there were 43,000 step and blended families in Queensland with children. Yet, as at 30 June 2007, only 179 people in Queensland were seeking to adopt a step-child: Australian Bureau of Statistics, *Family Characteristics and Transitions 2006-07* (2008) 17 <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/5E0A33B317158C79CA25745F001694CB/\\$File/44420%20Reissue%20July%202008.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/5E0A33B317158C79CA25745F001694CB/$File/44420%20Reissue%20July%202008.pdf)> at 14 July 2010; Child Safety, *Future Adoption Laws for Queensland: Policy Paper* (2008) 19 <<http://www.childsafety.qld.gov.au/legislation/documents/future-adoption-laws.pdf>> at 14 July 2010.

⁹ For appropriateness of step-parent adoption see Department of Disability, Housing and Community Services (ACT), *Stepchildren and Adoption* (2009) 2 <http://www.dhcs.act.gov.au/_data/assets/pdf_file/0017/11708/DHC1628_stepchildrenandadopt2.pdf> at 14 July 2010 ('A step-parent adoption is usually only appropriate when a child has lived, almost exclusively, for most of his/her life as the child of the step-parent').

¹⁰ *Re DG and the Adoption Act 2000 (NSW)* (2006) 36 Fam LR 124 (Austin J).

of age, DG felt the need to take advantage of the changes wrought by the *Adoption Act 2000*, viz the opening up of adoption to adoptees who had been previously married. She submitted that ‘her life ha[d] been one of very close association and connection with her mother and step-father, and that their lives ha[d] been entwined since her childhood.’¹¹ All parties viewed adoption as ‘formalising and making legal confirmation of the emotional and practical state of the family situation as it ... ha[d] been for the past 30 years.’¹² The trial judge sympathised with DG’s desire to secure her sense of belonging through adoption and stated, ‘were it not for ... one difficulty I would have no hesitation in making the order.’¹³ The reason the adoption order was not made will be discussed below,¹⁴ but the crucial point is that DG’s emotional needs to belong and have an identity currently have no weight in any Queensland forum.

Another New South Wales case, *Adoption of DR by DCB and HMB*,¹⁵ did not concern adoption by a step-parent, but it is illustrative of the dangers in disallowing adult adoption regardless of the circumstances. In that case, D had been raised in Indian orphanages from the age of 3 months. When he was 11, Mr and Mrs B began sponsoring him, as they did other children. However in his case ‘the relationship quickly developed beyond mere sponsorship and financial support, and became quite different from that between Mr and Mrs B and the other children they supported.’¹⁶ They corresponded regularly and D began calling Mrs B ‘mummy.’ When D became very ill two years later, Mrs B visited him in India, and thereafter every year until he was brought to live with Mr and Mrs B at the age of 17. They had contemplated adoption earlier, but ‘at that time the financial and administrative obstacles seemed too great.’¹⁷ It was not until D turned 21 that Mr and Mrs B were able to apply to adopt him ‘so as to give legal effect to what they regard[ed] as a real family relationship.’¹⁸ In the circumstances D had known no other family, Mr and Mrs B had treated him as a son for nearly 10 years, and without adoption his immigration status would have come under question. The New South Wales Supreme Court granted the adoption order, yet had Mr and Mrs B resided in Queensland, the law would not have recognised their parent-child relationship.

*Re Adoption Application by Clark*¹⁹ was a South Australian case decided before adult adoption was abolished in that State. It concerned an application by a former step-mother to adopt Y, a 19 year old boy. Y’s birth mother had died when he was 5 years old. His father later met Mrs Clark who ‘exercised the role of mother and homemaker to the family.’²⁰ Y’s earliest memories of a mother figure were of Mrs Clark. Some 7 years later Y’s father and Mrs Clark separated, whereupon Y’s father refused Mrs Clark access to the children she had been rearing. Y continued seeing Mrs Clark in secret until he went to live with her and her new husband at the age of 16. After

¹¹ Ibid [8].

¹² Ibid [11].

¹³ Ibid [15].

¹⁴ Ibid [33]-[46]; upheld on appeal: *Re DG and the Adoption Act 2000 (NSW)* (2007) 38 Fam LR 122, [1], [29]-[34], [52]-[3] (Handley AJA with whom Santow JA adreed), [13]-[15] (Basten JA).

¹⁵ *Re Director-General, Department of Community Services (NSW): Adoption of DR by DCB and HMB* (2000) 26 Fam LR 107 (Hodgson CJ).

¹⁶ Ibid [9].

¹⁷ Ibid [11].

¹⁸ Ibid [15].

¹⁹ *Re Adoption Application by Clark* (1987) 11 Fam LR 962 (Boxall SM, Rowe and Lee JJP).

²⁰ Ibid 966.

several failed attempts to maintain contact with his father, Y became ‘deeply hurt,’ so much so that he ‘no longer consider[ed] [him] to be his father.’²¹ Three years later, Y urged Mrs Clark and her husband to adopt him in order to ‘regularise the family situation’ and to satisfy his emotional needs.²² The Full Children’s Court found that ‘exceptional circumstances’ warranted the making of the adoption order. In cases involving separated parents there may be justification in suspecting the motives of parents as well as the influence they exercise over their children. Yet these suspicions should lessen with the child’s progressing maturity and ability to exercise independent judgment. In this sense, Y’s adoption might be met with less suspicion at the age of 19 than had he sought adoption at 16. Yet Queensland would only permit adoption in the earlier scenario.

B *Welfare and Best Interests of a Child over 18*

In Y and Mrs Clark’s case, the South Australian Children’s Court explored the aspects of adult adoption that advance the ‘welfare and best interests’ of a child over 18.²³ The factors raised fall within one of two classes of need: practical and emotional. The Court considered that as a practical issue, ‘parentage [may need] to be clarified in terms of various legal relationships.’²⁴ The Court listed several examples including medical emergencies, the signing of various documents, and acting as guarantors in contractual matters. *Adoption of DR* also demonstrates that adult adoption can clarify issues pertaining to immigration.²⁵

Inheritance may also be an issue for step-children.²⁶ If a step-parent dies intestate, then the step-child is not entitled to a share of the estate in the same way as his or her ‘issue.’²⁷ A step-child can apply to the Supreme Court for provision to be made out of the estate,²⁸ however this involves expenses not incurred by adopted children, and in any case the Court may in its discretion decline.²⁹ Conversely, because children usually outlive their parents, the consequences of a step-child dying intestate are often overlooked.³⁰ If they die childless and unmarried, ‘the parents are entitled to the whole of the residuary estate in equal shares.’³¹ A step-parent is then excluded and the child may inadvertently benefit a person they have disowned. The obvious rejoinder is

²¹ Ibid 968.

²² Ibid 969.

²³ Ibid 971-2.

²⁴ Ibid 972.

²⁵ *Re Director-General, Department of Community Services (NSW): Adoption of DR by DCB and HMB* (2000) 26 Fam LR 107, [3], [37]-[42] (Hodgson CJ).

²⁶ *W: Re Adoption* (1998) 23 Fam LR 538, 544-5 (Windeyer J).

²⁷ *Succession Act 1981* (Qld) s 36A, sch 2, see also s 40 (‘child’ is given a special definition for pt 4 to include a ‘stepchild’; use of ‘child’ outside pt 4 must therefore have a different meaning); *Re Leach (Deceased)*; *Leach v Lindeman and Others* [1985] 2 All ER 754, 759 (Slade LJ, with whom Goff and O’Connor LJ agreed) (un-adopted step-children are not kin).

²⁸ *Succession Act 1981* (Qld) s 41(1).

²⁹ See for example *Re John* [2000] 2 Qd R 322 (McMurdo P, Davies and Thomas JJA) (The applicant’s mother had died shortly before her step-father, and so she was not a ‘step-child’ at the time of his death. The application was dismissed).

³⁰ See for example *Pearce v Public Trustee* [1916] GLR 125 (the mother had transferred land to her son so that her former husband would not inherit it. However her son then died intestate so that her former husband was entitled to half).

³¹ *Succession Act 1981* (Qld) sch 2, pt 2.

that both can very simply write a will.³² However, a will does not necessarily cover every form of inheritance. For example, a step-parent who is a beneficiary under a family trust may not be able to bring a step-child within the terms of that trust otherwise than by adoption.³³ This may be the case where the person who originally established the trust did so for the benefit of their ‘lineal descendants’ or ‘grandchildren.’ Succession law outside Australia may also reduce the effectiveness of a testamentary disposition; in *Adoption of X*,³⁴ one of the factors taken into account by the Family Court in granting leave to adopt to an Irish step-father, was that Irish inheritance tax treated adopted children more favourably than step-children.

Another common riposte is that a step-child may alter their surname to reflect that of their step-father.³⁵ However this procedure does not modify the position of the biological parent. Even after a child turns 18, parents are occasionally required to fulfill a parental role such as by signing documents. For example, a parent is required to state their earnings for some Centrelink allowances,³⁶ and parents may be called upon to verify a person’s surname in blended-family situations such as in passport applications. In some cases, this role of the biological parent may be resented and seen as an intrusion upon the proper domain of a ‘real’ parent. Name changes do not provide for other practical contingencies. For example, in *N v M*,³⁷ the adoptive parents were of the Mormon faith and intended to undertake a religious ordinance whereby each member of the family would be ‘sealed in the family.’ However a person could not be ‘sealed in the family’ unless a member of the family in the eyes of the law. In such a case involving a child over 18, Queensland law would be discriminatory in having a greater impact upon some denominations compared to others.

Moreover, advising adults who wish to be adopted that they must simply change their name and ensure they have a will, requires these individuals to *pretend* that they are a child of the family. Their parent-child relationship may be of the same or higher quality as others grounded in biology,³⁸ but the law treats it differently. An analogy can be drawn to the issue of same-sex marriage.³⁹ Some members of same-sex couples are highly affronted by not being permitted to marry under Australian law.

³² B Hoggett, *Parents and Children* (Sweet & Maxwell, 4th ed, 1993) 107; *Succession Act 1981* (Qld) ss 8-10.

³³ *Knight v Knight* (1840) 3 Beav 148, 172 (Langdale MR) (the will/trust is to be interpreted according to the intention of the testator/settlor); *Re Estate of Jack Alexander Warren* [2001] NSWSC 104, [14] (Davies AJ) (held that ‘children’ in the will included one step-child but not another); *Adoption Act 2009* (Qld) ss 214(2), 216.

³⁴ *Adoption of X* (1993/1994) 17 Fam LR 594, 598 (Wilczek J).

³⁵ *Births, Deaths and Marriages Registration Act 2003* (Qld) ss 15-21; Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 2009, 1656 Philip Reeves, Minister for Child Safety and Minister for Sport; *Fogwell and Ashton* (1993) 17 Fam LR 94, 100 (Chisolm J).

³⁶ For example *Social Security Act 1991* (Cth) s 1067(9)(b), (11)(d) (to qualify for ‘independent’ rate, may need to prove ‘not receiving continuous support ... from a parent’), see also subs (13) (step-parents specifically excluded from consideration).

³⁷ *N and Another v M* (1983) 8 Fam LR 984, 988 (Waddell J).

³⁸ S Schwartz and G Finley, ‘Father Involvement, Nurturant Fathering, and Young Adult Psychosocial Functioning’ (2006) 27 *Journal of Family Issues* 712, 712, 725-8; K Lamb, ‘“I Want to Be Just Like Their Real Dad”: Factors Associated with Stepfather Adoption’ (2007) 28(9) *Journal of Family Issues* 1162, 1168-9, 1174.

³⁹ The same analogy is drawn in J Diakow, *Adult Adoption Restrictions in British Columbia* (2006) British Columbia Civil Liberties Association, 2
<<http://www.bccla.org/othercontent/06Adult%20adoption.pdf>> at 14 July 2010.

The crucial point is that this feeling persists despite significant advances in equal treatment of same-sex de-facto relationships. The reason for taking offence lies in the fact that people place importance in the legal recognition of relationships. In the same way, adults who wish to be adopted do so because they place importance on the law's role in defining relationships.⁴⁰

In the reported cases, it is emotional needs that provide the primary rationale for seeking adoption as an adult.⁴¹ According to the South Australian Children's Court, it is the 'desire and emotional need to have persons ... consider[ed] ... [as] parents in reality, recognised as such by the law.'⁴² Judicial commentary has long recognised that this desire underpins the distinct purpose of adult adoption; 'to give legal recognition to the prior existence of [a] family situation,'⁴³ rather than the reverse of using the law to create a family, as is the case in the adoption of minors.⁴⁴

Yet it is important to note that the courts have not specifically enumerated the emotional benefits that are perceived to flow from adult adoption beyond general descriptors such as gaining a sense of belonging or having relationships recognised. Nor have psychological studies been conducted to verify these emotional benefits, presumably due to the extremely small samples that would be involved. The literature on the link between adoption and identity is almost exclusively devoted to the adoption of minors and its propensity to distort identities, especially during adolescence.⁴⁵ While no psychological studies have specifically focused on adult adoption and its positive impact on identity and feelings of belonging, the general psychological literature maintains that a central 'feature of human experience is the need to belong.'⁴⁶ Menzies and Davidson studied people who felt they did not 'belong' in their family and found that a 'feeling of inauthenticity, or confusion of identity, often goes hand-in-hand with feelings of alienation from the rest of society, a sense of not belonging, accompanied by hopelessness, futility and despair.'⁴⁷ This internal source of 'inauthenticity' can be contrasted with external sources of 'inauthenticity' in the case of adult adoption. That is, adults who wish to be adopted

⁴⁰ Bryant, above n 3, 299 (state authorised procedures are used in order to 'receive official recognition and enforcement of the adoption').

⁴¹ *Re Adoption Application by Clark* (1987) 11 Fam LR 962, 969, 972 (Boxall SM, Rowe and Lee JJP); *Re Director-General, Department of Community Services (NSW): Adoption of DR by DCB and HMB* (2000) 26 Fam LR 107, [15] (Hodgson CJ); *Re DG and the Adoption Act 2000 (NSW)* (2006) 36 Fam LR 124, [8], [11] (Austin J).

⁴² *Re Adoption Application by Clark* (1987) 11 Fam LR 962, 972 (Boxall SM, Rowe and Lee JJP).

⁴³ *Application A77/2302* (Unreported, SCNSW, Waddell J, 21 August 1978).

⁴⁴ To like effect see *Re Adoption of SS* (2002) 28 Fam LR 509, [7].

⁴⁵ See for example M Berry and R Barth, 'A Study of Disrupted Adoptive Placements of Adolescents' (1990) 69(3) *Child Welfare* 209, 211 ('Most studies of emotional disturbance in adopted teens have concerned youths who were adopted in infancy'); A Baden and M Wiley, 'Counseling Adopted Persons in Adulthood: Integrating Practice and Research' (2007) 35(6) *Counseling Psychologist* 868, 868-901 (present a review of identity literature); A Marshall and M McDonald, *The Many-sided Triangle* (Melbourne University Press, 2001) 91 (biological identity), 87, 162 (regarding interracial adoption); C Witt, 'Family Resemblances: Adoption, Personal Identity, and Genetic Essentialism' in S Haslanger and C Witt (eds), *Adoption Matters: Philosophical and Feminist Essays* (2005) 135; K Leighton, 'Being Adopted and Being a Philosopher: Exploring Identity and the "Desire to Know" Differently' in S Haslanger and C Witt (eds), *Adoption Matters: Philosophical and Feminist Essays* (2005) 146.

⁴⁶ D Menzies and B Davidson, 'Authenticity and Belonging: The Experience of Being Known in the Group' (2002) 35 *Group Analysis* 43, 44.

⁴⁷ *Ibid.*

do feel that they belong in the family they have embraced, but this feeling is undermined by the law and by society in treating their parent-child relationship differently, thereby generating feelings of being inauthentic. This theme is further explored in the literature comparing foster care children who are adopted and those who ‘age out’ of care. Studies from the early 1980s onwards have found that in stark contrast to the experience of adoptees, long-term foster care tends to leave children feeling insecure and without any meaningful sense of belonging.⁴⁸ In reviewing this research, Triseliotis considered that the insecurities centre around two main themes: anxiety and uncertainty arising from the lack of legal security and the ambiguity of their position in otherwise ‘belong[ing] to nobody.’⁴⁹ Similar insecurities apply to adults who wish to be adopted, albeit at a later stage in life when they are expected to be more independent.

Moreover, other studies show that these feelings of belonging and security may also be correlated with positive life outcomes. For example, Cashmore and Paxman examined the relationship between ‘actual’ stability, ‘felt’ stability and later outcomes of young people 4 to 5 years after ageing out of foster care. The ‘felt’ security score was generated from responses to questions regarding the participants’ sense of belonging and of having had their needs met while in foster care.⁵⁰ The life outcomes measure incorporated employment, stability of housing, education, substance use, mental health, criminal activity and relationships.⁵¹ They found that ‘[w]hile both stability and felt security were powerful predictors of overall outcome scores, felt security was found to predict outcomes over and above stability.’⁵²

Although caution must be exercised in generalising and applying these findings to adult adoption, the similar motives for adoption by adults and by foster care children may mean that adoption for both groups involves similar psychological repercussions. It is also possible that the link between ‘felt’ security and positive life outcomes uncovered in foster care children is comparable to the link intuited by the courts between cementing a sense of belonging and lifelong ‘benefits’ for adult adoptees. Ultimately, psychological studies focused specifically on adult adoptees are required to either confirm or reject any analogies that can be drawn. Regardless of psychological evidence, for adults who wish to be adopted, the debate over adult adoption is necessary because Queensland law currently denies the very real potential of adoption in cementing a sense of belonging and an identity as someone’s ‘child.’ The next part of this article considers the Queensland position in greater detail.

⁴⁸ B Tizard, *Adoption: A Second Chance* (Open Books, 1977); J Triseliotis, ‘Identity and Security in Long-Term Fostering and Adoption’ (1983) 7 *Adoption and Fostering* 22; M Hill, L Lambert and J Triseliotis, *Achieving Adoption with Love and Money* (National Children’s Bureau, 1989); M Bohman and S Sigvardson, ‘Outcomes in Adoption: Lessons from Longitudinal Studies’ in D Brodzinsky and M Schechter (eds), *The Psychology of Adoption* (1990) 93; J Triseliotis and M Hill, ‘Contrasting Adoption, Foster Care and Residential Care’ in D Brodzinsky and M Schechter (eds), *The Psychology of Adoption* (1990) 107.

⁴⁹ J Triseliotis, ‘Long-Term Foster Care or Adoption? The Evidence Examined’ (2002) 7 *Child and Family Social Work* 23, 28.

⁵⁰ J Cashmore and M Paxman, ‘Predicting After-Care Outcomes: the Importance of “Felt” Security’ (2006) 11 *Child and Family Social Work* 232, 235.

⁵¹ Ibid 236.

⁵² Ibid 238.

III THE ADOPTION ACT 2009 (QLD) – THE CHANGES MADE AND THE CHANGES NOT MADE

Geoff Monahan notes that within Australia, ‘there has been a great deal of legislative activity to ensure that adoption remains in the best interests of children.’⁵³ Queensland is the latest Australian jurisdiction to overhaul its adoption regime in an attempt to ensure that the best interests of children, as judged by ‘contemporary community standards,’ are met through modern adoption practices.⁵⁴ The Queensland Parliament passed the *Adoption Act 2009* (Qld) on the 18th of August 2009,⁵⁵ commencing on the 1st of February 2010.⁵⁶ Among the significant changes introduced⁵⁷ are open adoptions,⁵⁸ adoption plans,⁵⁹ conversion from administrative adoption orders to a judicial regime,⁶⁰ and greater access to information.⁶¹

A *The Changes Made to Step-Parent Adoption*

As noted above, step-parents are involved in the majority of adoptions where the parties have a pre-existing relationship.⁶² Despite this, the second reading speech was silent as to changes the *Adoption Act 2009* (Qld) will introduce to step-parent adoptions. Formerly, adoption by a step-parent required the consent of the parents or guardians,⁶³ and of the child if over 12,⁶⁴ as well as satisfaction of the test that ‘the welfare and interests of the child would be better served by such an order than by an order for guardianship or custody.’⁶⁵ That test survives in similar terms in the new Act,⁶⁶ but in addition there must now be ‘exceptional circumstances.’⁶⁷ This is to ‘reinforce that the adoption of a child by a step-parent is not a routine matter, but an exceptional matter.’⁶⁸ As an additional requirement, leave of the Family Court to adopt has been made mandatory for step-parents,⁶⁹ whereas formerly it was

⁵³ G Monahan, ‘Current Adoption Law and Practice in Australia: Part I – Local Adoption’ (2008) 13 *Current Family Law* 202, 202.

⁵⁴ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 April 2009, 73 (Philip Reeves, Minister for Child Safety and Minister for Sport) (Second Reading Speech).

⁵⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 2009, 1628-89.

⁵⁶ *Proclamation, Subordinate Legislation 2009 No 217* (Qld) sch; *Adoption Act 2009* (Qld) s 2 (‘Commencement’).

⁵⁷ See generally: Explanatory Notes, *Adoption Bill 2009* (Qld) 1-15.

⁵⁸ *Adoption Act 2009* (Qld) ss 157(1)(c), 164(2)(a), 165(2)(a), 167(a)(ii) (the ‘Degree of Openness’), also s 6(2)(h)(ii) (‘Guiding Principles’).

⁵⁹ *Adoption Act 2009* (Qld) pt 8.

⁶⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 22 April 2009, 76 (‘brings Queensland into line with every other Australian jurisdiction’); *Adoption Act 2009* (Qld) s 174 (‘Court may make adoption orders’), pt 10 (‘Court proceedings’); compare with *Adoption of Children Act 1964* (Qld) s 7 (‘Adoption by order of chief executive’).

⁶¹ *Adoption Act 2009* (Qld) pt 11 (now able to access info re adoptions pre-1 June 1991).

⁶² Australian Institute of Health and Welfare, above n 5, vi, 6, 25.

⁶³ *Adoption of Children Act 1964* (Qld) s 19, may be dispensed under s 25.

⁶⁴ *Adoption of Children Act 1964* (Qld) s 26.

⁶⁵ *Adoption of Children Act 1964* (Qld) s 12(5) read with s 6 (definition of ‘relative’).

⁶⁶ *Adoption Act 2009* (Qld) s 208(e).

⁶⁷ *Adoption Act 2009* (Qld) s 208(f).

⁶⁸ Explanatory Notes, *Adoption Bill 2009* (Qld) 109.

⁶⁹ *Adoption Act 2009* (Qld) s 92(1)(d); *Family Law Act 1975* (Cth) s 60G(1); for the test applied by the Family Court in granting leave see *Fogwell and Ashton* (1993) 17 Fam LR 94, 100-1 (Chisolm J) (test is whether there is a real possibility of success in a state court, and no doubt as to

optional.⁷⁰ This may be to reduce the confusion involved with lingering parental responsibility orders when previously leave was not sought.⁷¹ The new Act also introduces differentiated age requirements. To be adopted, a step-child must be between 5 and 16 years old,⁷² though the chief executive has a discretion to accept the application of a 17 year old step-child under certain circumstances.⁷³ The explanatory notes state that '[t]he child must be at least five years old so that the relationship with the step-parent can be assessed and the child's views about the step-parent can be ascertained.'⁷⁴ However, the notes fail to rationalise the upper limit, which is disconcerting given that step-children tend to be older than other children when they are adopted.⁷⁵ Moreover, the Act continues to bar adoptions of children over 18,⁷⁶ which is out of sync with other Australian jurisdictions and which disproportionately affects step-child adoptions.⁷⁷

B *The Changes Not Made to Adult Adoption*

Adult adoption has never been sanctioned by Queensland legislation. De facto adoption was first permitted under the *Orphanages Act 1879* (Qld), which provided for 'inmates' to reside with 'trustworthy and respectable' people outside of an orphanage.⁷⁸ Later, the *Infant Life Protection Act 1905* (Qld) provided for the adoption of illegitimate children under the age of 10.⁷⁹ Until the 1921 amendments to that Act, other children could only be adopted privately through contracts drawn up by solicitors.⁸⁰ It is plausible that at this time adult adoptions were effected in this way, though no records exist of such a practice. The first comprehensive adoption legislation in 1935 restricted adoption to 'infants' under the age of 21 years.⁸¹ This age restriction was preserved and later amended to 18 in the 1964 Act.⁸² The new

child's best interests); compare with *Adoption of X* (1993/1994) 17 Fam LR 594, 597 (Wilczek J) ('further significant reason' test).

⁷⁰ Child Safety, *Leave of the Family Court* (2008)

<<http://www.childsafety.qld.gov.au/adoption/relative-step-child/leave-family-court.html>> at 14 July 2010 ('important to consider whether or not to apply for leave').

⁷¹ O Jessep and R Chisholm, 'Step-Parent Adoptions and the Family Law Act' (1992) 6(2) *Australian Journal of Family Law* 179, 185-6 (argue inappropriate for Cth to interfere), 182-5 (question constitutional validity).

⁷² *Adoption Act 2009* (Qld) s 92(1)(i); compare with *Adoption Act 2009* (Qld) s 10 read with *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'child'; not defined in *Adoption Act*); compare with *Adoption of Children Act 1964* (Qld) s 11 (blanket requirement that child be under 18).

⁷³ *Adoption Act 2009* (Qld) s 92(2).

⁷⁴ Explanatory Notes, *Adoption Bill 2009* (Qld) 65.

⁷⁵ Australian Institute of Health and Welfare, above n 5, 26, 36.

⁷⁶ *Adoption Act 2009* (Qld) s 10 read with *Acts Interpretation Act 1954* (Qld) s 36; *Adoption of Children Act 1964* (Qld) s 11.

⁷⁷ Australian Institute of Health and Welfare, above n 5, 41, 54: in 2008-09, all 9 adoptions of 'children' over 18 were 'known' adoptions. Of these 8 were by step-parents.

⁷⁸ *Orphanages Act 1879* (Qld) ss 23-4; repealed by *State Children Act of 1911* (Qld) s 3, sch 1.

⁷⁹ *Infant Life Protection Act 1905* (Qld) ss 6(1)(b) (adoption of infant under 3 years for reward), 15 (adoption of illegitimate infant under 3 years); repealed by *Children's Services Act of 1965* (Qld) s 3, sch 1.

⁸⁰ P Boss, *Adoption Australia: A Comparative Study of Australian Adoption Legislation and Policy* (1992) 211.

⁸¹ *Adoption of Children Act 1935* (Qld) s 4(1), (2); repealed by *Adoption of Children Act 1964* (Qld) s 5(1).

⁸² *Adoption of Children Act 1964* (Qld) s 11 (now 18 years as amended); *Adoption of Children Act Amendment Act 1979* (Qld) s 3 ('twenty-one' replaced with 'eighteen').

Adoption Act 2009 perpetuates this gap in Queensland law.⁸³ However, it should be noted that the changes in Queensland were not guided by a comprehensive Law Reform Commission report, as was the case in New South Wales.⁸⁴ The Queensland Government issued two reports before presenting the Bill to Parliament, neither of which touched upon adult adoption.⁸⁵ It is very likely that the Queensland Government did not turn its attention towards adult adoption until the Opposition raised the issue in Parliament.

C *Parliamentary Debates*

During the parliamentary debates on the *Adoption Bill*, the Shadow Minister for Child Safety, Mr Dempsey, proposed the following amendment: ‘An adult may not be adopted except by a step-parent as provided under part 5’.⁸⁶

There are two shortcomings to this proposal. First, it is not apparent why adult adoption should be limited to step-families to the exclusion of foster care relationships for example. Second, by specifically referring to part 5, such an amendment would encounter the same problems as in *Re DG*, to be considered below.⁸⁷ However the Opposition made several valid points in favour of adult adoption.

Mr Dempsey noted that the stated purpose of adoption – ‘to provide a permanent legal family for children’ – is inconsistent with preventing an adult child from being adopted, who may equally ‘wish for a permanent legal relationship.’⁸⁸ He drew attention to the discriminatory impact of the law, in potentially allowing one sibling to be adopted but not another simply by accident of age.

It seems to me that common sense has gone out the window when we say that just because one child is six months older ... we suddenly say, ‘The gate is closed. Off you go.’ We at least need some flexibility within the bill to be able to ensure that that child can be brought into that family unit.⁸⁹

Mrs Stuckey, the Member for Currumbin, also spoke in support of the proposed amendment:

⁸³ *Adoption Act 2009* (Qld) s 10; *Acts Interpretation Act 1954* (Qld) s 36 (definition of ‘child’).

⁸⁴ New South Wales Law Reform Commission, *Review of Adoption of Children Act 1965 (NSW)*, Report No 81 (1997).

⁸⁵ Child Safety, *Future Adoption Laws for Queensland: Policy Paper*, above n 8; Child Safety, *Balancing Privacy and Access: Adoption Consultation Paper* (2008) <<http://www.childsafety.qld.gov.au/consultations/documents/balancing-privacy-and-access.pdf>> at 14 July 2010.

⁸⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 2009, 1654 (John Dempsey, Shadow Minister for Child Safety and Shadow Minister for Sport).

⁸⁷ Especially *Adoption Act 2009* (Qld) s 92(1)(c).

⁸⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 2009, 1654 (John Dempsey).

⁸⁹ *Ibid* 1655 (John Dempsey).

People who form blended families actually need that inclusion and need to have that recognition just as much as those of us who take it for granted because of the situation we are born into.⁹⁰

A representative of the Government retorted that “[c]hildren” by definition are those aged under 18,⁹¹ and as such adult adoption simply falls outside the scope of the Bill. In any case, a step-parent may alter their will, and a step-child is free to change their name.⁹² However, as already noted, these mechanisms do not necessarily cover every legal contingency, and moreover, may not adequately serve the emotional needs of every step-child. At root, the Government and Opposition were in dispute over whether adults could also be children, and whether adult adoption could be effected by legislation otherwise concerned exclusively with the welfare of minors. The next part of this article explores how other jurisdictions have decided these questions.

IV COMPARISON WITH OTHER COMMON LAW JURISDICTIONS

This part analyses the law of adoption in comparable jurisdictions, both domestic and international. While the identification of a common practice in the majority of jurisdictions is not necessarily determinative of what the position ought to be in Queensland, it may nonetheless prove persuasive. Future changes in Queensland may also reflect the lessons learnt elsewhere.

A *South Australia*

Among Australian jurisdictions, only South Australia follows the Queensland model in prohibiting adult adoption. Until 1996, South Australia permitted adoption between the ages of 18 and 20 if the person had been brought up, maintained and educated by the applicant(s), and there were special reasons for making such an order.⁹³ It is unclear why South Australia abolished adult adoption, especially given that the trend elsewhere has been in the opposite direction.⁹⁴

B *Australian Capital Territory, New South Wales, Northern Territory, Tasmania, Victoria, Western Australia*

The remaining Australian States and Territories allow adult adoption under certain conditions.⁹⁵ Adult adoption provisions in Australia follow one of two general patterns. In New South Wales and Western Australia, adult adoption is restricted to

⁹⁰ Ibid 1656 (Janet Stuckey, Shadow Minister for Public Works and Information and Communication Technology).

⁹¹ Ibid 1655 (Philip Reeves, Minister for Child Safety and Minister for Sport).

⁹² Ibid 1655-6 (Philip Reeves).

⁹³ *Adoption Act 1988* (SA) former s 13 (now deleted); *Adoption (Miscellaneous) Amendment Act 1996* (SA) s 14; compare with *Adoption Act 1988* (SA) s 8(2)(a) read with s 4(1).

⁹⁴ New South Wales Law Reform Commission, above n 84, [4.16]: NT, Tas and Vic did not permit adoption of people over 18 years of age in 1997; now they do: *Adoption of Children Act 1994* (NT) s 12(1)(b); *Adoption Act 1988* (Tas) s 19(1)(b); *Adoption Act 1984* (Vic) s 10(1)(b).

⁹⁵ *Adoption Act 1993* (ACT) s 10; *Adoption Act 2000* (NSW) s 24; *Adoption of Children Act 1994* (NT) s 12(1)(b); *Adoption Act 1988* (Tas) s 19(1)(b); *Adoption Act 1984* (Vic) s 10(1)(b); *Adoption Act 1994* (WA) s 66(2).

parent-child relationships formed before the adoptee turned 18.⁹⁶ According to the New South Wales Law Reform Commission, the rationale behind this restriction is that,

[a]dult 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* is too far removed from the fundamental purpose of the Act [(that is, providing for permanent care)].⁹⁷

However, the Law Reform Commission acknowledged that adult adoption is motivated by ‘emotional or sentimental reasons,’ as distinct from the need to provide permanent care of minors.⁹⁸ Thus conceptually, it is difficult to comprehend why adult adoption should be restricted using the discrete purposes underlying the adoption of minors. Moreover, imposing blanket bans on certain types of adult adoption involves the same risks of harsh outcomes in the individual case as preventing adult adoption altogether. For example, the Law Reform Commission received a submission outlining the injustice of not being able ‘to complete’ a parent-child relationship of 18 years duration through adoption because it had formed shortly after the child turned 18.⁹⁹ A similar requirement exists in the adoption legislation of British Columbia, Canada.¹⁰⁰ The British Columbia Civil Liberties Association has highlighted the repercussions the restriction has for parents wishing to ‘adopt back’ their biological children after being reunited only after the child reaches the age of majority.¹⁰¹ Although not specifically related to step-parent adoption, it does demonstrate the dangers in assuming that blanket rules can fulfill the best interest of the child in each individual case.

In the Northern Territory, Tasmania and Victoria, an adult can be adopted provided they were ‘brought up, maintained and educated’ by the applicants,¹⁰² and in the Australian Capital Territory the requirement is worded slightly differently as ‘reared, maintained and educated.’¹⁰³ It is unclear whether this prerequisite must have been satisfied prior to the adoptee turning 18. In common parlance ‘bring up’ and ‘rear’ are used almost exclusively on the object ‘child,’ and it appears nonsensical to say ‘bring up (or rear) an adult.’ The terms are not defined in the Acts and the only significant judicial exploration of ‘brought up, maintained and educated’ concerned its spatial and not its temporal limits.¹⁰⁴ Older cases have sought only to define each term cumulatively.¹⁰⁵ The Merriam-Webster Dictionary defines ‘bring up’ as ‘to bring (a

⁹⁶ *Adoption Act 2000* (NSW) s 24(2)(a); compare with New South Wales Law Reform Commission, above n 84, Recommendation 25 (the recommended s 18(b)(i) required a 5 year relationship prior to turning 18); *Adoption Act 1994* (WA) s 66(2).

⁹⁷ New South Wales Law Reform Commission, above n 84, [4.20] (emphasis in original).

⁹⁸ *Ibid* [4.8], [4.22].

⁹⁹ *Ibid* [4.10]-[4.11].

¹⁰⁰ *Adoption Act*, RSBC 1996, c 5, s 44(2)(a) (British Columbia).

¹⁰¹ Diakow, above n 39, 1.

¹⁰² *Adoption of Children Act 1994* (NT) s 12(1)(b); *Adoption Act 1988* (Tas) s 19(1)(b); *Adoption Act 1984* (Vic) s 10(1)(b).

¹⁰³ *Adoption Act 1993* (ACT) s 9(b); see also *Re Adoption Application by Clark* (1987) 11 Fam LR 962, 963-4 (the Children’s Court used ‘reared’ interchangeably when considering the meaning of ‘brought up, maintained and educated’).

¹⁰⁴ *Re Director-General, Department of Community Services (NSW): Adoption of DR by DCB and HMB* (2000) 26 Fam LR 107 (Hodgson CJ) (held that a minor was ‘brought up’ by the applicants, despite residing separately in India).

¹⁰⁵ *Application A77/2302* (Unreported, SCNSW, Waddell J, 21 August 1978) (held the terms ‘brought up, maintained and educated’ are cumulative); *Re P (infants)* [1962] 3 All ER 789, 794

person) to maturity through nurturing care and education' and 'rear' as 'to bring to maturity or self-sufficiency usually through nurturing care.'¹⁰⁶ It is submitted that while maturity and independence may be achieved by the age of 18, this need not necessarily be the case. Indeed, independence is increasingly achieved at a much later period in life.¹⁰⁷ Thus, upon a plain reading, 'brought up, maintained and educated' should be applicable to relationships formed after the child turns 18. This would explain why the Australian Capital Territory also requires that the applicants be of good repute,¹⁰⁸ given that such an expansive reading potentially broadens the scope for fraudulent use of adoption. It appears that the New South Wales Law Reform Commission adopted a similar interpretation. Otherwise they would have been content to express the proposed requirement simply as 'brought up, maintained and educated' without adding 'before turning 18.'¹⁰⁹

Australian jurisdictions also divide on the issue of whether marriage of the child acts as a bar to adoption. As a limiting factor it is clearly of greater relevance to adults who wish to be adopted. Tasmania, the Northern Territory and Western Australia disallow adoption of anyone who is, or has been, married.¹¹⁰ The latter two extend the bar to people within a de facto relationship. In contrast, the Australian Capital Territory, New South Wales and Victoria do not see adoption and marriage as inconsistent.¹¹¹ The New South Wales Law Reform Commission puts the case most succinctly for the irrelevance of marriage status:

It is difficult to see why marriage should be a barrier to obtaining an adult adoption order. The exception is discriminatory. The fact that the adoptee has already made a home elsewhere and is not in need of rearing, maintenance, and education is not relevant in this context.¹¹²

Marriage may be an indication of independence from parents and a source of emotional and economic support, but it cannot provide an identity as someone's child.

(Pennycuik J) ('Maintenance' means a moral duty of 'affection, care and interest' and common law or statutory duty to maintain 'in the financial or economic sense'); *Kallin v Kallin* [1944] SASR 73, 75 (Mayo J) (similar definition of 'maintenance').

¹⁰⁶ Merriam Webster Dictionary (2010) *Bring Up* <<http://www.merriam-webster.com/dictionary/bring%20up>> at 14 July 2010; Merriam Webster Dictionary (2010) *Rear* <<http://www.merriam-webster.com/dictionary/rear>> at 14 July 2010.

¹⁰⁷ W Aquilino, 'The Returning Adult Child and Parental Experience Midlife' in C Ryff and M Seltzer (eds), *The Parental Experience in Midlife* (1996) 423, 424-7 (42% of people who leave home between 19-34 return home to live; 25% of children do not leave home until 22 or older); J Arnett, 'Conceptions of the Transition to Adulthood Among Emerging Adults in American Ethnic Groups' (2003) 2003(100) *New Directions for Child and Adolescent Development* 63, 63-74 (notes that the traditional markers of adulthood are later in life); P Cohen et al, 'Variation in Patterns of Developmental Transitions in the Emerging Adulthood Period' (2003) 39(4) *Developmental Psychology* 657, 661 (transition status markers experienced closer to 27 than 17); L Steinberg, 'Cognitive and Affective Development in Adolescence' (2005) 9(2) *Trends in Cognitive Sciences* 69, 69-73 (review of brain maturation literature).

¹⁰⁸ *Adoption Act 1993* (ACT) s 10.

¹⁰⁹ New South Wales Law Reform Commission, above n 84, [4.19] (emphasis in original).

¹¹⁰ *Adoption of Children Act 1994* (NT) s 12(2); *Adoption Act 1988* (Tas) s 19(1); *Adoption Act 1994* (WA) s 66(1)(b).

¹¹¹ *Adoption Act 1993* (ACT) s 13; *Adoption Act 2000* (NSW) s 24 ('Who can be adopted?': no mention of marriage); compare with *Adoption of Children Act 1965* (NSW) s 18(4); *Adoption Act 1984* (Vic) s 10 ('Who may be adopted': no mention of marriage).

¹¹² New South Wales Law Reform Commission, above n 84, [4.21], see also xxxi, 97 (Recommendation 26).

For the purposes of this article, one of the most pertinent aspects of adoption legislation is the interaction between the step-parent and adult adoption provisions. The New South Wales case of *Re DG*¹¹³ is illustrative of the danger in failing to consider the two categories of adoption together. As Austin J noted,

The LRC Report considered adult adoptions and step-parent adoptions separately. Reasoning in this way, the commission omitted to put the two policy areas together, so as to consider step parent adoptions of adults.¹¹⁴

As a result, the law contained an unintended overlap. DG was able to establish that she had been ‘brought up, maintained and educated’ by her step-father prior to turning 18.¹¹⁵ However she also needed to satisfy the step-parent provision which required that she lived with her step-father for not less than three years immediately before the application for adoption.¹¹⁶ As a 35 year old woman, it had been a long time since she had lived in the family home for a period of three years. Austin J considered that the step-parent provision was drafted with minors in mind. Otherwise, the Commission’s ‘reasoning would have been inconsistent with its recommendation to abolish the prohibition on the adoption of a married person.’¹¹⁷ He was nonetheless constrained by the clear words of the Act.¹¹⁸ The New South Wales legislation has since been amended so that the ‘living’ requirement does not apply to the adoption of an adult step-child.¹¹⁹ Interestingly, the Queensland Opposition’s proposed amendment would have fallen into the same trap.¹²⁰

This is not the only way in which the step-parent and adult adoption provisions overlap. The legislation in the Australian Capital Territory, New South Wales, Northern Territory, Tasmania, and Victoria stipulates that for step-parent adoption, the court must be satisfied that a custody or guardianship order would not be more appropriate.¹²¹ There is no rule of statutory construction that would suggest adult adoptions are exempt from this requirement, yet the permanent care basis of such orders suggests that the legislature had minors in mind. Previously, the notions of custody and guardianship were grounded in the *Family Law Act 1975* (Cth), however in 1995 all references to custody and guardianship in that Act were substituted with the notion of parental responsibility.¹²² The current position is that a maintenance order can be made in respect of an adult who is continuing education or has a disability,¹²³ but otherwise a parenting order cannot be made in respect of a child over 18 years of age.¹²⁴ Guardianship orders can of course be made under State law in

¹¹³ *Re DG and the Adoption Act 2000 (NSW)* (2006) 36 Fam LR 124 (Austin J); *Re DG and the Adoption Act 2000 (NSW)* (2007) 38 Fam LR 122 (Santow and Basten JJA, Handley AJA).

¹¹⁴ *Re DG and the Adoption Act 2000 (NSW)* (2006) 36 Fam LR 124, [37].

¹¹⁵ *Ibid* [19].

¹¹⁶ *Ibid* [20].

¹¹⁷ *Ibid* [41].

¹¹⁸ *Ibid* [45].

¹¹⁹ *Adoption Act 2000 (NSW)* s 30(2); *Adoption Amendment Act 2008 (NSW)* sch 1, [8].

¹²⁰ *Adoption Act 2009 (Qld)* s 92(1)(c) (‘for a continuous period of at least 3 years up to the time of the application’).

¹²¹ *Adoption Act 1993 (ACT)* s 18(2)(b), s 2 (definition of ‘guardian’); *Adoption Act 2000 (NSW)* s 30(1)(d); *Adoption of Children Act 1994 (NT)* s 15(3)(a); *Adoption Act 1988 (Tas)* s 20(7)(a); *Adoption Act 1984 (Vic)* s 11(6)(a).

¹²² *Family Law Reform Act 1995 (Cth)*.

¹²³ *Family Law Act 1975 (Cth)* s 66L.

¹²⁴ *Family Law Act 1975 (Cth)* s 65H.

respect of adults who suffer some incapacity.¹²⁵ However, if a guardianship order or maintenance order is indeed generally more appropriate for disabled adults than adoption, it follows that this consideration should apply regardless of whether the adoption involves a step-parent. It is unclear why step-parents have been singled out in this regard. By virtue of the overlap, some States also require ‘exceptional circumstances.’¹²⁶ This is only logical if there is a sound basis for restricting step-parent adoption of adults to a greater extent than other adult adoptions. Concerns about children being manipulated by bitter parents¹²⁷ should subside as the child grows older and gains independent insight. Western Australia is the only Australian jurisdiction that eliminates any overlap. It does this by defining a ‘child’ as someone under 18, and only referring to a ‘child’ as the object of adoption in the step-parent provision.¹²⁸ By contrast, the adult adoption provision refers to a ‘person who is 18 or more years of age,’¹²⁹ without seeking to include adult adoptees within the meaning of ‘child.’ In this way, the adoption of an adult step-child is governed by the adult adoption provision alone.¹³⁰

C *New Zealand, United Kingdom, South Africa*

New Zealand and South Africa do not allow adoption of adults, and the United Kingdom provides only a very small window of opportunity. The latest adoption legislation in the United Kingdom extends eligibility for adoption by one year past the age of majority; that is, until the proposed adoptee turns 19 years of age.¹³¹ The antecedent Act did not seek to impose age restrictions, but did in practice by referring to the adoptee as a ‘child.’¹³² With devolution, Scotland appears to have followed England’s lead. The recent Scottish *Adoption of Children Act* allows for the adoption of an adult, but only where the application was made while the adoptee was below the age of 18.¹³³ This approach of extending eligibility may have arisen from an effort to limit the harsh and permanent consequences for families that failed to apply within time. Yet it is difficult to limit this consideration to any particular cutoff.

In New Zealand, eligibility for adoption is limited to those under 20 years of age,¹³⁴ which is the age of majority.¹³⁵ Yet the statute applies different consent requirements

¹²⁵ See for example *Guardianship and Administration Act 2000* (Qld) s 11A (‘Adults with impaired capacity are the primary focus of this Act’).

¹²⁶ *Adoption of Children Act 1994* (NT) s 15(3)(b); *Adoption Act 1988* (Tas) s 20(7)(c); *Adoption Act 1984* (Vic) s 11(6)(b).

¹²⁷ For example *In re Skipworth* (1989) 13 Fam LR 137, 138 (Rowlands J); *Re Adoption Application AD 58/1984* (1986) 11 Fam LR 518, 524-5 (Kelly J); *N and Another v M* (1983) 8 Fam LR 984, 985, 990 (Waddell J); *In the Marriage of Kent and Pigot* (1982) 8 Fam LR 537, 538-9 (Asche SJ, with whom Pawley and Emery SJJ agreed).

¹²⁸ *Adoption Act 1994* (WA) ss 4 (definition of ‘child’), 55.

¹²⁹ *Adoption Act 1994* (WA) s 66(2).

¹³⁰ Other international jurisdictions have adopted a similar approach. See for example *South Carolina Adoption Act*, SC CODE ANN § 63-9-1110 read with § 63-9-30(4) (definition of ‘child’) (2009) (South Carolina).

¹³¹ *Adoption of Children Act 2002* (UK) c 38, s 47(9).

¹³² *Adoption Act 1976* (UK) c 36, s 12.

¹³³ *Adoption of Children (Scotland) Act 2007* (UK) asp 4, s 28(4).

¹³⁴ *Adoption Act 1955* (NZ) s 3 read with s 2 (definition of ‘child’).

¹³⁵ *Age of Majority Act 1970* (NZ) s 4.

for adoptees over the age of 18,¹³⁶ suggesting some recognition of their increased autonomy. South Africa simply limits adoption eligibility to those under 18 years of age.¹³⁷ There is no ready explanation as to why these jurisdictions are linked by their rejection of adult adoption. Certainly no common thread can distinguish North American jurisdictions which overwhelmingly do allow adult adoption.

D Canada

Of Canada's 13 Provinces and Territories, 11 specifically endorse adult adoption. Newfoundland and Labrador unambiguously restricts¹³⁸ eligibility to 'unmarried person[s] under the age of 19 years [the age of majority],'¹³⁹ while Nova Scotia's legislation is awkwardly drafted, such that it is unclear whether adult adoption is permitted.¹⁴⁰

British Columbia's requirements for adult adoption are almost identical to those in New South Wales, in that the applicant must establish that a parent-child relationship arose before the adoptee became an adult.¹⁴¹ As noted above, the British Columbia Civil Liberties Association has received complaints regarding the provision's rigidity. The North West Territories¹⁴² and Nunavut¹⁴³ impose a similar requirement of a pre-existing relationship. In contrast, the legislation in New Brunswick and Manitoba merely direct the court to take into account whether the applicant provided the adoptee, whilst a minor, with 'care, custody and support.'¹⁴⁴

Quebec offers perhaps the best compromise between ensuring a parent-child relationship and flexibility. The prima facie position is the same as in New South Wales; that is, an adult may only be adopted by 'the persons who stood in loco parentis towards him when he was a minor.'¹⁴⁵ However the court is granted a discretion to dispense with that requirement in appropriate cases.

Alberta is alone in the common law world in making provision for adult adoption in a separate piece of legislation.¹⁴⁶ Indeed, the Government of Alberta is proactive about adult adoption and even publishes a 'Self Help Kit for Adult Adoptions.'¹⁴⁷

¹³⁶ *Adoption Act 1955* (NZ) s 7(3) (the consent of a parent-appointed guardian is not required after the adoptee turns 18).

¹³⁷ *Children's Act 2005* (South Africa) s 230 ('Child who may be adopted') read with s 1 (definition of 'child').

¹³⁸ 'Restrict' is conjugated in this way because 'Newfoundland and Labrador' is the name of one Province.

¹³⁹ *Adoption Act*, SNL 1999, c A-2.1, s 25 ('Adoption order') read with s 2(i) (definition of 'child') (Newfoundland and Labrador).

¹⁴⁰ *Children and Family Services Act*, SNS 1990, c 5, ss 3(1)(e), 74, 76, 78 (Nova Scotia).

¹⁴¹ *Adoption Act*, RSBC 1996, c 5, s 44 especially subs (2) (British Columbia).

¹⁴² *Adoption Act*, SNWT 1998, c 9, s 34(3)(a), see also s 28 (procedural requirements) (North West Territories).

¹⁴³ *Adoption Act*, SNWT (Nu) 1998, c 9, s 34(3)(a) (Nunavut).

¹⁴⁴ *Family Services Act*, SNB 1983, c 16, s 65(3), see also s 65(2) (New Brunswick); *The Adoption Act*, SM 1997, c 47, s 94(2), see also ss 93, 94(1), 97 (Manitoba).

¹⁴⁵ *Civil Code of Quebec*, SQ 1991, c 64, a 545.

¹⁴⁶ *Adult Adoption Act*, RSA 2000, c A-4, see especially ss 2-5, 9; compare with *Adult Adoption Information Act 1985* (NZ) (re adults who had been adopted as minors).

¹⁴⁷ Government of Alberta, Queen's Printer, *Laws Online* (2010) <http://www.qp.alberta.ca/Laws_Online.cfm> at 14 July 2010.

Ontario offers no legislative guidance, save to direct the court to consider an adult adoptee's 'views and wishes.'¹⁴⁸ The statutes in Prince Edward Island,¹⁴⁹ Saskatchewan,¹⁵⁰ and Yukon¹⁵¹ are similarly unhelpful.

E *United States of America*

With the exception of New Jersey, every state in the United States allows adoption of adults.¹⁵² Colorado limits adult adoption to a small window of opportunity between the ages of 18 and 21.¹⁵³ The remaining states fall into one of two broad categories. Eight States require a pre-existing familial relationship, and the other 40 have a prima facie position in favour of any adult adoption. Within the first category, Idaho, Ohio, South Dakota and Wyoming require that a parent-child relationship had formed with the petitioner prior to the adoptee attaining the age of majority.¹⁵⁴ Idaho and South Dakota also fix a minimum duration for the relationship to have persisted while the adoptee was still a minor: 1 year and 6 months respectively.¹⁵⁵ While similar to the New South Wales provision, this additional requirement of establishing a minimum duration of the relationship proves more restrictive. Alabama, Arizona, Illinois, Nebraska, and Virginia, follow the pattern in certain other Australian States of allowing the parent-child relationship to have formed after the adoptee turned 18,¹⁵⁶ albeit some states have minimum duration requirements ranging from 3 months to 2 years not found in Australia.¹⁵⁷

¹⁴⁸ *Child and Family Services Act*, RSO 1990, c C11, s 152(4), see also s 146(3) (Ontario).

¹⁴⁹ *Adoption Act*, RSPEI 1992, c 1, s 28 (Prince Edward Island).

¹⁵⁰ *The Adoption Act*, RSS 1998, c A-5.2, s 24 (court must consider reasonable acceptable) (Saskatchewan).

¹⁵¹ *Child and Family Services Act*, SY 2008, c 1, s 130 (court must consider the adoption 'acceptable').

¹⁵² N J STAT ANN § 9:3-38 (West 2009) (New Jersey).

¹⁵³ *Children's Code*, COLO REV STAT (Michie) §19-5-201 (2009) (Colorado).

¹⁵⁴ IDAHO CODE ANN § 16-1501 (2009); see also § 16-1504 (consent of adoptee and their spouse required) (Idaho); OHIO REV CODE ANN § 3107.02(B) (Lexis Nexis 2009) (Ohio) (the established relationship requirement is only for foster carers and step-parents: para (3); the only other form of adult adoption permitted is of disabled and mentally retarded adults: paras (1) and (2)); S D CODIFIED LAWS § 25-6-18 (2009) (South Dakota); WYO STAT ANN § 1-22-102(b)(i) (2009) (Wyoming); see also §1-22-109(b) (consent of adoptee required).

¹⁵⁵ Or alternatively that a 'substantial family relationship' can be proven to have existed: IDAHO CODE ANN § 16-1501 (2009).

¹⁵⁶ *Alabama Adoption Code*, ALA CODE § 26-10A-6(2)(c) (1975) (Alabama); ARIZ REV STAT § 14-8101(F)(1) (2008) (Arizona) (the court is to have regard to the 'length and nature of the relationship' though the legislation does not specify that the familial relationship need have arisen before the adoptee attained the age of majority; compare with foster carers § 14-8101 (A)); *Adoption Act*, 750 ILL COMP STAT 50/1(F)(d), 50/3 (2009) (Illinois); NEB REV STAT § 43-101(2) (2008) (Nebraska) (Adoptive parents who are *not* step-parents are required to show a parent-child relationship of 6 months duration prior to the adoptee attaining the age of majority. Presumably, the relative silence as regards step-parents means that such a pre-existing relationship need not be proved in their case); VA CODE ANN § 63.2-1243(i) (2009) (Virginia).

¹⁵⁷ VA CODE ANN § 63.2-1243(i) (2009) (period of at least three months but the legislation does not specify when it needs to have occurred) (Virginia); *Adoption Act*, 750 ILL COMP STAT 50/3 (2009) (only for de facto step parents; must be the period immediately before the adoption proceeding); compare with 50/1(B), (F)(d) (for married step-parents no minimum duration requirement).

The remaining 40 states go beyond any Australian jurisdiction in allowing freedom of adult adoption as the default position.¹⁵⁸ Consent of the adoptee, the adoptee's spouse and the petitioner's spouse (where relevant) is required in different combinations. In a handful of states the birth parents must also be notified.¹⁵⁹ Evidently, such unbridled freedom to adopt can lead to adoption being used for ulterior purposes, as well as a disjuncture between relationships as they exist in fact and in law. For example, in *Adoption of Patricia A Spado*, a woman adopted her lesbian partner in Maine in order to secure access to a family trust.¹⁶⁰ The adoptee in that case was in fact the elder partner. In recognition of these possibilities, other states expressly forbid the adoption of a spouse or older adult.¹⁶¹ Any move to liberate adult adoption in Queensland or in other Australian jurisdictions should be mindful of Spado's example. If adoption is to remain a means by which parent-child relationships are recognised in law, then some restriction will be necessary to thwart collateral purposes.¹⁶² Class bans on adoption of spouses or older adults would be consistent with such an understanding of adoption. However more expansive restrictions have the potential to cause injustice in the individual case. For example, at first glance, adoption by grandparents would appear anathema to the purpose of adoption, and may cause 'generational confusion.'

¹⁵⁸ ALASKA STAT §25.23.010 (2009) (Alaska); ARK CODE ANN § 9-9-203 (2009) (Arkansas); CAL FAMILY CODE § 9300 (2008) (California); CONN GEN STAT § 45a-734 (2009) (Connecticut); DEL CODE Tit 13, § 951 (2010) (Delaware); DC CODE § 16-303 (2009) (District of Columbia); FLA STAT § 63.042 (2009) (Florida); OCGA § 19-8-21 (2009) (Georgia); HAW REV STAT § 578-1.5 (2009) (Hawai'i); IND CODE § 31-19-2-1 (2009) (Indiana); IOWA CODE § 600.3 (2009) (Iowa); KAN STAT § 59-2113 (2009) (Kansas); KY REV STAT § 405.390 (2009) (Kentucky); LA REV STAT § 9: 461 (provides specifically for adult adoption by step-parent) (2009) (Louisiana); ME REV STAT tit 18-A, §§9-102(a), (i), 9-202(b)(1)(ii), 9-302(b)(5) (2008) (Maine); MD CODE ANN, FAM LAW § 5-3B-13(a) (2009) (Maryland); MASS GEN LAWS ch 210, § 3 (2009) (Massachusetts); MICH COMP LAWS § 710.22(a) (2010) (Michigan); MINN STAT §§ 259.24(4), 259.241 (2009) (Minnesota); MISS CODE (Michie) § 93-17-3(4) (2009) (Mississippi); RSMo §§ 453.010, 453.090(5) (2009) (Missouri); MONT CODE ANN § 42.4.401 (2009) (Montana); NEV REV STAT § 127.190(1) (2007) (Nevada); NH REV STAT ANN § 170-B:3 (2009) (New Hampshire); NM STAT ANN § 40-14-5(A) (2009) (New Mexico); NY DOM REL § 111(4) (2009) (New York); NC GEN STAT § 48-5-101 (2008) (North Carolina); ND CENT CODE § 14-15-02 (2009) (North Dakota); OKLA STAT tit 10, § 7507-1.1 (2009) (Oklahoma); OR REV STAT §§ 109.309, 109.329 (2007) (Oregon); 23 PA CONS STAT ANN § 2311 (West 2004) (Pennsylvania); RI GEN LAWS § 15-7-4(d) (2008) (Rhode Island); SC CODE ANN § 63-9-1120 (2009) (South Carolina); TENN CODE ANN § 36-1-107(c) (2009) (Tennessee); TEX FAM CODE § 162.501 (2009) (Texas); UTAH CODE ANN § 78B-6-115(2) (2009) (Utah); VT CODE ANN § 15A-5-101 (2009) (Vermont); WASH REV CODE § 26.33.140(1) (2009) (Washington); WIS STAT § 882.01 (2009) (Wisconsin); W VA CODE § 48-22-801 (2009) (West Virginia).

¹⁵⁹ For example FLA STAT § 63.062(8)(b) (2009) (Florida).

¹⁶⁰ *Adoption of Patricia A Spado*, 2007 ME 6 (Me, 2007) (Levy J) (Maine Supreme Judicial Court allowed technical appeal of decision to annul adoption between same-sex couple) <http://www.courts.state.me.us/court_info/opinions/2007_documents/07me6sp.pdf> at 14 July 2010; *Adoption of Patricia S*, 2009 ME 76 (Me, 2009) especially [24]-[6] (Clifford J) (appeal upheld) <http://www.courts.state.me.us/court_info/opinions/2009%20documents/09me76sp.pdf> at 14 July 2010; for the phenomenon of same-sex couple adoption generally, see D Jacobs, 'Adult Adoption a High-Stakes Means to an Inheritance', *New York Times*, New York, 20 May 2009, <http://www.nytimes.com/2009/05/21/your-money/estate-planning/21ADOPT.html?_r=2> at 14 July 2010; see also Bryant, above n 3, 311-21 (use of adoption in Japan of extra-marital lovers).

¹⁶¹ CONN GEN STAT § 45a-734(a) (2009) (Connecticut); MASS GEN LAWS ch 210, § 1 (2009) (Massachusetts); MONT CODE ANN § 42-4-402(1) (2009) (Montana); NEV REV STAT § 127.190(1) (2007) (Nevada); NC GEN STAT § 48-5-101(a) (2008) (North Carolina); *Adoption Act*, VT STAT ANN Tit 15A, § 5-101 (2009) (Vermont).

¹⁶² W Wadlington, 'Minimum Age Difference as a Requisite for Adoption' (1966) 1966(2) *Duke Law Journal* 392, 409 (to avoid 'a freak or totally new form of relation').

Yet it is not difficult to conceive of an extreme set of circumstances where grandparent adoption would at least be arguably appropriate. In *Re A & B (Adoption by Grandparents)*¹⁶³ twin girls had been raised as the daughters of their biological grandparents since the age of 3 months. The court found that a failure to grant adoption could cause ‘a positively harmful result...in that the twins may in some way perceive that their own view of their position within the family is not shared by the world at large.’¹⁶⁴ Thus, supervision by a vigilant court¹⁶⁵ may produce better outcomes than legislating a panoply of class bans.

This comparison with other jurisdictions demonstrates that the permanent care rationale underpinning the adoption of minors appears in numerous jurisdictions to circumscribe the scope of adult adoption, despite the distinct purpose of adult adoption being grounded in ‘emotional or sentimental reasons’ relating to identity and belonging.¹⁶⁶ It appears that the New South Wales Law Reform Commission’s confusion about the purpose of adult adoption as distinct from child adoption, is symptomatic of the legislative position in most jurisdictions. Only Alberta in Canada clearly distinguishes adult adoption in a separate statute. In contrast, adult adoption in other jurisdictions appears as an awkward appendage to legislation otherwise exclusively concerned with child welfare. In the next part, this article considers whether adult adoption can be brought within the theoretical paradigm of ‘the best interests of the child.’

V ADULT ADOPTION AND ‘THE BEST INTERESTS OF THE CHILD’ PARADIGM

During debate in Parliament, the Queensland Minister for Child Safety asserted that ‘[t]he proposal to enable an adult to be adopted by his or her step-parent is inconsistent with the main objective of the bill.’¹⁶⁷ The Act itself states that its main objective is to provide for the adoption of children in a way that ‘promotes the wellbeing and best interests of adopted persons throughout their lives.’¹⁶⁸ Together with the guiding principles provision,¹⁶⁹ this object is a novel version of the ubiquitous principle that the best interests of the child are to be the paramount consideration in matters pertaining to child welfare. From its common law origins in the 19th century,¹⁷⁰ the ‘best interests’ paramouncy principle has come to underpin

¹⁶³ *Re A & B (Adoption by Grandparents)* (2003) 30 Fam LR 387 (Palmer J).

¹⁶⁴ *Ibid* [26].

¹⁶⁵ See *Re K and the Adoption of Children Act 1965* (1988) 12 Fam LR 263, 264-5 (Young J) (‘The court is always very careful to see that adoption is used for the purposes contemplated by the Act and not for any collateral purposes’); *Re Lee Yen Chum* (1963) 4 FLR 296, 299 (Selby J) (re ‘accommodation’ adoptions).

¹⁶⁶ New South Wales Law Reform Commission, above n 84, [4.8], [4.22].

¹⁶⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 18 August 2009, 1655 (Philip Reeves).

¹⁶⁸ *Adoption Act 2009* (Qld) s 5(a).

¹⁶⁹ *Adoption Act 2009* (Qld) s 6(1).

¹⁷⁰ For example *Hope v Hope* (1854), 4 De GM & G 328, 344, 345 (Cranworth LC); *Re McGrath (infants)* [1893] 1 Ch 143, 148 (Lindley LJ) (‘The dominant matter for the consideration of the Court is the welfare of the child’); *Ward v Laverty* [1924] All ER Rep 319, 323 (Viscount Cave LC) (‘It is the welfare of the children, which, according to the rules that are now well accepted, forms the paramount consideration in these cases’) cited in *A v Liverpool County Council* [1981] 2 All ER 385, 387 (Wilberforce LJ); for a discussion of the historical roots see *J v C* [1969] 1 All ER 788 (Guest LJ).

the vast majority of modern child welfare laws throughout the world. It has informed adoption law in Queensland since 1921¹⁷¹ and has been reinforced by the normative influence of international law since 1989.¹⁷² Since the 1970s, academic debate over the theory underpinning child welfare – and more specifically adoption – has almost invariably centred on the ‘best interests of the child.’¹⁷³ Thus, the Minister essentially argued that allowing the adoption of adults would be beyond the theoretical scope of adoption legislation. To the contrary, this article submits that the reformulation of the ‘best interests’ principle in the new Act more closely aligns the interests of minors and adults, and that ultimately ‘child’ can include an adult child.

A Reformulation of the ‘Best Interests’ Principle

Over the years the courts have had to contend with several different renderings of the same principle. Despite occasional suggestions, for example, that ‘best interests’ encompasses broader considerations than ‘welfare,’¹⁷⁴ it is generally considered that the varying terminology involves ‘a distinction without a difference.’¹⁷⁵ Yet the new Act makes an addition to the principle that cannot be ignored in the context of adult adoption. The paramountcy principle has been reframed as: ‘the wellbeing and best interests of an adopted child, both through childhood *and the rest of his or her life*, are paramount.’¹⁷⁶ While perhaps explicable by the Government’s focus on reforming the right to information,¹⁷⁷ this addition to the principle effectively acknowledges that it is difficult to confine ‘interests’ to ‘interests whilst a minor’ in the context of adoption, especially given that adoption alters legal and personal relations and has potential repercussions for identity over the course of a lifetime.¹⁷⁸ This novel reformulation follows the precedent of only New South Wales and the United Kingdom from among common law jurisdictions.¹⁷⁹ Their respective positions provide little guidance as one allows adult adoption and the other restricts adoption to

¹⁷¹ *Infant Life Protection Act Amendment Act of 1921* (Qld) s 4 (added the requirement that ‘[t]he welfare and interests of the child will be promoted by the adoption’).

¹⁷² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 21 (entered into force 2 September 1990); see also art 1 (child means a person below the age of 18); see also *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, opened for signature 29 May 1993, UNTS 1870, I-31922, art 1(a) (entered into force 1 May 1995) (‘Hague Convention’).

¹⁷³ Most notably the Best Interests Trilogy: J Goldstein, A Freud, and A Solnit, *Beyond the Best Interests of the Child* (Free Press, 1973); J Goldstein et al, *Before the Best Interests of the Child* (Free Press, 1979); Joseph Goldstein et al, *In the Best Interests of the Child* (Free Press, 1986); see also Joseph Goldstein et al, *The Best Interests of the Child. The Least Detrimental Alternative* (Free Press, 1996) (where the authors later disavowed ‘best interests’); for adoption, see for example K Murphy, M Quartly, and D Cuthbert, ‘“In the Best Interests of the Child”: Mapping the (Re)Emergence of Pro-Adoption Politics in Contemporary Australia’ (2009) 55(2) *Australian Journal of Politics and History* 201, 202; also Marshall and McDonald, above n 45, 10.

¹⁷⁴ *Re Z* (1996) 20 Fam LR 651, 659 (Nicholson CJ and Frederico J).

¹⁷⁵ H Finlay, ‘“First” or “Paramount”? The Interests of the Child in Matrimonial Proceedings’ (1968) 42 *Australian Law Journal* 96, 103; see also R Chisholm, ‘“The Paramount Consideration”: Children’s Interests in Family Law’ (2002) 16 *Australian Journal of Family Law* 1, 2; A Dickey, *Family Law* (Lawbook Co, 5th ed, 2007) 291; *Priest v Priest* (1963) 9 FLR 384, 392 (Herring CJ).

¹⁷⁶ *Adoption Act 2009* (Qld) s 6(1) (emphasis added), see also ss 5(a) and 9; compare with *Adoption of Children Act 1964* (Qld) ss 5A and 10.

¹⁷⁷ Child Safety, *Balancing Privacy and Access: Adoption Consultation Paper*, above n 85.

¹⁷⁸ See *Re DG: Adoption of DR* (2000) 26 Fam LR 107, [37], [39] (Hodgson J).

¹⁷⁹ *Adoption Act 2000* (NSW) s 7(a) (‘and later life’); *Adoption of Children Act 2002* (UK) c 38, s 1(2); *Adoption of Children (Scotland) Act 2007* (UK) asp 4, s 14(3).

the age of 18. Regardless of which model has been adopted, the change highlights that the lifelong benefits that a minor receives from adoption are the same as those that an adult would receive were that option available to them. The addition of the phrase ‘and the rest of his or her life’ supplements the permanent care rationale with a recognition that the effects of adoption continue into adulthood, including for example, repercussions for identity and belonging.

B *Can an Adult be a ‘Child’?*

In contrast to the considerable literature addressing the meanings of ‘best interests’,¹⁸⁰ and ‘paramount’,¹⁸¹ there is a dearth of literature on the limits of ‘the child.’¹⁸² In other family law matters, courts have defined ‘the child’ as restricted to the child who is the subject of the proceedings.¹⁸³ In cases where the child’s mother is also a minor, the court has given paramount consideration to the son or daughter.¹⁸⁴ This may indicate that it is the quality of being someone’s child, rather than of being under 18, which is of greater relevance. This line of cases may also be explained on the basis that the parent below the age of majority was simply not the minor who was the subject of the proceedings, and that had they been the focus of the case, their interests would have been treated as paramount.¹⁸⁵ However, in any case where a young parent would be the subject of child welfare proceedings, the young parent would be involved in their capacity as the child of their own parents, and never as a parent themselves. This demonstrates that a ‘parent’ in one matter can be a ‘child’ in another, and that the best interests principle will only attach to them in the latter situation. The law’s ability to differentiate between a minor’s role as a parent and as a child should mean that it is equally capable of doing the same with respect to adults, and of applying the best interests principle accordingly.

Elsewhere, other jurisdictions have simultaneously allowed adult adoption and retained the best interests of the child as the paramount consideration. Where the statute defines ‘child’ as inclusive of adult adoptees, the courts have simply applied the best interests of the child in respect of adult children.¹⁸⁶ A handful of American states have replaced the best interests principle in adult adoptions, requiring the court

¹⁸⁰ See for example V Kordouli, ‘Relocation – Balancing the Judicial Tightrope’ (2006) 20 *Australian Journal of Family Law* 89; D Thomson, ‘Beyond the Rhetoric of the Best Interests of the Child’ (2005) 7 *Australian Journal of Professional and Applied Ethics* 58; for adoption specific literature see R Schuz, ‘The Right of a Child to be Raised by His Biological Parents – Lessons from the Israeli “Baby of Strife” Case’ (2007) 27(3) *Children’s Legal Rights Journal* 85; J Roby, ‘From Rhetoric to Best Practice: Children’s Rights in Intercountry Adoption’ (2007) 27(3) *Children’s Legal Rights Journal* 48.

¹⁸¹ See for example Chisholm, above n 175; J Crowe and L Toohey, ‘From Good Intentions to Ethical Outcomes: The Paramountcy of Children’s Interests in the *Family Law Act*’ (2009) 33(2) *Melbourne University Law Review* 391.

¹⁸² See Dickey, above n 175, 301 where 2 paragraphs are devoted to the meaning of ‘the child.’

¹⁸³ See *F v M1 and M2* (1994) 18 Fam LR 221, 226 (Kay J).

¹⁸⁴ See *Birmingham City Council v H (a Minor)* [1994] 2 AC 212; *F v Leeds City Council* [1994] 2 Fam LR (Eng) 60.

¹⁸⁵ See *Vandenburg v Bunn*; *Vandenburg v Barry* [1994] FLC 92-493, 81,124 where the court gave paramount consideration to the welfare of the child who was the subject of the proceedings despite the fact that the welfare of another child was potentially affected.

¹⁸⁶ For example *Re Adoption Application by Clark* (1987) 11 Fam LR 962, 963, 965 (Boxall SM, Rowe and Lee JJP); *Re DG and the Adoption Act 2000 (NSW)* (2006) 36 Fam LR 124, [16] (Austin J).

instead to consider the best interests of all persons involved.¹⁸⁷ This approach reflects the idea that children are vulnerable by virtue of their immature years, and that once adulthood is reached this consideration automatically lapses.¹⁸⁸ Yet the principle has more to do with the *relative* vulnerability between the parties than with vulnerability defined merely by an age cutoff. Even in American states where the court is required to consider all relevant interests, it is clear that a hierarchy of interests ought to exist. As in the case of the adoption of minors, it would be repugnant to use adult adoption solely to provide children to ‘middle-class couples with fertility problems.’¹⁸⁹ In this sense, the adoptee’s desire to have a parent-child relationship recognised at law will always be of more relevance than the adoptive parent’s desire to have a child, regardless of the adoptee’s age. The New South Wales Supreme Court appears to have adopted this nuanced approach, modifying the ‘paramount’ component of the principle. Whereas in the adoption of minors ‘paramount’ means that ‘the welfare of the child will overcome all considerations opposed to it,’¹⁹⁰ in relation to adult adoption, the New South Wales Supreme Court has held,

it is plain that the interests of a child who has already attained 18, including future interests, are to be given weight, if not as much weight as the interests of a child prior the time of attaining 18.¹⁹¹

This stance can be vindicated ethically. Crowe and Toohey have analysed ethical justifications for giving paramount consideration to the interests of children. They identified the notion of parental duties as a ‘correlative of the idea of a child’s inherent vulnerability as a moral person.’¹⁹² According to this concept, parents owe ethical duties to their children, which frequently requires that they put the interests of their children before their own. This applies to a lesser extent to adult children. Parental duties decrease in inverse proportion to the child’s age, as does its correlative, the child’s vulnerability. Parenthood nonetheless continues throughout life, unless ruptured. As already noted, of most relevance to adult adoptees are the lingering emotional or symbolic roles parents fulfill. Thus, if the basis for giving precedence to children’s interests is the notion of parental duties, then equally the interests of adult children should be given priority, albeit to a lesser degree than those of a minor.

To recapitulate, the changes wrought by the *Adoption Act 2009* (Qld) mean that the ‘interests’ in the best interests principle now specifically include the lifelong interests that are of most importance to adult adoptees; the case law shows that in applying the best interests principle, courts are adept at differentiating a person’s role as a child from their other capacities; and finally, as a matter of logic, it is possible to apply the

¹⁸⁷ See for example OKLA STAT tit 10, § 7507-1.1 (‘if the court finds that it is to the best interests of the people involved’) (2009) (Oklahoma).

¹⁸⁸ See for example *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, preamble (‘childhood is entitled to special care and assistance’), art 1 (‘child means every human being below the age of eighteen’) (entered into force 2 September 1990).

¹⁸⁹ Marshall and McDonald, above n 45, 10.

¹⁹⁰ *Re TLR (an infant)* [1968] 1 NSW 776, 779 (Myers J) (re ‘paramount’ in the *Adoption of Children Act 1965* (NSW)); compare with *Re An Adoption of D* (2008) 38 Fam LR 345, [36]-[7] (Refshauge J) quoting *ABA v EWF* (1977) 3 Fam LR 11487, 11492 (Connor J) (‘it is not the overriding consideration nor is it the only consideration’).

¹⁹¹ *Re Director-General, Department of Community Services (NSW): Adoption of DR by DCB and HMB* (2000) 26 Fam LR 107, [39] (Hodgson CJ).

¹⁹² Crowe and Toohey, above n 181, 407.

best interests principle in respect of a child who is also an adult. The Queensland Government's contention that adult adoption falls outside the scope of the *Adoption Act 2009* (Qld) fails both practically – as evidenced by experience elsewhere – and theoretically.

VI CONCLUSION

Adult adoption has been shown to be important to some step-children because a change of name and will cannot provide for every legal contingency. Moreover, for some people only adoption can fulfil their emotional need of having their parent-child relationship recognised as it exists in fact. This reveals a psychological link between legal recognition of relationships and feelings of authenticity. Psychological studies of foster care children indicate that adoption may reinforce a sense of identity and belonging and that this in turn can lead to positive life outcomes. It is submitted that it is likely that similar results would be uncovered in a psychological study of adult adoptees, though to date no such study has been conducted.

Comparatively, the vast preponderance of common law jurisdictions appreciate these desires in permitting adult adoption. Some, like New South Wales and Western Australia, require a parent-child relationship prior to the adoptee becoming an adult. Others require a pre-existing relationship but do not stipulate at what point it needs to have arisen. Most American States and some Canadian Provinces and Territories do not even require that. Quebec in Canada stands alone in offering a janus-faced provision encompassing the rigidity of New South Wales and the flexibility of most American States. Other jurisdictions also offer lessons in how to deal with the overlap between step-parent and adult adoptions. At least one jurisdiction – namely New South Wales – has been forced to amend their adoption legislation to take account of the overlap. Western Australia eliminates any overlap by referring only to 'child' in the step-parent adoption provision. Other jurisdictions outside of Australia have dealt with the issue in the same way. Should the Queensland Parliament allow adult adoption in the future, it must consider whether it is justified in restricting adult adoptions by step-parents to a greater extent than other adult adoptions.

There are two main arguments against allowing adult adoption. The first, proposed by the Queensland Government during parliamentary debates, is that adult adoption necessarily falls outside the ambit of 'the best interests of the child.' As shown, adults are also the children of their parents and the Government's assertion cannot be supported in theory or practice. A better argument, which was not raised in debates, is that the liberalisation of adoption could potentially lead to 'adoptions of convenience' motivated by collateral purposes. However, this is an argument against certain models of adult adoption – notably the unduly liberal provisions in some American states – rather than against liberalisation per se. Provided Queensland is mindful of the experience in other jurisdictions, adult adoptions can be permitted without opening the floodgates to adoptions of convenience. The situation in the Australian States and Territories that allow adult adoption is evidence of this.

There are good practical and emotional reasons for allowing adults to be adopted by their step-parents in appropriate circumstances, and there are no sound arguments against; that is, there are only positive and no negative consequences for allowing adult adoption. By prohibiting adult adoption in these circumstances, the state is

arbitrarily denying the way in which an adult sees themselves as the child of those they consider to be their parents. This amounts to arbitrary interference in family matters and a breach of human rights. This provides cause for reconsidering the ban on adult adoption in Queensland. In sum, others have, Queensland can, and Queensland should, allow for the adoption of adult step-children.