SENATE INQUIRY INTO COMMONWEALTH CONTRIBUTION TO FORCED ADOPTION POLICIES AND PRACTICES

ADOPTION ORIGINS VICTORIA INC.

Preamble to Submission

On behalf of Origins Victoria members we are citizens of the Commonwealth Of Australia and are mostly residents of the State Of Victoria

As citizens of the Commonwealth of Australia we have an inalienable right to protection under the Australian Constitution and Common law of this country

As Australian citizens the Commonwealth affords us protection from unlawful and harmful actions that threaten our rights to Life Liberty and Justice from those who would deny us these rights within and without the borders of Australia.

Introduction and Summary of contents

Adoption Origins Victoria Inc. would like to acknowledge all people who have worked towards truth and justice around Australia's past adoption culture. The opportunity to have this inquiry is the product of numerous people's experiences over many decades studying the nature of the adoption industry. A large part of this study revealed the inherent injustices of a complex system designed to respond to diverse wants, expectations and desires; often without basic thought and regard for the mother and her baby at the heart of the issue.

We offer our sincere gratitude to the Senate Committee and Senator Siewert for their time and effort learning about the history of past adoption practices and for their endeavors'to find just solutions to the many problems this inquiry will uncover.

In the following document, Origins Victoria Inc. establishes betrayal was at the heart of the adoption process. In addition, many mothers had their babies unlawfully removed in the labour ward before they had even expelled the placenta.

Origins Victoria Inc further establishes that unfair practices relating to assistance and support to mothers was insufficient and in many cases non-existent. This includes the rights of mother's to be counseled; to be informed of the assistance available in order for her to make fully informed decision as to what was in the best interest for her child.

Origins Victoria Inc also reveals how the abuse of a mother and her child was indeed both systemic and systematic. The systemic abuse began when a single mother presented at the antenatal clinic and was referred to the social worker for a short term answer. In turn, a mother's pregnancy was viewed as a profound problem. However, she was unaware that the person that she believed will advocate to assist her and her baby's future together had already a mindset toward social cleansing and was already committed to potential adoptive parents.

Accordingly, the letter 'A' was recorded on a mother's file to alert labour ward staff. In reality, this meant that others had made the decision and not the mother. The consequences of this action resulted in longstanding emotional trauma for many mothers: it destroyed her trust in humankind; compounded any existing problems that were highly likely, in other circumstances, for a mother to grow through and survive emotionally. This baby was in turn subject to a grievous and life-long wound of separation and extrication to the ultimate debasement of the baby's own identity being exterminated.

Origins contends Mothers were incarcerated, marginalized, indoctrinated, humiliated, dehumanized, disenfranchised, and then coerced into signing documentation that would sever her right to parent her own child. Impacting psychologically trauma upon herself and forcing her child to suffer issues of abandonment, loss of identity forever. These crimes against humanity were accomplished by breaching Commonwealth Laws because hospitals whether fully or partially funded were accountable to the Commonwealth Government see 1948 National Health Act

Failing to provide professional counseling facilities for the mother prior to, during and/or after confinement Maltreatment of the unmarried mother treatment of her in a cruel or demeaning manner.

Failure to have any proper regard for natural law, prevailing domestic and international principles concerning the protection and advancement of human rights. Promoting adoption in preference to warning mothers of potential harm such a course of action may cause them and their child.

The inhumane practice forbidding eye contact between the mother and her child with the intention of suppressing bonding resulting in violent to the psyche of mother and child.

The use of stirrups, shackling hands to the bed holding a sheet in front of the mother with heavy sedation as a means of control and Physical restraint in order to stop them from seeing the child immediately after giving birth. For example, (see Four corners 1969 Mike Willasee Katie's story,[1])

Informing mothers that their child had died, when they were alive and have been relocated for adoption. (see M Mc Donald Interview)

Failing to have regard to and act in the best interests of both the mother and the child. Failing to take into consideration the mother's individual circumstances. An approach of on solution fits all.Welfare of children Ordinance1949 and adoption Act28, 58 1964
Maltreatment of the mother, failure to make reasonable attempt to ensure unmarried mothers that their treatment was equal to that of married mothers. National health act

Allegations of institutions giving custody of children to prospective adoptive parent prior to the conclusion of the 30 day revocation period. Welfare of children Ordinance1949 and adoption Act28, 58.1964

This submission will show how past adoption practices were callous, merciless and sadistic acts contravening a mother's basic human rights. At the heart of this abuse lies the fact that adoption practices were ill-conceived and authorities stooped to civil crime in adoption practices; social workers, medical professionals, church organisations and the successive State and Commonwealth governments throughout this period of adoption breached State and Commonwealth laws. Director Generals Reports have been submitted on a memory stick

Euphemisms.

We will be using the term 'mother' throughout this submission simply because that is what we are. We have been mothers from the moment of conception, throughout the birthing experience until infinity. In later years, many of us birthed our own family and in most cases, we would have parented our own infant but for the interference of people that failed in their duty of care, We would have parented our own baby if not for the breaching of State, Commonwealth, and International Laws. Failing to have regard to, and act upon, the mothers' individual circumstances.

Why "BIRTHMOTHER" Means "BREEDER"

by Diane Turski

I had never heard the term "birthmother" until I reunited with my son. When the social worker who located me referred to me as his "birthmother," my first reaction was to instinctively recoil in distaste. What is a "birthmother?" It occurred to me that perhaps she had merely applied this ridiculous sounding term in an attempt at political correctness, so I ignored it. However, when my son's adoptive mother initiated her first contact with me she referred to him as my "birthson." What is a "birthson?" And what would a "birthfather" be - I didn't know that fathers gave birth! In a "birthfamily" are there also "birthsisters," "birthbrothers," "birthgrandparents," "birthaunts," "birthuncles," "birthcousins," "birthpets," etc?

It was then that I began to suspect that these ridiculous "birth" terms were not merely being applied in a benign attempt at political correctness. Was it possible that the adoption industry intended to insult us by applying these ridiculous labels to us? Is it possible that we mothers have been so naive that we haven't yet realized their true intent? Could it be that we are insulting ourselves every time that we apply or allow others to apply these ridiculous terms to us?

Investigating, I learned that U.S. social workers had collaborated about 30 years ago to invent their own list of contrived terms to appease their adopting clients. Adopters no longer wanted anyone to use the original term "natural mothers." Why? Three reasons: 1) it indicated respect for the mother's true relationship to her child - she could not be written-off as a "convenient slut" whose only value was reproduction, 2) it recognized that the sacred mother/child relationship extended past birth and even past surrender, and 3) it implied that the adoptive mother's relationship to the child was unnatural.

The adoption industry didn't want adoption to be considered unnatural - they could lose customers this way! After all, people were paying good money for "a child of their own."

Adopters didn't want a reminder that the child they were adopting still had a loving parent somewhere else. After all, social workers had promised them a child "as if born to."

So social workers responded by creating a list of ridiculous "birth" terms meant to confine the mother's relationship with her child to simply giving birth, ending at that point. In other words, "birthmother" is simply a euphemism for "incubator" or "breeder."

Then, social workers deliberately disguised their disrespectful intent by calling it "Respectful Adoption Language." "Respectful" to adoptive parents, who are now to be called "parents," as if the two natural parents no longer exist.

Deliberately creating the term "birthmother" was a further attempt to break the bond between mother and child; in addition to altering birth records to indicate that adopters gave

birth, sealing the original birth certificate, and changing the child's identity with a false adopted name. Adoption is built on lies and denials of truth, so we mothers shouldn't be surprised that "Respectful Adoption Language" is just another deceitful ploy.

However, one truth that cannot be denied is the truth that thousands of mothers and their lost children have found in reunion: that the deep spiritual/emotional mother-child bond between them has never been broken, despite the decades they were separated. That natural motherhood is forever, that the relationship extended *past* birth. Adopters feeling threatened by this sometimes try to pressure adoptees to end reunions: instead, they should hold their brokers accountable for lying to them with the "as if born to" sales-pitch.

Now that we mothers have learned the truth about the invention of these ridiculous "birth" terms, what should we do about it? Do we really want to continue to disrespect ourselves and allow the adoption industry to continue to disrespect us by applying and allowing others to apply these terms to us?

Or should we insist on applying truly respectful language, such as the term "natural mother," which is still used in other countries who have not been as propagandized by the United States adoption industry? I believe it is time for us mothers to defend ourselves and our children from further insults and attacks.

Diane Turski is a mother who lost her newborn son to a sealed-record adoption in 1968. Thirty years later they happily reunited when he found her, proving that the mother/child bond can never be broken. During those thirty years Diane, as a single mother, had successfully raised her daughter while earning an MBA degree and pursuing a business career. The reunion triggered Diane's activism and her dedication to bringing truth and social justice to other mothers of adoption loss.

All of the documents cited in this submission are available or copies can be provided to you upon request

- Who is Adoption Origins Victoria Inc
- Terms of Reference
- 1948 National Health Service Act (Cwlth) referendum
- General information and literature review
- Commonwealth Law Ordinance Of Adoption
- Commonwealth Marriage Bill

- Commonwealth Crimes Act consents
- Financial Assistance Available
- The language of adoption and eugenics including Rapid adoption
- Victorian Inquiry

" Raison d'être –
(a) the role, if any, of the Commonwealth Government, its policies and practices in contributing to forced adoptions; and

(b) the potential role of the Commonwealth in developing a national framework to assist states and territories to address the consequences for the mothers, their families and children who were subject to forced adoption policies.

Adoption Origins Vic Inc contend the following Commonwealth Laws practices and Ordinances were breached in the hungry mission to rationalize the unlawful and fraudulent removal of perfect new born babies from their own mother to be placed in the created *Lawful* care of mainly infertile couples

Contravention of Commonwealth Legislations are as follows

(a) the role, if any, of the Commonwealth Government, its Laws, policies and
(b) The Commonwealth Marriage Act 1961 Sect 89
(c) The Commonwealth Crimes Act
(d) The Commonwealth Social Security Act 1943
(e) The National Health Service Act 1948
(f) The A.C.T Ordinance of adoption of Children's Act 1941
(g) The Human Rights Review of the A.C.T. Adoption Of Children Ordinance
(h) Annual reports submitted to the Commonwealth Government and placed on the table

Infringement of International Laws the Australian Commonwealth are Signatories to include:

(i)The United Nations Rights of the Child Rights of the child
(J) The Hague convention
(K) The Nuremberg
(L) The Genocide Convention ACT 1949

Who is Adoption Origins Victoria Inc

Adoption Origins Victoria Inc began in Victoria when a small group of people met in mid 1996 with Hon. Christine Campbell M.P State member for Pascoe vale and handed her a petition requesting her to lobby for an inquiry into past adoption practices.

As the shadow minister for Women's/ family affairs Ms Campbell contacted her collogues in other states and requested they also call for an inquiry, and with her assistance Origins Vic held its inaugural meeting at Parliament house on the 20th February 1997 where 300 people were in attendance and a public plea for an Inquiry was made by Francis O'Brien QC and Elizabeth Edwards convener of Adoption Origins Vic Inc.

Our aims have always aligned with our sister groups in NSW and QLD

Origins Inc (New South Wales) was established in 1996 by a group of mothers who lost their children to adoption. In 1998, Origins Inc successfully called for a State Parliamentary Inquiry into adoption practices in New South Wales. It was the second longest Inquiry held in the history of NSW.

The present Committee members of Adoption Origins Vic Inc are Elizabeth Edwards Convener, Jeanie Argus Secretary, Lyn Kinghorn Treasurer, Janet Tough assistant Secretary, Marie Coffee, Patsy Gall, and Patricia Posterino.

Our mission is the support of healing, assistance with family reunion, promotion of community awareness as to the consequences of adoption separation, to liaise with likeminded organizations, promotion of research, reform and redress, and we produce a monthly newsletter.

We have a library of information concerning the practice of adoption in Victoria, historical material, medical journals and papers, related reports, legislation and minutes dating from the post WWII period.

Conferences organized by us include: Mental Health for People affected by Family Separation held in Mental Health week Liverpool NSW 2002
State Conference Mental Health for People affected by Family Separation Cobram 2003
Mental Health for People affected by Family Separation QLD Mental Health week 2004
Mental Health for People affected by Family Separation held in Mental Health week at the Melbourne Town Hall in 2006.

Adoption Origins Victoria Inc is affiliated with Origins Queensland, Origins Canada, Origins HARP for Forgotten Australians, Stolen Generations Alliance, Baby Scoop Era USA, South West Sydney Stolen Generations Support Group, Trackers UK.

Our relationships with research teams includes Monash University

Recently there has been much coverage to Spain and the baby trafficking allegations being investigated, the grandmothers in Argentina have taken legal action, Canada has had a lot of press coverage and politicians there are calling for an inquiry, and Korea has put the Australian government on notice because of Korean babies being placed on the international adoptions stage.

International Law
The Convention of Genocide Act 1949

*Article 2*A although it may not have been the intention to Kill a Mother or her child the clean break was a failure that led to many deaths. Origins cannot produce precise figures of suicides however the act of severing the existing bond between a mother and her child surely shows the intent to kill the soul by telling a Mother her child was dead by denying a Mother her right to see hear touch her baby, equated to a nine month abortion therefore effectively killing her child.
B bodily or mental harm *See Clothier 1945*
C The very act of marking a file to alert labour ward staff that the baby was to be withheld from its mother shows intent to inflict Mental harm *See Crimes Act etc*
The forced removal of a baby from its mother and inflicting lactation suppressants showed the intent to inflict upon family group destruction in whole or part *see Dr Geoff Rickarby. Genocide Convention Act*
D Prevent birth imposing measures by sterilization on a Mother after delivery and her child whilst carrying out experimentations whilst in the care of Foundling homes and adoptive

parents *see Forgotton Australians Hamilton Burns, Bundaberg, Dr Deborah Ambry Mick O Meara. Marion Bell*.
E Transferring from one group to another *Genocide Convention Act*

Degeneracy of women – and calls for rehabilitation

Attitudes to the single Mother changed post world war 11
The pregnant single adoption had been created in law as a solution to primarily providing for a homeless child. Instead it became the desperate response for infertile couples seeking a family. By taking an unwed mothers child through social ignominy both the unwed mother and her family who also had been shamed for an unacceptable pregnancy ensured both she and her baby became prey, and simply put the professionals *created a reality* for what their perceived seed of poverty. Moreover Judgmental attitudes reflected the push for social cleansing

Edited by BETTY LEE

Woman and the Home

Should we deprive unmarried mothers of a baby's love?

By MARIE J. FANNING

A GREAT deal of controversy was caused in England recently when Mrs. Heading Mitchell, secretary of a Moral Welfare Association, said that unmarried mothers should be forced to look after their babies for eight weeks before putting them out for adoption.

"Doctors advocate that illegitimate children should be taken from their mothers at birth and put out to adoption at a fortnight old," Mrs. Mitchell stated, "but the doctors are wrong.

"The mother should be allowed to have her child with her for at least eight weeks. She must be taught her responsibility for the great disadvantage under which her child was brought into the world. The pain of parting with her child after eight weeks or more may help to keep the unmarried mother straight in her future life."

Church Council and Welfare Organisations in England were divided in their opinions as to whether Mrs. Mitchell's suggestion would have the desired effect on the mother's moral outlook.

Many maternity homes run by charitable and religious organisations in Melbourne endeavour to keep unmarried mothers with their babies for periods up to three months. Matrons of these homes say that although they would like to think that the time spent with the child before it is adopted helps the mother to a better way of living, this is not their only object in recommending this course. They believe that the baby receives a better start in life if it is possible for the mother to feed it herself for at least two months, and also consider that the mother should be given this period to decide whether she really wants to part with her baby.

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THIS week several Melbourne women interested in the welfare of unmarried mothers gave their views on the statement made by Mrs. Mitchell.

MISS ISOBEL STRAWN, Almoner at the Women's Hospital, said she considered Mrs.

Mitchell's recommendation altogether too harsh.

"If a baby is to be released for adoption it is much better for both mother and child that

Commonwealth Crimes Act

Why the Church the Medical profession and Governments were complicit with unlawful and in many cases forced removal of babies and resorted to commit crimes of Abduction.
The solution devised by the ASSWA to the 'problem' – the moral offence caused by 'illegitimacy and ex-nuptial pregnancy was cruel dehumanizing and never can be justified or reconciled.
Just as Japan continues to experience and grieves the effects upon innocent people fallout from nuclear bombs dropped on Hiroshima and Nagasaki at the conclusion of WW11 mother's 50 years later continue to grieve for the unconscionable behaviour of people who should have be advocating on behalf of the downtrodden and oppressed not expressing moral superiority and devising punitive unlawful resolutions.
The 'problem' – the moral offence caused by 'illegitimacy and ex-nuptial pregnancy…sources of disgrace and scandal had a neat solution' - 'Adoption' - 'which provided at the same time for the needs of infertile couples.' (Former Social worker for the Catholic Adoption Agency, extracted from her article, "Adoption in the 80s〕 (...)

In 1967 spokeswoman for the Australian Association of Social Workers – the peak training body of the social work profession – (...) described the "ultimate objective of Adoption" as follows:
'The Social workers concern is with childlessness or infertility, but the particular area of competence is, not in it's treatment, but in assessment or resolution of the effects on the marital relationship of the couple...The ultimate objective of Adoption is such a planned change, through helping to make a family where before one did not exist...But before the placement can be made there are other minor or contributory changes in the social functioning of various individuals where the social worker's part is well defined...and that is...The natural parents must resolve, if possible, conflicts about the surrender of the child.' According to (...) *, neither the unwed nor their offspring – 'various individuals'– nor the childless married couple defined family.*

In 1956, Reid expressed an identical view at a national convention of social workers in America, when he stated:
'The concept that the unmarried mother and her child constitute a family is to me unsupportable. There is no family in any real sense of the word.'

Almoners and Social Workers

Their failure to provide equal medical assistance to unmarried mothers.
Public hospitals employed an Almoner to provide advocacy and for the services of dispensing any information for financial assistance, the duration of this course was sometimes 1 week or ten days
In the 1960s Social workers took over the role of Almoners, problematic to this was the Education system itself. Melbourne University provided comprehensive training but it was an era when the interdisciplinary was centered on Eugenics and a prevailing mindset was contemptuous of single mothers and regarding both her and her offspring as being feeble minded rejected the possibility of single mothers raising their own infant
However governments funding services conjectured fiscal hardship would burden the public purse.
This was the environment that secrecy and shame was compounded by a single girls being marginalised.

When a single mother presented at her first anti natal appointment she was directed to the social worker who assessed her position. If a mother to be had concealed her pregnancy from her parents it would be highly likely she would need support to raise her new family.
Very often a mother was discharged from her work therefore she was unemployed.
She would be transferred to an unmarried mother's home to carry out domestic duties in return for her board and keep. Sometimes a Mother would be dispatched to a wealthy family be a nanny and assist with home duties without pay.
Vulnerable she was subjected to indoctrination that disenfranchised her from her maternity and from even believing she had a right to her baby, instead being told that if she loved her baby she would place the baby for adoption
When she presented in labour she was a lamb being led to the slaughter, because at the social workers instructions her file was marked A or BFA (Baby for Adoption) This was illegal and apart from showing intent to deprive a mother from eye contact with her baby in many cases her baby altogether. Popular conviction held bonding took place post partum.
In other cases a Mother was drugged or knocked unconscious with nitrous oxide to assist staff to remove the infant with no fuss. *(See Justice Chisholm)*
As adoption came to be accepted as the solution to infertility hospital staff felt validated in taking a baby from an unmarried mother, in some cases telling her that her baby was dead and placing the baby to an alien breast of a woman who had just delivered a still born baby, termed Rapid adoption this was a preferred method until the proclamation of the1964 Act .
Adoption is a social construct and a created reality. In other circumstance all involved in the adoption practice would be treated for a delusion, but in adoption the medical profession devised it as a means of providing solutions.
A single mother could ignore she had a maternity; a child conceived out of wedlock could pretend that it had a family. An infertile married couple confused themselves that they had a family of their own as if born to them in wedlock; however this neat solution well known as the adoption triangle was flawed, not standing alone it relied upon the fabric of society to accomplish the embellishment fashioned by the medical professionals treating infertile couples they too needed to deny mothers identity as the true mothers of their own children
Denial of their maternity has imposed mental and psychological dissociation from the whole experience of what should be the most precious and enjoyable time in a women's life, instead these women 's babies were donated for most part to married couples deemed more deserving and more suitable.
The life time of mental trauma was imposed upon Mothers and their infant from the very beginning when at the actual birth; practices were adopted in most hospitals to prevent any bonding between the mother and her child as follows
Denying mothers the full knowledge of their legal rights and options.
Failing to provide the information in writing and -or failing to establish if the mother is fully cognizant of her rights and options. This is particularly important with women who have literacy difficulties.

- Inappropriate use of drugs before and after the birth to induce a state of compliance to take the consent
- Dangerous levels of nitrous oxide administered
- The placement of pillows, on the mothers chest to prevent eye contact with her infant
- Mother's hands shackled to the side of the bed during and post labour
- By replacing the parents legal right to guardian ship of their child
- Unbeknownst to the Mother , her file marked BFA to signify to staff that the baby was to be removed mostly before she had expelled the placenta

This practice contravened the law as these mothers were to be treated no differently to any

other mother who presented in labour. She was to make the decision to relinquish her baby only *after delivery* *and without any duress being placed upon her* the law did not specify the source of duress, clearly many professionals seemed to be oblivious of this, feeling justified in punishing unwed mothers for offending against the mores. *see Adoption Children's Act sec 29 (b)*
The NSW inquiry Standing Committee into past adoption practices established that to remove a baby and when a mother requested its return was denied constituted abduction or unlawful removal see *Richard Chisholm p 140*

In his book titled *''Unmarried Mothers''* Clark Vincent 1961, he predicted that very scenario" *it is quite possible that, in the near future, unwed mothers will be "punished" by having their children taken from them right after birth. A policy like this would not be executed -- nor labelled explicitly -- as "punishment.*"
After the proclamation of the 1964 act they dared not continue with rapid adoption because the Mother may not have signed a consent.*(Sarah Hamilton) Burns Joy ware*

Psychological Impacts
'***Imagine this sentence of silence***.!!
The impact of these assaults has affected women in different ways. Some have resorted to total denial of the experience, never admitting to their children or in some cases even their husbands that they lost a child to adoption
45%Never had another baby
(...) has told Origins how Professor (...) informed her that previous to her being administered Depo-Provera whilst incarcerated in Winlaton detention centre for girls her reproductive system had been butchered. (...) did not have another baby.
(...) was raped at the age of 16 resulting in her conceiving her son. Immediately after the birth she was placed in a special care unit because of infected blood, administered during the birth Upon her return to "Kedish" unmarried mothers home in Stevenson St Kew, a fracas broke out when she demanded the return of her baby, but when the (...) (...) refused to return (...) 's baby, (...) pushed her and this led to her subsequent placement in care. Charged with being uncontrollable child she was made a Ward of the State and it was whilst she was incarcerated in Winlaton that the above drug was administered her contravened the Convention of Genocide Act.

Denied the right to grieve the child many did not even see, Mothers were instructed to get on with their lives to forget about the baby, instead told that "*one day they would wed and have a baby of their own.*"
This did not happen 45% of mothers were so damaged; they never had a baby of their own.
These women living their lives in total disassociation from the subject are inconsolable.

One Mother reported she only fell short from jumping off the tallest building because her treating psychiatrist Dr Geoffrey Rickarby made the connection between what she was suffering and her mental condition with the original separation.
Mothers were told one day you will marry and have a baby of your own as if this baby was not theirs!
A comprehensive amount of mothers were in a long term relationship, some of these had already made firm plans for marriage however there was an restriction incumbent to their marriage at the time of the birth of their child . Women have reported they were awaiting a finalization of a previous marriage which could take years prior to the present family law act.

Debunking the Myth of *No Pension* and replacing it with *Special Benefits*

Were available and are discussed in documents from the Queen Victoria Hospital, Almoner Department report 1946. "The public's attitude to the unmarried mother has changed during the war years, and many have been able to stay with their families or friends. For them Sickness benefit payments have been of great assistance in the weeks of incapacity prior to their admission, and of special benefit to those girls who kept their babies and could nurse them for three months instead of weaning them a few weeks after discharge, so that they might return to work."[ii] Miss. (...) wrote in her 1947 report that there had "been a marked increase in the number of single girls attending the Anti-Natal Clinic (140 compared to 92 the previous year)… who were assisted with benefits… The result has been to add to the work of the Department, for now it is we, not the Homes, who have to find suitable accommodation and work, apply for Government allowances and arrange for the adoption or care for the babies in Homes or Crèches."[iii]

In 1963, it is noted in the Victorian Social Welfare Department Annual report in the Family Assistance Section that applications made under Part V of the Children's Welfare Act provided support for the person having care or custody of a child without sufficient means of support and no legal proceedings available to obtain support "could apply to the director general for a weekly sum to be paid towards the child's maintence."[iv] In 1969, the Director-General of Social Welfare (Victoria) recommended that the Commonwealth Department of Social Services accept full responsibility for all money payments including pensions and benefits to a number of demographics including unmarried mothers.[v]

In 1971, the Director-General's report from the Department of Social services stated that Special benefits were current for 504 men and 3571 women. "…slightly more than two-thirds of the woman were under 25 years, the majority having been in receipt of benefit for less than two months. The bulk of these women were unmarried mothers."[vi] Other sources who corroborate our argument that government benefits and payments were available to unmarried mothers are (...) and (...) .[vii]

Duress

If a child has been unlawfully removed and a mother requested her legal rights for the return of her child and was denied her baby then it is spurious to suggest she can sign a document that states she is consenting to give away what she has never had. She cannot in law commit an offence against herself

The Law did not state the source of duress the law invalidated consent to adoption if taken under duress.

Drugs were used to gain consent to adoption in particular the Chelmsford deep sleep therapy cocktail where a mother was woken to sign consent many of these mothers have no memory of the birthing process or what transpired afterward. They did not see their baby others were threatened with the father being jailed for carnal knowledge or worse told their baby was dead. These were drugged also and in a drugged state thought they were signing a death certificate, see attachment Joy Ware

Other mothers conceded to social workers demands because they had been disenfranchised and see their baby was conditional to their seeing their baby once or being discharged.

One Mother was carted off to a local Psychiatric hospital because she became so distressed when not given her baby, one minor reported being further incarcerated in a hostel juvenile for girls and made a ward of the state because she was hysterical, and refused to sign a consent for her little baby boy to be adopted attachments anon
Cherylyn Harris Lyn Kinghorn and Elizabeth Edwards stories of consent

A Commonwealth Australian Capital Territory Ordinance legislated to protect the rights of citizens of Australia, over road a State act.
Gough Whitlam pushed for the Commonwealth Marriage Bill that was passed in 1959 to overcome unlawful removal of babies being transferred from State to State because they were being hidden from welfare agencies and natural mothers,.... State governments were legally obliged to comply with the legal implications legitimization of babies

A Commonwealth A.C.T. Ordinance legislated to protect the rights of citizens of Australia and over road a State act

In 1959 A Commonwealth Marriage Bill was passed, lobbied for by Gough Whitlam to subjugate unlawful removal of babies being transferred from State to state because they were being hidden from welfare agencies and natural mothers, and eventually led to the proclamation of the 1961 Commonwealth Marriage Act the State governments were legally obliged to comply with legitimization of babies. See Marriage Bill

Violation of the NSW Adoption Act meant an adoption to be invalid, because babies were being removed from the Territories and placed for adoption in other States *where their adoptions were not regarded to be legal.* Previous to the Commonwealth intervention babies

were held until a NSW child welfare worker travelled to Canberra and brought the infant to Sydney for the adoption process. It was for this reason The Commonwealth introduced into the 1941 Commonwealth Australian Capital Territory Ordinance an Adoption Act that eventually led to a national uniform act.
Judges making adoption orders in accordance with State Adoption Acts were required to comply with The ACT Commonwealths Ordinance.
The Australian Capital Territory did not become a self regulatory government until 1981

The Role of Guardian Ad Litem

A Judge signing an adoption order relied upon the necessary witness statements of Guardian Ad Litem,s being truthful documents as prescribed in rules 21 and 22 of the adoption of children Rule.
The Guardian ad Litem,s role was to establish adoption to be in the best interest of the child, this was our law, later Australia would become a signatory to the Hague convention.
Guardians were either lazy people or they felt they had a legal right to redefine the meaning of "best interest of the child"
No Mother I have met was approached by the Guardian ad Litem and if they had they would have established the dishonesty of people taking the instruments of consent.

Social workers cautioned against failure of their Fiduciary Duty
The Victorian 1964 Adoption Act required authorities wait 5 days before taking consent, prior to its commencement, consent could be taken as soon as the infant was delivered.
Whilst addressing the *9th National Conference Proceedings Australian Association of social Workers in SA 1965* (...) warned of the *Mothers inalienable right to be treated the same as any other mother when she presented to deliver her baby,* she went on to say that a *single mother*
had the right to hold feed ***and decide for herself what was in the best interest for her baby***

The literature of adoption professionals (even during the peak adoption period) almost unanimously called for the legal rights of the mother and by effect, the child to be upheld. "In order that adoption practice be child-centered, it must, therefore, commence by being focused on the natural parents, because, as we all know, the experiences of these people—especially the mother—will have great bearing on the subsequent life of the child."[viii] However, in practice these expectations failed.

- Fathers parental rights and legal obligations were blatantly negated by social workers included taking all measures for him to assume his financial responsibility for his child, his name was removed from the instrument to register their baby, most decisively he was to give his signed consent to the adoption of his child a Principle Officer was to be invited to the party **ONLY** when the father had the abandoned the mother and his child.
- A social workers was to assist a mother to make application for a maintenance order
- A Social worker was to provide a layette for the baby
- A Social worker was to make application for the prescribed benefits for the mother to provide for her infant.
- A Social worker was to inform a mother of temporary foster care
- Social worker duties included advising a mother of a priority list for public housing.
- A mother was to be treated no differently to any other mother who presented in labour
- DES was administered to prevent lactation and this too showed intent because as previously

stated a mother was not to make a decision regarding adoption of her infant until after the birth.

- Her baby was to be given to her to nurse, and to give complete care to HER baby.
- Social workers duties included advocating on behalf of her client (that is a mother) was to inform her of crèche or private homecare.
- Adoption was not to be advocated because of known dire and life time effects upon a mother.
- Adoption was not to be offered to her because of known psychological effects upon her child (stemming from rejection from its mother of origin, because contrary to the notion of a clean break theory bonding had taken place inutero. (*see attachment Florience Clothier*).

In 1967 spokeswoman for the Australian Association of Social Workers – the peak training body of the social work profession – (...) described the "ultimate objective of Adoption" as follows:

'The Social workers concern is with childlessness or infertility, but the particular area of competence is, not in its treatment, but in assessment or resolution of the effects on the marital relationship of the couple...The ultimate objective of Adoption is such a planned change, through helping to make a family where before one did not exist...But before the placement can be made there are other minor or contributory changes in the social functioning of various individuals where the social worker's part is well defined...and that is...The natural parents must resolve, if possible, conflicts about the surrender of the child.'

These practices had much to do with the institutional manner in which adoption was carried out. In reality, a concerned social worker could advocate their fears and concerns and some of these are recorded in professional journals but mostly too little avail. It was only when the litany of concerns became an avalanche of literature that concerns were acknowledged in policy making circles.

The 'problem' – the moral offence caused by 'illegitimacy and ex-nuptial pregnancy…sources of disgrace and scandal (had) a neat solution' - 'Adoption' - 'which provided at the same time for the needs of infertile couples.' (former Social worker for the Catholic Adoption Agency, extracted from her article, "Adoption in the 80s).'

According to (...) , neither the unwed nor their offspring – 'various individuals'– nor the childless married couple defined family.

In 1956, Reid expressed an identical view at a national convention of social workers in America, when he stated: 'The concept that the unmarried mother and her child constitute a family is to me unsupportable. There is no family in any real sense of

<u>Fathers and their Rights disregarded</u>

- were hidden and their parental rights and obligations negated
- Fathers legal obligations included taking financial responsibility for his child .
- A Father's name was to be documented on the application to register their baby
- A Father was to give his signed consent to the adoption of his child

The 1964 Act introduced a Principle Officer it reinforced a duplicitous and covert means of deceiving a mother because she was entitled to revoke her consent until the adoption order was

signed. Adjunct to mother's rights being hidden the introduction of the new Act gave social workers a self appointed power to remove without impunity the father's names from applications to register the birth of his child, however the Maintenance act still stood and a fathers fiscal obligations and legal rights continued to take precedence. In 1967 (...) a guest speaker at an adoption seminar held in Sydney University whilst expressing concern for the Father stressed the fact that "natural parents had rights" and that "the help given by social workers here in Australia has not been extended to the Father'' Most mothers report the father's name and details were either not recorded or even deleted and fraudulent facts were certified in applications by solicitors and social workers to register our babies births. The father was a parent and required to sign consent to adoption. However the introduction of a principle officer gave an alternative in the unusual circumstance that the father was "un known". In reality Social workers with another agenda took advantage of the juncture and withheld information advising mothers of their right to seek maintenance for her child.

Adoptions workers repeatedly voiced concern within the social work peers group but it did not change the experiences of the mothers locked into a prevailing culture that sought to provide their babies for infertile couples.
During 1965 Sr (...) cautioned social workers to be aware of their legal responsibilities to a mother.
(...) reinforced the legal rights of single mothers; conversely she ignored her own censure and took babies (see Di Wellfare case).
The same year at second National Adoption Conference 1972 Fr (...) rebuked professionals as to the ways they were breaching a mothers legal rights.

An anticipated and proposed 1964 Adoption of children act by Rupert Hamer as a model Act and worthy to be uniform legislature did nothing to prevent the hospital practices of removing a baby before a mother had expelled the placenta
In a Commonwealth annual report tabled in Parliament in 1964 Esther Phillips validated the notion that past adoption as being adoptive parents centered.
Concerned about having to return to the mother of origin to gain permission for medical treatment she wrote 'that one of the difficulties under the 1958 act is that the child unless a ward of the state , remains under the nominal guardianship of its parents until an adoption order is signed"
Origins fail to see a problem with having to gain a consent for medical treatment of her child if a mother freely and truthfully gave her informed consent for the adoption of her child in the first instance *See Victorian Hansards*

In her memoirs Sarah Hamilton Burns relates her life growing up in the care of Anne Hamilton Byrne she states the Social worker, (...) passed her over to Hamilton Byrne.
(...) as she is now known is clear that her mother of Origin was told by (...) her baby died.
(...) later committed suicide his receptionist (...) was the sister of (...) already cited in this Submission, *see Marion Bell case*, (...) , was a consent taker for the Catholic Welfare Bureau until she accepted a role in IVF at the RWH Melbourne in 2003

However to a hard conditioned mind set it required legal intervention to evoke action. 30 years too late the circulars went out when the Commonwealth Health Minister disseminated a circular forbidding the practice of removing babies, that the industry stood up and took notice.

Attached as an end note to a 1982 New South Wales Hospital Circular concerning the legal rights of a mother under the conditions of having a child proposed for adoption, the author, Dr. J. Friend felt the need to define and separate children born outside marriage.

Beyond the concerns and practical questions raised in this literature, is a culture of self congratulations. This was bought into question by (...) in her review of Parents, Children and Adoption written by Jane Rowe. (...) said: "…it is disappointing to find, in a book which sets out to be a textbook for adoption workers, that the wordy descriptive passages so often leave one with a kindly, vague shadow of the benevolent worker, rather than a clear guide to be followed."[ix]
Even then, if the protocols were changed the employees of the institutions were doing business as usual. Although the rhetoric of a hospital usually claims the duty of care to a patient, the reality is that social workers perceived they had a more pressing duty to infertile couples.

The literature provides many examples of adoption professionals making statements of concern about the failure of institutions to up hold the legal rights of the mothers, in 1960 whilst addressing his collogues in the medical profession (...) the chief obstetrician at the Royal Women's Hospital , considered legislation to be of negligible worth. "The prospect of the unmarried girl or her family adequately caring for a child and giving it a normal environment and upbringing is so small that I believe for practical purposes it can be ignored. I believe that in all such cases the obstetrician should urge that the child should be adopted. In recommending that a particular child is fit for adoption, we tend to err on the side of over-cautiousness. "When in doubt don't" is part of the wisdom of living; but over adoptions I would suggest "when in doubt, do", should be the rule."[x] Although the peer reviewed journals featured a continuous supply of articles concerned with the legal rights of the mother, unless there was reason to change behaviors due to threats or legal action, ultimately on the floor of the hospital or adoption agency, the primary concerns were orientated to the administration of the institution or those of the potential adopters. The mother and child were secondary.

The following extract serves to highlight the level of contempt with which they held Mothers
(...) 1960 – senior obstetric consultant, Royal Women's Hospital
"When you see a single girl who is pregnant, I think there are two questions to ask: "Do you love him?" "Can you marry him?" If the answer to both is "yes", you urge the girl to get married. I think it is wrong to marry for no other reason than it makes the birth legitimate. Those who live by the sword perish by the sword. Those marry with a shotgun are inclined to find the marriage dissolved by the shotgun."[xi]
His attitude toward mothers and their babies reflected a contempt that even exists with some adoption workers today.
"Heredity is important; but everything we hear from child health specialists tells us how important the right environment for normal mental and social development is.

To them environment is almost everything, and I believe that a good environment will do a better job of bad genes than a bad environment will make of good genes. When you walk through the nurseries, you will know that some babies are hungry, some will have a belly-ache, but none of you imagine that they are stuffed full of original sin- the way they are cuddled and kissed as they are carried to their mothers makes this obvious. It is the environment which pushes the sinfulness into these babies. Adoption brings joy to the adopting parents and makes the prospect of a better life to the child, and makes the life of the mother much easier. Often experience matures the mother, and I have seen many happily-adjusted women who have had a child out of wedlock.[xii] (...) went on to say "All of you here belong to some club or another—the British Medical Association, the Royal College of Nursing, golf clubs, tennis clubs—and you all know that if you do not behave properly you can be thrown out. If you belong to a bowling club, you cannot trample the green with hobnail boots; but you can trample on the face of anything that is decent and proper, and because of something called the sacred rights of parents, you can never be thrown out of the parents' club. There are many welfare and fondling homes full of neglected children. To have children is to assume an obligation and to create the opportunity of rearing good people. When parents continuously neglect their obligations, should not they be deprived of their rights?" "I believe that if parents have neglected their children, for a time and in a manner which could be specified, the children should be available for adoption. I know it I true that the younger a child is when he is adopted into
a family, the more likely the adoption to be successful; but it is better to start a family late than not at all''.

"The last thing an obstetrician might concern himself with is the law in regard to adoption".

The above is an extract from the Featherstone Lecture where (...) held his personal contemptible opinions to be above the law and advocated that his colleagues in the medical profession do the same (...) was equally benign she instructed her staff when dealing with a single Mother not to acknowledge the foetus growing in a single mothers womb but to always refer to *the lump and direct her to believe her lump would be removed* *Sex and sexually McCalman university press*

In the culture of misogynistic hatred of a single mother it was presumed that a woman contrived a pregnancy by herself and unless married she would be a burden to society and the father, who may have raped her, he may have misled her into thinking he intended to marry her, he may have been already been married and was paying maintenance for an existing family or as Origins is aware in many cases he may have been committed to the relationship. Made invisible by a culture of adoption, never the less he was exonerated from his financial commitment to his new family.
It is important to stress that whilst there is a plethora of individual stories surrounding the conception and abduction her baby the outcome was the same, that is instead of advocacy, she, and her family (Baby) was dammed to interference as a marked woman,

Language "Putative father" – a term used by adoption professionals and social workers that suggests that the mothers do not know who the sire of their child is, or perhaps suggests that the woman is lying or had some any sexual partners that she could not know the paternity of the child. It is a term that was used even what the mother did name the father with absolute

certainty. The mother did not know her own mind? Or did this phrase render privacy or immunity to prosecution for the father, especially when the woman was a minor.
"* The term "mother" is used throughout since the majority of babies adopted are conceived and carried by single mothers most of adoption consents are signed by single mothers. The statements made should be taken to apply to the mother and father in the case of a legitimate child."[xiii]
Language has been a major issue of contention inside the area of adoption literature. Each group and author has their preferences.[xiv] The term "Birth Mother" is illogical and has long been an item of contention within our organization. We are the mothers of our children in all aspects of the word.[xv] Those who adopted our children are not their biological parents and justify a descriptor in front of their use of the title mother. We find they are best described as the "Adoptive Mother" or the "Adoptive Father." is a powerful tool and a weapon the adoption industry did not hesitate to use in order to disenfranchise a mother.
Depersonalization began in an unmarried mothers home where in many cases mothers report authorities changed a Mothers name and her baby was termed as "The baby" .The very people who should have been advocating for the best interest of a mother and
her child used fear of her child being ostracised because of it being "illegitimate" or worse "bastard" to gain the consent Birth Mother is contentious to Mothers, it is insulting and devalues a single mother and reduces her and her family as a breeder.Interference came from parents, social workers, and medical professionals who were politically committed to providing a family to an ***infertile*** couple.
Having been marginalized a mother was then disenfranchised from her own baby. Unbeknown to the Mother the labour ward staff was alerted to their role in the abduction because her medical file was marked "A" BFA"(baby for adoption).By the time she presented in labour she had not only been deemed unfit, now she also believed she was incapable, some hospitals even marked files "socially cleared" upon discharge. This was a stamp used to clear a person who presented with STD not to someone who just gave birth to her first baby. As she lay completely vulnerable the placenta not yet expelled her baby was removed, presumed to belong to another and this was the punishment that was metered to rehabilitate her from her wanton ways. Rather than giving her support the profession compounded the problem with a solution that reinforced her sense of guilt by telling her that if she loved her baby she would place her baby into the care of a *barren* married couple!
Mrs Alfred Deakin, the wife of the Prime Minister of the Commonwealth, while in England recently, contributed the following article under the above heading to "Good Words "*I am president of the Sutherland" Home (Victoria) Neglected Children Society, We take the babies from birth and find-situations and work for the mothers. When the children are old enough, we either board them out or arrange their adoption. I believe that the principal cause of' all our saddest cases of destitute women and children lies in the 'fact' that the mother is feeble-minded and not bad. 'The fault lies, 'of course, in lack of 'early training and the ignorance of mothers who throw their girls on the sea of life 'without the proper preparation. The children of such badly brought-up girls in their turn are feeble-minded, and require very careful treatment, both physical and mental. Wonders can 'be worked 'in their training"* see attachments

Incarceration and Social isolation had taken a hit on her financial abilities; information to assist her make a fully informed decision was deliberately withheld.
Her baby was given into perpetuity to a couple in a Court Of Law yet she was not invited to be present at what was to affect with such dire consequences until her dying day. The adoption order was heard in camera. We are dealing with the issue of the forced separation of family members. A child legally deprived of its mother, father and kin - a mother, father and kin deprived of their child/family member. These people are alive. These people are only 'socially

dead'. There can be social resurrection through awareness of the violation of human rights which the institution of adoption is. All people involved in the abduction of babies of a single parent have to be held accountable they destroyed existing family see the Genocide Act
Although the peer reviewed journals featured a continuous supply of articles concerned with the legal rights of the mother, unless there was reason to change behaviors due to threats or legal action, ultimately on the floor of the hospital or adoption agency, the primary concerns were orientated to the administration of the institution or those of the potential adopters. The mother and child were secondary Adoption Origins Victoria understands the psychological milieu of adoption practices as: "Adoption is a created reality, a delusion. It requires an unmarried pregnant girl to deny that she has had a maternity, her child must accept strangers as their mother and father of origin and the infertile couple has to believe they have had a child of their own as if born to them in wedlock." This notion of bizarre thought is confirmed by (...) "The value of birth is maintained in adoption where quite obviously a birth did not take place. In this way adoption is paradoxical. It seeks to mimic the family form derived from biological ties but, in order to do so, defines the biological tie that necessarily pre-exists as having no power or meaning. The legal expunging of all available records of this tie is part of the process of extinguishing the relinquishing parent's rights. The paradox is that the bond of nature is sufficiently valued for all that concerns the child, except the actual birth, to be reconstructed socially. A new 'birth' certificate is issued, naming the child as the child of its social parents. The original birth certificate is marked as 'superseded' and filed away. This is a legal fiction. There can only be one birth."[xvi] The perceptions of the mother, father and child are invalidated and dismissed. An alternative perception of reality is imposed by social workers, adoption workers prospective and approved by order adopters.

Adoption Origins Victoria recognizes the institutional history of Fondling Homes. We recognize ourselves as being incarcerated in those institutions, being seen as inmates by their employees and having experienced the culture of being hidden. We understand that through the language and culture of those institutions we were perceived as being persons warranting rehabilitation. Whether this rehabilitation was intended to degrade us or not – the notion of being seen as warranting rehabilitation was and remains offensive.[xvii] This was part of the delusional culture of adoption foisted upon us.
For our children, the historical institutions of church, law and marriage have imposed a stigma, illegitimacy.[xviii] The Children Equality of Status Act 1976 legally concluded a long period of time where a child born out of wedlock was considered illegitimate. The purpose of this act was intended to address some of the inequalities of the child and to create new legal relationships, especially with the father.
Prior to this act, these children were in law fillius nullius, literally "the child of no one," and this status carried with it considerable social and legal disadvantage. It is interesting that the authors of "The Many-Sided Triangle" note; "It may be that there is some analogy between this ancient phrase and 'terra nullius', used in the context of Aboriginal land claims. Both deny the way the world is."[xix] The child was made "legitimate" through the marriage of the adopting parents.[xx] However many couples having conceived prior to the delivery married soon after however their baby/family continued to be withheld many told it was too late when the registered were opened and people accessed their records they began to digest the lies .This process of terrible pain took nearly a decade for Mothers who had psychologically and emotionally disassociated themselves from the trauma surrounding the birth of their first infant to un-package.

The rhetoric of the Bracks/Brumby governments has proven paradoxically juxtaposed to its promise of transparency. Origins ask why did it become complicit with the past?

The Anne Hamilton Byrne Family/Cult

Top lawyer being probed for misconduct

Anne Hamilton-Byrne with husband William in 1993.
Photo: *John Woudstra*

Richard Baker
April 28, 2008

A PROMINENT ALP-linked solicitor who chairs Victoria Legal Aid is under investigation over allegations of professional misconduct and failing to inform a client of his work for the leader of a notorious religious sect.

Victoria's Legal Services Commissioner, Victoria Marles, is believed to be investigating allegations that Williams Winter solicitor John Howie wrongly transferred land titles relating to a client's multimillion-dollar CBD property.

Mr Howie also faces questions about his relationship with The Family religious sect following his decision to represent its founder, Anne Hamilton-Byrne, in a Supreme Court civil case brought last year by her granddaughter, Rebecca Cook-Hamilton.

Mr Howie has strong ALP connections in Victoria and has been appointed by various state government ministers as chairman of taxpayer-funded agencies such as Film Victoria, Vic Sport and Victoria Legal Aid.

He also serves on the boards of the Department of Justice's Legal Fees and Costs Reimbursement Committee, Melbourne & Olympic Parks Trust, Vic Health and the La Trobe University law school.

Mr Howie told *The Age* he could not comment on the misconduct allegations against him by the client, Moscow-based journalist and academic John Helmer, because they were subject to an investigation by the "appropriate authority".

A spokeswoman for the Legal Services Commissioner said she could not comment on individual investigations for privacy reasons.

Mr Howie told *The Age* his relationship with Mrs Hamilton-Byrne and her group was "purely professional". It is believed Mr Howie's previous firm, Lethlean, Howie & Maher, had acted for Mrs Hamilton-Byrne's husband, William Hamilton-Byrne, in the 1980s.

The couple made headlines in Victoria in the 1980s and 1990s by claiming children born to followers as their own, dying their hair blond and forcing them to smile in public.

Police raided the sect's Eildon property in 1987 and several children were removed. No child abuse charges have been laid against Mrs Hamilton-Byrne or her late husband.

In recent years, former child members of The Family have filed civil suits in the Supreme Court, alleging abuse, beatings and food and sleep deprivation.

The only conviction recorded against Mrs Hamilton-Byrne, who is in her 80s and lives at the sect's compound in Olinda, was in 1994 for falsely declaring three children were her natural triplets.

The Age believes Ms Marles is investigating a complaint alleging Mr Howie deliberately or negligently relied on a false document in 2003 to effect a land title transfer that wrongly removed Dr Helmer's rights to a half-share of a $5.5 million Swanston Street property

Adoption Origins requires the Victorian Government to be called to accountability.
Because of a superfluity of questions left unanswered.

In 1999 the Bracks government went to the election with a full inquiry into past adoption practices as its Social Welfare and ALP Women's policy
However when the James Jenkinson report validating Adoption Origins Vic claims was released to the Premier's Department instead of an inquiry the government offered Adoption Origins an alternative substitute that was an insult to a Mother her child and their experience.
Furthermore (...) was deposed to the backbench for refusing to accept the offer of what amounted to an academic exercise. FOI papers
It is important to note that in order to save lives the Kennett government initiated a policy of supervised monitoring of chroming, a habit carried out by young homeless people.
The Bracks government used the pathetic excuse and publicly berated its Minister of Community Services holding her responsible for the policy of supervised chroming to unseat her.
The following Minister, (...) called off the inquiry into past *crimes* in adoption this was an extraordinary turn of events as the inquiry into past adoption practices was established as ALP policy

Unclear and devastated with the execution of such significant inquiry Adoption Origins Vic made application and received the following information after under FOI
After (...) was stood down (...)
lead a delegation of ARMs mothers to Minister Pike's office to offer an alternative or as previously termed an *academic exercise* that would effectively cover up the past adoption practices and bury them in the Community services archives forever!
(...) continued the camouflage by dishonestly claiming there had already been an inquiry in 1983
This was untrue although there was an isolated referral to an inquiry there had been an ADOPTION LEGISLATION REVIEW COMMITTEE it released a report in March 1983 but the register had not been opened therefore the crimes that Origins Vic was claiming had not been uncovered or addressed and she knew our claims to be true .
In Victoria ARMs (Association relinquishing Mothers) continues to deny unlawful removal of babies and the taking of fraudulent consents.

Records Destruction

The Kennett Government was also guilty of being complicit in the crimes of the past Dr (...) refused an inquiry instead in 1998 the Kennett Government legislated for the General Disposal Schedule for Public Hospital Patient Information Records

Conversely in 1992 NSW legislated for an adoption information Act. This gave a mother access to all her medical records, drug sheets, and her infants nursery notes, this assisted in the healing process by allowing a Mother to slowly regain her deeply buried memory of a time in her life as she struggled to regain her reality of what transpired in the hospital when they took her baby and her sense of personal decency denied her when she was forced to carry the shame of a cruel and patriarchal society. These records show that adoptive parents were furnished with a Mothers legal nursery notes establishing the baby to be social cleared of congenital infection ie. STD

The Victorian adoption legislation in 2011 continues to forbid a mother equal opportunity to access identifying information

As previously mentioned the 1985 adoption legislation Review which preceded the 1984 adoption Act was also a catalyst for the successful lobby to open the records here in Victoria, in turn this would be the precursor to the rest of Australia obtaining their records. However in Victoria only there was a stipulation that a Mother could not receive identifying information regarding her child/children lost to adoption. Origins has relentlessly pursued a logical reason to why a mother was discriminated against, when for decades adoptive families knew her identity, and the current legislation disenfranchises her right of identifying information of the child she carried and birthed. Origins Vic has relentlessly requested answers to this blatant discrimination the consistent response from Vanish and the adoption industry was to argue that if a mother was given equal rights to identifying information regarding her child *very often forcibly removed at birth*, it would necessitate a Veto similar to other states.
Origins argue that to deprive a mother of 50-80 years of age of identifying information relating to the person she carried and birthed is not only a veto it is cruel. Anecdotal evidence well-known by *those in the know* (...)) have told us that on the eve of the
legislative change in Victoria an agreement was struck with parliamentarians to ensure a mother apply through a conduit either in the department of Adoption and Family Records or return to the agency who conducted the adoption of her child!.
Origins have attended many funeral services of members who have not known the identity of the child they have grieved for some cases fifty years.
Origins have suggested that the Adoption industry consider an alternative may lay in the Family Law Act.
The Contents of the Director Generals reports and tabled in the Commonwealth Parliament are attached on memory stick

General History.
History of adoption in Australia, and, in particular, Victoria

- Key Players in adoption in Victoria. Names of institutions and dates of the opening and closing. Maternity Homes and Fondling Homes.
- The Royal Women's Hospital became an adoption agency in 1929.[xxi]

2. In Australia an estimated 300 000 mothers have lost their children to adoption. Between 1950 and 1970, it is estimated that 150 000 mothers lost their first born, new born children, this number was reduced into the 1980s due to changes in culture and social policy.

The first adoption legislation passed in Britain was in 1926, however this was preceded by the *Western Australian Adoption of Children Act 1896*.[xxii] Before the Victorian *Adoption of Children Act* was passed into law in 1928, adoptions were defacto and were arranged by government and non-government organizations or individuals.[xxiii] Later Acts were passed in 1958 and 1964. The 1964 Act has been in force since 1966 and was amended in 1972 and 1974 (by the Status of Children Act 1974). In December 1980, the Adoption of Children (Information) Act was passed resulting in the creation of an Information Register in which adopted children and biological parents might enter their names to seek information or contact.[xxiv]

There is a specific body of common law regarding adoption.[xxv] In Australia adoption is considered a state or territorial matter, each possessing its own legislation: an Adoption of Children Act or Ordinance. The legislation written and passed during the 1960's was based on a model uniform act with the ambition of uniformity. Since, states and territories have modified their legislations resulting in a variety of legislative regimes.

Adoption practices in the 1920's and 30's in Victoria were described as being focused on the interests of the child which was considerable at odds with an impetus to find a way of distributing children from fondling homes or nursery's which were expensive and overcrowded. Childless couples were given an image of an opportunity to rescue an unfortunate, needy, neglected child through the charitable action of adoption. Adoption professionals actively campaigned prospective parents expending considerable energy in convincing them that it was a "safe" choice.[xxvi] Adoption was slowly accepted due to potential adopter's fears "that the immorality and other evil tendencies were passed on from the mother to child."[xxvii] In time, prospective parents (married and childless) agreed adoption was "safe" and a considerable numbers of adoptions were the result.

The once popular, rhetoric of "in the interest of the child" quickly became muted replaced with an emphasis on the interests of the adoptive parents.[xxviii] Mr (...) , an adoption worker from Victoria reflected, "many would agree that in the past some practice had been applicant-centered with placements being made to meet adopting parents' needs, ie. to help overcome grief at the loss of a natural child; to help cement a shaky marriage; to provide company a lonely child."[xxix] From this emphasis on adopter satisfaction emerged a culture of prospective parents who demanded "the perfect baby… or as a recent newspaper article called him or her, the "blue ribbon baby" was available in good supply" according to Dr (...) of the Adoption Advisory Clinic at Prince of Wales Hospital, Randwick. [xxx] The child had become a product.

"Many agencies in this country have illegal, punitive and harmful practices when it comes to a mother's inalienable right to have contact with her child."[xxxi]

(...) , a social worker employed at the Catholic Family Welfare Bureau at Melbourne wrote in 1966:

"In assessment and placing of children with adoptive applicants we are always looking for their normal capacity for parenthood. Our judgment in many cases is only little better than chance and our ability to assess possible problems must leave a greater margin for error than perhaps any other field of social welfare. However, it is reassuring to note that studies carried out in the USA have shown that trained workers in adoption agencies have significantly better results than independent adoption work… Often we are affected by over-crowded nurseries and insufficient couples applying to adopt 'hard to place' children and a growing awareness that delay for the baby can have a damaging effect on his personality that even the best and most understanding couple may not be able to counteract… This may mean that in the 'stress' of the moment we place a child hurriedly, perhaps too soon, perhaps with the wrong couple, perhaps to unsuitable people."[xxxii]

In 1972, after the peak period of adoptions in Australia, (...) , Director of the Methodist Department of Child Care addressed a General Meeting at the Children's Welfare Association of Victoria. He was blunt about the lack of altruism in adoption parents:
"For most of these adoptive parents and also for the community, adoption is the second best to having a family of their own. This is not meant as an unkind judgment, but rather as a realistic approach to adoption motivation. Not many adoptive parents consciously choose adoption as an alternative to having children of their own. This group of traditional adopters, then, inevitably seeks in the adopted child a biological expression of themselves. They hope the child will 'fit into their family.' They do not want the child to be different… Unconsciously adoptive parents are seeking to have no break in their genealogical line."[xxxiii]

"…An adoption agency has the responsibility to only to the placement of children, but also toward, for instance, the childless couple whose needs will no longer be met though adoption if there is a scarcity of infants without problems available for adoption."[xxxiv] Rev. (...) displays no concern for the interests of the mother of these children, once the legal instruments are signed. This is more than likely not the attitude of adoption agencies portrayed to the mothers at the time of her signing the adoption consent.

There was a substantial change in how the community perceived and behaved towards unwed mothers.
The commodity became less obtainable; therefore a premium was placed on it and the producer.

<u>What were the changes in language</u>?

In 1973, the Whitlam government introduced the 'Supporting Mother's Benefit.' It was available to unmarried mothers including deserted de facto wives, de facto wives of incarcerated men, to married women not living with their spouse and to women separated from their partners provided they have care of their children. Any woman receiving the benefit was eligible to participate in vocational training schemes initially created for widows. The Benefit had 'a', 'b' and 'c' categories with three tiers of payment with an additional sum added for each dependant child. It was a basic income which provided a subsistence living for a mother and child.
Fr (...) Catholic Social Welfare Commission, New South Wales – address to the second Adoption Conference in 1972.
"The consent to surrender the child clarifies the position of the natural parents and after the revocation time has expired their rights largely cease. There are some problems about the mother having no rights while retaining some obligations… While the natural parent no longer have any

rights to the child she still has some very important rights that have to be respected by every individual and group within our society. She is powerless and particularly vulnerable to abuse, and that abuse is not an uncommon feature. She has, for example, the same right as any other patient in a hospital. He has the right to be told what has been prepared for her by way of physical and medical treatment, and she has the same right as any other patient to refuse such treatment. She has the right to name her child and the right to see her child with no more restrictions as any other patient in the hospital, even though those restrictions are subject to her final decision. She can sign herself out of hospital as can any other patient who is not subject to a committal for psychiatric reasons. She has the right to see anyone she wishes, including the putative father of the child, and he has the right to see the child as much as any other father has the right.

Many of these rights are not being recognized, apparently on the grounds that restrictions are in the interests of the mother and her child. Not only is there no evidence to support restrictions on such grounds, but there is an abundance of evidence that this type of repression is damaging to the mother and child and can seriously jeopardize the realism of the decision that the mother is endeavouring to make about whether or not she should surrender the child for adoption. There is clearly a need for those helping disadvantaged people – and single mothers are frequently disadvantaged – to critically examine their motivation and their way of dealing with those they are intending to assist."[xxxv]

1982 NSW Hospital policy circular re adoption:
"There have been marked changes in hospital practice over the last ten years. In the early 1960's the view was commonly held that it was in the mother's interests that she not see the child she was planning to surrender for adoption, and policies thus followed which prevented her from seeing the child. The hospitals themselves did not doubt that they had a legal right to adopt such policies which were rarely questioned by the staff and by the mothers themselves.[xxxvi]

Changes in practice have been the result of a growth in psychological knowledge, and the understanding that it is neither feasible nor healthy to protect a person from his/her grief. At the same time there have been changes in the patient/hospital relationships with a tendency for patients to be more assertive in obtaining what they see as their rights and taking more personal responsibility for their own treatment."[xxxvii]

> "A single mother whatever her age is the sole legal guardian of her child and remains so until a consent to adoption is signed. She therefore has the rights of access to her child and cannot legally be denied this. There may, of course, be medical reasons related to the child's health that may restrict access. The mother has the right to name her child."[xxxviii] (Underlining is done by the author.)
>
> "An adoption consent may be proved invalid under the terms of the Adoption of Children Act, 1965 (section 31 (c)) is the mother has been subject to duress or undue influence. Refusing the mother permission to see or handle her child prior to signing the consent, or putting obstacles in the way of her asserting this right, may readily be interpreted as duress if the validity of an adoption consent is being contested. One challenge to the validity of a consent on these grounds has already been heard in the New South Wales Supreme Court. In the same context

any comments or actions by staff members which the mother could see as pressure to persuade her to place her baby for adoption run the risk of later bearing on the legal interpretation of duress. Anyone found in these circumstances to have exerted "undue pressure" is liable to prosecution under Section 51 of the Act."[xxxix]

"It is the experience of adoption workers that most women planning to give up a child now see their child. The majority of these does sign a consent and allow the adoption to proceed. Thus, contrary to common belief, experience suggests that there is no negative relationship between a mother seeing her child and signing the consent to adoption or revoking such consent. In fact this will help her face her grief at the time and in turn will promote long term adjustment to her loss.

It is believed that the following guidelines should serve to safeguard the rights of the mother while at the same time giving due recognition to both the personal and professional concern of individual staff members for the welfare of the mother and child."[xl]

In 1983, the Victorian Government released a report titled "Adoption Legislation Review Committee – Victoria." It was the product of 124 committee meetings, approximately 500 submissions from the community, community meetings, and individual consultations with experts in various field related to adoption. The authors of this report saw the purpose of adoption in the 1930's and 1940's as having a primary objective of aiding the child. "Adoption enables a child to achieve permanent security in a substitute home with an adult or adults fully committed to fulfilling paternal responsibilities and obligations and to ensuring the well-being of the child."[xli]

Major adoption trends from 1966 to 1982. The authors interpret the fall in total Adoption Orders directly related to the overall rate of birth (attributed to ease of access to contraception and abortion) and from the decision of mothers to raise their children themselves. They also note that in 1969 less than 50% of children born outside marriage were adopted.[xlii] It is interesting to note the decline in Adoption Orders after the 1973 introduction of the 'Supporting Mother's Benefit.'[xliii]

The demand of couples wanting to adopt continued and the decline of children available bought about periodical closing of applicant lists. It was then that the adoption professionals began to look more carefully at the large number of children previously deemed 'unfit for adoption' and began to develop strategies to 'sell' the idea of adopting a 'hard to place child.' The era of the "perfect specimen" had passed.

adoption, except that the adoptive parents saw documents which contained the mother's name, and sometimes the name of the child's father. Copies of these documents were issued to the adoptive parents."[xliv] The nature of the information sought by social workers in included: backgrounds of the mother and father (family history, including racial and cultural material), mother's and father's medical history, descriptions of personality and skills, parents vocational history and education (to establish intelligence), and physical attributes.[xlv] In Victoria, mothers who lost children to adoption are unable to view this documentation to legislation and the destruction of most of this material.[xlvi]

Returned Babies.

"It is likely that children who look different, who have minor asymmetry of the head or face, or have a large tongue, will be considered abnormal. In such cases investigations are in order,

but once labels such as "mongoloid" or "suspected brain damage" or hypothyroidism" appear in the records, they remain and become difficult to raise."[xlvii]

"…children who look normal may be passed for adoption, only to return later with serious problems."[xlviii]

Mothers who were in confinement at St. Joseph's Babies' Home Broad meadows condition their version, the version of a woman who had a child in the home's her issues intentions/ interpretation.

Katie was sent to this institution for her confinement in 1963. Shortly after admittance she was interviewed by Social Worker, (...) who reported in her file that Katie's plans for her future "were very uncertain." Katie had expressed her intention to keep her child.

During her stay at the home she was compelled to work serving meals to nursing staff 6 days per week and having her sickness benefit garnisheed by the institution, a small amount returned to her for her own use. After falling ill with a kidney infection and a hospital stay, she did not receive any visitors, nor is she aware of her parents being notified of her condition. She returned to the home to work with the Karitane nurses in the toddler's nursery although she had "not fully recovered her strength." She learnt later, from her mother that visitors, even family members were not permitted to visit unmarried mothers at St. Josephs.

Incoming mail "was censored" and was redirected via Mrs. (...) , a relative of the (...) at St. Josephs.

Katie was transferred to the Royal Women's Hospital at Melbourne to give birth. "During labour I was chained to the bed with leather straps binding my wrists and heavily drugged with a concoction of Chloral Hydrate (2000mg), Sparine (25mg), and Pethidine (100mg)."[xlix] She vomited after drinking the initial dose of Chloral Hydrate and after considerable discussion the medical staff opted to giving her another dose.

After the birth of Katie's daughter, the infant was immediately removed from the room and without consultation Katie was given drugs to suppress lactation. Later, in the ward she requested her child and was informed that it was hospital policy that unmarried mothers were not to see their children for a number of days. "I had not signed a consent form".When I returned to St. Joseph's Babies' Home with my daughter, the nuns and priests baptized her without my knowledge or consent. Later, in a meeting with (...) , she reminded me that I was a minor and was told I could not survive in the community with my daughter. "She was very manipulative and coercive as she endeavored to have me sign the consent."[l] One of her arguments was the statement "…even if you did keep your baby it would only be a matter of time before Child Welfare knocked on your door and took your baby from you. That would be much harder on you and your baby."[li] Katie believes that she would have been able to to care for her child. She and the infant were welcome in her parent's home, and Katie had a stable employment history. Katie did sign the consent, and after returning to her parents' home in Sydney wrote a letter to (...) requesting to see her daughter. She received a reply stating her daughter had been placed with a family.

What is immediately obvious is that Katie did not receive a copy of her consent order. She did not understand the nature or ramifications of the document she signed, the veracity of the order is in question given she was a minor and felt coerced…

<u>Impacts of adoption on mothers</u>.

The bonding process between the mother and the child inutero has been widely acknowledged by the health professionals. However, the importance of this understanding is ignored or purposefully diminished if the mother has lost her child to adoption. The many reasons for this will be examined in this submission.

Historically, the mothers who have lost their children to adoption have been neglected in sociological, psychiatric, psychological and welfare literature. It is estimated that less than 5% of all adoption literature deals with the impacts and consequences of separation on the mother. Dian Wellfare, a mother who lost a child to closed adoption described it as "a separation so permanent as to emulate the veil between the living and the dead" although little attention has been given to the trauma inflicted on the mother who loses a child in such a permanent and unnatural manner.[lii] Sister (...) , an advocate of adoption from the Catholic Adoption Agency described the impacts of adoption on mothers to her listeners at the Inaugural Proceedings to introduce the *Adoption of Children Act 1965* as "a great many intents and purposes comparable to separation from a child through death.[liii]
Another proponent of adoption, Miss (...) , a trainer of adoption workers in 1968 for the Anglican Church Adoption Agency said that women who lose their children to adoption experience depression, anxiety, self esteem, experiences weeping, feelings of rejection and sensations of social isolation. She also instructed her students to be aware of life threatening behaviors such as suicide attempts, compulsive behaviors, aggression, hostility and self destructive acts. (...) also recognized a pattern of nightmares amongst the women consisting of images of babies being tortured.[liv]
This loss is a traumatic event, whose symptoms are regularly dismissed with statements by professionals and people within the personal relationship sphere of the mother such as instructions like "Get over it, move on with your life." Such responses reinforce the experience of helplessness and isolation experienced at the time of her separation from her child. Beyond the loss of the child the mother may have experienced financial hardship or homelessness through loss of employment, interrupted and destroyed relationships with family, friends and her community. Adoption Origins Victoria have found that approximately 45% of the women who have lost children to adoption have not had subsequent children. In effect, these women have lost the opportunity to participate in the changing roles a woman with children would expect to enjoy though out her life time, including becoming a grandparent. This loss has significant impact on the quality of the mother's life both privately and in the public sphere leaving her uninvited in the social structures dedicated to family life.
Over the years that we have been meeting with mothers who have lost children to adoption we have seen a myriad of psychological responses to a host of unique adoption experiences. Some are deeply traumatized. Each woman has her own way of coping with loss and grief.
According to an article, "The Unmarried Mothers," published in The Bulletin, in 1967, unpublished research by (...) found that "mothers who surrender their children to adoption seem to suffer chronic bereavement for the rest of the lives… unmarried fathers suffer bereavement and guilt long after the child is born and adopted, although most of the have by then terminated their relationship with the mother… and adoptive children usually manifest a keen and obsession wish to locate and meet their natural mothers, which becomes dominant during adolescence."[lv]
Many have overt symptoms of PTSD. They describe sensations of emptiness, are unable to recall the birth of their child, and find exposure to present events associated with their trauma unbearable.[lvi] There are common strategies to coping on these occasions the usual being dissociation, and somatic expressions such as depression, headaches, amnesias, time loss, trances and "out of body experiences." For others, the loss might be expressed in publically displayed acts of grief, anxiety or behaviors' arising from emotional wounds creating further social isolation.
Alternatively, they may suffer irresolvable grief in shame, silence and secrecy. The very unfortunate find their symptoms unmanageable and are admitted to psychiatric institutions.
The long term remedies sought by the mothers for their trauma and grief are varied. Some seek counseling, find refuge in faith, friendship, family or careers; others have become on

reliant on alcohol, prescription drugs and/or illicit drugs and experience difficult lives. We are not alone in our conclusions.[lvii]
In 1997, The Australian Association of Social Workers issued a Statement About Adoption which was offered to the 6th Australian Conference on Adoption. It said "ASSW expresses its extreme regret at the lifelong pain experienced by many women who have relinquished their children for adoption." It then went on to justify the actions of its employees claiming their actions were "done with the best intentions," talked about hindsight and concluded with the statement "this is no way diminishes the pain felt by the mothers and children who were separated at birth."[lviii] The conveners of the conference chose not to read it to the audience as it did not acknowledge the illicit actions of Social Workers and the pain imposed on the mothers through their actions. We see the devious language in the phrase "relinquished their children for adoption," it does not acknowledge the obtaining of consent by coercion.

Consents

Fraudulent information regarding birth entries

Origins have proof that some infants were registered in the names of their adoptive parents but we do not know how many. We can never know how many adoptions were obtained by this method. Origins Vic has been informed that when Sr (...) passed away a list of names of babies placed with people who registered them in their own names went with her. at the very Whilst this is anecdotal her conspiring with the Archbishop in covering up priests indiscretions at least or even worse was revealed in an obituary and verified by Peter Costigan in the Herald Sun 12 July 1996. See insert Peter Costigan.

In one case documented in the Tasmanian Inquiry the Mothers gave an account of her identity details being recorded in her twin daughter's prospective adopted name.
The natural parent was to have registered the birth in her own handwriting; conversely the solicitor or social worker who took the consent undertook to register the birth. The mother was unaware of the whereabouts of her twin babies who had been removed from Tasmania to Victoria within hours of her signing what she believed to be a release for temporary foster care .She only learned much later of what had transpired when she applied for their return. The Mother in question had kept her first born child and the social worker had threatened to remove all of her children if she failed to sign consent to foster care for her new born twins. *See attachment Charmaine Price*

Forbidding and making it impossible for mothers to see or touch their child until they have signed a consent form. We have found that mothers who have not been reunited with their child live with perpetual anxiety concerning the well-being of their child. This occurs with news of natural and manmade disasters. There was considerable pain evoked within our community when it was revealed that the remains of many infants were discovered during the excavations for the extension of Royal children's Hospital, at Parkville, Melbourne in YEAR? The remains were unidentifiable. We are aware that infants and children deemed 'unfit for adoption' were housed in that institution…
Impacts on Fathers The changes in legislation during the 1960's increased the degree of secrecy surrounding the adoption, except "the adoptive parents saw documents which contained the mother's name, and sometimes the name of the child's father. Copies of these documents were issued to the adoptive parents."[lix]

Mothers have described that if there was a potential for consent to adoption to be disputed (for example the parents were engaged to be married) the fathers name would not be included in the records.

The practice of threatening young mothers with charging the father of their child with carnal knowledge was well established. Inglis described the impact as: "In this atmosphere of punitive moralism, fathers by nature were not fathers in law unless they placed themselves in that situation."[lx] And in many cases they did claim the child as their own. They were engaged to the mother, often with the blessing of the parents and a wedding was pending. Several of our members have mentioned that Social Workers failed to acknowledge the fathers or actively removed their names from legal and informational documentation.

Commonwealth Marriage Bill include Whitlam Bill and Commonwealth Marriage Act 1961 Sec 89

Mothers did marry after the infant was abducted and before the adoption order was signed. Some mothers reported being told it was too late after requesting the return of their baby and later found this to be untrue. see Elizabeth Edwards Submission

If they had been given copies of the consent and directions to revoke they could have followed the legislated process to ensure their babies return, however they had no choice but to accept that the authorities were telling the truth. Richard Chisholm New South Wales Standing Committee Final report Committee

Couples did marry, by virtue of the marriage act the baby was legitimated and they automatically became their baby's legal guardian. If a Mother /Father were present when the adoption order was made these conspiracies could never eventuated because to a presiding Judge it looked as though consent was in order or the baby had been abandoned.

Therefore all who colluded in the abduction were responsible for breaking the law.

Furthermore, a Mother later discovered that if one parent disagreed with them keeping their child, the Social Worker would side with the parent. Others describe manipulations of the mother and father creating a situation where an imminent marriage, that would have legitimized the child, to be cancelled. This interference in the relationships of the mother further damaged her relationships with her larger family. A considerable number of women who have contacted our organization did marry the father of their child lost to adoption but discovered that the status of our children was not revised in the documentation.

The terms of reference to this inquiry requests a we make…….in the following passage there is a direct correlation between breaches of the responsibility between a State Adoption Act to the Commonwealth Parliament.

Because the Commonwealth Marriage Act sec 36 legitimated a child of the relationship

Mothers have reported to Origins their marriage was ignored by the authorities.

Regardless of requesting their infant be returned and there being no consent to adoption signed by the father babies were withheld and adoptions proceeded.

If the prescribed copy to the consent had been issued to the MOTHER at the time of taking the consent she would have been privy to the information necessary to her and her husband to challenge an adoption that was not in the best interest of their child One couple were informed after three weeks of delivery "that it was too late"

They married but their infant was not adopted for 11 months after their marriage.

The soon-to-be adopters had the baby in their care from day 5 so they temporally moved to country Victoria until the adoption order was signed.

One month prior to the parents of origin marriage, a guardian ad Litem was appointed by the court, however he had already baptized the infant in the name of the future adopters. His failure to submit the report contract to the court seemingly accountability as was also Commonwealth Marriage Act.

This was a blatant contravention of the Commonwealth Marriage Act The myth of the father being "a deserter, seducer and exploiter" was occasionally questioned by adoption

professionals. Miss (...) social worker, told a seminar at the University of Sydney in 1967: "In Australia the help given by social workers has not at this stage been extended to the unmarried father… in any case, as a parent of the child, they could, where possible be consulted about the adoption… In most cases when a genuine effort has been made to help them or consult them, they have responded."[lxi]
Impacts on subsequent children.

Little discussion exists in the literature about the impact of forced adoption on the mothers subsequent children. We have found that subsequent children pay a heavy penalty in terms of the mother's ability to cope emotionally. Further we have seen serious consequences can arise as a result of the mother revealing information to subsequent children about an earlier child she bore and lost to adoption until recently. Origins have learned of children distancing themselves from Mothers because if she ***gave*** one of her children away it could have been them, they also lost trust in her ability to love them, and her integrity. The stress associated with to reveal is significant. The decision to reveal may bring positive results within her familial relationship; however it might also prove disastrous with subsequent siblings reacting with anger, territorial claims, and profound identity disturbances and on occasion's outright rejection of the mother. The act of disclosure is fraught with dangers to relationships. This impacts on contact with the adopted child on subsequent children.
The decision not to reveal not to reveal is equally difficult for the mother as she is aware that a choice not to has the consequence of her remaining with a secret which will remain debilitating to her. Of equal importance, she will be denying the right to a relationship with the adopted child to his/her siblings and extended family. She also lives with an understanding that information about the loss of a child may become known to her family on her death. Assisting women with this decision process and its consequences is a significant part of Origins Victoria's support process.

The Impact of adoption on the adopted child Insecurity.

"A deep identification without forebears, as experienced originally in the mother-child relationship, gives us our most fundamental security."[lxii]
According to the literature, the adoptive child is subject to accusations of having 'Fantasies' regarding their family (commonly described as 'family romance') when they find themselves questioning the validity of the adoptive parents.[lxiii] Many adopted children who have that fact withheld from them and discover it later or have revealed it later recall believing at times "this is not my family, I belong elsewhere." The psychoanalytic community fails to realize how observant the child is or that the child may pick up hints regarding their origins from the adoptive parents. When the thoughts of the child are revealed punitive action is often the result, especially from patents that have chosen to conceal the child's history. For the adoptive child, the delusion of adoption as described by Elizabeth Edwards, convenor of Adoption Origins Victoria is a reality with profound effects. "Adoption is a created reality, a delusion. It requires an unmarried pregnant girl to deny that she has had a maternity, her child must accept strangers as their mother and father of origin and the infertile couple has to believe they have had a child of their own as if born to them in wedlock." The child does, in actuality, have "other" parents.[lxiv] Psychiatrist, (...) claims; "Adoption is an inherently arbitrary process that defies the child's natural wish for fairness."[lxv]
By 1952, there was an established literature on the ill effects of adoption on the child. British psychiatrist, E Wellich wrote on the subject of the lack of knowledge and definite relationship to an individual's genealogy and coined the phrase "genealogical bewilderment." In his opinion, this lack of identification resulted in the child's "irrational rebellion against their adoptive parents and the world as a whole, and eventually to delinquency."[lxvi] This idea was adopted and adapted by many theorists of the period.[lxvii]

Children housed in the St Joseph's Babies' Home, Broadmeadows, Victoria were most certainly subject to emotional damage within the structure of an institution holding??? at its peak residency. Due to the Mother Craft Training School, that provided an income for the institution and credibility in the community through its provision of vocational qualifications. This came at a cost to the children who were considered "unadoptable" and kept as long term wards. The Mother craft qualifications were based on infant care, not that of the toddler. Sister (...) , one of the interviewees described an ongoing trauma attached to the "unnatural crowding together of children."[lxviii] As this was a training institution, trainees would be rostered and rotated. Infants would be handled by six or seven people within a regular shift.[lxix] Due to the number of admissions older children would be shifted to different nurseries at 8 months, 15 months and 24 months, providing little consistency in parenting. As the Infant nursery demanded more of the staff for training, there was a ratio of one staff sister, and two unmarried mothers to 24 children.[lxx] It was an environment that would have had dire consequences on the long term mental health of the children and adverse effects on any future placement. Dr (...) described the cumulative effects of such conditions: "It would seem that those children, who are permanently placed after the age of six months, are more likely to have behaviour problems, difficulties with adjustment to their new families and are less likely to be accepted by their parents."[lxxi] Social Worker, Miss (...) ,.[lxxii]

Sister (...) , who was responsible for one of the toddler nurseries, was profoundly aware of the Impact of institutionalization on the children in her care and attempted to remedy it.[lxxiii] She described the annual transfer of children to other Catholic Homes such as St. Anthony's at Kew, the Good Shepherd Sisters Home at Abbotsford and St. Vincent de Paul's Home at Black Rock as "the worst day of the year." Her duties were to travel with the children to the institutions and leave them in the entrance hall. The children did not want to be separated from one of the few stable people in their short lives. Sister (...) would return to the St. Joseph's Babies' Home campus with torn clothing – a result of terrified and clinging children being wrenched from her by adult staff.[lxxiv]

The mothers would have reasonable expectation that her child would experience quality medical care – many of the mothers were told by nursing staff, social workers and other adoption professionals that "their child would experience a quality of life that the mother could never provide." Dr. (...) Pediatrician in Charge, Adoption Advisory Centre at the Prince of Wales Hospital had a different perception of events: "Until recently, pediatricians and physicians have shown little interest in children surrendered for adoption. Thus, a baby spent six months in a country hospital without being examined at all because everyone was too busy."[lxxv] This amounts to breach of good faith.

Violence against adopted children by adoptive parents.

The prevalence of child abuse described by children found by their mothers is alarming. We have found that stories of abuse from our children traumatic. At the time of signing the consent to adoption we were told, and believed that our children were going to "good homes." We now understand the vulnerability of adopted children to physical, psychological and sexual abuse was well understood within the adoption professional's community.[lxxvi] Had we been aware of this possibility it is unlikely we would have signed consent forms. This is another issue in the questions we have regarding informed consent. Given these conditions it is little wonder that there is a substantial literature on behavioral problems in adopted children.

Suicide in adopted children.

We have learnt from some of our members that the child had committed suicide prior to meeting their mothers or had attempted suicide. For any parent this is devastating news, for us the pain is extended at knowing our child was suffering so profoundly and we could do nothing to assist. There is considerable literature describing a correlation between suicide and adoption.[lxxvii] Origins have also been aware of premature deaths of mothers. See attached Psychological Impacts

Examples of unlawful and unethical practices described by members of Adoption Origins Victoria Inc:

In a letter to the secretary of the Hospitals and Charities Commission from Sister (...) providing information arguing that the St Joseph's Babies' Home remained a viable and flexible institution in the changing adoption demand period of the mid 1970's stated: "…we do intend to remain in the same field and continue to care for the single mother and her babe, the placement of babes in foster care and with adopting parents."[lxxviii] It was suggested by Sister (...) in 1966 but the idea was rejected on the grounds that they were a registered adoption agency and the Bureau did not approve of the scheme on the basis of "hardship suffered by the adopting parents if the single mother reneged."[lxxix] However at the time this practice was being undertaken by both the Royal Women's Hospital and the Mercy Hospital as a means of emptying beds in the maternity wards due to high demand. The idea was raised again by Sister (...) in 1971 and was discussed with (...) a Social Worker. On the arrival of Sister (...) in 1971 the plan was implemented.*

This suggests that the children of mothers who had signed consent forms but were within the 30 day revocation period were being left in the custody of prospective adoptive parents. If this is not a breach of the Act, it is most certainly a disregard for the spirit of the Act. Further, these placements may have initiated a bonding with the prospective adoptive parents thus placing the infant into a situation of further psychological damage had its mother chosen to revoke the consent. This institution was receiving funding from the Commonwealth and was accountable to current adoption policy.[lxxx]

Mothers' who were minors under the age of sexual consent were subjected to threats of having their partners incarcerated for carnal knowledge, if they refused to sign the adoption consent.

Not allowing the mother to leave the hospital without signing a consent form.

Denying the mother her basic human right to see her own child by placing objects as obstacles to a line of sight, administration of stupefying drugs, using physical restraints, and with holding formation of the 30 day revocation period, thus preventing the mother from revoking the adoption decision by advising them that "it is too late, the child has gone."

Allegations that Social Workers were not informing mothers of available benefits and payments, prior to the 1973 implementation of the "Supporting Mothers Benefit," that would have made it possible for mothers to keep their child. We contend that this was at times purposeful, with the intention of dissuading mothers from keeping their children through the threat of impoverishment.

Adoption Origins Victoria has long held concerns regarding the administering DES, or die-ethyl-Stilboestrol to mothers prior to and after the birth of the child to prevent lactation. This medication has been publically recognized to be a carcinogen since 1971, we expect safety concerns date further back. We are aware that mothers had this drug administered to them while they were under the influence of stupefying drugs and therefore consider this to be without informed consent.

The New South Wales Standing Committee on Adoption Practices in December 2000, considered this issue, accepting the advice of Drs. Hinde and Pagano, while stating that "the Committee believes that judgments on whether the administration of medication to unmarried mothers was unethical and unlawful would require further comparative research studies."[lxxxi]

We believe that mothers need to be able to obtain the medical records surrounding the birth to establish if this drug was administered and at what doses.

- Forcing the cessation of lactation by breast binding
- Sedation with "lytic cocktails" consisting of various mixtures of Phenobarbitone Pethidine, Sparine and Lagactyl. [lxxxii]
  We have heard many mothers describe the administration of post-hypnotic memory altering barbiturates both during and/or after labour.[lxxxiii] The medications include Sodium Amatol, Methadone, Heroin, Chloral Hydrate and are used with the intention to "bring about a drowsiness in which nervousness and apprehension are allayed and to abolish memory."[lxxxiv] Some of members have suggested this treatment was specific to unmarried mothers and was intended to reduce resistance to signing consent forms. The long term implications of mothers having incomplete memories of their maternity and a sense that they were duped into signing consents by being stupefied by medication are profound. We query the validity of the consent to adoptions signed under those conditions… The wholesale administration of sedatives impeded the mother's cognitive processes regarding the loss of her child, causing her retrograde amnesia, the result being that few mothers were able to come to terms with the reality of the birth.[lxxxv]

Origins are repeatedly confided with Mothers claims of the following unlawful exploitation in hospitals.
Hiding the child within the institution and denying the mother access to the child while the mother had custody of the child.
Not ensuring the mothers understood the permanent nature of adoption, or misinforming the mother as to the status of her child.
Assault offences.

- Restraining mothers to beds while in labour. Physically restraining the mother as a means of preventing her from contact with her child. See Katies story…[lxxxvi]
- Interference with the act of birth, including unnecessary caesarian sections, unnecessary forceps deliveries…
- Using overt and covert forms of duress to obtain a consent for adoption.
- Inducing mothers to sign incomplete documents of consent for adoption.
- Workers within the adoption industry colluding with obstetric hospitals to introduce and carry out illicit adoption practices. For example, codes written on hospital records designed to indicate that the mother to be was unmarried and therefore she and her baby were subject to routine adoption procedures – although the mother had not to any adoption procedures.

- Promising things that could not be delivered or guaranteed. For example and "ideal life" for the child post-adoption. The notion of "in the best interests of the child" was a means of obtaining consent by deception.

- Obtaining unenforceable invalid consents from minors. Obtaining signatures from a minor without a legal advocate preset. Obtaining a signature from a minor without ensuring the minor is aware of their legal rights or the implication of the document.

The insistence that a mother should sign adoption consent prior to the delivery of her child.

- Religious rites, such as baptisms, were conducted without the consent of the mother while the child remained in the custody of the biological mother. See Katies story[lxxxvii] We have heard allegations of falsification of religious denomination on a Third Schedule, Part A Form of Consent by Parent or Guardian to Adoption Order. Point 5 reads: "I desire the said child to be bought up as a (insert name of religion). he authors of Adoption Australia from the National children's Bureau of Australia noted: "About the only condition that a relinquishing parent could have made on giving consent to the adoption related to the religious upbringing of the child by the adoptive parents."[lxxxviii]

Sister (...) advised her peers the Australian Journal of Social Work of revised recommendations for the framing of regulations, adoption of Children Act, 1965, Child care Committee, Australian Association of Social Workers (NSW Branch):
"The natural mother also has the right to decide the religion of the child, and no one except the Director of Child welfare can override this decision – and that is very grave reason. The Association has recommended that there be provision in the form of consent for some positive consideration and decision in this matter by the surrendering mother. There is a grave responsibility upon each adoption agency not to accept a child for placement for adoption unless it has sufficient applicants from the denomination which the mother has stipulated."[lxxxix]

A significant amount of hospital and medical documentation regarding the mother and child are not available to the mother under FOI. Some have been destroyed.[xc] These include nursery notes, labour ward records, drug registers and transfer notes.
Allegations of falsification of birth documents.
Allegations of falsification of consent documents.
Failure to deliver the mother copies of the consent document. Form 4 also contains the legal instrument "Form of Revocation of Consent to Adoption Order.

Rapid adoption was a favored method of the medical profession in Australia before the proclamation of the *Adoption of Children Act 1964*. It has been found to have been practiced in New South Wales, Victoria and Tasmania …..[xci]

Rapid adoption was defined in 1967 by Dr. Blow as "the immediate allotment of a child to a mother just confined of a stillborn Child."[xcii] However, we prefer to describe it for the purposes of this inquiry.
In Victoria the process of Rapid adoption has been well researched due to adoptees contacting Adoption Origins Victoria after the Adoption Register was opened in 1998. This was when we began to meet mothers whose children had fallen prey to the practice.

After the unmarried mother delivered her baby, the doctor would inform her that her infant had died. Then the child would be placed on the breast to a married woman with a history of stillbirth. The adoptive parents were fully aware of the origins of the child. The unmarried mother would be administered stupefying medications and asked to sign a document. She would be told that the document was an application to register her baby's death, in actuality it was consent to adoption. see Tasmanian Inquiry

Registration of baby details of her address determined whether a Mother received a birth certificate

In 1999 Origins Vic. Convener personally attended an interview with Department of Births Deaths and Marriages personnel after applying for the original application of registration of her first born child. She requested the reason why she received the original birth registration whilst other mothers had not. The employee informed the convener that if the address on the application recorded an unmarried Mothers home the policy was not to provide a mother with her infant's birth certificate! This Birth certificate relating to her child legally belonged to her and not to the Department or anyone else

The language of eugenics, institutions, adoption policy and practice

The term "Eurgenics" derives from the Greek word *eu* (good or well) and the suffix *genēs*, (birth). It was coined and made popular by Sir Francis Galton in 1883, who defined it as "the study of all agencies under human control which can improve or impair the racial quality of future generations."[xciii] According to Unified Medical Language System, eugenics is defined as "the applied science or the biosocial movement which advocates the use of practices aimed at improving the genetic composition of a population."[xciv] It is somewhat more reserved that the definition given by Galton and does not overtly includes policies designed to exclude socially unpopular groups such as the poor or those considered worthy of rehabilitation. After the events in Germany during World War II overt discussion of eugenics became unpopular, except in some exceptional communities. This is a section of The R D Featherstone Lecture, given by the obstetrician, (...) at the Medical Society Hall in East Melbourne, July 1959.

"Years ago, diphtheria, dysentery, and scarlet fever would at times decimate these homes. Natural selection played a part in keeping this portion of the population down. Fortunately that does not happen now; but these children often grow up to be a burden to themselves and to the society in which they live."[xcv]

As much as the word 'eugenics' has been popularly relegated to historic vocabulary, the practice of eugenics has continued and expanded. It is ever present in social policy and genetic medicine. Modern eugenics have to general divisions: positive eugenics – actions designed to increase the rate of "fit" individuals and negative eugenics – actions designed to decrease the degenerate population. Adoption practice we argue, has elements of both divisions used against the mother and her child, perpetrated by the community, the adoption professionals and particularly the adoptive parents.

Eugenics—the study of human racial progress through selective breeding—frequently invokes images of social engineering, virulent racism, immigrant persecution, and Nazi genocide, but Vermont's little known adventure in eugenics shows the inherent adaptability of eugenics theory and methods to parochial social justice.

Beginning with genealogies of Vermont's rural poor in the 1920s, and concluding in the 1930s with an expose of ethnic prejudice in Vermont's largest city, this story of the Eugenics

Survey of Vermont explores the scope, limits, and changing interpretations of eugenics in America and offers a new approach to the history of progressive politics and social reform in New England.

Inspired and directed by Zoology Professor (...) the survey, through social research, political agitation, and education campaigns, infused eugenic agendas into progressive programs for child welfare, mental health, and rural community development. Breeding Better Vermonters examines social, ethnic, and religious tensions and reveals how population studies, theories of human heredity, and rhetoric of altruism became subtle, yet powerful tools of social control

and exclusion in a state whose motto was "freedom and unity."

' (...) , whose background in biology allows her to explain with clarity the scientific origins of eugenics, tells her sobering talewith both sensitivity and a touch of outrage."
—
Medical tests such as STI (STD) tests were performed on children while they remained in the custody of the mother (prior to signing consent to adoption) were carried out with the consent of the mother but often at the request of the prospective adopting parents. This was common practice according to (...)

"… usually a more extensive examination is made and includes a serological blood test for syphilitic infection, which the infant may have acquired from the mother. This examination of the infant is not essential but is so well recognized as a preliminary procedure that it is requested by the adopting parents."[xcvi]

This may have also resulted in breach of privacy given the results may have been discussed amongst Social Workers and other staff.

These experiences are understood by our members to be part of the punitive culture of adoption expressed in unfair division of power by disregarding the parent's privacy along with exposure of private information to the adopters. The destruction of documentation leads us to wonder about the content in the adoption professionals report.[xcvii]
(...) sees this act as implying "…mothers and children separated by adoption are a danger to each other."[xcviii]
"During the 1970's, small but significant numbers of "children with special needs" have been placed for adoption (older children, children with disabilities etc)… the Victorian adoption scene had changed, not only by virtue of the numbers of children being placed for adoption but also the age and characteristics of those children."[xcix]

The 1970 – 80 decade also saw a sharp rise in the trend of adopting children from racial groups other that those of the adopting parents and overseas adoptions. In part this was influenced by the decline of children available in Victoria but also due to greater television publicity and advertising by NGO's concerning the plight of children affected by natural disaster and war.
A child of different ethnic origins was normalized for the traditional anglo-european adopter through the large migrant population and careful public education which had changed the culture of Victoria. Aboriginal children were rarely available for adoption were found culturally appropriate families through the Victorian Aboriginal Care Agency. The word 'miscegenation' had become the vocabulary of a racist.

Post World War II found a society in a state of flux, where the number of unmarried women bearing children and the number of infertile couples were on the increase. The problem of delinquency and degeneracy was now being addressed by a growing army of adoption professionals, social workers and clinicians. (...) an American social commentator found the rise in illegitimate births disquieting and predicted that the demand for children available for adoption exceeded the supply and if there remained an emphasis in the courts on "the rights of the child" over the rights of the parents then it was probable that unwed mothers "would be punished" by having their children removed from them at birth. He went on to explain that this policy would be couched in terms like "scientific findings, the best interests of the child, rehabilitation goals for the unwed mother and stability of the family and society.

He emphasized that "such policy would not be enacted or labeled as punishment" – the hallmark of skillfully designed negative social eugenics.[c]
In Australia, the same social changes were occurring…

Dr. (...) in a study of 130 children at the Adoption Advisory Clinic at Prince of Wales Hospital, Randwick, described some of the children available for adoption in the late 1960's as: "the perfect baby… or as a recent newspaper article called him or her, the "blue ribbon baby" was available in good supply. Selection was easy and those rejected were deferred or ended up in institutions."[ci]
He went on to describe the mothers of the children deemed as 'unfit for adoption' as
"the *unmarried mothers are likely are likely to be poor, undernourished, and of low intelligence, if not actually retarded."*[cii]

That was before changes in social policy made benefits more easily available to unwed mothers. After the introduction of the Whitlam Social Security policies, a greater availability of contraception and a wider community acceptance of the unmarried mother Dr. (...) claimed "Adoption, as we know it, seems to be on the way out because of the decreasing amount of babies available for adoption."[ciii] He was not alone in his concerns about the adoption industry.[civ]

With the decreasing supply of newborns considerably more interest was given to those children previously considered unfit for adoption. Prior to the lack of supply these children were given little attention.

"In the past, when many babies were available, few children with problems were placed during the first few weeks of life… Agencies were busy and short staffed. They had difficulty coping with problem children. Doctors were quick to place the 'Deferred' label on a baby and many personal prejudices about adoption were being perpetuated by the professionals. Often, in ignorance of the facts, prospective parents were advised to adopt or not adopt a particular child. Now, more concern is being shown by medical practitioners but the source is drying up."[cv]

The era of the "blue ribbon baby" had passed and the scrutiny of the mother and child became more intense, more obviously interested in degrees of 'quality' now that quantity was gone. He was concerned that many of the babies available for adoption were of low birth weight, with family histories of mental illness, congenital infections, substance abuse, neurological problems, the progeny of incest, genetic disorders or simply a bit too old. As a result of dwindling availability of children for adoption Dr. (...) suggested that:

"…the doctors' concern should extend beyond the fit-for-adoption slot and should include assessment of fitness to adopt. Most couples want 'a perfect specimen'… If they cannot have one themselves they want to adopt one as nearly perfect as possible. Only if they cannot have one of those will they will take a baby who might be faulty…"[cvi]

We have heard allegations of medical abuse and medical research on children in homes.
It was claimed by Sister (...) and Sister (...) that during the 1940's the Children's Hospital and the Commonwealth Serum Laboratories did combined research at St. Joseph's

Babies' Home that "contributed to the production of triple antigen serum."[cvii] Because of the nature of the informants we feel that these allegations need to be investigated. The researcher who recorded these interviews provided a footnote regarding her follow up of this revelation by the nuns. "This claim by Sisters (...) and (...) cannot be verified by existing records. Contact was made with Dr. (...) , Consultant in Immunization; (...) (...) said the records on immunization in Australia are very sketchy. See Dr. Feery's article Impact of immunization on Disease Patterns in Australia, Medical Journal of Australia, 2,pp 172-176, 1981."[cviii] We are concerned that the documents surrounding any clinical trials may have been destroyed.[cix]

Contempt prevailed and her file was marked A or BFA baby for adoption, In many cases a mother was administered mind altering drugs in order to sedate her until a consent had been signed and she discharged. A potentially cacogenic drug (Diethylstilboestrol) DES given to prevent lactation without any consultation with her thereby showing intent by Drs (...) Origins considers they committed perjury in their testimony in the NSW Standing Committee inquiry into past adoption practices They administered maternity care with Prof (...) at RWH

Anne Hamilton-Byrne acquired fourteen infants and young children between about 1968 and 1975. Some were the natural children of Santiniketan members, others had been obtained through irregular adoptions arranged by lawyers, doctors and social workers within the group who could bypass the normal processes.

The children's identities were changed using false birth certificates or deed poll, all being given the surname 'Hamilton-Byrne' and dressed alike even to the extent of their hair being dyed uniformly blonde.
The children were kept in seclusion and home-schooled at Kia Lama, a rural property usually referred to as "Uptop", at Taylor Bay on Lake Eildon near the town of Eildon, Victoria.

They were taught that Anne Hamilton-Byrne was their biological mother, and knew the other adults in the group as 'aunties' and 'uncles'. They were denied almost all access to the outside world, and subjected to a discipline that included frequent corporal punishment and starvation diets.
The children were frequently dosed with the psychiatric drugs Anatensol, Diazepam, Haloperidol, Largactil, Mogadon, Serepax, Stelazine, Tegretol or Tofranil.

On reaching adolescence they were compelled to undergo an initiation involving LSD: while under the influence of the drug the child would be left in a dark roomThe Newhaven building was later reopened as a nursing home with no connections to its previous owner or uses.
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Sarah Hamilton-Byrne memoir
A few children managed to escape. One adoptive daughter, Sarah Hamilton-Byrne, later wrote a book titled**, "*Unseen Unheard Unknown*"** in which she claimed, among other things, that children were stolen.
She claimed that her biological mother had come to get rid of a baby and that members of the medical establishment in Melbourne and Geelong took part in a process where women were told that their babies had died at birth, when they had actually been taken away and eventually passed on to Anne Hamilton-Byrne, alone apart from visits by Hamilton-Byrne or one of the psychiatrists from the group.

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Sarah Hamilton-Byrne memoir

Increase of School Age.

On 4th February, 1964, the age to which attendance at school is compulsory was raised from 14 to 15 years. Following consequential alterations to the Social Welfare, Children's Welfare and other relevant Acts, this has had the effect of also raising the maximum age at which children may initially come under the Division's supervision from 14 to 15 years. Thus, children of 14 years on the date of their admission to the care of the Department, who formerly came under the control of the Youth Welfare Division, now come under the control of the Family Welfare Division. However, because the great majority of these children are delinquents, and many need supervision and treatment in closed institutions, of which the Family Welfare Division has none, it has been found necessary, as a matter of expediency, to seek the Minister's approval under Section 26 (*c*) of the Children's Welfare Act for their transfer to youth training centres. New institutions for both boys and girls are necessary before the Family Welfare Division will be able to assume its additional responsibilities consequent upon the legislative changes.

Another effect has been that applications for assistance under Part V. of the Children's Welfare Act may now be accepted, and assistance given, in respect of children up to 15 years.

The raising of the school leaving age has also widened the scope of the Division's functions under the *Street Trading Act* 1958, and Part VIII. of the Children's Welfare Act, relating to the employment of children in places of public entertainment.

Adoption of Children Act 1964.

In May, 1964, following a series of Commonwealth-wide consultations involving Ministers of the Crown, Child Welfare Directors, Parliamentary Draftsmen and representatives of voluntary agencies, a new Adoption of Children Act was passed by the Victorian Parliament. It is expected that similar acts will be passed in the other States and in the Commonwealth Territories at a later stage. The adoption legislation throughout the Commonwealth will then become substantially uniform in its basic principles. The principal changes introduced by the new legislation as compared with the existing Victorian legislation are—

(1) The cases in which the Court may exercise jurisdication are defined. The child must be present in Victoria and the applicants must be resident or domiciled in Victoria. (Section 6).

(2) Applicants to adopt may be younger than under the existing legislation. Section 11 provides that they shall have attained the age of 21 years, and in the case of a male be at least 18 years older, and in the case of a female at least 16 years older than the child to be adopted. Under the existing legislation, the applicants, with some exceptions, must be 25 years of age and 21 years older than the child.

(3) Section 12 provides that the Court shall not make an order for the adoption of a child unless it has received a report, in writing, from the Director-General or the principal officer of a private adoption agency. It is expected that most of these reports will be furnished by social workers. This provision will replace the appointment of a guardian ad litem, as is provided in the existing legislation.

(4) The new Act provides that where the Court refuses to make an adoption order it may make an order for the care and control of the child (Section 15). There is no similar provision in the existing legislation.

(5) Arrangements for adoption may be made only by the Director-General or private adoption agencies approved by the Chief Secretary (Section 17). There is an exception where a child is being adopted by a relative. Section 50 provides for penalties for making unauthorized arrangements.

(6) The Court's power to dispense with the consent of parents and relatives is widened considerably. (Section 29.)

(7) It will be possible to dispense with a parent's or guardian's consent to adopt in a separate proceeding before the application is made for an adoption order. (Section 29 (2)). This provision will be particularly helpful in the case of wards of the Department because the Department will be able to ascertain whether a ward is legally eligible for adoption before actually placing it with a suitable couple.

(8) There is provision for the guardianship of a child between the time the consent to adoption is signed and the time the adoption order is made. (Section 31.)

(9) There is recognition of interstate and overseas adoptions. (Sections 40–43.)

(10) There are restrictions against advertisements relating to the adoption of children. (Section 48.)

(11) There is a wide regulation making power. (Section 67.)

The date for the proclamation of the Act has not been decided. The additional work which the Division will undertake under the Act will necessitate a substantial increase in the staff of the Foster Care and Adoption Section and in placement facilities. Many of the babies who will come into the Division's care for adoption will need to be accommodated whilst waiting for the parents' consents to the adoptions to become irrevocable and whilst matching the babies with suitable adoptive parents.

Family Assistance and Emergency Grants.

Another important development concerns the new power given to the Division to make immediate emergency grants of money in cases of distress. These grants may be made to families applying for, or already in receipt of, assistance for children under Part V. of the Children's Welfare Act.

Generally speaking, Part V. assistance is granted, subject to a means test, to such persons as deserted wives, widows and the wives of unemployed persons and those in gaol who have children under 15 years in their custody. Most of these persons receive a Commonwealth pension or benefit. The State, after taking into consideration all sources of income other than child endowment and essential expenditure for accommodation, &c., supplements the income in appropriate cases to assist the family to be self-supporting. This supplementary assistance is paid fortnightly after the application is received and processed. This means that no money is available for about 14 days.

To overcome this waiting period and to help families already assisted to meet some pressing necessity for which no other provision can be made, the Division has now been empowered to make emergency grants. These grants are mainly for the purpose of purchasing food, discharging a pressing debt, or meeting similar emergencies. The maximum grant is £10 per family and, other than in exceptional circumstances, only one emergency grant per family is made each year.

The first emergency grants were made in November, 1963. Between then and 30th June, 1964, 677 applications were received. Of these 665 were approved, involving an expenditure of £5,138.

The total number of families receiving assistance under Part V. decreased from 2,591 as at 1st July, 1963, to 1,978 as at 30th June, 1964 ; or 24 per cent. While this was due in some measure to the lower incidence of unemployment in the community, the main cause was the considerable increase in the rates of Commonwealth pensions payable to widows with children from September, 1963, making some of these families independent of supplementary assistance. The resultant saving of expenditure enabled the levels whereby rates of assistance were assessed to be revised to the benefit of other families.

Relative Adoptions

The only purpose of a step parent adoption is to sever an existing relationship a concern not only voiced by (...) from the council of The Single Mother and Her Child in 1965 but was echoed by the Human Rights Commission in its report to the on the Review of The ACT Adoption of Children Ordinance 1965
In response to the following Statutes 9.3 Step-parent adoptions
Section 17(3) and (4)
(3) **The Court shall not make an adoption order in favour of one person if that person is married and is not living separately and apart form his or her spouse**.
51
(4) The Court may make an adoption order in favour of a husband and wife jointly notwithstanding that one of them is a natural parent of the child.

The Human Rights Commission responded with consternation the following
90 Section 17(3) necessitates the making of an adoption order •jointly in the case of any couple living together, and has the effect of requiring a natural parent to adopt his or her own child if that parent has married or remarried and the child's step-parent wishes to adopt the child. Similarly, adoption legislation in all States and the Northern Territory provides for the adoption of a child into a step-family, and most Jurisdictions require such adoptions to be by the natural parent and spouse jointly. In Queensland, Western Australia and South Australia adoption by the spouse alone is permitted, although in South Australia, in practice, only joint applications are accepted. The consent of the other natural parent is however required and, if refused, the adoption cannot go ahead, unless there is an order to dispense with consent.

91. The provisions for step-parent adoptions require careful consideration in view of the significant increase in these over recent years, at a time when non-relative/baby adoptions have been decreasing steadily. This trend in step-parent adoptions is linked with increases in re-marriages which, (...) noted, increased by more that one-third over the period
1970-1982.! By 1981-1982 step-parent adoptions comprised nearly 48 per cent of all adoptions in Australia. From the incomplete statistics available, (...) found that numbers were fairly evenly divided between adoptions into a second marriage and adoptions into a first marriage of ex-nuptial children. She concluded:
...it is clear that some families are using adoption as a means of establishing the legal status and family relationships of stepchildren and step-parents within the new family. It is also clear that only a small percentage of stepfamilies choose to use adoption for this purpose or see adoption as an appropriate mechanism for clarifying and establishing family relationships. In 1982, an estimated 30-35 000 children could potentially have become part of a stepfamily: only 1422 children were the subject of step-parent adoptions in that year

2 (Step Parent Adoptions) are adoptions designed to keep the child within the framework of their biological family. A child might be adopted by an aunt, grandmother or other relative. Prior to the creation of adoption legislation this was

organized privately and usually informally. Adoption professionals considered this unsatisfactory due to familial complications, a grandmother could become the mother thus rendering the mother the sister of the child. The opening of adoption records has reinforced this thinking.[cx]
Upon close scrutiny relative adoption has some very gaping flaws

In the case of parent's separation or even death the custodial parent may wish for the new partner to adopt their child, this requires the custodial parent also having to relinquish the child/children before an adoption can proceed, and the parent who is already the legal guardian must also adopt

On the contrary The Human right commission stated the only purpose of a relative adoption was to exclude an existing family

92. Statistical data provided by the Welfare Services Branch of the Department of Territories show that in the A.C.T. there were twenty-eight step-parent adoptions (two involving two children each) over the period January 1985-June 1986, in which fifteen were children from ex-nuptial relationships, and fifteen were from previous marriages.
93. As was pointed out in a comment provided by the Welfare Services Branch of the Department of Territories, step-parent adoptions 'are a phenomenon for which the adoption legislation was not intended or designed. Adoption legislation was largely intended to regulate the placement of infants with (usually) unrelated persons.' At the time of the enactment of the A.C.T.

Adoption of Children Ordinance 1965, step-parent adoptions were far fewer in number and welfare administrators were largely unaware of any associated risks.
94. Step-parent adoptions are sought for a variety of legal and/ personal reasons, including: change of surname and birth certificate; inheritance rights; termination of maintenance obligations of natural parent; transfer of full legal parental rights and obligations to the step-parent; exclusion of the rights of a natural parent and other relatives; and discouragement of continuing relationships with, and access to, the other parent and extended family.

3 Additionally, according to (...) :
It is still not uncommon for children to be seen as possessions or property to be transferred from one owner or parent to another. Such parents see themselves as having absolute rights to make all decisions regarding the welfare and future of the child even decisions regarding severing of important family ties.

Adoption may in addition be sought because of a lack of knowledge of alternative options, or because of the unsatisfactory nature of these.
95 The Commission concurs with the view expressed by the Welfare Services Branch of the Department of Territories, that some applications for natural parent adoptions may be appropriate: for example, in the case of an ex-nuptial child whose father has established no relationship with nor demonstrated any interest in the child and whose mother marries another man. In general, however, the Commission considers

step-parent adoption to be inappropriate on a number of grounds, including the following:
(1) it creates by law one set of family and social relationships at the expense of another set: it is doubtful that the severing through adoption of a child's links with one half of his/her family will benefit relationships with the custodial parent or step-parent, as the child may resent losing ties with relatives, and the changing or closing off of records that adoption entails.
(2) The contention that adoption clarifies and establishes the legal status and parental rights and obligations of both the step-parent and natural parent is open to question. In reality the step-parent is already caring for the child and will continue to do so, irrespective of an adoption order. As a result, adoption would seem unnecessary in order to secure care; and inappropriate and contrary to the best interests of the child in its effect of extinguishing all legal links with the natural parent.
(3) Adoption by a natural parent or relative, as noted above, severs existing legal relationships, creating in their place an adoptive relationship. While the creation of a legal relationship where none previously existed is desirable, the severance of existing relationships is undesirable, particularly where it results in the severance of legal links with siblings and an extended family

In the opinion of Origins adoption severs all important relationships, and that is the very least problem it creates

Open Adoption

Personal stories are the most compelling evidence of atrocities and in the following Origins wishes to relate two cases of open adoption abuses by a systemic attitude to adoption
or to be more precise separation being defined as the best interest of the child.

Origins have members who gave consent in good faith to an open adoption only to have visitation rights revoked later on. An open adoption is the process whereby a mother having given consent continues to have access visits with her child adopted by others.
This method was introduced and legislated for in Victoria in the 1984 act after the Victorian Government carried out although comprehensive a hasty review of the Adoption Act and practices. Adoptive parents returned to the courts seeking to close the adoption pleading The Hague convention by stating their baby was being traumatized by the visitation of the natural Mother!
The mother of origin was herself a social worker employed by the department, she married and her children of the marriage were deprived of a relationship with their sister. see “mental health conference Melbourne

Another case that has been presented to Origins is of a Father who would have dearly loved to marry the mother of his child however she persisted with the notion of adoption for whatever reason, he finally consented to an open adoption where he had visitation rights delegated to him however once again the adoptive parents unhappy with having to share parental rights took the case back to the courts and the father had

his visitation rights reduced this was a very responsible young man and he had not imposed upon the adoptive parents in any way. (...)

Single parent adoptions

Such approval should not be dependent on the marital status of the adoptive applicant(s), but on the best interests of the child. Agency guidelines should be altered accordingly, with each case to be decided on its merits, in addition, agencies should be directed to keep under review research on the effects on a child of living in a variety of family contexts,

Including two adults in a committed de facto relationship, or a single parent established in a stable domestic relationship with a sibling.

- Prior to 1964 ACT plethora of small nursing homes for aged provided shelter for forced removal and consents private adoptions

The Law States we cannot sign for a crime against ourselves! a legal maxim stating a person cannot consent to unlawful act eg relinquish what has already been taken. *legal studies*

Literature review

Adoption Origins Victoria Inc. has been developing a library of research concerning adoption practices since our inception.

We have examined various types of literature for this Inquiry including, peer reviewed articles in journals for adoption professionals, general and institutional histories, circulars, legislation, book reviews, newspaper and periodical articles, conference papers, ….

Origins Vic Inc have been contacted by members of what has become known as "**the family"** This was a cult where a (...) from Melbourne University introduced Anne Hamilton Byrne to a cult residing in the foothills of the Dandenong ranges. Some of its members included doctor's lawyer's nurses and one social worker from the RWH who all were involved in provided babies to members for adoption and then experimentation See *Unseen Unheard Unknown* by Sarah Hamilton Byrne

Summary

"Adoption has such pervasive and profound consequences, for good or ill (and usually both), that assessing it calls for intelligence, expertise, honesty and compassion." Judge Richard Chisholm.[cxi]

We have provided you with a name, parts of a document, and a litany of use and abuse of both mothers and their children.

We contend that many of the adoption agencies and hospitals providing medical services were funded by "Hospitals and Charities" therefore they were answerable to the federal government. In turn the Federal Government was responsible for ensuring that legislation was honoured by these institutions and those individuals who were on Federal Government payrolls.

Also we contend that the Federal Government was conscious of breaches of the law and failed in its duty to act against perpetrators, be it an individual or institution.

We contend that the Federal Departments responsible for the care of our children were aware of the literature regarding disabling behavioral problems in adopted children. We believe they did not take adequate action with that knowledge and failed in their duty of care.

Denying mothers knowledge of their legal rights and options.

Failing to have regard to, and act in, the best interests of the mother and child by failing to take into account the mothers individual circumstances.

Failing to provide professional counseling facilities for the mother prior to, during and/or after confinement.

Maltreatment of the unmarried mother – treat her in a cruel and demeaning manner.

Failing to make reasonable attempts to ensure that the unmarried mother would enjoy equal opportunity compared to the married mother.

Failing to have proper regard to natural law, prevailing domestic and international principles concerning the advancement of human rights.

Using both overt and covert method of coercion to obtain consents.

Forbidding mothers to either see or touch their babies at, or soon after birth.

Promoting adoption rather than warning mothers of the potential harm such a course of action may cause.

Introducing the inhumane practice of forbidding eye contact between mother and child with the intention of suppressing bonding – resulting in violent trauma to the psyche of both the mother and infant.

Violently interfering in the birth procedure by aggressively removing the newborn before the birth was complete.

Preventing lactation by administering medications.

Placing obstacles in front of the mother preventing her form seeing the child at birth.

Sedating the mothers during labour with stupefying drugs.

Hiding infants within the confines of the hospital with the intention of denying access.

Shackling mothers or physically restraining mothers during labour to prevent contact with their newborn.

Obtaining unenforceable consents from minors, without an adult advocate present.

Obtaining consents from mothers who did not understand the implications of the consent form.

Preventing mothers for using their right to revocation within the permitted period. Dishonestly advising mothers that their infants had been placed and therefore were inaccessible.

Victoria the Covert State FOI

In NSW the Victims of what has been named as a systemic conspiracy Justice Chisholm have full access to all records including their babies nursery notes since the introduction of the NSW adoption information act in 1990
When Origins Victoria requested similar legislation that could assist in recovery for Mothers who had disassociated from the traumatic experience Kennett Government reinforced the secrecy surrounding adoption in 1998 when they revised the FOI act General Disposable Schedule for Public Hospital Patient Information Records, which include restrictions on Private records also..

What happened to the Victorian Inquiry and VCAAT

Origins has cultivated a reputation for providing factual evidence and not embellishing a good story
As the convenor of Origins Vic Inc Mrs Edwards along with the then Secretary Mrs Watson were invited to meet with (...)
and (...) on February 25th 2002
Origins presented them with a document listing issues that the committee had unanimously agreed needed the minister's urgent attention, one being the proposed inquiry which (...) had publicly announced had been stalled in September 2000.
Another was the issue of the unlegislated and illegal policy adopted by Birth's Death's and Marriages of issuing an ***indistinguishable birth certificate*** to any person adopted in Victoria This concerned Origins Victoria gravely, because if never informed the adopted person may never know they were adopted, and therefore CSV (Community Services Victoria) ran the risk of a veritable possibility of unlawful adoptions.
Documents gained under FOI show (...) sought legal advice after our meeting.

Mrs (...) and Ms (...) scrutinised the list and then came to the point. They had invited us here to consider an alternative to an inquiry.
We sat in silence as their proposal unfolded I cannot recall who actually articulated their proposition but I do know Mrs (...) noted all that transpired. The alternative was spelt out as follows
The Government would have someone interview mothers, our stories would be archived in the Department and the mother would be given two free counselling sessions in return.
Silence followed our predicted reaction to the recommendation:
Eventually we agreed to take the proposal of what we regarded to be little more than an academic exercise back to our membership.
After consultation with its membership Origins wrote and declined their offer.

Origins were not a small group as claimed by the department or by (...) when she led a delegation to meet with Minister Pike.
Origins have lobbied for this inquiry for nigh on twenty years, unaided, unpaid to support, and advocate on behalf of mothers who have come and gone.

However to keep our issue in the frontline we have organized mental health conferences, attended meetings, seminars, fund raised and in short been beacons of hope principally for mothers who did not relinquish their baby but also for all people affected by family separation in adoption. This is the level of commitment we have shown whilst seeking truth and justice. *see attachments*

There has from our inception been a lot of conjecture about Origins seeking compensation, resulting in (...) of ARMs making allegations in an ARMs newsletter claiming Origins would be seen as seeking thirty pieces of silver by our children, however Origins Vic Inc have never formalised a policy regarding fiscal redress although there had been many ideas floated, including the notion of compensation, or a class action. Because of the group's frustration with setbacks coming from systemic obstruction and eventuating with (...) stalling the inquiry, Origins Vic made enquiries to Pilch (Public Interest Law Clearing House) never the less with a negative outcome, therefore we placed our energy into a quest of what happened to our inquiry, and this resulted the seeking of legal support from PILCH to be represented at VCAAT for documents denied us from the Department of Community Services.
On April 24th 2003 Elizabeth Edwards acting on behalf of Origins Vic made an application under the 1981 FOI Act for all documents relating to the proposed Inquiry into Victorian past practices referred to 1999 Victorian ALP policy, and all correspondence, briefs, emails, memos, and diary entries since October 1999.

Further more she requested all correspondence, briefs, emails, memos, and diary entries since October 1999 relating to meetings between the Premier, Premiers private staff or Departmental officers with the organization ARMS (Association Representing Mothers Separated from their Children)

Ms Edwards was eventually notified that Origins Vic had been exempted from a large volume of the afore mentioned correspondence, therefore she applied to have the application heard in the VCAAT (Victorian Civil and Administrative Tribunal)

There were three hearing's prior to the final tribunal which took two full days.
In the second and third proceeding chaired by (...) , she laughingly exempted document after document.

Distressed by her conduct Ms Edwards contacted the Herald sun who sent a reporter to the court, upon his arrival (...) 's demeanor changed. However she did not release any more documents.

The next time Origins attended VCAAT. Mr. (...) chaired the following hearing that lasted two days, and this time we were armed with a Barrister…..

We were no closer to ascertaing why our inquiry had been stalled one week before nine/eleven and then dropped by Bronwyn Pike who replaced Christine Campbell and although we had received a voluminous amount of documents most of them had been blacked out, never the less we did find that (...) had absolutely refused an alternative to the promised inquiry one week before she was dismissed for supposable sanctioning supervised chroming.

The Department Of Community Services personnel misrepresented Origins Vic by profiling us as a very small group of women, and thereby minimizing the importance of our issue.

Instead they pushed ARMS policy of an alternative to an Inquiry into Civil Crimes in adoption. (...) representing ARMS led a delegation to the Minister, Bronwyn Pike.

(...) is married to (...) who was (...) at the following election he stood and gained the seat of (...) and took a seat in the Bracks Government.

However senior personnel at community services had pre-empted that Origins would refuse an alternative to an inquiry that amounted to an academic exercise.

Realizing that the State of Victoria had a lot to hide, Origins concentrated its focus toward gaining a Senate Inquiry

Victorian Indistinguishable Birth Certificate

A birth certificate that is interchangeable is currently issued in Victoria and has been since 1990 when Births deaths and marriages adopted it as a policy it had not been legislated for until 2006.

The reason given to Origins for this fabrication is that adopted persons did not want the Post office personnel to identify they were adopted.

Origins contend that a birth certificate should not record a lie: Rather an ingenuous Birth certificate that records the details of a birth and we question the need to change an infant's identity.

Origins advocate an adoption certificate be issued or custodial rights be granted in the family Law court. The flagrant danger with Australia's history of adoption abductions is clear.

One member of Origins answered an advertisement by Angli-care for people interested in becoming foster parents in her local newspaper. When she presented the agency ushered one group into another room.

Origins would request the Committee study Victorian statistics for toddler and juvenile adoptions and compare them to infant adoptions then compare these figures to the peak adoption period See Colleen s list.

- Who was meant to be advocating for the disenfranchised.,
- Why did they marginalized Mothers and language used
- Who did they advocate on behalf of, and who was their client?
- What they knew but failed to tell us
- "A' Mothers and their "illegitimate" infants
- What law gave permission for authorities to abduct a baby, or place restrictions upon a Mothers right to her own child?
- Crimes in hospital practice
- Who gave permission for medical professionals to administer drugs of sedation and mind-altering cocktails
- Who gave the authorities permission for them to administer cacogenic drugs to prevent lactation
- Source of Duress
- Fraudulent consents
- Crimes in forced adoption
- Father's rights ignored
- Failure of Guardian ad Litem to fully investigate
- Marriage and the false evidence adoptions
- Impacts of adoption
- Victoria's restrictions to Equal Opportunity of Identifying Information Legislation
- VCAT and FOI limitations
- Summary
- Recommendations
- References

Commonwealth Acts Breached

- Commonwealth Crimes act breached
- Hague Convention breached
- Marriage Act breached
- Social services Act breached
- Medical eg DES
- Human rights
- Incarceration against a persons will
- The Josephites and other homes
- Catholic Family Welfare bureau
- *See included in attachments* book listing baby homes
- *+ see attached on memory stick* Josephite's and other homes reports
- *see Cheryl Critchley* – Herald Sun articles

Conclusion

Who will recognise our rights here in Victoria to information recorded on our medical records? Current legislation in Victoria allows the destruction of our medical files. Who will address a mothers equal opportunity to identifiable information regarding her adult child lost to adoption? Who will undertake to attend to and rectify the injustice of present day governments covering up the actions of the past by preventing the truth being told on the flimsy excuse of describing a past Review Of The Adoption Act, an inquiry into past criminal and intentional removal of innocent babies being targeted for permanent separation from their own mothers simply because she was unwed when the government was aware that it was being complicit in crimes into past adoption practices?..

That onerous task has fallen upon you and on behalf of all mothers and their children targeted for adoption and separated against their will in Victoria I implore you to carefully consider the facts that have been well researched by Mothers for the past twenty years and that have led to Origins seeking an inquiry for the truth to be revealed and justice acknowledged for.

Despite information conveyed in their own training manuals and adequate warnings offered at the many conferences held by AASW advising Social worker /Almoners of their legal duties they chose to ignore the law. Although , we have met the adult child we may pine for the child we lost at birth the truth is we have been separated from our baby forever and with it went our soul, We were left with a skeleton of self which we had to recreate in order to exist and Origins Vic is certain that Humpty Dumpty cannot be restored to its original glory, having said that we hope this submission for truth and justice will authenticate the truth as being historical fact and thus give us a measure of peace to sustain us in the autumn of our lives.

Recommendations

- That there be a Royal Commission into past adoption practice crimes.

- That all adoptions should be suspended until more substantial research is completed on the impact of separation on the mother, father, child and others. As a means of addressing problems arising from the absolute destruction of paternal and maternal information. We are now in the age of genetics – the elimination of this information has dire effects in regard to the medical wellbeing and outcomes of the child.

- That the birth certificate should only record the details of birth. A separate certificate should be issued concerning the adoption.

- That the Australian Federal Government and their agencies issue a full and frank acknowledgment of their unlawful and harmful practices.

- That research should be conducted within the penal system and child custody institutions to examine the percentage of adopted persons incarcerated.

- That the Federal Government make funding available for comparative research studies on the administration of DES, or di-ethyl-stilboestrol and the "lytic cocktails" in combination.

- That the Federal Government creates legislation making available cost free all medical records to the mothers to establish if these drugs were administered and in what doses.

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HIGH COURT OF AUSTRALIA ATTORNEY-GENERAL (VICT.) v. THE COMMONWEALTH [1962] HCA 37; (1962) 107 CLR 529

Constitutional Law (Cth)

High Court of Australia
Dixon C.J.(1), McTiernan(2), Kitto(3), Taylor(4), Menzies(5), Windeyer(6) and Owen(7) JJ.

CATCHWORDS

Constitutional Law (Cth) - Marriage - Legitimacy - Legitimation - Commonwealth power to make laws with respect to marriage - Legitimation of child by subsequent marriage of parents - Legitimacy of child of void marriage believed valid - Investment of State courts with jurisdiction to declare that applicant is legitimate child of his parents or that he or his parents or child or a remote ancestor or descendant is or was a legitimated person - Validity - The Constitution (63 & 64 Vict. c. 12), ss. 51 (xxi.), (xxxix.), 76, 77 (iii.) - Marriage Act 1961 (Cth) (No. 12 of 1961), ss. 89-93, 94.

HEARING

Melbourne, 1961, October 13, 16, 17; 1962, March 14, 15;
Sydney, 1962, August 1. 1:8:1962
DEMURRER.

DECISION

1962, August 1.
The following written judgments were delivered:-
DIXON C.J. By his statement of claim in this action the Attorney-General for Marriage Act 1961 (No. 12) and s. 94 of that Act are invalid. The defendant Commonwealth demurs. The purpose of the Attorney-General of Victoria is to set at rest as soon as may be doubts which may now or years hence affect or attend the title to proprietary rights and other private rights. (at p539)

2. Part VI which contains ss. 89 to 93 is headed "Legitimation". Section 94 is the first section of Pt VII which is headed "Offences": s. 94 deals with "bigamy". The question of the power of the Commonwealth Parliament to enact s. 94 does not appear to me to be very serious but the question of the validity of what is enacted in Pt VI, particularly in ss. 89 and 91, is indeed serious. No source of legislative power extending to legitimation generally can be invoked unless it be the power conferred upon the Parliament by s. 51 (xxi.) to make laws with respect to marriage. The subject matter of the power is simply expressed by the one word "marriage." But the fewer the words in which the subject matter of a constitutional power is expressed the more extensive sometimes may be the field laid open to a generous interpretation. Nevertheless it may seem a paradox that bastardy, being a legal condition resulting from birth out of wedlock, should be removed by an exercise of a power to make laws with respect to marriage. But what s. 89 and s. 91 do is to seize upon the fact that at some time a marriage takes place between the parents - in the first case a valid marriage some time after the birth of the illegitimate child, in the second case an invalid marriage, considered by one party to be valid, as a result of which the child was born. The Commonwealth claims that it is with respect to that marriage, the valid subsequent marriage or the invalid prior marriage, that the impugned law was made and that it is

within power because the law is but fixing consequences to a marriage, in the one case a valid subsequent marriage, in the other case an ostensible marriage, void but with a sufficient appearance of validity to persuade one party to believe in it. The argument for the Commonwealth, formulated with telling brevity, is that Pt VI is a law with respect to marriage because it determines the legal effects, in relation to the progeny of a man and a woman, of a marriage or a putative marriage between them. For the Attorney-General of the State the paradox remains; he maintains that the argument does not show that the law is one "with respect to" marriage; it is a law with respect to nothing but legitimation, the marriage actual or ostensible between the parties being at best a limiting condition. The case for the State Attorney-General is simply that the provisions fail for defect of power: they deal only with a status arising under State law for the purpose of the devolution of property and other rights depending on family or personal relationships. (at p540)

3. The sections of Pt VI must be dealt with separately and in detail, in order to determine their relation to the subject of marriage. Section 89 is directed to legitimating children whose parents were not married to one another when they were born but intermarried subsequently: they are legitimated whether or not when they were born their parents might lawfully have married each other. The section bears a strong resemblance to s. 1 of the Legitimacy Act, 1926 of the United Kingdom (16 and 17 Geo. 5 c. 60) as amended by s. 1 of the Legitimacy Act, 1959 (7 & 8 Eliz. 2 c. 73). Sub-section (1) of s. 89 provides that a child whose parents were not married to each other at the time of his birth but have subsequently married each other is by virtue of the marriage for all purposes the legitimate child of his parents. The sub-section expressly says that the child may be born and the marriage may have taken place before or after the commencement of the Act and also that the child is legitimate from his birth or the commencement of the Act whichever is the later; but sub-s. (5) qualifies the effect of this general statement by providing that the section does not apply in relation to a child so as to affect any estate, right or interest in real or personal property to which a person has become, or may become, entitled by virtue of a disposition that took effect before the marriage of the parents of the child or the commencement of the Act whichever was the later, or entitled by devolution of law on the death of a person who died before the marriage of the parents of the child or the commencement of the Act whichever was the later. The qualification is expressed to apply whether the person became so entitled mediately or immediately in possession or in expectancy. The words "by virtue of the marriage" are to be noticed because they may be said to give the provision a more apparent connexion with marriage as a subject of legislative power. In the counterpart in the United Kingdom statute the words are "the marriage shall legitimate the child". On the other side the savings of sub-s. (5) bring out, what indeed is obvious enough, that the chief operation or effect of legitimation is to place the child in the same category as legitimate children for the purpose of inheritance, of sharing as next of kin, of filling descriptions found in wills, settlements and other assurances of property when the

description depends on, or implies, blood relationship at some point and generally in affecting the operation or application of legal instruments or legal categories governing rights, duties, liabilities, privileges or immunities. Sub-section (4) saves, at all events in great measure, the effect of legitimations which under State law took place before the commencement of the Act and sub-s. (3) excludes from the application of s. 89 marriages when the domicile of the father was not Australian or the marriage did not take place in Australia (unless it took place under Pt V of the Act or what may be described as the corresponding previous legislation; (see s. 4)). Section 90 deals with the operation of marriages between parents abroad to legitimate a child born before the marriage but there is no reason to think that support for its validity may be obtained from any other legislative power and so far as it would operate to change the law its validity would seem to stand or fall with that of s. 89. Section 91 takes as its postulates first that there is a void marriage, and second that there is a child of that void marriage. If at the time that child was conceived or at the time when the marriage took place, whichever was the later, either party to the marriage believed on reasonable grounds that the marriage was valid, then the child of the void marriage is to be deemed for all purposes the legitimate child of his parents. One of the parents must have been domiciled in Australia when the child was born, or, if the parent died before the birth, at his death: (sub-s. (2)). But the section applies whether the child was born before or after the commencement of the Act whether marriage took place in or outside Australia or before or after the commencement of the Act. Sub-section (4) of s. 91 is to the same effect as sub-s. (5) of s. 89: it excludes the application of s. 92 in relation to a child so as to affect any estate, right or interest in any real or personal property (and so on, as in s. 89 (5)) to which a person has become or may become entitled (as in s. 89 (5)) before the birth of the child or the commencement of the Act whichever was the later. The provision is based on s. 2 of the Legitimacy Act, 1959 of the United Kingdom (7 & 8 Eliz. 2 c. 73): that section makes it very clear that the devolution of titles of honour, of interests in real and personal property and other rights are within the operation of the provision. It will be seen that in s. 91 the connexion with marriage is nothing more than that the child was born of parents between whom a void marriage had been celebrated. The marriage must have been entered into de facto before his birth but not necessarily before he was conceived. At one point or the other one party to the void marriage must have believed in the validity of the void marriage. Is that a law "with respect" to marriage? (at p542)

4. A marriage taking place after the commencement of the Matrimonial Causes Act 1959 is void if one of the parties at the time it was celebrated was lawfully married to some other person, if the parties were within the prohibited degrees of consanguinity or affinity, if the consent of either party was unreal by reason of duress, fraud, mistaken identity, mistake as to the nature of the ceremony or mental incapacity of a party or if the marriageable age had not been reached by one of the parties to the marriage: see s. 18 of the Matrimonial Causes Act 1959. It is not necessary to discuss the grounds under the laws of the States for treating marriages celebrated before the commencement of that Act as invalid; it suffices to say that a marriage within the prohibited degrees may be voidable and not void (Svanosio v. Svanosio (1918) VLR 267 and Liddell v. Moss (1920) SR (Q) 104) and the marriageable ages were different. But a void marriage is no marriage at all. (at p542)

5. We are here dealing with bastardy or illegitimacy as a legal conception. When s. 89 (1) says that the (otherwise bastard) child is legitimate for all purposes and s. 91 says that in the conditions it stipulates the child shall be deemed for all purposes to be the legitimate child of his parents, they are surely speaking of the purposes of the law. If they are speaking only of social purposes, of the respect paid to the child born out of wedlock by his neighbours, the law contained in s. 89 and s. 91 would appear to have no sanctions and to provide little basis for any legal discussion of its falling within or outside the head of power. The validity of a law as an exercise of a legislative power must depend upon its legal operation. The test of the validity of a law as one made with respect to a given subject matter must in the end be what it does with reference to the subject matter. Doubtless simple statements like the foregoing may conceal many complications: for on the one hand the subject matter may itself involve or include a penumbra of things that are incidental, consequential and ancillary and a law as to some aspects of these things would not be ultra vires, and on the other hand the operation of a law upon any subject may not be apparent on its face but yet be clear when the actual practical working of cause and effect is perceived. Perhaps in this Court Sloan v. Pollard [1947] HCA 51; (1947) 75 CLR 445 , and Griffin v. Constantine [1954] HCA 80; (1954) 91 CLR 136 supply examples: they are examples which have the advantage of illustrating the difficulty while at the same time possessing no other bearing upon this case. It may be said at once that the power conferred by s. 51 (xxi.) should receive no narrow or restrictive construction. In Quick and Garran at p. 608 a wide connotation of the words "with respect to marriage" is suggested by a reference to a denotation which perhaps needs a little explanation. For it covers "consequences of the relation including the status of the married parties, their mutual rights and obligations, the legitmacy of children and their civil rights". These are indefinite and highly abstract words but the status of the married parties evidently refers to the particular legal position they hold by reason of their married state considered as a legal position which unmarried persons do not share; their mutual rights and obligations means those arising out of the married state and the legitimacy of children refers to the status of children born to them in wedlock. In all this "marriage" is considered as the source of the mutual rights and of the legal consequences which flow from it but requiring the definition, the support and the enforcement of the federal law. Sir Harrison Moore doubted whether the power was intended to go so far: - "But" (he wrote) "it enables the Commonwealth to determine what marriages shall be recognized in the Commonwealth, the forms for the celebration of marriage, the consents of parents, guardians etc., the capacity of the parties and the establishment or removal of disabilities to intermarriage. Whether it goes further and enables the Commonwealth Parliament to legislate as to the effect of marriage on the property of the spouses, their contractual and tortious responsibility, and their rights of succession inter se may be doubted". Moore, The Constitution of the Commonwealth of Australia, 2nd ed. (1910) p. 474. But the decision of the questions before us does not appear to me to depend on the resolution of these doubts. The question, for example, whether s. 89 is valid does not lie so much in the extent of the legislative power with respect to marriage as in an appreciation of what s. 89 does, or in other words of its operation. When it says "the child is for all purposes the legitimate child of his parents" it is stating a proposition about his place in the law and the manner in which the law operates upon him and applies to and with reference to him. It is not a statement of a concept independently of its consequences; it is directed to placing him in a legal category, and to conferring upon him a status in the law for

the purpose of affecting his rights and duties; the rights and duties being almost entirely, if not entirely, those depending on State statutes, upon the principles of the common law and the doctrines of equity, upon law which it is outside the powers of the Parliament directly to change. It is difficult to apprehend a distinction between a valid federal law "legitimating" an illegitimate child and a law placing him in the same category and under the same rights and duties as the law, the State law, has created for children of their parents born in wedlock. An illustration may be obtained from the Third Schedule of the Victorian Administration and Probate Act 1958. Clauses 3 and 4 of the schedule allow certain rebates from the duty imposed by s. 116 upon the estates of deceased persons. Among others "children" of the deceased to whom part of the final balance of the estate passes are or may be entitled to rebates. Clause 9 defines "children" for the purpose of the schedule and it provides that where the deceased person was a woman the illegitimate children of such person shall be included. Now it seems quite obvious that (if valid) s. 89 would operate to remove the illegitimate children who fall within s. 89 into the category of legitimate children although the deceased person be a man. This is, clearly enough, contrary to the intention of the State, but of course State law must give way under s. 109. Under s. 52 of the same Act distribution of an estate on intestacy is provided for and the persons entitled in the various contingencies that may occur are set out. Repeatedly children are referred to. That means, needless to say, legitimate children, and of course s. 89 (subject to the operation of sub-s. (5) of that section) will apply so as to bring within the class persons who under the law of the State are not legitimate and (even under Pt III of Act No. 6564) would not have been legitimated under that law. It is convenient to illustrate the position by reference to the provisions of the Victorian Administration and Probate Act 1958, but there are almost countless examples to be found under the law of the various States of the change in the operation or application of the law of the State which would be worked and what, perhaps, it is not too venturesome to say is that there is very little or no other real or actual legal operation that can be found for s. 89 and s. 91. It would be tedious to refer to all the points at which the operation or application of the law which lies outside the province of the Commonwealth would be affected. Heirship matters little nowadays even in relation to titles of honour, whether the heirs be special or general, but perhaps the obvious point should not be omitted that where a question of heirship exists either at common law or under or according to some assurance or instrument requiring that an heir should be taken into account it might be found that it was the federal enactment that would determine it and that would apply right down the line and across to collateral lines. (at p545)

6. We are all familiar with the rule that in any disposition of property whether testamentary of inter vivos a reference to son, daughter, nephew, niece, sister or any ordinary descriptive term implying blood relationship is to be construed as confined to those filling the description by legitimate blood relationship: only a very strong context or a context aided by extrinsic circumstances leaving no logical escape will authorize any other interpretation. The rule when it became settled was not considered artificial but to accord with the intention expressed in the words. But however that may have been, it is clear that s. 89 and s. 91 would, if valid, give the rule a different application or operation; it would no longer apply to illegitimate sons or daughters legitimated under those sections whether they thus qualified as objects of the disposition or were persons through whom the actual objects traced their relationship. Take again the rebuttal of the presumption of a resulting trust by the relationship of

the donee: the theory of advancement did not apply to an illegitimate child to whom the donor did not stand in loco parentis. Here again the operation of s. 89 and of s. 91 would be to change the application in fact of this rule. In questions of the custody, guardianship and maintenance of infants, in the interpretation of statutes on many subjects and in every matter where the relationship forms for purposes of State law a criterion of right, duty, privilege, immunity or other legal relationship, s. 89 must change or affect the operation of State law. The point is that that is how the law operates and not with respect to marriage. (at p546)

7. If we turn now to s. 91, what has already been said of s. 89 will be seen to be equally applicable except for one characteristic. The characteristic excepted is that the de facto marriage which it postulates and which, if it were valid, would render the offspring legitimate may be said to be avoided or invalidated by Commonwealth law. May the legitimation of the offspring of the parents if one of them believes in the validity of the marriage be treated as nothing but a compensatory qualification of the invalidity ? If so, would that suffice to make it a law with respect to "marriage" ? Plainly its purpose is to give the status of a child born in wedlock to a child born out of wedlock, not to alleviate the condition of the parent who married "innocently", so to speak. The marriage need not take place before the conception of the child: it need not be since the Matrimonial Causes Act 1959. The better view appears to be that the section is a provision for conferring a status of legitimacy and that the requirement that there shall be a void marriage, although it provides a link with "marriage" in the sense of a pretended or invalid marriage, does not make it a law with respect to marriage. It is in fact an adoption with modifications and in some respects extensions of s. 1 of the Legitimacy Act, 1959 (U.K.) and possesses a like purpose which is not that of regulating marriage or otherwise of legislating with respect thereto but of affecting rights, duties and relations generally depending on legitimacy. In the argument for the Commonwealth the foregoing view that the substantial or chief legal operation of the provisions was to create the legal relations arising from legitimacy was by no means disregarded. The natural and historical relation of legitimacy to marriage was relied upon as warranting a use of the legislative power with respect to marriage to extend the boundaries of legitimacy. It is an argument that in part depends upon a more abstract or notional conception of legitimacy than has been conceded to it in the foregoing reasons. It is a conception which seems to pay insufficient regard to the fact that it is a legal conception adopted for the purposes operating by and upon the law. As an abstract social conception we cannot be concerned with it. Consistently, however, with the argument for the Commonwealth, a concession was made or suggested on behalf of the Commonwealth which it is difficult to accept. The concession was that although in face of s. 89 and s. 91 State law could not proceed on a basis that a child covered by thos provisions was not a legitimate child of his parents - for to do so would be to bring invalidity under s. 109 of the Constitution - yet the State could enact laws which would distinguish between the legitimate and (if one may use the expression) those federally legitimated, and mould their inheritance laws and other such laws to prefer the former and perhaps thus consequentially or impliedly exclude the latter. It is not clear how far the suggested concession went: for it was not developed. But it is necessary to say that, unless by a very restrictive and unnatural interpretation of s. 89 and s. 91, it seems impossible without doing violence to the application commonly ascribed to s. 109 to understand how such a result could be justified. (at p547)

8. As to s. 92 it seems unnecessary to add anything although it stands in Pt VI. It may be remarked, however, that under s. 77 of the Constitution it is not entirely free from difficulty. For example, it is by no means clear that the legitimacy referred to under sub-s. (1) (a) of s. 92 necessarily involves a matter arising under a law of the Commonwealth. It is enough to say that I think that the real usefulness of the section is in relation to s. 89 and s. 91 and if those sections are invalid it has no significance if it has anything to support it. (at p547)

9. Section 94 dealing with the offence of bigamy raises an entirely different question. The objections made to its validity are that it is not directed to a marriage as such but rather to public order and good morals. The suggestion is that the second marriage is no marriage and to make it an offence to go through the ceremony of marriage, being married, is not a law with respect to marriage. This view does not appear tenable. The crime consists in the profanation or misuse of the marriage ceremony. It is surely within the competence of the Commonwealth to make it an offence to enter into a marriage fraudulently to go through a marriage ceremony with no capacity to do so. How the crime is dealt with is entirely a matter of policy. Section 94 appears clearly enough to be law with respect to marriage or to matters incidental thereto, and it is a valid law of the Commonwealth. But as to Pt VI it is enough to say that the operation of ss. 89 and 91 is not in relation to marriage but in relation to legitimacy as a matter affecting proprietary and other rights, obligations, capacities and responsibilities. They are not laws with respect to marriage. (at p547)

10. The demurrer should be overruled. (at p547)

McTIERNAN J. The validity of Pt VI and of s. 94 of the Marriage Act 1961 - a Federal statute - is called into question in this action. The heading of Pt VI is "Legitimation", and it consists of ss. 89 to 93 inclusive. The side-notes to these sections are: "Legitimation by virtue of marriage of parents", s. 89; "Foreign legitimations", s. 90; "Legitimacy of children of certain void marriages", s. 91; "Declarations of legitimacy etc." (and of legitimation), s. 92; "Adoptions, and State etc." (and Territory) "law as to registration not to be affected", s. 93. Section 94 is in Pt VII of the Act; the heading of this part is "Offences", and the sidenote to s. 94 is "Bigamy". The ground on which the action is based is that s. 51 of the Commonwealth of Australia Constitution Act does not authorize the Parliament to pass any of the provisions of the Marriage Act 1961 which have been mentioned. The defence of the validity of the provisions is based on par. (xxi.) of s. 51. The subject of this power is designated, "Marriage". Sections 89 and 90 seek to confer on children born before their parents married - children whose status is bastardy - the status of legitimacy. These sections would if valid alter the status of such children from bastardy to legitimacy. They do not seek merely to draw the veil over the bastardy of such children but to invest them with the status of legitimacy in the concrete. Legitimacy has under English law a number of aspects: it is a status consisting of rights of inheritance from parents and next of kin ; it is a branch of family law comprising the rights and obligations arising from the relation of parent and child; it comprises rules of interpretation, which favour legitimate children. Section 89 enacts as to a "child" of the class of whom it speaks, a child born before the intermarriage of his parents, that he "is, by virtue of the marriage" (of his parents) "for all purposes the legitimate child of his parents . . .". It is apparent from the terms of the section that at

the time of the marriage the person concerned might be sui juris, or he might not then be living: the section is expressed to apply if at the time of that person's birth there was a legal impediment to the marriage of his parents to each other. In view of the latter provision, it would appear to me to be difficult to support the validity of the section as an exercise of the marriage power on the theory that by its own inherent quality the marriage of the parents relates back so as to rectify the status of the child. That the section aims at vesting the "child" of whom it speaks with new juristic rights, such as are connoted by the status of legitimacy, is clear from sub-s. (5), whose purpose is to limit the vesting of such rights in the way mentioned in that sub-section. The frame work of s. 90 is different from s. 89. Its essential purpose is the same as that of s. 89. The gist of both sections is expressed in the words I have quoted from s. 89; these words artificially attribute to the marriage it mentions the virtue of rendering the child with which it is concerned "for all purposes" the legitimate child of his parents. Each of these sections mentions marriage only for the purpose of making it a mode of legitimation. The real object is to remove from the child with which the section is concerned all the disabilities under which a bastard labours and to put him before the law as a legitimate child: the result at which these sections aim is to give the child new juristic rights, those appertaining to the status of legitimacy. It does not follow from the fact that "marriage" is mentioned in these sections that they are laws "with respect to" - on the subject of - marriage. The test of the nature of the laws is the object to which they are primarily directed. In my opinion ss. 89 and 90 are really laws of legitimacy. If legitimacy is not a facet of marriage these sections cannot be supported under s. 51 of the Constitution. (at p549)

2. The term "Marriage" only outlines the power granted by par. (xxi.) of s. 51: it does not particularize its contents, but nothing diverse in kind from what is connoted by the term marriage falls within the scope of the power. The words "with respect to" are words of "indication" not of "enlargement". The term marriage bears its own limitations and Parliament cannot enlarge its meaning. In the context - the Constitution - the term "marriage" should receive its full grammatical and ordinary sense: plainly in this context it means only monogamous marriage. In my view, the term in par. (xxi.) refers to marriage as a social transaction: but as the term marks the outer limits of the power conferred by par. (xxi.) its meaning is not imprecise. In my view, the term cannot be extended further than to embrace uniting in marriage and the status of marriage. The meaning of status used in relation to marriage is discussed in Ford v. Ford [1947] HCA 7; (1947) 73 CLR 524 . A function of marriage is to confer legitimacy on children born in lawful wedlock. In the case of the children to whom ss. 89 and 90 refer they would be legitimated by the operation of these sections, not by marriage, if the sections are valid. In writing about the relation of marriage to legitimacy, Mr. Jackson said in his treatise on the Formation and Annulment of Marriage, p. 34: "The Statute of Merton brought to a head differences in ecclesiastical and lay attitudes to the law of illegitimacy. The legitimacy of a child has obvious connexions with marriage". Marriage is one branch of family law: legitimacy is another branch of that law. The Constitution is guarded in granting power to the Parliament to legislate on the subject of domestic relations. Section 51 (xxi.) grants power to legislate on "Marriage": s. 51 (xxii.) mentions, as subjects of legislative power, "Divorce and matrimonial causes, and in relation thereto parental rights and the custody of children". Does the term "Marriage" tacitly extend to bastardy or legitimacy? Fr. G. H. Joyce S.J. writes in his study of The History and Doctrine of

Christian Marriage 2nd ed., p. 264: "Legitimacy and dower are more or less intimately connected with marriage". The husband of a married woman is presumed to be the father of her child but by proper and cogent evidence the child may be proved to be a bastard. Legitimacy is correlative to marriage and the parenthood of both husband and wife, not merely to marriage. Legitimacy and marriage are connected in that a child born of the marriage is legitimate: but they are not parts of a whole subject which the term marriage is apt to describe. A competent legislature may make legitimation conditional on the fact of subsequent marriage, registration or any process it thinks fit to prescribe: it may legitimate any person, who is illegitimate, by direct enactment. Marriage under English law does not itself legitimate children born before marriage. The term "marriage" in s. 51 bears its own limitations and one is that in its lay aspect, the legitimation of antenati, children born before marriage, is beyond its province. The Parliament of the Commonwealth cannot under its marriage power pass a law giving marriage - that is the subsequent marriage of the parents of children born before marriage - that effect. In my view ss. 89 and 90 are unconstitutional intrusions into fields of law which under s. 51 of the Constitution stay with the States and are part of their exclusive province of legislation. In my opinion both these sections are beyond the competence of the Parliament of the Commonwealth. (at p550)

3. Section 91, an important provision in Pt VI, is an entirely different kind of law from ss. 89 and 90. Its operation is by way of rectifying the status of a child whom the law cannot regard as legitimate merely because it places the marriage of the child's parents in the category of a void marriage. The child with whom the section is concerned is not one born out of wedlock in the sense that he was born before the marriage of his parents: he is, in fact, a child born of a marriage between his parents. The object of the section is to declare that the child derived the status of legitimacy from the marriage of which he was born if either parent was in bona fide as prescribed. The section does not seek, as do ss. 89 and 90 to ascribe to marriage, the extraneous quality of a legitimating process. I think that s. 91 is in substance a law on the subject of "Marriage" and is therefore valid. (at p550)

4. In my view s. 92 might be justified as a good exercise of power to make laws under s. 51 (xxi.) if legitimacy were part of the subject matter "Marriage". It follows from the view I have taken as to the interpretation of this power, that s. 92 cannot stand except as ancillary to s. 91. But I express no opinion as to whether it would be correct to "read down" s. 92 so as to limit its operation in that way. Subject to this I would declare s. 92 invalid. (at p551)

5. Section 93 raises no separate constitutional question. It is ancillary to each of the preceding sections in Pt VI. As I think that s. 91 is valid, I would declare s. 93 valid in so far as it limits the operation of s. 91. (at p551)

6. The last of the sections which are in question is s. 94. It describes conduct equivalent to the felony of bigamy and imposes punishment for such conduct. The argument against the validity of this section was based upon the history of the felony of bigamy. It does not seem to me necessary to recapitulate that history. The conclusion sought to be drawn from it is that bigamy belongs to the sphere of crime, not of marriage law, and the section is bad because crime in general is not a head of

power mentioned in s. 51 of the Constitution. Section 94 does describe conduct substantially equivalent to the felony of bigamy. But I think that the conduct can be regarded under another aspect. In my opinion, a constitutional justification for the enactment of s. 94 is that it is a law for the protection of the monagamous character of marriage and the use of the ceremony or form of marriage for unlawful purposes; and to legislate for those purposes is not a departure from the subject matter of par. (xxi.) of s. 51. (at p551)

7. It seems to me to be sufficient to make an order that ss. 89 and 90 are invalid. (at p551)

KITTO J. The Commonwealth demurs to a statement of claim by which the Attorney-General for the State of Victoria seeks declarations of invalidity, for excess of legislative power, in respect of the provisions contained in six sections of the Marriage Act 1961 enacted by the Parliament of the Commonwealth. The sections are ss. 89 to 94 inclusive, and their main provisions may be broadly described as having to do with three topics: legitimation per subsequens matrimonium, the legitimacy of the child of a void marriage, and the crime of bigamy. The Constitution contains no specific grant of power to make laws with respect to legitimation or legitimacy, or with respect either to bigamy in particular or crime in general; and there is no head of federal power which is or could be relied upon to support any of the challenged provisions (leaving aside s. 92 for the moment), unless it be the power with respect to marriage (s. 51 (xxi.)), or the incidental power (s. 51 (xxxix.)) in its application to the execution of the marriage power. (at p552)

2. Sections 89 and 90 provide for the legitimation of illegitimate children by the marriage of their parents. The former section applies where either the father was domiciled in Australia at the time of the marriage or the marriage took place in Australia or, under certain federal enactments, outside Australia. The latter section applies where the marriage took place outside Australia and the father, though not domiciled in Australia at the time of the marriage, was then domiciled in a place by the law of which the child became legitimated by virtue of the marriage. Each section, where it applies, makes the child "the legitimate child of his parents" as from the later of two events - in the case of s. 89 the child's birth or the commencement of the Act, and in the case of s. 90 the marriage of the parents or the commencement of the Act. Legitimation under s. 89 is limited by sub-s. (5) so as not to affect any estate right or interest in property to which a person is entitled by virtue of a disposition which took effect, or by devolution by law on the death of a person who died, before the marriage of the parents or the commencement of the Act, whichever was the later; but, with this qualification, legitimation under either section is "for all purposes". (at p552)

3. Whether these sections are laws with respect to marriage is a question to be decided upon consideration of their purported legal operation, that is to say of the changes that they purport to make in the existing law. Each provision, in a case to which it applies, alters the legal situation both of the child and of the parents, and consequently the legal situation of every person who may trace relationship to the child through the parents or vice versa. Whereas formerly the fact that the child was born of the parents was denied recognition for legal purposes generally (though it was recognized for some particular purposes), it is now to be recognized for all legal purposes, subject, in

cases under s. 89, to the qualification in s. 89 (5). The common law, "shutting its eyes to the facts of life", as Viscount Simonds put it in Galloway v. Galloway (1956) AC, at p 311 , "described an illegitimate child as filius nullius". By the Act, if the sections be valid, the law admits him to the title of a lawful child and admits his natural parents to the title of his lawful parents. The ultimate legal consequences are to be found in the application of a variety of statutory provisions, wills, settlements and other instruments. Classes described by reference to relationship, as by such expressions as "child", "parent", "nephew", may become enlarged by the inclusion of the child in virtue of his legitimation: for instruments using such expressions take effect on the footing that unless a different intention appears they are to be understood "according to the meaning of the terms used by the law": Boyes v. Bedale [1863] EngR 1097; (1863) 1 H & M 798, at p 803 [1863] EngR 1097; (71 ER 349, at p 351) . That is to say that instruments employing such expressions, if they employ them without qualification, possess an inherent flexibility of application since they describe classes the width of which at any given time depends upon the extent of the recognition which the law accords at that time to actual relationships. Accordingly, a legitimation provision is not a law affecting legal interpretation: it does not make instruments operate otherwise than in accordance with the intention they disclose, but only alters the situation in which that intention takes effect. As Romer J. observed in regard to wills in In re Bischoffsheim; Cassel v. Grant (1948) Ch 79 , citing Kay J. in In re Andros; Andros v. Andros (1883) 24 Ch D 637, at p 639 : "The only relevant rule of construction is that a bequest in an English will to the children of A. means to his legitimate children and that rule does not carry the matter very far, for the question remains who are his legitimate children and that is not a question of construction at all, it is a question of law" (1948) Ch, at pp 86, 87 . This necessarily means that the divers matters which form the subjects of instruments referring to children, or parents, or relatives to be traced through the one to the other, continue to be governed by the relevant instruments, and the instruments continue to mean what they meant before. I ought, I think, to add that for my own part I should have thought the learned Solicitor-General for the Commonwealth was right when he said that if a State legislature should consider that the extension by ss. 89 and 90 (and s. 91 also) of the class of persons to be recognized as lawful children results in any of its laws taking effect in a manner of which it disapproves the remedy is in its own hands. A State law which refers to "children", for example, might be amended so as to limit the class to children born or conceived during the marriage. That would suffice to create, between such children on the one hand and legitimate children generally on the other, just such a distinction as the common law has made familiar by distinguishing for the purposes of succession to realty between children born in lawful wedlock on the one hand and all legitimate children (including those whose legitimation per subsequens matrimonium under the law of another country is recognized in England) on the other. (at p553)

4. Of course, not every enactment which confers the status of legitimacy upon illegitimate children is properly described as a law with respect to marriage. If the legitimation is made to depend not upon the contracting of a valid marriage but upon the taking of some other step by the parents or one of them or by someone else - upon a formal acknowledgment of the child by the parents, for example, or the order of a Court or of an executive official - there is not such a relation between the law and the subject of marriage as would justify the description. But in such a case, it seems to me, the enactment is rightly to be described not only as a law with respect to

legitimation but also as a law with respect to the step to which a legitimating effect is given. The purpose and operation of the law is to annex a legal incident to the step, and there seems to be no error of proportion or perspective in regarding the step itself, no less than legitimation, as a topic of the law. But, however this may seem in regard to legitimating steps of other kinds, at least it should be conceded, I think, where a marriage between a child's parents is made to spell the legitimation of the child. For it is of the essence of marriage, from a legal point of view, that it produces, or provides a pre-requisite for, the legal recognition of family relationships; and what a law does which provides for legitimation by marriage is simply to add to the legal significance of marriage in this very matter of legal relationships. It is not as if, under such a law, the change of status as between child and parents depended upon the intention or agreement of the parents when marrying one another. If it did, marriage, though referred to in the enactment, could hardly be described as a subject in respect of which the law was made. But a law which makes the legitimation of a child - perhpas one might more appropriately say the legitimation of the parents as such - an inevitable legal consequence of the inter-marrying of the parents seems to me to be a law directly and squarely upon the subject of what marriage amounts to in law, and therefore upon the subject of marriage. Whether a law operating by reference to the married status, a Married Women's Property Act for example, is also a law upon marriage is a question of a different kind, and I say nothing about it. Here we are concerned only with a law dealing with the legal nature of marrying, a law joining with other laws to fix the bounds of the legal changes which marrying is to bring about. (at p554)

5. When Pothier wrote his Traite du Contrat de Mariage, he included in his chapter on the civil effects of marriage an article containing a full discussion of legitimation per subsequens matrimonium, evidently considering that to do so was by no means to travel beyond the bounds of his subject. Perhaps to one steeped in systems of law derived from the Roman it comes more naturally to treat legitimation by marriage as a subdivision of the topic of marriage than it does to one whose habits of thought have been formed in the common law, and in whose mind, therefore, the topic of marriage is altogether separate from that of legitimation save in relation to the exceptional case where the principles of private international law require notice to be taken of foreign rules. Nevertheless I doubt whether anyone who reads the celebrated judgments in the cases of Birtwhistle v. Vardill [1835] EngR 75; (1835) 2 Cl & F 571 (6 ER 1270); (1840) 7 Cl & F 895 (7 ER 1308) , and In re Goodman's Trusts (1881) 17 Ch D 266 , can fail to receive the impression that those who took part in those cases conceived themselves to be considering a branch of the law as to the effect of marriage. Indeed, the subject of legitimation by marriage is very generally treated and spoken of in the books as if the most natural approach to it is from the angle of its being marriage in its legitimating aspect. Pothier, for example, wrote of the Constitution of Constantine (to which he pointed as the origin of legitimation by subsequent marriage) as having provided that not only should the marriage give the woman the title and the rights of a lawful wife "but should give equally to the children whom he should have had of that woman while she was no more than a concubine the title and all the rights of lawful children": Pt V, c. 2, art 2, s. 1. The legitimation of ante-nati he described as coming about "par la seule force et efficace du mariage"; and he quoted the Latin: "Tanta est vis matrimonii, ut qui antea sunt geneti, post contractum matrimonium legitimi habeantur". To my mind, a law by the operation of which so much vis, so much force

et efficace, attaches to marriage should not be denied the description of a law with respect to marriage. (at p555)

6. I conclude, therefore, that ss. 89 and 90 are laws of the Commonwealth validly made under s. 51 (xxi.) of the Constitution, and I turn to ss. 91 and 94. Those sections, though different from one another in nature, are, I think, alike in this that they both should be considered in association with s. 18 of the Matrimonial Causes Act 1959 (Cth). That section declares that a marriage is void in each of five cases. The cases may be thus described: (a) where either party is, at the time of the marriage, lawfully married to some other person; (b) where the parties are within the prohibited degrees of consanguinity or affinity and their marriage is not permitted under s. 20; (c) (subject to certain exceptions) where the marriage is not valid under the law of the place where it takes place, by reason of a failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages; (d) where the consent of either of the parties is not a real consent, because of duress, fraud, mistake as to the identity of the other party or the nature of the ceremony, or mental incapacity; and (e) where either of the parties is not of marriageable age. Such a provision having been made, and clearly made in execution of the power with respect to marriage which is vested in the Parliament by s. 51 (xxi.) of the Constitution, the question which seems to me to be crucial in regard to the validity of ss. 91 and 94 of the Marriage Act is whether those sections are not laws with respect to matters incidental to that execution, and so within the power under s. 51 (xxxix.) of the Constitution to legislate upon incidental matters. It is settled that the matters to which that power extends are not such as are incidental to the subject matter of other powers (for these are within the grant of those other powers themselves), but are such additional matters as arise in the course of exercising other powers: Attorney-General for the Commonwealth v. Colonial Sugar Refinery Co. Ltd. (1914) AC 237, at p 256 ; Le Mesurier v. Connor (1929) 42 CLR 481, at p 498 . What s. 91 does by its leading provision (and its remaining provisions merely qualify this in certain respects) is to require that a child of a void marriage shall be deemed for all purposes to be the legitimate child of his parents as from his birth or the commencement of the Act (whichever is the later) if, at the time the child was begotten or the marriage took place (whichever was the later), either party believed on reasonable grounds that the marriage was valid. Thus the Parliament, having rendered void five classes of marriages which otherwise would have been valid, has by s. 91 done no more than add an ancillary provision, limiting the legal consequences of the avoidance. In respect of marriages which are merely voidable, it had enacted a limitation of a comparable kind in s. 51 (2) of the Matrimonial Causes Act itself, providing that a decree of nullity of a voidable marriage does not render illegitimate a child of the parties born since, or legitimated during, the marriage. I should not doubt that that was a valid provision, as being a law upon a matter arising incidentally in the execution of the marriage power by the enactment of s. 51 (1), whereby a decree of nullity of a voidable marriage is made to annul the marriage from the date of the decree absolute. In my opinion, s. 91 is valid for a like reason. (at p556)

7. Then, s. 94 enacts in sub-s. (1) that a person who is married shall not go through a form or ceremony of marriage with any person; and it provides as the maximum penalty imprisonment for five years. In sub-s. (4) it enacts that a person shall not go through a form or ceremony of marriage with a person who is married, knowing, or

having reasonable grounds to believe, that the latter person is married; and it provides a similar penalty. The remaining sub-sections are ancillary and need to be described. The provisions of sub-ss. (1) and (4), and consequently the provisions of the section as a whole, appear to me to be laws upon a matter incidental to the rendering void of polygamous marriages by s. 18 (1) (a) of the Matrimonial Causes Act, and the making of provision in ss. 45 and 46 of the Marriage Act as to the forms and ceremonies by which valid marriages may be solemnized. Such provisions as those of s. 94 (1) and (4) appear to be traditional in systems of law which insist upon the monogamous character of marriage. Originally the Church, regarding marriage as a sacrament and the married state as essentially monogamous, undertook the punishment of persons who profaned its ceremonies by misapplying them to bigamous purposes, deceitfully making solemn affirmation that no impediment stood in the way. In England the jurisdiction passed to the temporal courts, at latest by the statute 1 Jac. I, c. 11 (see Russell on Crime, 11th ed. (1958) p. 826); and parliaments have gone on ever since enacting laws for the punishment of bigamy. Why the practice should so long have persisted of making provisions on the subject in such drastic terms as those of s. 94, instead of confining severe penalties to the case where the party already married has used the marriage ceremony as a means for deception of the other, is a question that has puzzled Professor Glanville Williams (see (1945) 61 L.Q.R. pp. 76-78), notwithstanding his recognition that "it is this ceremony that, through the force of tradition, maintains the institution of monogamy and keeps families stable". But whatever one may think about that, the fact remains that the exercise of legislative power to make marriage monogamous by rendering void a bigamous marriage has for centuries been accompanied by legislation making it a crime to go through a ceremony of marriage bigamously. Accordingly, when a legislature exercises a power to make laws with respect to marriage by denying validity to bigamous marriages and by prescribing the forms and ceremonies by which valid marriages may be solemnized, it is faced by long tradition with an incidental question, whether it should not add a criminal sanction directed to keeping the forms and ceremonies of marriage from being used for bigamous unions. When it gives its answer in the form of an enactment such as s. 94, it legislates, in my opinion, upon a matter incidental to the execution of its power in respect of marriage. (at p558)

8. Only ss. 92 and 93 remain to be mentioned. No more need be said of the latter, which saves the validity and effect of adoptions and the operation of State and Territory laws providing for entries in registers, than that it must necessarily stand or fall with ss. 89-91. On the other hand, s. 92, while it would necessarily fall with ss. 89-91 if they were to be held void, is not necessarily valid if they be upheld: for in the latter event there remains a question to which the Chief Justice has drawn attention. The section purports to invest the Supreme Court of a State or Territory with jurisdiction to hear and determine an application for a declaration (a) that the applicant is the legitimate child of his parents, or (b) that he or his parents or child or a remote ancestor or descendant is or was a legitimated person. In so far as the section purports to invest State courts with federal jurisdiction, it must depend for its validity upon s. 77 (iii.) of the Constitution. This is limited to conferring federal jurisdiction with respect to any of the matters mentioned in ss. 75 and 76; and of these the only description of matter that seems relevant is a matter "arising under any laws made by the Parliament": s. 76 (ii.). Whether the jurisdiction which s. 92 purports to confer is so limited, or should be so confined by an application of s. 15 A of the Acts

Interpretation Act 1901-1957 (Cth), that the section is supportable under these provisions of the Constitution is a question which has not been argued, and it appears not to be within the intended scope of the demurrer. Subject to the exclusion of that question, the demurrer, in my opinion, should be allowed. (at p558)

TAYLOR J. The Marriage Act 1961 is a comprehensive statute enacted pursuant to the power of the Parliament of the Commonwealth to make laws for the peace order and good government of the Commonwealth with respect to "Marriage". It contains a great many provisions and its main purpose is to establish a uniform marriage law throughout the Commonwealth. As may be expected it deals with the subject of marriageable age and the marriage of minors, the application of the prohibited degrees of consanguinity and affinity referred to in ss. 18-20 of the Matrimonial Causes Act 1959 and the Second Schedule to that Act, it makes provision for authorizing prescribed persons to solemnize marriages and for the definition of their functions and duties, it creates certain offences and contains a number of transitional provisions. But it is with certain provisions of Pt VI of the Act that we are immediately concerned. Initially this Part deals with the legitimation of children by subsequent marriage. In particular s. 89 provides that a child whose parents were not married to each other at the time of his birth but have subsequently married each other is, by virtue of the marriage, for all purposes the legitimate child of his parents as from his birth or the commencement of the Act, whichever was the later. This provision applies in relation to a child whether or not there was a legal impediment to the marriage of his parents at the time of his birth and whether or not the child was still living at the time of the marriage. But it does not apply in relation to a child unless at the time of the marriage of his parents his father was domiciled in Australia or unless the marriage took place in Australia or outside Australia under Pt V of the Act or under the Marriage (Overseas) Act 1955. Further, the provision does not apply in relation to a child so as to affect any estate, right or interest in real or personal property to which a person has become, or may become, entitled, either mediately or immediately, in possession or expectancy, by virtue of a disposition that took effect, or by devolution by law on the death of a person who dies, before the marriage of the parents of the child or the commencement of the Act, whichever was the later (sub-s. (5)). Section 90 deals with the case of what are called foreign legitimations and operates to legitimate children born out of wedlock where the marriage of its parents took place outside Australia and the father was not domiciled in Australia at the time of the marriage. Section 91 deals with a different type of case. Where there has been a child of a void marriage such child shall be deemed for all purposes to be the legitimate child of his parents if, at the time of the intercourse that resulted in the birth of the child or the time when the ceremony of marriage took place, whichever was the later, either party to the marriage believed on reasonable grounds that the marriage was valid. The operation of the section is subject to appropriate requirements as to domicile and sub-s. (4) contains a provision similar to that contained in s. 89 (5). Each of these provisions is impugned on the ground that it does not answer the description of a law with respect to "Marriage". Rather, it is said, they should be characterized as laws with respect to inheritance or, perhaps, laws with respect to family relations. On neither of these views, it is contended, can they be justified by reference to the constitutional power relied upon. (at p559)

2. A further provision which is attacked is s. 94 of the Act which, in effect, provides that bigamy shall be an offence punishable by imprisonment. The force of the argument that this provision is invalid has eluded me for however narrow a view be taken of the constitutional power, it must be implicit that the Parliament of the Commonwealth may prescribe the requisites of a valid marriage, that it may attribute a legal effect to the marriage itself, and that it may provide that neither party shall, whilst the marriage subsists, go through a form of marriage with another person. Such a provision is, in my view, at the very heart of o power to make laws with respect to marriage. (at p560)

3. To a considerable extent the plaintiff's argument depended upon the initial contention that the constitutional power is limited to an authority to make laws with respect to the solemnization of marriage. The ultimate basis for this contention is that in s. 51 of the Constitution, par. (xxi.) - "Marriage" - is immediately followed by par. (xxii.) - "Divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants". This latter head of power, of course, authorizes laws with respect to the dissolution of marriages and this is a power, it is said, which would be conferred by par. (xxi.) if it stood alone. But it does not stand alone and it is contended that, in the presence of par. (xxii.), it ought to receive the limited construction suggested. I do not assent to this contention and would not be prepared to do so even if it seemed to me that, standing alone, par. (xxi.) would justify the enactment of every law expressly authorized by par. (xii.) for the fact that the constitutional instrument contains express provision for the matters mentioned in the latter paragraph provides no warrant for reading "Marriage", merely, as "Solemnization of Marriages". What must be borne in mind is that the expression with which we are concerned is used to define a broad constitutional power and in the paragraph in question the word "marriage" - appearing without limitation or qualification - is entitled to as wide an interpretation as it can reasonably bear. It is, of course, impossible to suggest a synonym which will precisely define the limits of the power and, no doubt, its full meaning will be worked out only in the fullness of time. But in the meantime I feel bound to regard the paragraph as justification for the enactment of any law with respect to marriage considered as an institution. That is to say, that it extends not only to laws prescribing the form and requisites of a valid marriage but also to laws defining and regulating the respective rights duties and obligations of the parties inter se. Indeed, the full measure of the legal effect of a marriage can be determined only be reference to the rights duties and obligations, which, by law, arise out of the relationship and I can see no reason why a constitutional power to make laws with respect to the subject matter of "Marriage" should not be thought to authorize laws defining or modifying and re-defining the legal incidents of the relationship. It is, of course, a relationship which is not by any means constituted or regulated exclusively by a congeries of legally enforceable rights and duties. In respect of many aspects of the relationsip, as Atkin L.J. observed in Balfour v. Balfour (1919) 2 KB 571 , "Each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted" (1919) 2 KB, at p 579 (see also Gage v. The King (1961) 1 QB 188). (at p561)

4. I should add that in expressing the view which I have concerning the content of the constitutional power I feel fortified by the decision in In re Marriage Legislation in Canada (1912) AC 880 . In that case the questions which were before the Judicial

Committee were concerned with the powers, inter se, of the Parliament of a Province and the Parliament of the Dominion with respect to the making of laws relating to the validity of marriages celebrated in a particular manner. By s. 91 of the British North America Act 1867 the Parliament of the Dominion had exclusive power to make laws, it should be observed, with respect to marriage and divorce. But by s. 92 the legislature of each Province might exclusively make laws in relation to the solemnization of marriage in the Province. The argument against the validity of the particular provincial statute that was impugned was that "all questions relating to the validity of the contract of marriage, including the conditions of that validity, were within the exclusive jurisdiction conferred on the Dominion Parliament by s. 91" (5). As a corollary it was argued that the provincial power extended "only to the directory regulation of the formalities by which the contract is to be authenticated, and does not extend to any question of validity" (1912) AC, at p 886 . This argument was rejected, the Judicial Committee being of the opinion that the terms of the grant of exclusive power to the provincial legislatures should be understood as importing "the whole of what solemnization ordinarily meant in the systems of law of the Provinces of Canada at the time of confederation . . . including conditions which affect validity" (1912) AC, at p 887 . As a consequence the grant of provincial power, as so construed, was to be understood as an exception from the grant of exclusive power made to the Dominion Parliament. Their Lordships did not purport to say what residue of exclusive power in relation to laws with respect to marriage remained in the Parliament of the Dominion after making the necessary exception from its general grant but there can be no doubt that much remained as is illustrated by the case of Hill v. Hill (1928) 4 DLR 161 . In that case it was held that a provincial statute which authorized a married woman to sue in any form of action as if she were an unmarried woman - and which, therefore, affected her status and purported to entitle her to sue her husband for slander - was an invasion of the exclusive power of the Parliament of the Dominion to make laws with respect to marriage. These observations are I think more than sufficient to dispose of the objection to s. 94 but they do not dispose of the objections to the other sections which are under attack. (at p562)

5. It is said by Blackstone that by the common law of England a legitimate child was one "born in lawful wedlock, or within a competent time afterwards" (Commentaries vol. i p. 446). The parents of any such child were bound to maintain and protect it and, in some measure, to give it an education suitable to its station in life though as Blackstone acknowledges, with due moderation and propriety, it could not be denied that the laws of his time had defects in the lastmentioned particular (p. 451). All other children were said to be bastards and could "be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise; as was done in the case of John of Gaunt's bastard children, by a statute of Richard the Second" (Commentaries vol. i, p. 459). In the course of his discussion Blackstone refers to the distinction between civil and canon law, on the one hand, and the English common law, on the other, concerning the principle of legitimation by subsequent marriage and, in support of the common law, he sets out the reasons upon which "we may suppose the peers to have acted at the parliament of Merton when they refused to enact that children born before marriage should be esteemed legitimate". But there seems reason to doubt "that in the thirteenth century the question was discussed on what, in modern times, would be considered its real merits". These are the words of Sir Dennis FitzPatrick in an article in the Journal of Comparative Legislation (N.S.

vol. vi p. 35) whilst Pollock and Maitland seem to think that on that occasion history may have been falsified "in order to secure a triumph for English law" (The History of English Law 2nd ed. (1898) vol. i, p. 209.) However this may be, it has been pointed out that in spite of the general terms of the resolution of the barons, it was made effective "only by a procedural rule, applicable at least to a Possessory Writ, that the special plea in an action for the recovery of land that a child was not born in wedlock was tried by a jury in the Common Law Courts" and that, "apart from this special case, the question of legitimacy would be left as an issue to be tried by the Ecclesiastical Courts" (Potter - Historical Introduction to English Law and its Institutions, 3rd ed. (1948) p. 212). Indeed, it is said, that "Even after the Reformation there is authority for saying that legitimum per subsequens matrimonium was recognized by the Ecclesiastical Courts". As Pollock and Maitland put it "Thenceforward (i.e. after the statute of Merton) the king's justices assumed the right to send to a jury the question whether a person was born before or after the marriage of his parents, and it might fall out that a man legitimate enough to be ordained or (it may be) to succeed to the chattels of his father, would be a bastard incapable of inheriting land either from father or from mother (vol. i p. 127). At a later stage these learned authors again refer to the disagreement between the temporal and spiritual courts concerning the "retroactive power" of marriages in relation to antenuptial children. Their observation is that "the bastard remained incapable of inheriting land even though his parents had become husband and wife and thereby made him capable of receiving holy orders and, in all probability, of taking a share in the movable goods of his parents". In a footnote the authors acknowledge that they know of "no text that proves that the bastard legitimated by the marriage of his parents could succeed to a 'bairn's part' of the father's goods" but they say "it seems quite certain that the church courts must have tried to enforce their own theory within a sphere that was their own and we doubt very much whether the king's court would have prohibited them from so doing" (vol ii pp. 277, 378). The question whether the rule should be incorporated into the law of England, which had been the subject of such a sharp difference of opinion between the ecclesiastical courts and the temporal courts, seems to have provided the basis for a controversy which continued, in some form or other, for nearly seven hundred years until it was brought to an end by the Legitimation Act of 1926. (at p563)

6. These observations may not be thought to throw a great deal of light on the present problem but what is of importance to notice is that although, more particularly in earlier times, legitimacy was of great importance in matters involving questions of descent and inheritance, that was by no means its only importance. It was of importance concerning the status of the child itself, in relation to the rights and duties of the child and his parents inter se and with respect to the child's position and name as a member of the family. "From legitimacy flow many important considerations, the right of inheritance, the right of bearing the father's name, kinship and family ties, the right to be maintained, educated, and protected" (Eversley - Domestic Relations - 6th ed. (1951) p. 317). (at p564)

7. The canon and civil law principle of legitimation by subsequent marriage, naturally enough, found ready acceptance in the countries of Western Europe. In more recent times it has been incorporated into the laws of such countries as England, the United States of America, New Zealand and the Australian States which did not find their

origin in the civil law. But it is apparent that this is not the only form or process known to civilized communities by which an antenuptial child may be legitimated. As already pointed out it may be accomplished by a special Act of a competent legislature. It may, in New South Wales, be accomplished by an adoption pursuant to the Child Welfare Act, 1939-1956 though, it would seem, legitimation qua both parents would be effected only if the application for adoption be made jointly by the parents of the child after their marriage. No doubt in that case the presumption under s. 168 of that Act would be that the adopted child was the lawful child of their marriage. In some of the American States legitimation may be accomplished by judicial decree, in another by written instrument recorded in the same manner as a deed and, in yet another, by a notarial act. Again, in some of the States, public acknowledgement by a father of his illegitimate child and the receiving of it into his family with the consent of his wife is said to establish the child as legitimate. I mention these matters for one purpose only; they establish that legitimation is not necessarily associated with marriage and the matters referred to seem to justify the conclusion that a law with respect to legitimation is not, per se, a law with respect to marriage. On the other hand, they indicate to my mind that such a law is not, considered alone, a law with respect to descent or inheritance for it does not, of its own force, provide for or determine the devolution of property. It is, of course, true that if, and as long as, inheritance laws provide for the devolution of the property of a deceased intestate for the benefit of his next-of-kin an antenuptial legitimated child will share. But this is merely because his legitimation enables him to assert that he is within the general class of next-of-kin. Nevertheless, if the power to prescribe the rules of inheritance resides in one legislative body and a power to make laws with respect to legitimation resides in another, the former body may, if it so wishes, so alter the rules of inheritance as to exclude such a child from benefit just as it might, if it so chose, so alter the rules as to exclude a wife. None of these observations, however, establish that ss. 89, 90 and 91 of the Marriage Act are laws with respect to marriage and it is, I think, necessary to consider a little more closely the purpose, character and effect of the principle which, in the first place, s. 89 purports to introduce. (at p565)

8. The introduction of legitimation by subsequent marriage into Roman law is ascribed to the Emperor Constantine. First of all it was, it seems, intended as a temporary law but, with some modification, it was "made perpetual by Justinian". The history of its development in Roman law and its adoption in other countries is traced in the article by Sir Dennis FitzPatrick previously referred to (see also Law Quarterly Review (1920) vol. 36 p. 255). According to Lord Fraser, whose observations are quoted in the latter article "the object of its Imperial authors - an object which it accomplished - was to put down that system of concubinage which had grown into almost universal favour throughout the Empire, and which the law regarded as semi-marriage". The same view is shared by the learned author of the earlier article who observes that "it is to be gathered from the texts, which have come down to us, that among the Romans the parents of natural children were commonly desirous of raising them to the higher status, and it is understood that this method of effecting that object was devised, partly at least, with a view to providing an additional inducement to parties living in the state of concubinage, which was even then condemned by the Christian teachers, to exchange that state for the state of matrimony" (Journal of Comparative Legislation N.S. vol. vi at p. 29). When the principle was first introduced it applied with respect to children then in existence but "Justinian removed

this limitation". Nevertheless "the rule continued to be applicable only to children born of concubinage to the exclusion of children born of those looser connexions which were strongly condemned by the law". But where the rule operated "the marriage effected the legitimation ipso jure". This was the origin of the rule which has found its way into the law of so many countries though modifications in the rule and variations in its application may be noticed from time to time whilst fictions were introduced to explain how it was that legitimation of pre-nuptial children came to be accomplished by the marriage of the parents. According to Pollock and Maitland "the disabilities annexed to bastardy are regarded by the canonists as a punishment inflicted on offending parents" (Vol. ii p. 376) and Tindal L.C.J. in Birthwhistle v. Vardill [1840] EngR 868; [1840] EngR 868; (1840) 7 Cl & F 895, at p 936 [1840] EngR 868; (7 ER 1308, at pp 1322, 1323) observed that the canon law regarded the subsequent marriage as evidence of the parents' repentance of their former sin and, on that account, by positive rule of law, it operated to legitimate any antenuptial child. Scottish law, however, seems to have come to regard the subsequent marriage as conclusive evidence of an earlier marriage prior to the child's birth. But in each case the legitimation was inseparably bound up with the marriage and was accomplished irrespective of the intention of the parties to the marriage. Of course, one would not readily suppose that parents marrying after the birth of a child would not desire to legitimate it but in a footnote to his article previously mentioned Sir Dennis FitzPatrick observed that he had "come across certain references to the subject from which it would appear that parents of illegitimate children in France are by no means so anxious to legitimate them as the authors of the code seem to have expected". I mention this only to stress the fact that legitimation in such a case, and the legitimation for which s. 89 provides, is accomplished by force of the marriage itself. It is inextricably bound up with it and it is impossible either for the parents, or for the child, to avoid that consequence of subsequent marriage. Indeed, legitimation by subsequent marriage became so much a feature of the marriage itself that in some countries "where the subsequent marriage was of a ceremonial character, it appears . . . to have been not unusual to have the children present and taken from under the mother's cloak, as if they had been born in wedlock". This practice is said to have been adopted, no doubt for more abundant caution, when John of Gaunt married his third wife (Law Quarterly Review (1920) vol. 36 p. 267). Such children were "mantle children" but the unconvincing piece of legerdemain which the practice involved received little recognition in England even in the very early days (see also Pollock and Maitland vol. ii, p. 397). (at p566)

9. It is possible to see that in England there has always been a distinction between what may perhaps loosely be called legitimacy for the purpose of inheritance to land and legitimacy for other purposes. It may be that the distinction has not always been clearly defined but it has persisted and, indeed, it persisted in one form until the Legitimation Act, 1926. In modern times the distinction is to be observed in the case of persons who, though not born in wedlock, are legitimate according to the law of their parents' domicil at the time of birth. The existence of this distinction led the author of one of the articles previously referred to "to call attention to the peculiar status in England of a child who is born in Scotland of unmarried parents domiciled there and is afterwards legitimated by their subsequent marriage. In England", it is then said, "this child is partially legitimate; he is not legitimate there for the purpose of succession to real property in England, the descent of which is governed by the law

of England, but he is legitimate in England for all other purposes" (Law Quarterly Review (1920) vol. 36 p. 261). These observations are founded upon the opinions of the Judges in Birtwhistle v. Vardill [1840] EngR 868; (1840) 7 Cl & F 895 (7 ER 1308) where it was held that a child born in Scotland, of parents domiciled there, who at the time of his birth were not married, but who afterwards intermarried in Scotland, though legitimate by the law of Scotland, could not take, as heir, lands of his father in England. But I find it difficult to understand how it can be said that a child may be partly legitimate and partly illegitimate or - in spite of the fact that I have used the expression loosely - how a child may be legitimate for some purposes and illegitimate for others. The true explanation of the decision in the case mentioned is, I think, given by Lord Brougham in the following passage: "The learned Judges have given no opinion upon the question whether or not a person legitimated by subsequent marriage in a country where that law prevails, is therefore legitimate all the world over: nor, perhaps, was it incumbent on them to argue this for the purpose of answering the question put to them by the House. They contend that the statute, or rather the common law recognized and declared by the statute, requires something beyond mere legitimacy to make an heir to English real estate. They agree with the Court below, that legitimacy alone is not sufficient; it must be as was there said (5 Barn. and Cress. 454), legitimacy sub modo, - legitimacy and being born in wedlock. Consequently they appear plainly to admit, that a person may be legitimate for all other purposes, and yet incapable of taking land by descent - that we ought not to say 'a man's eldest lawful son is his heir at law', but 'his eldest lawful son if born in lawful wedlock'" (1840) 7 Cl & F, at p 955 (7 ER, at p 1330) . Later, in In re Goodman's Trusts (1881) 17 Ch D 266 , the Court of Appeal held that a child born before wedlock, of parents who were at her birth domiciled in Holland, but legitimated according to the law of Holland by the subsequent marriage of her parents, was entitled to a share in the personal estate of an intestate dying in England as one of her next-of-kin under the Statute of Distributions. In the course of his reasons James L.J. referred to Vardill's Case [1840] EngR 868; [1840] EngR 868; (1840) 7 Cl & F 895 (7 ER 1308) and said: "What the assembled Judges said in Doe v. Vardill, and what the Lords held, was, that the case of heirship to English land was a peculiar exception to the rights incident to that character and status of legitimacy, which was admitted by both Judges and Lords to be the true character and status of the claimant. It was only an additional instance of the many anomalies which at that time affected the descent of land. Legitimate relationship in the first degree was of no avail if the claimant were an alien, or if he were of the half-blood, or in the direct ascending line, which, pace Professor Blackstone, were precious absurdities in the English law of real property. But in this particular case, the exception is, at all events, plausible. The English heirship, the descent of English land, required not only that the man should be legitimate, but as it were porphyro-genitus, born legitimate within the narrowest pale of English legitimacy. Heirship is an incident of land, depending on local law, the law of the country, the county, the manor, and even of the particular property itself, the forma doni. Kinship is an incident of the person, and universal. It appears to me that a statement of the law so given, and so accepted nearly fifty years ago, which has been adopted without question by jurists as a correct statement of English adhesion to the universal law and comity of nations, is not to be questioned at this time by any tribunal short of the House of Lords, and I should humbly think not by them" (1881) 17 Ch D, at p 299 . (See also per Cotton L.J. (1881) 17 Ch D, at p 299 and per Romer J. in In re Bischoffsheim: Cassel v. Grant (1948) 1 Ch 79 and Bamgbose v. Daniel

(1955) AC 107). These authorities, which recognized the right of a person legitimate according to the law of his parents' domicile at the time of his birth to share in his father's personal estate in England, but which denied him the right to inherit his father's English land unless born in wedlock, show that the rules concerning succession to English land have been worked out on very special principles. Accordingly it does not necessarily follow that because a person is disqualified as an heir to English land he must be regarded by English law as the illegitimate offspring of his parents. If he were to be so regarded the anomalies would be abvious as James L.J. so colourfully pointed out in Goodman's Case (1881) 17 Ch D 266 : "What is the rule which the English law adopts and applies to a non-English child? This is a question of international comity and international law. According to that law as recognized, and that comity as practised, in all other civilized communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin - the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilized world. On principle, it appears to me that every consideration goes strongly to show, at least, that we ought not so to stand. The family relation is at the foundation of all society, and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilized country, should be respected and acknowledged by every other member of the great community of nations. England has been for centuries a country of hospitality and commerce. It has opened its shores to thousands of political refugees and religious exiles, fleeing from their enemies and persecutors. It has opened its ports to merchants of the whole world, and has by wise laws induced and encouraged them to settle in our marts. But would it not be shocking if such a man, seeking a home in this country, with his family of legitimated children, should find that the English hospitality was as bad as the worst form of the persecution from which he had escaped, by destroying his family ties, by declaring that the relation of father and child no longer existed, that his rights and duties and powers as a father had ceased, that the child of his parental affection and fond pride, whom he had taught to love, honour, and obey him, for whom he had toiled and saved, was to be thenceforth, in contemplation of the law of his new country, a fatherless bastard? Take the case of a foreigner resident abroad, with such a child. If that child were abducted from his guardianship and brought to this country, can any one doubt that the Courts of this country would recognize his paternal right and guardianship, and order the child to be delivered to any person authorized by him? But suppose, instead of sending, he were to come himself to this country in person, would it be possible to hold that he would lose his right to the guardianship of the child in this country because of the historical or mythical legend that the English barons and earls many centuries ago cried out in Latin, Nolumus leges Angliae mutare? Can it be possible that a Dutch father, stepping on board a steamer at Rotterdam with his dear and lawful child, should on his arrival at the port of London find that the child had become a stranger in blood and in law, and a bastard, filius nullius? (at p569)

10. "It may be suggested that that would not apply to a mere transient visit or a temporary commorancy, during which the foreign character of the visitor and his family would be recognized, with all its incidents and consequences, but that it would only apply to a man electing to have a permanent English domicil. But what could, in

that view, be more shocking than that a man, having such a family residing with him, perhaps for years, in this country as his lawful family, recognized as such by every Court in the kingdom, being minded at last to make this country his permanent domicil, should thereby bastardize his children; and that he could re-legitimate them by another change of domicil from London to Edinburgh?" (1881) 17 Ch D, at pp 296-298 . It is, I think, obvious that the expressions "rules with respect to inheritance" and "rules with respect to legitimacy" are by no means synonymous expressions. It is, however, equally clear that where the right to inherit depends upon heirship or kinship the rules as to legitimacy will be material matters for consideration. But it would be quite wrong to test legitimacy by the capacity to inherit either goods or land. A person may inherit because he is legitimate; he is not legitimate merely because he is qualified to inherit. If it were otherwise it would be open to the Parliament of any State of the Commonwealth to alter the inheritance laws of the State and so bastardize the offspring of a marriage pursuant to the Commonwealth Act. The States may, of course, alter the inheritance laws so as to exclude the issue of a lawful marriage so contracted from benefit upon the intestacy of either parent but, if this were to happen, it would afford no warrant for characterizing the children as illegitimate. (at p570)

11. With considerations such as these in mind I find it impossible to divorce rules defining legitimacy by reference to marriage from the general body of laws relating to marriage. They are inextricably interwoven and, as far as I can see, always have been. It seems natural enough to regard children born during the subsistence of a valid marriage as legitimate but they are so because the law says so and, undoubtedly, such a law must be, in my view, a law with respect to marriage. It is of no consequence that any such child was the result of antenuptial intercourse for, as Blackstone says, the law is "not so strict as to require that the child shall be begotten . . . after lawful wedlock" (Commentaries vol. i p. 454). Can it be doubted that the constitutional power to make laws with respect to marriage would authorize a like prescription or that a State law, purporting to characterize as illegitimate all issue of marriages pursuant to the Commonwealth Act except those both begotten and born after marriage, would be invalid? In my view, the prescription of rules defining the conditions of legitimacy of the issue of parties to a marriage pursuant to the Commonwealth Statute are comprehended by the expression "laws with respect to marriage" and the provisions of s. 89, having regard to the history of the rule in question, its purpose and its relation to and significance in the matrimonial relationship constitute a law with respect to that subject matter. (at p571)

12. Section 90 operates in the case of marriages which take place out of Australia and where the father and the child was not domiciled in Australia at the time of the marriage. But when it is seen that what the section does is to give to the matrimonial relationship in Australia a like legitimating effect it is clear that it is no more than complementary to s. 89. Accordingly the foregoing observations apply with equal force to its provisions. (at p571)

13. The principal objection to s. 91 is that it does not deal with marriage at all; it deals, it is said, with what may perhaps be regarded as a contradiction in terms - "void marriages". But it is a provision which may be said, in one sense, to qualify, upon certain conditions, the voidness of the so-called marriage. It introduces a very old principle and one not unknown to the canon law. Pollock and Maitland refer to the

principle (vol. ii pp. 375, 376) and add: "It was long before the canonists worked out to the full their theory about these putative marriages. Some would have held that if there was good faith in the one consort and guilty knowledge in the other, the child might be legitimate as regards one of his parents, illegitimate as regards the other. Others held that such lopsided legitimacy was impossible". However the impossible seems to have been accomplished in America in the States of Michigan, Nebraska and New York where in the case of a bigamous union, the children of the union are said to be legitimate only in relation to that parent who was legally capable of contracting marriage. To my mind it is not a valid objection that s. 91 does not depend for its operation on the existence of a valid marriage. In view of what has already been said about the content of the legislative power I think it is sufficient to say in justification of the section that, in the circumstances contemplated, it gives to the form of marriage the effect which it prescribes even though the form does not result in a marriage which is, itself, valid. (at p571)

14. In my opinion the demurrer to the statement of the claim should be allowed. (at p571)

MENZIES J. The demurrer by the Commonwealth to the statement of claim delivered by the Attorney-General for the State of Victoria alleging the invalidity of Pt VI and s. 94 of the Commonwealth Marriage Act 1961 requires consideration of the power of the Commonwealth Parliament to make laws with respect to marriage (s. 51 (xxi.)). The principal provisions of Pt VI of the Act provide for legitimacy in a case where parents of a child born before marriage marry afterwards (s. 89) and in a case where a child is born to parents whose marriage was void but was believed by one of them on reasonable grounds to be a valid marriage (s. 91). There is also a provision legitimating a child born before marriage to parents who marry outside Australia where, according to the law of the father's then domicile, the marriage would legitimate an earlier-born child (s. 90). Provision is also made for a person to obtain a declaration of legitimacy (s. 92). These provisions are substantially different from those of the law of the State. Section 94, which is in Pt VII relating to offences, makes bigamy an offence. Sub-section (1) is in these terms: "A person who is married shall not go through a form or ceremony of marriage with any person". It is also an offence for a person to go through a ceremony of marriage with a person who is married, knowing, or having reasonable grounds to believe, that the latter person is married (sub-s. (4)). There is an exception in the case of a person going through a ceremony of marriage with that person's spouse (sub-s. (5)) and particular defences are provided (sub-ss. (2) and (3)). These provisions are substantially the same as those of the law of the State. (at p572)

2. It was first argued by the Solicitor-General for the State that the power of the Commonwealth Parliament is no greater than if, instead of the head of power being indicated by the word "marriage", as it is, the words "solemnization of marriage" had been used. Such a limited interpretation would be contrary to well-settled principles of constitutional construction. The argument was based, however, upon the existence of another head of power, viz. s. 51 (xxii.) "Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants" which it was claimed showed that s. 51 (xxi.) had a restricted meaning. Although I am disposed to think that had there been no s. 51 (xxii.) the marriage power would of

itself have covered divorce. I do not think the existence of s. 51 (xxii.) requires the implication that s. 51 (xxi.) is limited to determining who may marry and the forms and ceremonies of marriage. The power must extend to the mutual rights and obligations of spouses unless it be that State law could deprive marriage according to Commonwealth law of any legal significance except for Commonwealth purposes (e.g., divorce, income tax, estate duty, etc.). It would be quite unrealistic to construe s. 51 (xxi.) and (xxii.) together as according power to provide for the vows with which marriage shall begin and the grounds for divorce to bring it to an end but as having nothing to do with the obligations one to another of those who marry, the disregard of which obligations is the basis for divorce. (at p572)

3. There was, however, a narrower ground of the State's attack on Pt VI - that is, that even if the word "marriage" be construed more broadly, Pt VI is not concerned with the content of marriage in the sense of the mutual rights and duties of those who marry but with a different subject matter, viz. illegitimacy arising from birth outside marriage. For the Commonwealth it was claimed, as I think on solid grounds, that this was a misdescription of Pt VI because what is attempted does not go beyond dealing with the effect of marriage upon the legitimacy of the children born out of wedlock to those marrying (ss. 89 and 90) or going through the ceremony of marriage (s. 91). The Solicitor-General for the Commonwealth, argued "Part VI of the Marriage Act 1961 is a law 'with respect to marriage', because it determines the legal effects, in relation to the progeny of a man and a woman, of a marriage, or a putative marriage, between them". Starting with the contention that the Commonwealth Parliament could, by a law with respect to marriage, provide that children of a marriage according to Commonwealth law should be legitimate for all purposes, the argument proceeded that ss. 89 and 90 do no more than attribute to the marriage of the parents an effect with regard to themselves and their earlier-born children, and that s. 91 attributes a particular effect to a marriage ceremony when one party believes that the ceremony did result in marriage, defining the relationship of those marrying and their later-born children. What seems to me to be the principal objection to this argument is that to speak of a person being legitimate for all purposes means, in the context of the constitutional division between Commonwealth and State legislative power, little more than saying that the person is legitimate for any purpose of State law and that what is meant can only be fully determined by reference to the various State laws that attach legal significance to legitimacy (e.g., the descent of property upon intestacy). I have reached the conclusion, however, that if there were a State law which enacted that for all purposes of State law an illegitimate child shall be deemed to be a legitimate child of its parents, there would still remain a well-recognized distinction between legitimacy and illegitimacy independently of the extent to which Commonwealth Parliament may adopt legitimacy as a legal criterion for purposes within its legislative power. Whatever might have been the case long ago, few people now regard marriage as the means of providing successors to property. In these days when persons who are concerned with the devolution of their property after death usually dispose of it by will, the only succession that those who marry are really concerned with is that a family and name should be continued by the birth of children. I regard the description of a person as legitimate as meaning something more than that he or she is entitled to such advantages as State law gives to persons born who are legitimate. It means that the child has a family and a name. It is not filius nullius; it is the child of a marriage. The observations made by Sir William Scott in 1795 in Lindo

v. Belisario [1795] EngR 4123; [1795] EngR 4123; (1795) 1 Hag Con 216 (161 ER 530) - "A marriage is not every casual commerce; nor would it be so even in the law of nature. A mere casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation, that, in a state of nature, would be a marriage" (1795) 1 Hag Con, at p 231 (161 ER, at p 535) - in the emphasis that is given to the place of children in the conception of marriage point, I think, to something that is well within the meaning of the word "marriage" in the Commonwealth Constitution. I would, therefore, regard a Commonwealth law providing that the children of a valid marriage should be legitimate for all purposes as being a law with respect to marriage and not as being a law with respect to property. It would deal with the relationship of those marrying to the children of the marriage and this, I think, would be within the marriage power notwithstanding that it would relate to the status of the children as well. Many laws have, however, several aspects. Accepting, as I do, the premise of the argument of the Solicitor-General for the Commonwealth, I am also ready to go further and to regard ss. 89 and 90 as being laws with respect to marriage because they relate to the effect of marriage upon the relationship of those who marry and their children. They provide that the marriage of the parents of a natural child makes the child a child of the marriage. I have had greater difficulty about s. 91 because it may be said to be concerned with the effect of something that is not marriage upon the relationship of parents and child. Nevertheless, because Commonwealth power does include determining what effect should be given to the ceremony of marriage which the Act provides, I have reached the conclusion that s. 91 is also within power. Cf. Pt VIII of the Matrimonial Causes Act 1959 (Cth) and particularly s. 83. (at p574)

4. Before leaving Pt VI, I would add that I do not regard its provisions as interfering with the power of the States to determine how property should pass upon death, or any of the other matters for which State legislation has adopted legitimacy as a criterion. The only limitation that I think flows from the validity to Pt VI is that a State cannot provide that a person legitimate by Commonwealth law is illegitimate for any purpose of State law. Of course, so long as State laws do adopt legitimacy as a criterion, they will, if Pt VI is valid, operate differently after the coming into operation of the Commonwealth Act from the way in which they did previously. This, however, does not mean that the Commonwealth has invaded a field outside its power. What will happen is not in any way different from any other case where a valid Commonwealth law changes a status that State law has adopted as a criterion for some purpose of its own (e.g. a State law prohibiting the appointment of a bankrupt as a director of a company will operate in accordance with the definition of bankruptcy adopted by Commonwealth law for the time being). (at p575)

5. For these reasons I consider that the attack upon Pt VI fails. (at p575)

6. With regard to s. 94, I am satisfied that it is within Commonwealth legislative power with regard to marriage to make it an offence for persons to go through a ceremony of marriage when one of them is married to another. In support of the contrary conclusion, we were referred to the preamble of the Statute of James I of 1603 creating the crime of bigamy, which it was said showed that bigamy became a

crime because it was regarded both as a sin and a vice involving "great dishonour of God and the undoing of divers honest men's children". Some emphasis was also placed upon the proviso in the Act which protected those who had married a second time if the first marriage had been declared void or dissolved by an ecclesiastical court. It was argued that this history indicated that the crime of bigamy cannot be regarded merely as a law for the protection of marriage but has in it elements outside Commonwealth legislative power. However the matter might have appeared in 1603 - and I am far from thinking that the Statute of James I was not a law for the protection of marriage - it is beyond question that the offence created by Commonwealth law is committed when a person who is married to one person goes through a ceremony of marriage with another, and I have found myself unable to grasp the notion that a law which clearly upon its face is for the protection of marriage in accordance with law must be treated as outside the marriage power because the conduct that is made punishable was three and a half centuries ago made a crime on the grounds that it was considered to be an offence against God and society except in cases where an ecclesiastical court had disposed of the first marriage. As Evatt J. said in Thomas v. The King [1937] HCA 83; (1937) 59 CLR 279 : "The bigamy enactment is of vast importance, because it is designed to protect an existing status as well as to protect innocent and unsuspecting persons who intend to assume such a status, and, of course, the children of either union" (1937) 59 CLR, at p 316 . (at p576)

7. In my opinion the demurrer succeeds and the action fails. (at p576)

WINDEYER J. I propose to consider first the general scope of the power to make laws with respect to marriage. Secondly, to consider whether s. 89 of the Commonwealth Marriage Act 1961 is such a law; and, for that purpose, to deal briefly with legitimacy, illegitimacy and legitimation as legal concepts and with the doctrine of legitimation by subsequent matrimony. Thirdly, to consider s. 91 of the Act, and the doctrine of putative marriages that it embodies, to see whether it is, in the constitutional sense, a law with respect to marriage. And fourthly, to deal with the provisions of s. 94 concerning bigamy. (at p576)

2. The word "marriage" can mean, just as can the Latin nuptiae or the French mariage, either the act of marrying, that is the promises and rites by which the state of matrimony is created, or that state itself. I consider that in the Constitution the word embraces both senses, comprehending wedlock as well as wedding, matrimony as well as espousals. It refers to marriage as an institution, but as a lawyer understands it rather than with its meaning for an anthropologist or sociologist. (at p576)

3. The Constitution is an instrument operating according to English law, written in language expressive of the concepts of that law, an instrument formed in 1900 for the government of a people who had inherited that law. The scope of the powers it gives are not be to ascertained by merely analytical and a priori reasoning from the abstract meaning of words. Constitutional interpretation is affected by established usages of legal language. But marriage is so fundamental and so universal an institution of society that it is not easy to set limits to a power to make laws with respect to it. Its legal consequences reach far into many fields of law. Both Sir Robert Garran and Sir William Harrison Moore alluded to this question in passages that have been referred to in the judgments of other members of the Court. And, more recently, Doctor

Anstey Wynes has referred to the same doubts in a suggestive paragraph in his useful work on Australian constitutional powers. (at p576)

4. It has been suggested that the Constitution speaks of marriage only in the form recognized by English law in 1900. The word, it is said, is to be read as defined by the famous phrase of Lord Penzance in Hyde v. Hyde (1866) LR 1 P & D, at p 133 , "the voluntary union for life of one man and one woman, to the exclusion of all others"; and that therefore the legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity. That seems to me an unwarranted limitation. Marriage can have a wider meaning for law. For example, Justinian described it broadly as the union of husband and wife involving the habitual intercourse of daily life, nuptiae sive matrimonium est viri et mulieris coniunctio, individuam conseutudinem vitae continens (Inst. 1, 9, 1.); and he said that those citizens are joined together in lawful wedlock who are united according to law, qui secundum praecepta legum coeunt (Inst. 1, 10, 1.). And Higgins J. in the course of his judgment in the Brewery Labels Case [1908] HCA 94; (1908) 6 CLR 469 - that it was a dissenting judgment is immaterial for present purposes - said: "Under the power to make laws with respect to marriage I should say that the Parliament could prescribe what unions are to be regarded as marriages" (3) - and later, he was speaking of trade marks: "The usage in 1900 gives us the central type; it does not give us the circumference of the power" (1908) 6 CLR, at p 610 . I express no view on whether, theoretically, it would be within the power of the Commonwealth Parliament to make polygamy lawful in Australia. That question has absolutely no reality. But for some purposes, including the legitimacy of children and rights of succession, our law does recognize polygamous, or potentially polygamous, marriages contracted in countries where such marriages are lawful by persons domiciled there: see e.g. Bamgbose v. Daniel (1955) AC 107 ; and compare Sowa v. Sowa (1961) P 70 . If, instead of leaving the resolution of such matters to the principles of comity and private international law, the Commonwealth Parliament were to legislate expressly for the recognition by Australian courts of such unions when lawful by domiciliary law, such an enactment would, I should think, be within its power. And a law dealing with the tribal marriages of aboriginal inhabitants of Australia might also, I would think, be within power. Such marriages can give rise to difficulties (see University of Western Australia Annual Law Review, vol. v p. 326) - but perhaps mainly in the Territories, where there are no limitations on Commonwealth legislative power. (at p577)

5. I have mentioned these matters, not because they are directly relevant here, but to make it clear that I do not think that the Commonwealth power over marriage is to be narrowly construed. It is plenary. And, as the Chief Justice, then Dixon J., pointed out in Bank of N.S.W. v. The Commonwealth (1948) 76 CLR, at p 333 , when a single word is used - as the single word "marriage" is here - to assign a subject to Commonwealth power it is not to be read as limiting or defining the kind of laws that may be made with respect to that subject. Nevertheless, the word used must be read as fully descriptive of the subject in respect of which laws may be made. As Higgins J. put it it states a subject for legislation not a peg on which the Parliament may hang legislation: see Ex parte Walsh & Johnson; In re Yates (1925) 37 CLR, at p 117 . That is of the utmost importance in this case. Marriage has so many consequences in law, and the status of husband and wife has so many attributes in so many departments of law, that it is easy to think of any law that gives a new consequence to the estate of

matrimony, or which alters or enlarges the rights, claims and immunities that give a legal context and substance to the status of husband and wife, as a law with respect to marriage. But, as will appear, that, I think, is a wrong approach. When any enactment is challenged on the ground that it is outside the power over a particular subject, a decision whether or not that is so must ultimately depend upon what exactly is the effect of the enactment upon that subject, in this case upon marriage. The Chief Justice has dealt with this in his judgment, which I have had the advantage of reading; and with what he has said on this aspect I respectfully and entirely agree. (at p578)

6. We share in the inheritance of European Christian civilisation. We derive from it a concept of marriage that is universal in all systems of law that participate in that inheritance. From the time when the canon law was codified by Gratian the marriage law of the Church was a topic for jurists throughout Christendom. From their common understanding of it much has come that is important for this case. The matters about which the Commonwealth may to-day make laws with respect to marriage are those of the kind generally considered, for comparative law and private international law, as being the subjects of a country's marriage laws. (at p578)

7. Marriage law is not a matter of precise demarcation; but it is a recognized topic of juristic classification. In England the marriage law was administered in the ecclesiastical courts until the middle of the nineteenth century. It was based upon canon law as it was before the Council of Trent, but modified and circumscribed by statutes. Significantly, those statutes came to be known as "Marriage Acts". This helped to mark out marriage law as a topic for English lawyers. Among such Acts, passed before 1900, were 32 Hen. VIII, c. 38 (1540), concerning pre-contracts and the degrees of consanguinity; 12 Car. II, c. 33 (1660), made permanent by 13 Car. II, c. 11, confirming marriages contracted "since the beginning of the late Troubles" according to enactments introduced during the Commonwealth; 26 Geo. II, c. 33 (1753), Lord Hardwicke's Act against clandestine marriages; 4 Geo. IV, c. 76, the Marriage Act of 1823; 5 & 6 Wm. IV, c. 54 (1835), Lord Lyndhurst's Act making marriages within the prohibited degrees void, not voidable; 6 & 7 Wm. IV, c. 85, the Marriage Act of 1836, which among other provisions permitted marriages at register offices; 19 & 20 Vict., c. 119, the Marriage and Registration Act of 1856. Then came the various Matrimonial Causes Acts. These began in 1857 with 20 & 21 Vict., c. 85, which provided, for the first time in England, for dissolution of marriage by judicial decree. (at p579)

8. In the Australian Colonies too there were Marriage Acts, before Federation. And, both in England and Australia, this statute law had given a civil character to the contract of marriage, while recognizing the place that religious rites might have in its solemnization. Statute law prescribed the conditions and circumstances in which men and women might enter into matrimony, the method of doing so and the consequences of incapacities, impediments and informalities. It thus dealt with who might be married and how. Rules concerning these matters, and with them divorce from matrimonial obligations and dissolution of the bonds of matrimony, constitute marriage law in a primary sense. It is a body of rules relating to the creation or the termination of the status of husband and wife, as distinct from the legal attributes, incidents and consequences that attach and give a substance to that status. (at p579)

9. It was suggested in argument that to restrict the power to legislate with respect to marriage to subjects that constitute marriage law in this primary sense, would be to give it a narrow application. But to think of marriage forms and ceremonies, capacities and consents as a small area for law making is to take much for granted. The statute law of marriage may seem to be in a small compass. But it embodies the results of a long process of social history, it codifies much complicated learning, it sets at rest some famous controversies. Marriage is now in law a consensual compact. But it is not dissoluble at will; and it must be celebrated by an authorized person, and he may be a clergyman. "Irregular" marriages by verba de praesenti or verba de futuro subsequente copula are no longer valid. We have no need to-day of the learning so impressively marshalled by Willes J. in Beamish v. Beamish [1861] EngR 475; (1861) 9 HLC 274 (11 ER 735) , or of the reflection of it in New South Wales in Reg. v. Roberts (1850) 1 Legge 544 . If we ever need it, it is only in such unusual circumstances as occurred in Victoria in Quick v. Quick (or O'Connell) (1953) VLR 224 , or when an echo of battles long ago about "common law marriages" comes to us from abroad, as recently it did for Phillimore J. in Lazarewicz (otherwise Fadanelli) v. Lazarewicz (1962) P 171 . Lawyers can forget, and mostly do forget, the refined canonical learning about pre-contracts and direment and prohibitive impediments. Statute law now tells us who are capable of marrying. The history of the degrees of consanguinity and affinity does not trouble us. The days are long gone when they were, to use Pollock and Maitland's words, "enveloped in exuberant learning," "a maze of flighty fancies and misapplied logic" - when, for example, a man might not, without a dispensation, marry a relative within the seventh degree or his godfather's daughter. All this elaborate doctrine was pruned by statute in the time of Henry VIII. The circumstances may be found in the judgments of the Queen's Bench in Reg. v. Chadwick and Reg. v. St. Giles in the Fields [1847] EngR 62; [1847] EngR 62; (1847) 11 QB 173 (116 ER 441) . The prohibited degrees are now tabulated in the Act. These are all large tracts for law. (at p580)

10. But, large though they are, the elements of capacity, consent and celebration, which constitute so much of the marriage law in its primary sense, do not, I think, exhaust the subject of the Commonwealth power. Commonwealth law can, in my opinion, extend at least to the personal relationships that are the consequences of marriage - cohabitation, conjugal society, all that is meant by consortium, the mutual society, help and comfort that the one ought to have of the other. These are of the very nature of marriage. So far as they can be regulated by law without impairing the essence of marriage, laws about them would, I consider, properly be called laws with respect to marriage. Even if the Constitution had not contained an express power to legislate with respect to divorce and matrimonial causes, I would have thought that laws prescribing consequences for breaches of the personal obligations that are inherent in the marriage relationship were within the power of the Commonwealth Parliament. And, I am inclined to think, the Commonwealth power would extend to matters concerning the support and care of children, duties that are commonly considered to be inherent in the institution of matrimony. The procreation and upbringing of children is set down in the Prayer Book first among the causes for which matrimony was ordained. If an authority of a different kind be preferred, Voltaire's Dictionnaire Philosophique (1764), in the article on canon law, said: Le mariage dans l'ordre civil est une union legitime de l'homme et de la femme, pour avoir des enfans, pour les elever, et pour leur assurer les droits des proprietes, sous

l'autorite de la loi. And Puffendorf said that "the natural and regular end of marriage is the obtaining of children whom we may, with certainty, call our own": Law of Nature & Nations vi, I, 15. (at p581)

11. When one turns from personal relationships between spouses and alimentary obligations to the consequences of marriage in other fields, different considerations seem to me to arise. Marriage law determines what unions are valid marriages creating the status of husband and wife. To that status extrinsic law can from time to time affix all kinds of consequences, varying from the rights of one spouse in the property of the other to the eligibility of a woman to hold a publican's licence. Marriage has always had important consequences in the law of property. Indeed the need for public recognition of marriages for establishing descents and securing inheritance was one of the objections to clandestine marriages, at all events for the temporal lawyers. But whether the regulation of the property rights and interests of the spouses, and of the claims of their offspring to a patrimony, would be within the power of the Commonwealth seems to me very doubtful. Most systems of law contain rules about matrimonial property. But their very variety indicates that none of them is, as personal relationships and family obligations are, of the essence of the estate of matrimony. In English law, for example, dower did not originally accrue to the wife by virtue of the marriage, but by express endowment at the door of the church. (at p581)

12. The learned Solicitor-General for the Commonwealth did not hesitate to say, quite fittingly in the course of his persuasive argument, that the Commonwealth power extended into the field of property rights. He suggested, as I understood him, that it would reach to such matters as married women's property and testators' family maintenance law, that it would enable the Commonwealth to adopt for Australia a matrimonial property system providing for community of goods such as the communaute legale of French law or of matrimonial acquests as in Spain and Latin-America. The question may be brought nearer home by asking whether, dower having been abolished by State law, the Commonwealth Parliament could re-establish dower. (at p581)

13. Lord Cottenham in his speech in Reg. v. Millis [1844] EngR 391; (1844) 10 Cl & F 534 (8 ER 844) , speaking of the law in his day, said: "It is obvious that the consequences of a valid marriage must be, - 1st To give to the woman the right of a wife in respect to dower. 2nd To give to the man the right of a husband in the property of the woman. 3rd To give to the issue the right of legitimacy. 4th To impose upon the woman the incapacities of coverture. 5th To make the marriage of either of the parties, living the other, with a third person void" (1844) 10 Cl & F, at p 878 (8 ER, at p 971) . All these consequences, it may be noted, occur, or formerly occurred, simply "by force of the marriage", an expression used in the Act 4 Geo. IV c. 76 s. 23. And the list of consequences so arising can be elaborated. For example, the Wills Act, 1837 s. 18 provides that a will shall be revoked by marriage, although since 1925 this does not apply to a will made in contemplation of marriage. A woman by marrying becomes incompetent as a witness for the prosecution in criminal proceedings against her husband. Would laws relating to these matters be laws with respect to marriage in the constitutional sense? Is a law defining the share a widow takes upon the death intestate of her husband such a law? Could Commonwealth law regulate the liability

of a husband for the torts or contracts of his wife? Would the establishment of a legitime for spouses and the children of their marriage be within Commonwealth power? (at p582)

14. A law which is properly described as a law with respect to a particular subject matter is, of course, none the less so because it also happens to be a law with respect to another subject matter. And we are not to limit the scope of any Commonwealth power by a pre-conception of the extent of the residual powers of the States. But that does not mean that there are no implications in the Constitution. A law which gave to the fact of marriage consequences in the field of property, contract, tort and succession is a law which would have its effect in fields which Commonwealth law cannot cover, fields which for the most part belong to the States. I do not think that I am reverting to an old heresy in thinking that this, although not decisive, is not irrelevant. Speaking generally, the Constitution does not give the national Parliament powers over fundamental private rights. With some exceptions in the economic and international field, those are left to State law. True they are the very matters for which State boundaries might well seem unimportant, the very matters in which it might seem that all Australians should be governed by one law. But the powers that the Constitution gives to the Commonwealth are mostly over topics which involve in some way functions of government or the relationship of subjects to government, not the relationships of subjects to one another in matters of private law. One may regret that this is so. I certainly think it unfortunate that an Australian citizen should be legitimate by the law of one State and illegitimate according to the law of another, and that so fundamental a status should be determined by considerations of State domicile and the principles of private international law. But in fact the States have long had varying laws on this subject. In all States there are provisions for legitimation by subsequent matrimony. But they differ. Three States provide that any child who was born before his parents were married is, subject to certain conditions, rendered legitimate by their marrying. The other three States have followed the canon law whereby a child born out of wedlock is not legitimated by marriage unless at the time of his birth his parents might lawfully have married one another. The child of an adulterous intercourse, for example, is legitimated in one case but not in the other. Does the Constitution enable the Commonwealth Parliament to enter this field and by its overriding power produce uniformity where State laws are in disharmony? Most members of this Court think that it does. I am certainly not sorry that that is their conclusion. But I am unable to agree in it. Section 89 of the Marriage Act is, I consider, beyond Commonwealth power. It is unquestionably a law with respect to legitimation. I do not think that it is a law with respect to marriage. (at p583)

15. The relationship between legitimacy and marriage is, of course, obvious. A legitimate child is a child born in lawful wedlock, the offspring of a valid marriage of his parents. As Lord Brougham said in the course of his powerful, but in the result ineffectual, speech on the first occasion when Birtwhistle v. Vardill was before the House of Lords (1835) 2 Cl & F, at pp 588, 591 (6 ER at pp 1276, 1277) : "It is plain that legitimacy has but one meaning, namely, born in lawful wedlock". "Legitimate, as contradistinguished from legitimated means born in lawful wedlock, and means nothing else". That is indisputable according to our law. The civil law, perhaps, looks more to conception during wedlock than to birth during wedlock, for strictly legitimacy depends on the fact of the parents being married and the child being the

offspring of the marriage. But by English law the child of a woman born at any time after her marriage is presumed to be the child of her husband, and the time of procreation is not regarded. The presumption expressed by the maxim "pater est quem nuptiae demonstrant" is rebutted only if access was impossible. (at p583)

16. Legitimacy thus connotes two things; one a personal condition, the other a legal status. In the first it is descriptive of a fact, that is birth in lawful wedlock. The second, the legal status, is a consequence of and involved with the first. It attaches to all those who are in fact born legitimate. The personal condition, birth in wedlock is something that law cannot alter, because law cannot change facts. It can only deal with their consequences. The status of legitimacy, on the other hand, can be conferred by law on persons who did not in fact acquire it by birth; that is to say, persons born illegitimate can, by some process recognized by law as effective for the purpose, be given the same legal status as those born legitimate have. As Lord Merriman expressed it, "Parliament can alter the status of a child, but it cannot alter the chronological order of events": Colquitt v. Colquitt (1948) P 19, at p 26 . (at p584)

17. The concept of legitimacy and the distinction between legitimate and illegitimate children have a place in family law in most legal systems. The ancient Greeks had elaborated the distinction by rules relating to inheritances: see Potter, Antiquities of Greece, pp. 655-659. Roman law added its contribution of patria potestas and the notion of family. In Western European systems to-day a legitimate child, being a member of a family, gets his father's name and rights of aliment, parental care and succession. By our law he takes by inheritance and succession those things that are gained by inheritance and succession - the father's surname - a right, in the case of an eldest son or coparcener daughters, to take real property as heir before heirship was abolished - a right to succeed as next of kin upon intestacy. An illegitimate child, or bastard, does not share in this. He gets his surname not by inheritance but by repute. He has been said to be nullius filius. But this is merely a similitude for a legal consequence. It is obviously not a statement of fact, any more than is the statement that a husband and wife are one person. Lord Watson once said that "It has often been laid down that a bastard is filius nullius. Of that expression it is sufficient to say that it is as true in a legal as it is untrue in a natural sense": Clarke v. Carfin Coal Co. (1891) AC, at p 420 . The origin of the expression seems to have been in Roman law. Justinian said that children born of unions not amounting to lawful marriages were not in patria potestas, but in the position of children born of promiscuous intercourse, who, since their paternity is uncertain, were deemed to have no father: Inst. 1, 10, 12. The common law expressed the result by saying that a bastard was not of heritable blood. He could not be an heir; and no one could inherit through him: but he could acquire property; and he could have heirs of his own to inherit that property. However, inheritance apart, the law recognized the natural relationship of father and child: see R. v. Hodnett [1786] EngR 38; (1786) 1 TR 96 (99 ER 993) where Buller J. said "the rule that a bastard is nullius filius applies only to the case of inheritances; it was so considered by Lord Coke" (1786) 1 TR, at p 101 (99 ER, at p 996) . Indeed what the law really says is not that the bastard is nobody's son, but that, for the purpose of inheritance, he is as if he were nobody's son. That is how Coke put it: and he got it from Littleton: "He is in law quasi nullius filius, because he cannot be heir to any": Co. Litt., 123. (at p585)

18. The common law imposed no obligation upon the father to support his bastard child, but statutory provisions for filiation and maintenance have existed in England since 1576, 18 Eliz. 1 c. 3. In Australia they form part of the statute law of each State. By the canon law a bastard might not, without a dispensation, enter holy orders. And at one period illegitimacy produced other disabilities and ignominies in some civil law systems. Grotius said that "in old times there was a great difference between legitimate and illegitimate issue. The illegitimate were not only excluded from honourable offices, but might not testify against those born legitimate". "But", he said, writing in the early part of the seventeenth century, "to-day these distinctions are mostly obsolete and the principal difference consists in taking or leaving an inheritance": Jurisprudence of Holland, translation by Professor Lee, p. 55. English law never imposed any similar disabilities. Blackstone said that "really any other distinction, but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust and cruel to the last degree". Perhaps he underrated the element of disgrace and the humiliation that has often been the lot of the bastard. This element has varied in different periods and among different classes. At no time was an illegitimate child necessarily an outcast. All offices and dignities, except some in the Church, were and are open to him. If the child of a person of rank, he might be acknowledged, provided for, given a surname, perhaps with the prefix "fitz", and bear the family arms charged with a baton sinister or a border wavy. If a child of more humble parents his position has usually depended in the past, as it does to-day, on how far he is taken into the family. If his parents lived together and were married after his birth - and it is in that case that we are concerned with him - then, although the common law did not count him legitimate, his position in the family and in social estimation might not seem to differ from that of a child born legitimate, as perhaps his younger brothers and sisters were. Nevertheless it would be a mistake to depreciate the social consequences of illegitimate birth. (at p585)

19. It was argued that legitimation could be considered as a process by which a social stigma is removed, apart altogether from the effecting of any change in proprietary rights and capacities. It was said that the proprietary consequences, rights of inheritance and so forth, are incidents that the law attaches to the status of legitimate child, not the status itself. The proposition requires some analysis both to be sure of what was meant and to appreciate how it was sought to apply it. It is true that the legal consequences of legitimate birth have varied greatly from time to time and from one system of law to another. Some are more or less universally regarded as of the essence of family law. Such are the rights of young children to be cared for and maintained by their parents according to their needs and their parents' means. The parental duty is enforced in different ways in different systems, but is generally recognized. Other matters, such as rights of inheritance, the share if any that a child must get in his father's or mother's estate, vary from system to system and have varied from time to time. Although when Blackstone wrote not inheriting was the only important legal incapacity of a bastard, earlier writers never spoke of legitimacy as meaning no more than a capacity to inherit. Bracton did not. In a passage to which I refer later he spoke of persons as "legitimate and capable of inheriting". And Fortescue said that the law of England not only judges the offspring of illicit intercourse illegitimate, but also forbids them to succeed to the patrimony, . . . prolem nedum iudicat non esse legittimam sed et succedere prohibet in patrimonio: Fortescue, De Laudibus Legum

Angliae c. xxxix. It thus was, and is, quite appropriate to regard incapacity to inherit as a consequence of bastardy, not of its essence. Its essence is birth out of wedlock. But its effective meaning as a legal status is in the legal disabilities that attach to that condition. Similarly the essence of legitimacy is birth in wedlock. To that condition rights, claims, immunities and duties attach by law, so that legitimacy too is a legal status. But how can it be said that making a bastard legitimate does anything else in law than make him the recipient of, entitled to and bound by, the rights, claims, immunities and duties that, at the time and from time to time, are given by law to a legitimate child and denied by law to an illegitimate child? So far as those are matters that law can control or enforce, they are all, broadly, of a proprietary or pecuniary character, whether they relate to succession or to support. Legitimacy is not a style or dignity, or right of precedence. Reference was made to the cases on private international law where legitimacy is described as a personal status. Certainly it is so, and whether it exists or not is to be determined by domiciliary law. But its meaning for local law is in the legal rights that attach to it. I do not understand how either legitimacy or bastardy can be said to be a legal status apart from legal consequences. Invidious social attitudes do not make up a legal status, and they cannot be controlled by law. To speak of legitimation as effecting something other than a change in legal status assumes, so it seems to me, that law can accomplish something that in reality is beyond it. What would it mean to say that an illegitimate child had been legitimated unless he got all the legal rights of a legitimate child? It would mean, I suppose, that he must not be called a bastard or said to be illegitimate, that some other words must be used to describe the facts of his birth. And, even assuming that a law for the legitimation of an illegitimate child can be regarded as affecting a personal condition without regard to its legal consequences, I do not see that it is thereby made a law with respect to marriage. (at p587)

20. Section 89 of the Commonwealth Act provides that a child whose parents were not married to each other at the time of his birth but who have subsequently married is, by virtue of the marriage, for all purposes - which I take it means, for all purposes of law - the legitimate child of his parents as from his birth. The section is an independent provision in the Act. It gains nothing from its context. The question whether it is a law with respect to marriage is, therefore, best tested by ignoring the fact that it is a Marriage Act and assuming that the Commonwealth, without having enacted anything about marriage, had simply passed an Act in the terms of s. 89 and had called it a Legitimation Act, as its English prototype of 1926 is called. Would such an Act be a law with respect to marriage? And, if so, why? (at p587)

21. Every law for legitimation cannot, in my opinion, be a law with respect to marriage. Legitimation can be effected in various ways. These do not all have a place in English law, although English law recognizes their efficacy in other systems. For example, in some of the United States of America formal recognition by a child's father, without the parents ever being married at all, suffices. In some of the Australian States legal adoption may result in legitimation. Furthermore a bastard could always be legitimated by Act of Parliament, although there do not seem to be any modern instances of this except some mentioned in Kent's Commentaries as having occurred in the United States. I do not hink, however, that the Commonwealth Parliament could provide for legitimation by recognition or adoption or simply enact that A, a bastard, should be the legitimate son of B. Or, to take a fanciful illustration -

suppose that the Commonwealth Parliament decided that it would follow the example of Roman law by which a child might be legitimated by being made a decurio, that is a member of a curia or local administrative council, and that it thereupon enacted that any one who was illegitimate would be legitimated by becoming a lighthouse keeper or a postman. Such an enactment would not, in my opinion, be a law with respect to marriage. And I think it unlikely that it would be a law with respect to lighthouses or postal services. It would be a law with respect to bastardy and legitimation, and beyond Commonwealth power. (at p588)

22. On the other hand, if an Act that authorized or validated some particular union as a lawful marriage went on to declare that issue born or to be born thereof were legitimate, I have no doubt it would be a law with respect to marriage. That, I take it, is what the learned authors of Quick and Garran on The Constitution probably had in mind when they referred to laws on the subject of marriage embracing "the consequences of the relation including the status of the married parties, their mutual rights and obligations, the legitimacy of children and their civil rights". An example of a law of that sort is the statute of 1552, 5 & 6 Ed. VI, c. 12, concerning the marriages of clergy of the Church of England. It declared their marriages lawful and provided that children "born in any such matrimony shall be deemed, judged, reputed and taken to all intents, constructions and purposes to be born in lawful matrimony, and to be legitimate and inheritable to lands, tenements and hereditaments as any other children born in lawful matrimony between any of the King's lay subjects be inheritable". It also, it may be mentioned, provided for dower and curtesy, other ordinary consequences of lawful matrimony. Whether there have been any more recent examples of statutes in that form I do not know. Generally speaking it has been thought enough in Acts passed to remove doubts about the validity of marriages simply to declare them fully valid, either absolutely or, as in the Greek Marriages Act, 1884 and others, with certain savings. There is a list of fifty-three such Acts in the report of counsel's argument in Starkowski v. Attorney-General (1954) AC, at pp 164, 165 . I have not examined them all. But such as I have contain no express declaration of the legitimacy of children. That would follow in the case of children in fact born of a marriage thus declared valid. The same method was adopted in the Australian Colonies in legislation permitting marriages with a deceased wife's sister. But if, instead of leaving it as an inference of law, a Commonwealth Act validating a marriage expressly declared the issue to be legitimate, it would be a valid, if pleonastic, provision. But an Act which said the opposite, namely that children born to a husband and wife in lawful matrimony were bastards, would be self-contradictory and meaningless. To speak of it as a law with respect to marriage would, I consider, be a contradiction in terms. I am unable to accept the hypothesis of such a law as the foundation of an argument. And I am unable to accept the argument that a law by which marriage legitimates an earlier-born child is juristically equivalent to the fundamental principle that it is the marriage of spouses that makes their after-born children legitimate. In the one case it said marriage precedes the birth and operates prospectively, in the other it follows it and operates retrospectively. Therefore, so the argument ran, a pronouncement that the child is legitimate is in each case a law with respect to marriage. That is a view that might perhaps be logically open if the Commonwealth Parliament were instituting marriage for the first time for Australians as, according to legend, Cecrops did for Attica. But it is not. Legitimacy by birth and legitimation are not the same thing. (at p589)

23. That a child born in lawful wedlock is legitimate is not a consequence that extrinsic law has given to marriage and which it could withdraw or withhold. It is of the essence of the institution of marriage. It is inherent, not attributed. Legitimation, on the other hand, is the artificial giving to a person born illegitimate of the legal status that he would have had had he been born in wedlock. Far from being immanent in matrimony, as the legitimacy of offspring is, legitimation by subsequent marriage is a deliberate invention of law, just as are other methods of legitimation. It was introduced into Roman law by express enactment, extended by later enactments and taken into canon law by papal mandate. (at p589)

24. To sum up thus far: A law for the legitimation of bastards is not, as such, a law with respect to marriage. And not every law that gives entry into marriage a legal consequence is a law with respect to marriage. (at p589)

25. But s. 89 does both of those things. It provides for legitimation by marriage; and that, it was argued, suffices to bring it within the power. And my brother Kitto has suggested in his judgment - reading which has been most helpful to me, although I am unable to accept all his conclusions - that anyone well acquainted with the civil law would have no difficulty in seeing it as a law about marriage. It may be so - I am not a canonist or civilian - but, with respect, I doubt it. I appreciate, however, that legitimation by subsequent matrimony is a doctrine long known in the canon law, interwoven in the civil law and a part of the law of all countries governed by the civil law. To it, and then to its relation to the English law of marriage, I therefore now turn. (at p590)

26. The general idea of legitimation originated in later Roman law after the Empire had become Christian. Several methods of legitimation were then recognized by law. The effect of each was to bring the legitimated offspring within patria potestas, thus bringing them into the family, making them filii familias as if they had been born ex justis nuptiis. They could succeed to their father's property, but this, it seems, was always a secondary consideration to bringing them into patria potestas: see Professor Jolowicz, Roman Foundations of Modern Law, p. 197. Because legitimation involved subjection to patria potestas, an illegitimate child could not be legitimated against his will. (at p590)

27. It was Constantine who, early in the fourth century, first provided for legitimation by subsequent marriage. Originally this was confined to the offspring of concubinage and did not extend to bastards generally. Concubinage was a semimatrimonium, recognized by social custom and not regarded with censure. It was a monogamous relationship. A man might not have a wife and a concubine or two concubines. The position of the concubine was below that of a matron, but it was not dishonourable. She shared her husband's bed and board, but did not enjoy his honours. Pothier was later to speak, somewhat inaccurately perhaps, of the morganatic marriages of Germanic custom as a survival of the Roman practice of concubinage. Constantine's law was re-enacted by Zeno and extended by others. Justinian gave it a general application. It was no longer confined to marriages with concubines. The Church took over this doctrine. And, by the combined effect of canon law and civil law, it has continued, in slightly differing forms, to have a place in most Continental systems of law. Any child born out of wedlock is made legitimate by his parents marrying,

provided that no impediment existed to their marriage when the child was conceived or born. Which was the critical time is a question on which jurists differed. (at p590)

28. The canonical doctrine appeared in the Decretals (c. 6, X, 4, 17) in the form in which it was stated by Pope Alexander III: Tanta est vis matrimonii ut qui antea sunt geniti post contractum matrimonium legitimi habeantur. One theoretical basis for this, put forward later, was that notionally the marriage of the parents had taken place before the children were born. In some cases, of course, there might have been an informal marriage, sponsalia de praesenti or sponsalia de futuro, and the later ceremony a solemnization of it. But in most cases ante-dating the marriage was merely a fiction of law. In that form the civil law accepted the rule. Pothier in his Traite du Contrat de Mariage v. ii, 1, 1, said that the doctrine was said to be explained by an assumption that the intercourse by which the children were conceived occurred when the parents were intending to be married: that it was a kind of anticipation of the marriage that the parties then proposed to contract and which they had since effectively contracted. The children should therefore be regarded "comme des fruits anticipes de ce mariage, et comme s'ils en etoientnes". Consistently with this view, the legitimated children were deemed to have been born legitimate; and not only were living children legitimated, but also any who had died, so that their issue got rights of succession through them. The fiction also fitted neatly with the requirement that the parents must have been capable of marrying when their children were begotten or born. Only naturales, not spurii, could be legitimated. The offspring of an adulterous intercourse could not be legitimated, neither could those who were called incestuous because their parents were not validly married, being within the canonical degrees so extensively elaborated by the mediaeval Church. (at p591)

29. In modern times, in countries where legitimation by subsequent matrimony prevails by virtue of their inheritance of the civil law, the tendency has been to discard the fiction and to treat the principle simply as a conclusion of law based on justice and morality. This can be seen in the later, as compared with earlier, editions of Erskine's Institutes of the Law of Scotland, and see Green, Encyclopaedia of Scots Law, 2nd ed. vii, pp. 454, 455 and Kerr v. Martin (1840) 2 D 752, at p 755 , where there is an array of the Continental authorities on the whole subject. In common law countries into which legitimation by subsequent matrimony has been introduced by statute there has been no need to involve it with a fiction. However, in some casess. 89 is one - legitimation has been expressly given a retrospective effect: as in the canon law, the legitimated child is made legitimate as from birth. (at p591)

30. One other aspect should be mentioned. The children having been born out of wedlock, the presumption as to paternity that results from birth in wedlock is missing. Therefore, if a child is to be legitimated by marriage, it must be established in some way that the persons marrying are, in fact, the parents. This led to a question among civilians whether legitimation occurs simply by force of the marriage, or whether some contemporaneous formality establishing filiation and the assent of the spouses to the legitimation is necessary. There was at one period a widespread custom that children to be legitimated should attend the marriage ceremony under a cloak. Legitimated children were thus often called "mantle children". Pothier was at pains to show, in the passage to which Kitto J. has drawn attention, that it was not necessary by French law in his day that the parents should consent to the legitimation of their

children. It was not within their power, he said, to deprive them of the right that the law gave. Legitimation occurred by the unaided force and efficacy of the marriage the parents contracted. He went on to say that still less was it necessary to have the children at the marriage ceremony under a cloak. That was only one manner by which the parents could recognize them as their children: Pothier, op. cit. V, 1, 2, 4. (at p592)

31. Modern systems differ in their requirements. In France to-day the law is no longer as Pothier stated it; for by the Civil Code, Article 331, a formal legal recognition of the children by the parents is required, either before or at the marriage ceremony. In some of the United States of America, some form of ancillary registration is a condition of legitimation by subsequent marriage. And in Australia registration has been required by some of the State statutes. On the other hand, under the German Code of 1896, and in some other systems, a subsequent marriage automatically effects legitimation. Paternity is then simply a basic fact. If questioned, it must be independently established. The provision with which we are concerned, s. 89, is of that kind: the child is, "by virtue of the marriage, for all purposes the legitimate child of his parents". (at p592)

32. Turning now to the influence that the canon law doctrine has had in the law of England, and especially in the English law of marriage - It is often said that legitimation by subsequent matrimony had no place in the law of England until 1926, having been rejected, it is said, by the barons at Merton in 1236. But this is a misleading simplification. Long before the events at Merton occurred, Glanvil had noted that according to canon and Roman law a child born before marriage was made a legitimate heir by marriage; but that nevertheless by the ius et consuetudo regni he was not permitted to inherit a hereditament, not could he recover a hereditament by the ius regni: Tamen secundum ius et consuetudinem regni nullo modo tanquam heres in hereditate sustinetur vel hereditatem de iure regni petere potest (Glanvil, VII, 15). That is an exact statement. The law of the king's court was the ius et consuetudo regni. The court was chiefly concerned with the feudal land law, with questions of seisin and tenure and heirship. Marriage, on the other hand, was a matter for the ecclesiastical courts; and so was legitimacy if questioned, for it depended on the existence or the validity of a marriage. Therefore, when, in an action before the king's judges for recovery of land, it was alleged that the demandant or tenant was a bastard, because his parents had never been married or because their marriage was invalid, the king's court referred the issue of bastardy to the ecclesiastical court for the bishop's certificate. And when the allegation was that the parents had not been married until after the birth of the party, the temporal courts wished to refer it in that form - was the party born before marriage? This was a special plea of bastardy, called a plea of "special bastardy". At Merton the prelates objected to answering a question in that form. They wished to certify simply either legitimus or non legitimus according to the canon law. The barons were adamant. On a question of feudal law the lex terrae should prevail. Land should descend only to a tenant's right heir. How could one be sure of the paternity of a child not born in wedlock? Nolumus leges Angliae mutare they replied. The somewhat complicated details of all this may be read in Rolle's Abridgment i, 361-362; Reeves, History of English Law, i, 463-468; Maitland, Canon Law in England, 53-56, and the Selden Society's edition of Y.B. 6 & 7 Ed. II, pp. xii-xiv, 95-110. The upshot was that pleas of "special bastardy" came to be tried by the

country, at all events when the question arose on a possessory writ. But an issue of "general bastardy" might be referred to the ecclesiastical courts, as it had been before the Council met at Merton. Sharshulle J. in Y.B. 2 Ed. III (1337), Rolls Series p. 232, said: "There is no inconvenience since the law of Holy Church and the law of the land (la ley de la terre) differ; and he who well understands the statute of Merton . . . will know how to end the debate quickly enough". And in the same case Stonore J. said to the demandant: "Although it be certified that you are a mulier, (i.e. legitimate) yet it is not thereby proved that you are his next heir". That summed up the matter. (at p593)

33. The ecclesiastical courts in England had not relinquished their doctrine of legitimation by subsequent matrimony. They maintained and continued to apply it within their jurisdiction. The result was that in matters concerning real property, the royal court's view of legitimacy prevailed, except in the peculiar case of the bastard eigne and the mulier puisne. But for entry into Holy Orders and some other matters, including it seems the administration of the goods of intestates, the Church still had its way and decided legitimacy according to its rules: Pollock and Maitland, History of English Law, vol. ii, 378n, and see Co. Litt. 243a-245a. So that for a time legitimation by subsequent matrimony was still a part of English law. But events in England in the fifteenth and sixteenth century rapidly carried the matter a stage further. The ius et consuetudo regni, the law of the king's court, had by then become the common law of England. Fortescue's argumentative defence of its rules, written about 1470, may have been provoked by some proposal to introduce canon and civil law doctrine: see Barrington on the Statutes (1796) p. 48. By the time of the Reformation, or shortly afterwards, the common law rule had quite supplanted the canon and civil law doctrine of legitimation in relation to succession to personalty. That came to be regulated by statutes. And references in statutes to next of kin, or to children, were read as meaning those who were legitimate according to the common law. To them, and not to bastards, grants of administration might be made. To them and not to bastards the goods of an intestate should go. The land law had become the law of the land. The lex terrae was the lex Angliae. (at p594)

34. The law of marriage, however, remained the concern of the ecclesiastical courts until the nineteenth century. The common law courts were not often directly concerned with it. How far sentences of the ecclesiastical courts created estoppels in temporal courts was never an easy subject: See the Duchess of Kingston's Case (1776) 20 St Tr 355 , especially the opinion given by De Grey C.J. (1776) 20 St Tr, at pp 538-546 ; and the notes to Kenn's Case (1606) 7 Co 42 [1572] EngR 220; (77 ER 474) and to Bunting v. Lepingwell (1585) 4 Co 355 [1585] EngR 47; (76 ER 950) . From various causes, partly procedural, the jurisdiction of the ecclesiastical courts in cases of general bastardy declined. By 1617 it had been held by the Common Pleas that when in an action on the case for calling a man a bastard the defendant justified that he was a bastard, this should be tried by a jury and not by the ordinary: Hobart, p. 179. The old learning on these topics is summarized in Bacon's Abridgment under "Bastardy" and in Comyn's Digest under that title and under "Certificate". It is not necessary to go into it here. Ultimately bastardy was determined by the common law for all purposes; and subsequent marriage, if it had any bearing, affected only social estimation, not legal recognition. (at p594)

35. From this survey of the development of the law either of two conclusions, relevant to the present question, might perhaps be drawn. One is that the statutory introduction of the principle of legitimation by subsequent marriage is but a restitution to the law of marriage of a part that had become lost to it; the statutory restoration of which is, therefore, a law with respect to marriage. But that would be simply to resort to antiquarian learning. We are concerned with the law of to-day, not with the law of the Middle Ages. The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law of to-day by seeing how it took shape. The other view, and the one that I therefore think the correct one, is that by the course of legal development bastardy and marriage have become separate topics of law. A relationship that was the product of procedural law and the jurisdiction of the ecclesiastical courts has long ceased to exist. Legitimation and marriage are thus, I consider, different subjects for legislation to-day. I do not for a moment dispute that if a mediaeval canon lawyer had been asked whether the Church's doctrine of legitimation by subsequent matrimony was a law with respect to marriage he would have readily answered that it was. He would, I imagine, have at once assigned it to the fourth of the five divisions of canon law referred to in the mnemonic hexameter iudex, iudicium, clerus, connubia, crimen. In canonical jurisprudence the purpose of the doctrine was to encourage the parents to enter into matrimony for their own spiritual welfare. Its method was to deem a marriage to have taken place before the birth of the legitimated child. Its essential condition was the capacity of the parents to have married at that date. None of these considerations applies to the provisions in the Commonwealth Act. Its concern is the temporal welfare of the children, not the spiritual welfare of their parents. And in any event we are not to decide this question by reference to canonical jurisprudence. (at p595)

36. The viewpoint of the civilians seems somewhat more relevant. Some writers, influenced perhaps by the classical idea of the law of persons, dealt with the law of legitimacy and illegitimacy by reference to status. Grotius, for example, writing of Roman-Dutch law, dealt with marriage and with legitimate and illegitimate issue as separate topics and in separate chapters under the general heading "The Legal Conditions of Men", that is to say the law of status. A somewhat similar arrangement has been followed by a modern writer, Professor Lee, in his Introduction to Roman-Dutch Law. Pothier in his work on the Contract of Marriage, to which I referred earlier, considered legitimation by subsequent marriage among the civil effects of marriage, of which he listed a great many, both personal and proprietary. However, the differing ways in which institutional writers in the past have arranged their material do not mean much for present purposes. The French and German Civil Codes are more illuminating, for they embody systematic modern classifications of legal topics and deal with marriage as a wholly civil institution. Having read the relevant parts of them, it seems to me unlikely that either a French or German lawyer would readily regard legitimation by marriage as a part of marriage law. The former would, I imagine, regard both topics as embraced separately by the law of persons. The latter would perhaps say that they are separate divisions of family law. However that may be, we must interpret the Australian Constitution having regard to the categories and classifications of English law. (at p596)

37. In my opinion, the private international law cases to which we were referred, In re Goodman's Trusts (1881) 17 Ch D 266 ; In re Luck's Settlement Trusts (1940) 1 Ch

864 and In re Bischoffsheim (1948) 1 Ch 79 , are entirely consonant with the view that s. 89 is not a law with respect to marriage. In those cases the question whether or not a person was legitimate arose in connexion with claims to property. They establish that that question is one of status, and that status depends upon domicile, and that if a person is legitimate by the law of his domicile English law will recognize that status however created, whether by legitimation brought about by subsequent marriage or by recognition, or by birth. The validity by English law of the act or event, marriage or whatever it be, creating the status is irrelevant. The only question is what is the status by the law of the domicile. The troublesome question of what is the relevant domiciliary law need not detain us. I do not read the proceedings in Birtwhistle v. Vardill [1835] EngR 75; (1835) 2 Cl & F 571 (6 ER 1270); (1840) 7 Cl & F 895 (7 ER 1308) , on either of the occasions on which it was before the House of Lords as containing anything decisive for present purposes. The decision ultimately arrived at, fifteen years after the case began, after two hearings in the House of Lords, was that which had been succinctly stated by Abbott C.J. when the case was before the King's Bench in 1826 [1826] EngR 931; (1826) 5 B & C 438 (108 ER 163) : "The simple question is who is the heir to lands in England. The rule as to the law of the domicile has never been extended to real property" (1826) 5 B & C, at p 451 (108 ER, at p 168) . And as Holroyd J. put it, and this accords with the view later taken by Westlake and others: "I take it that legitimacy alone is not sufficient to make a person inherit socage lands, it must be legitimacy sub modo: the heir must be a child born after marriage" (1826) 5 B & C, at p 454 (108 ER, at p 169) . Throughout the proceedings the question, it seems to me, was one of legitimacy, of status, of heirship, not of marriage. The catch words - Questio Status. Legitimacy - which the reporters placed beside the headnote in Birtwhistle v. Vardill [1835] EngR 75; [1835] EngR 75; (1835) 2 Cl & F 571 (6 ER 1270) correctly state the subject matter of the case. The marriage and its effect in Scots law were not in dispute. The case in one aspect certainly involved the law of marriage, but only, it seems to me, because of the argument, warmly espoused by Lord Brougham, that the canon law theory or fiction, then prevailing in the law of Scotland, whereby the subsequent marriage was deemed to be ante-dated should in the case of a Scottish marriage be, as it were, received and recognized in England. This view was not accepted. (at p597)

38. Before leaving s. 89 I should refer to the suggestion, or concession, by counsel for the Commonwealth that a State might by statute curtail the effect of the Commonwealth Act. I do not myself see how this could be. I fully share the doubts that the Chief Justice has expressed. A State statute could, no doubt, give whatever meaning the legislature liked to any word appearing in it. But I cannot accept the proposition that was put forward as consistent with s. 109 of the Constitution. The status of legitimacy created by legitimation pursuant to s. 89 must, if the Commonwealth law be valid, apply throughout Australia and for all Australians. I do not think that its ordinary legal meaning can be impaired by any State. The States are, for many purposes of private international law, separate countries in relation to one another. But the relation of a State to the Commonwealth is an entirely different matter. It is governed by the Constitution. (at p597)

39. I go now to another question altogether, the validity of s. 91. This introduces into Australia the doctrine of putative marriage. At first sight, I was inclined to think this enactment also to be beyond the constitutional power over marriage, because its

emphasis seemed to be on the legitimacy of children rather than on the character of the union of their parents. But, on consideration, I have come to the conclusion that it is well within power. (at p597)

40. The doctrine of putative marriage has been long known to the civil law. And I think that in civil law countries it would be generally regarded as part of the law of marriage. Its history, theory and substance are discussed in two learned and interesting articles by Doctor Cohn, The Nullity of Marriage in the Law Quarterly Review (1948) vol. 64, 324 and 533. References to its place in modern Continental systems may be found in Burge's Colonial and Foreign Law, New edition (1910), iii, pp. 20, 83, 113, 114, 235-237 et passim. It is perhaps worth noticing that they are in the volume on marriage, and that legitimacy and legitimation are dealt with in another volume. (at p597)

41. The origin of the doctrine of putative marriage seems to have been in the canonical concept of good faith. Many of the rules of the canon law existed pro salute animae. The illegitimacy of children was a consequence of the guilt of their parents. If in the eyes of the Church they were not guilty, having had no guilty knowledge or intent but acting in good faith, then the consequence of guilt should not follow. (at p598)

42. The doctrine was known to Bracton and treated by him as part of English law. In a passage which he took from the work of the canonist Tancred he said, "If a woman in good faith marries a man who is already married, believing him to be unmarried, and has children by him, such children will be adjudged legitimate and capable of inheriting": as quoted by Pollock and Maitland, op. cit. ii, 376. He went on to say that the principle only applied when the invalid marriage was contracted in facie ecclesiae. A clandestine marriage would not suffice. Those who chose to be married clandestinely could not rely upon good faith. Fleta repeated Bracton. But after a time the principle was lost to English law. (at p598)

43. In an appeal from Quebec - where the Civil Code states the principle in the same words as do Articles 201 and 202 in the Title Du Mariage in the French Civil Code - Lord Dunedin, delivering the judgment of the Privy Council, said: "The doctrine of putative marriage was well known to the canon law, and has been adopted by many systems founded on the canon law. In England the canon law on this subject has been abandoned. In Scotland it is in viridi observantia": Berthiaume v. Dastous (1930) AC 79, at p 87 . Why the doctrine came to be abandoned in England is a matter on which there is some difference of opinion. However it does not affect the question for us. (at p598)

44. Section 91 is in marked contrast with s. 89. It does not, as s. 89 does, deal with legitimation. It provides that the offspring of a union, which at relevant times was believed by at least one of the parties to be a valid marriage, are legitimate. That is to say, the union has one of the essential qualities of lawful wedlock, that the children of it are born legitimate. The law calls it a void marriage it is true; but the terminology and concepts of law at this point - void, voidable, a nullity - have always contained difficulties. If the marriage be null, how can it have any of the effects of a valid marriage? Jurists have debated this for centuries. Godd faith supplies the defect, was

one answer. For our purpose the important fact is that the provision in question, s. 91, is not dealing with the status of a child who is the product of some merely casual and promiscuous intercourse. It is dealing with the offspring of a union that it calls a marriage, albeit a void marriage, one which the parties entered into as a marriage. Lord Chelmsford in Shaw v. Gould (1868) LR 3 H L 55 quoted the evidence of Scottish advocates as to the nature of a putative marriage as follows: "that is a marriage regular and solemn in point of form, but null in law, because of the existence of an impediment such as the prior existing marriage of one of the parties, both or either of the parties being ignorant of the existence of the prior marriage" (1868) LR 3 HL, at p 79 . That is what s. 91 is dealing with. Just as the test of legitimacy is birth in marriage, so one of the tests of whether a union is a marriage is, as Lord Cottenham said in the passage I referred to earlier, whether or not the children born of it are legitimate. I appreciate that the matter can be looked at in another way. It can be said, as Lord Phillimore once said, that "it is a possible jural conception that a child may be legitimate though its parents were not and could not be lawfully married. This principle was admitted by the canon law which governed western continental Europe till about a century ago": Khoo Hooi Leong v. Khoo Hean Kwee (1926) AC 529, at p 543 . But it seems to me that the law here in question is one with respect to marriage simply because it attributes one of the essential characteristics of marriage to a union that it recognizes as existing or as having existed. The Act also, it may be noted, treats this union as a marriage for the purpose of the doctrine of s. 89 of legitimation by marriage. This too accords with modern doctrine in some civil law countries. The motive and purpose of s. 91 may be to benefit the children. But its method is to do so by reference to the minds of the parents as determining whether or not their union was at the relevant time, in the well-known phrase, a "putative marriage". (at p599)

45. Section 92 providing for declarations of legitimacy is an important provision. But for the reasons referred to in the judgment of the Chief Justice and of Kitto J. it seems to me to extend to cases that are outside the constitutional power, unless its application be in some way restricted by the context, or it can be read in a limited sense. In terms it would authorize a State court to declare a person legitimate or legitimated for the purposes of local law when that status depended upon the law of another country. However convenient such a jurisdiction might be, it seems to me that the Commonwealth has no power to authorize the making of a declaration that a person is legitimate if his legitimation depended in no way on marriage but on, say, adoption or recognition by the law of a State of the United States or upon a rescription principis as in Malta (see Gera v. Ciantar (1887) 12 AC 557). As this matter was not argued, I say no more than that I agree that we should avoid making any pronouncement about this section. (at p600)

46. As to s. 94, which makes bigamy an offence, this, I think, is a law with respect to marriage. In a Commonwealth statute such a provision may, as a result of the Statute of Westminster, have a wider operation than State law can have. I do not think we need regard the existence of the crime of bigamy as making marriage monogamous. Monogamy is an essential of the Christian form of marriage. Whether or not it would be within the power of the Parliament to legislate for other forms of marriage, clearly what it has legislated for is Christian marriage. Moreover the Matrimonial Causes Act 1959, (Cth) expressly provides that a purported marriage is void if either of the parties is at the time married to another person. But whatever the present day reasons, or the

seventeenth century reasons, for making bigamy a statutory offence, it is an offence that in practice is bound up with the law of marriage and divorce. It is by its very terms concerned with persons who, being married, go through the forms and ceremonies of marriage - that is to say persons whom Commonwealth law recognizes as married who go through forms and ceremonies that are now prescribed by Commonwealth law. (at p600)

47. In the final result I consider that s. 89 is invalid, s. 91 is valid, s. 94 is valid; and that s. 92 is of doubtful validity. It is not necessary to say how in those circumstances the demurrer should be dealt with, as the majority of the Court are of a different opinion. (at p600)

OWEN J. The Attorney-General for the State of Victoria seeks a declaration that Pt VI and s. 94 of the Commonwealth Marriage Act (No. 12 of 1961) are invalid as being outside the legislative powers of the Commonwealth Parliament. The defendant Commonwealth has demurred on the ground that the provisions in question are within the power of the Commonwealth Parliament under s. 51 (xxi.) of the Constitution to make laws with respect to marriage. The Marriage Act consists of nine Parts. Part I contains a number of definitions and some miscellaneous provisions to which reference need not be made. Part II is headed "Marriageable Age and Marriage of Minors" and deals with these subjects. Part III deals with prohibited degrees of consanguinity and affinity. Part IV contains provisions regulating the solemnization of marriages including such matters as the persons who may solemnize marriages and the conditions to be fulfilled in connexion with the marriage ceremony and Pt V makes various provisions relating to the solemnizing of marriages overseas. Part VI, which is the subject of attack, is headed "Legitimation" and the three relevant provisions in it are ss. 89, 90 and 91. Section 89 (1) provides that a child whose parents were not married to each other at the time of the child's birth but have subsequently married each other is, for all purposes, the legitimate child of the parents, and by sub-s. (2) this provision is to apply whether or not there was a legal impediment to the marriage of the parents at the time of the child's birth. Section 90 provides, in effect, that where the parents of a child born illegitimate have married each other outside Australia, the father not being domiciled in Australia at the time of the marriage, and by the law of the place where the father was domiciled at the time of marriage the marriage legitimated the child, the child is, for all purposes, the legitimate child of his parents whether or not the law of the father's domicile at the time of the birth of the child permitted or recognized legitimation by subsequent marriage. Section 91 legitimates the child of a void marriage if at the time of the intercourse that resulted in the birth of the child or the time when the ceremony of marriage took place, whichever was the later, either party to the marriage believed on reasonable grounds that it was valid. Section 94 of the Act which is in Part VII headed "Offences" makes it an offence for a person who is married to go through the form or ceremony of marriage with any person. In other words it makes bigamy a crime under Commonwealth law. I feel no difficulty at all about the validity of s. 94. It seems to me that a law forbidding a person who is married to go through a second ceremony of marriage with a person who is not his or her spouse and imposing a penalty in case of breach is a law "with respect to marriage". (at p601)

2. The provisions of Pt VI, however, present more difficulty. The fundamental objection to their validity is based upon the fact that the status of illegitimacy and the results that flow from it relate to the law of property and inheritance. Illegitimacy carries with it a social stigma, but in law the word refers to the status of a person who, because not born in lawful wedlock, cannot be presumed to be the lawful issue of those who are in fact his parents and who therefore has none of the rights of inheritance which belong to a person whose status is one of legitimacy. Accordingly, it is said, Pt VI is not a law with respect to marriage but a law with respect to property and inheritance rights. I agree that it is a law answering this last description but it does not follow that it is not also a law with respect to marriage. If the Act had contained a provision that all children born in lawful wedlock should be presumed to be legitimate, instead of leaving that presumption to be supplied by the common law, I would have thought it impossible to say that such a law was not within power. If so, it would seem to follow that a Commonwealth law declaring that all children born of a marriage entered into in accordance with the provisions of the Commonwealth Marriage Act should be illegitimate would be equally valid or, if the power to make such a law resides in the Legislature of a State, that a State law to that effect would be within its competence. No one supposes that any legislature would enact such a law. The mind rebels against the very idea but the cause of its rebellion surely is that there is such a close association in the minds of civilized people between the concepts of marriage and the legitimacy of children born of marriage and this tends, I think, to support the view that a power to make laws with respect to marriage and with respect to matters incidental to the execution of that power carries with it a power to legislate as to the status of children born to those who marry or, perhaps, to those who go through the ceremony of marriage in the belief in the minds of one or both of the participants that a valid marriage has been contracted. There can, in my opinion, be no doubt that under the marriage power the Commonwealth Parliament may make laws regulating the mutual rights and obligations of those who marry and I can see no reason why the power should not be wide enough to enable the relationship between those who marry and their children to be defined and regulated whether those children be born before or after marriage. Section 89 takes marriage as its starting point and lays down what its effect shall be on the status and relationship of a child born before marriage to those who are in fact its parents. The section is, in my opinion, within the law-making powers of the Commonwealth Parliament. This was the view expressed in Quick and Garran on The Australian Constitution. Speaking of s. 51 (xxi.) the learned authors said (at p. 608): "Laws relating to this subject will therefore embrace (1) the establishment of the relation, including preliminary conditions, contractual capacity, banns, license, consent of parents or guardians, solemnization, evidence, and rules in restraint, (2) the consequences of the relation, including the status of the married parties, their mutual rights and obligations, the legitimacy of children and their civil rights." From what I have said it follows that s. 90 is equally within power. (at p602)

3. Section 91 presents a somewhat more difficult problem. It takes as its starting point not a valid marriage but a marriage which is void and makes the legitimation of a child born to the parties to that void marriage depend upon the belief on reasonable grounds of one or both of them that the marriage was valid. But there is, I think, a sufficient nexus between such a provision and the power to legislate with respect to marriage. There can be no doubt that it is within the competence of the

Commonwealth Parliament to declare what shall or shall not constitute a valid marriage and I can see no good reason why, if it can declare to be invalid that which on its face appears to be a valid marriage, it cannot limit the consequences of that invalidity upon the status of children born to the parties to the invalid marriage. (at p603)

4. Accordingly I am of opinion that the demurrer should be upheld. (at p603)

ORDER

It appearing that the validity of s. 92 of the Marriage Act 1961 may depend upon questions not intended to be raised by the demurrer and that accordingly the demurrer should be treated as not extending to the validity of s. 92 that the same be excluded from the demurrer, and that subject to the exclusion thereof the demurrer be allowed and declare that ss. 89, 90, 91, 93 and 94 of the said Act are valid and order that no costs of the demurrer be allowed.