

Inquiry into Local Adoption

Legal Aid NSW submission to the
House of Representatives
Standing Committee on Social
Policy and Legal Affairs

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Legal Aid
NEW SOUTH WALES 

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About Legal Aid NSW and our role in adoption

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

Legal Aid NSW is the primary provider of legal advice and representation to respondents in adoption proceedings in NSW. Primarily, Legal Aid NSW represents birth parents who are responding to an application for the adoption of their child who is in out-of-home care. Legal Aid NSW also represents children where the Supreme Court makes an order for the legal representation of a child the subject of adoption proceedings, as well as applicants for adoptions in exceptional circumstances. This is generally in cases of step-parent or relative adoptions. Legal Aid NSW also advises (and on occasion represents) grandparents and siblings of children who are subject to adoption proceedings.

We also produce legal education resources and conduct Community Legal Education about adoption throughout NSW. Legal Aid NSW has published the popular information brochure, "When Kids in Care are Adopted", and has worked with the NSW Department of Family and Community Services to provide our brochures and information sheets to birth parents in all cases where their children are the subject of proposed adoption applications.

Legal Aid NSW also conducts mediations in adoption proceedings through the Legal Aid Family Dispute Resolution Service. Dispute resolution is often successful in resolving or narrowing the issues in dispute in proceedings, for example, issues around contact, proposed changes of name or cultural planning.

Legal Aid NSW is represented on the Adoptions Working Party convened by the Supreme Court of NSW.

Legal Aid NSW welcomes the opportunity to make a submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into local adoption. Should you require any further information, please contact:

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Background

The Australian Institute of Health and Welfare (**AIHW**) produces a report about adoptions in Australia each year. That report refers to the different types of adoptions in Australia. These can be summarised as follows¹:

- *Known child adoptions* – are adoptions of children born or permanently residing in Australia before the adoption, who have a pre-existing relationship with the adoptive parent(s) and are generally not able to be adopted by anyone other than the adoptive parent(s). Known child adoptions include adoptions by step-parents, relatives and carers.
- *Local adoptions* – are adoptions of children born or permanently residing in Australia before the adoption who are legally able to be placed for adoption, but generally have no previous contact or relationship with the adoptive parent(s).
- *Intercountry adoptions* – are adoptions of children from countries other than Australia who are legally able to be placed for adoption, but generally have had no previous contact or relationship with the adoptive parent.

It is important to consider the above types of adoptions when inquiring into adoption practices in Australia, particularly as information is gathered by the AIHW in relation to the above categories.

While this inquiry is said to focus on “local adoption”, Legal Aid NSW understands that the Committee is concerned to explore any barriers to adoption for children who are unable to remain living with their birth parents, whether this be through a known child adoption or local adoption. For this reason, our submission focuses on adoption practices in NSW for children in out-of-home care (**OoHC**).

Current trends in adoption across Australia

In 2016-2017, 315 adoptions were finalised in Australia.² This is an increase of 13% from 2015-2016, when there were 278 adoptions in Australia.

Across Australia, the numbers of known child adoptions have increased over the past decade, from 100 in 2007-2008 to 204 in 2016-2017. These adoptions comprised 65% of all finalised adoptions in 2016-2017, with adoptions by carers, such as foster parents, the most common (at 70%).

In NSW, there were **152 known child adoptions** during 2016-2017. This is 74.5% of known child adoptions in Australia for that year.

In 2016-2017, 42 local adoptions were finalised across Australia, representing 13% of all adoptions. In NSW, there were **12 local adoptions**.

¹ Australian Institute of Health and Welfare (**AIHW**), “Adoptions Australia 2016-2017”, *Child Welfare Series Number 67*, Canberra, p 4.

² Unless otherwise stated, information in this section is taken from the above AIHW report.

ToR 1: Stability and permanency for children in OoHC with local adoption as a viable option

Where children can no longer remain living with their birth parents due to child protection concerns, the Children's Court of NSW has jurisdiction to make orders transferring parental responsibility from the child's birth parents to the Minister for Family and Community Services (**the Minister**) or to another suitable person. The Children's Court does not have the power to make an adoption order, which can only be made by the Supreme Court of NSW.

In practical terms, there are a number of options available for the permanent placement of children. These include:

- a) The placement of a child with an authorised foster carer, under the parental responsibility of the Minister.
- b) The placement of a child with a relative or kin under the parental responsibility of the Minister (the carer would need to become an authorised carer).
- c) The placement of a child with a relative or kin, and allocate that person parental responsibility for the child (the carer would not need to become an authorised carer).
- d) The placement of a child with a carer, relative or kin under a guardianship order.

A "guardianship order" is a type of final order that allocates to a guardian all aspects of parental responsibility for a child who has been in OoHC and whom the court has found to be in need of care and protection, until the child reaches the age of 18 years. There are limitations on other types of orders that can be made with a guardianship order. This is because guardians will not have the intervention of the state in how they parent the child, and will receive little support (other than financial support).

In 2014, the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**the Care Act**) was amended to place greater emphasis on adoption for children who have been removed from the care of their parents. Section 10A of the Care Act sets out a hierarchy of preferred placement options for children who come into contact with the child welfare system, which are:

- a) The child should be restored to the care of his or her parents so as to preserve the family relationship: s 10A(3)(a).
- b) If this is not possible, the child should be placed under the guardianship of a relative, kin or other suitable person: s 10A(3)(b).
- c) If that is not possible, the child (except in the case of an Aboriginal or Torres Strait Islander child) should be adopted: s 10A(3)(c).
- d) If that is not possible, the child or young person is to be placed under the parental responsibility of the Minister: s 10A(3)(d).

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- e) If it is not possible for an Aboriginal or Torres Strait Islander child to be placed in accordance with s 10A(3)(a), (b) or (d), the last preference is for the child to be adopted.

As a result of these reforms, there has been a steady increase in the number of OoHC adoptions in NSW. Data from the NSW Supreme Court and the NSW Department of Family and Community Services (**FaCS**) indicates that:

- In 2016-2017, 100 applications for adoption orders were filed in relation to children in OoHC.
- In the same year, the Supreme Court of NSW made 129 adoption orders for children in OoHC (as some orders were made in relation to applications filed the previous year).
- In the period July – December 2017, 82 applications for adoption were filed and 44 adoption orders were made for children in OoHC.³

Adoption proceedings in NSW can be “non-contested” or “contested”. Proceedings are non-contested where the birth parents have provided their consent to the adoption (if required) or where they have not sought to actively contest the matter by filing an appearance, or being joined as a party to the proceedings.

Non-contested applications are referred to a judge, who will usually make the adoption order in chambers.

Contested matters are those where the parent has filed an appearance, and has been joined as a party to the proceedings. In NSW, around 30% of adoption applications are contested by a birth parent.

In our experience, some of the key issues for birth parents in deciding whether to actively contest an adoption order include the following:

- There is a proposal by the adoption agency to decrease the duration of frequency of contact following the making of an adoption order. This is a particular concern for birth parents who have been regularly attending contact.
- The proposals for contact with the child following the making of an adoption order are not clear.
- There is a concern that upon an adoption order being made, a new birth certificate will be issued, which will no longer contain the birth parent’s details.
- The birth parents are concerned about a proposed change of name.

³ The Hon Justice Paul Brereton AM RFD, “The search for the forever family: Trends and issues in out-of-home-care adoption”, Speech given at the Department of Family and Community Services Annual Child Protection Legal Conference, 9 February 2018.

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- The birth parents want to resume caring for their child.
 - The birth parents do not want their child to think that they have “given up” or no longer love them.

Although these are very important issues for birth parents, they are ordinarily issues that are ventilated during the adoption proceedings and for this reason do not create “barriers” to orders being made.

FaCS and other key organisations that work in the area of adoption (like Barnardos, CatholicCare and Anglicare) and Legal Aid NSW participate in the NSW Supreme Court Adoptions Working Group. This group has assisted with the creation of precedent documents used in adoption proceedings, which can now be accessed from the Supreme Court of NSW website. The Group also provided some assistance to the Court in the formulation of a Practice Direction specific to adoption.

In summary, the position in NSW is that the current legislation actively promotes adoption. Further, while there is always scope for improvement, there are systems in place to streamline the adoption process whilst ensuring that birth parents have an opportunity to obtain legal representation and participate in proceedings.

ToR 2: Appropriate guiding principles for a national framework or code for local adoptions within Australia

Legal Aid NSW considers that guiding principles, a national framework or a code must recognise the fundamental principles of adoption law, including that the best interests of the child must be the paramount consideration in any action or decision taken with respect to the child’s adoption. The right of the child to know and maintain connection with their birth family and culture must be emphasised.

Processes, including legal proceedings, concerning adoption must be conducted openly and fairly, ensuring that all interested parties are afforded procedural fairness and meaningful access to justice.

Any guiding principles which are developed should incorporate Australia’s obligations under the United Nations Convention on the Rights of the Child (**UNCRC**).⁴

Set out below are the key principles which Legal Aid NSW considers should be reflected in any framework, code or guideline for local adoption developed in accordance with the inquiry’s second term of reference:

Best interests of the child are paramount

Guiding principles should recognise that the best interests of the child the subject of the adoption, both in childhood and later in life, are the paramount consideration in any action

⁴ Australia ratified the UNCRC in December 1990.

taken with respect to their adoption. This principle is included as a paramount consideration in adoption law in each State and Territory in Australia.⁵

In addition, guiding principles should recognise that adoption is to be regarded as a service for the child, and that no adult has the right to adopt a child.⁶

Article 21 of the UNCRC requires parties to the Convention who permit the system of adoption to ensure that the best interests of the children are the paramount consideration.

These principles must form the paramount considerations of any guiding principles to govern local adoption in Australia.

Recommendations

- **The paramount consideration in any guiding principles or national framework for adoption must be the best interests of the child, both in childhood and later in life.**
- **The guiding principles should recognise that adoption is to be regarded as a service for the child, and that no adult has a right to adopt a child.**

Children's views

The guiding principles should recognise that children must be given the opportunity to freely express their view on any proposed adoption, and those views must be given due weight in accordance with the developmental capacity and circumstances of the child. The principles should also recognise that children should have the opportunity to be heard and, where appropriate, to be legally represented in judicial proceedings concerning their adoption.

Article 12 of the UNCRC underscores the importance of children's views being expressed freely and accorded due weight in accordance with the age and maturity of the child. In particular, Article 12(2) requires the child to be provided with the opportunity to be heard in any judicial and administrative proceedings affecting the child.

The *Adoption Act 2000* (NSW) recognises the importance of children's views in respect of adoption.⁷ The Supreme Court of NSW is able to appoint a legal representative for the child in adoption proceedings, although at present this is done rarely.

Recommendations

- **Guiding principles and/or a national framework for adoption should include the principle that children must be given the opportunity to express their**

⁵ See for instance *Adoption Act 2000* (NSW), section 8(1)(a).

⁶ See for instance *Adoption Act 2000* (NSW), section 8(1)(b) and (c).

⁷ *Adoption Act 2000* (NSW), section 8(1)(d).

view freely, and that those views must be given due weight in accordance with the developmental capacity and circumstances of the child.

- **Guiding principles should recognise that children should be given the opportunity to be heard in any judicial or administrative proceedings concerning their adoption.**

Open adoption

It is essential that any guiding principles recognise the importance of openness in adoption in Australia. The principles must recognise the right of the child to know and maintain connections with their birth family and cultural heritage, and to have access to information about their history, birth family and culture.

To ensure this principle is upheld, the birth families of children must be identified and consulted, in a meaningful way, about the proposed adoption of their child. If steps are not taken to identify and advise parents of a proposed adoption, the right of the child to know their birth family may be lost.

In our experience, the process of an adoption application can be the catalyst for birth parents and families to engage with children, including recommencing contact or providing information, sometimes for the first time in many years. It is essential that birth families are included as part of the adoption process to ensure that children have the opportunity to know and understand their background, family and heritage.

If a child is to be adopted, birth parents must be given the opportunity to maintain a meaningful relationship with children, where it is safe and in the best interests of the child to do so. This will ordinarily include regular direct contact, sharing of information and development of connections between a child's birth family and adoptive family.

Guidelines should also recognise the importance to a child of extended family relationships and in particular, sibling relationships. The guidelines should identify that best practice requires the identification and fostering of a child's relationships with their siblings and extended family.

If a child is adopted outside of their ethnic, religious, cultural and linguistic background, the child must be given meaningful opportunities to know and be a part of their culture of origin. For children in OoHC, this must include casework aimed at identifying the particular cultural, ethnic, religious and linguistic backgrounds of a child, and developing, in consultation with the birth family, meaningful ways that a child can maintain those connections.

This principle accords with Article 9(3) of the UNCRC, which requires signatories to respect the right of a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. This Article also requires due regard to be paid to the desirability

of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

In order for the Australian community to continue to progress its acceptance and understanding of adoption, and to continue the move away from historical wrongs in respect of adoption in Australia's history, the principle of openness in adoption must be enshrined in any guiding principles concerning adoption. Connections between children and their birth families and cultures must be properly maintained.

Recommendations

- **The principle of openness in adoption should be included as a primary principle in any guiding principles.**
- **The right of an adopted child to know and maintain connections with their birth family and cultural heritage should be included in any guiding principles.**
- **Guiding principles should reflect that best practice requires a child's significant relationships with siblings and extended family to be identified and maintained.**

Procedural fairness and access to justice

To ensure openness in adoption in Australia, a key principle must be procedural fairness and access to justice for birth parents and other interested parties in adoption.

Stakeholders must ensure that all reasonable steps are taken to bring adoption proceedings to the attention of birth parents and respondents.

Birth families should be included in casework planning with respect to adoption, and must be given the opportunity to access independent legal advice and representation at an early stage in proceedings.

It is essential that respondents to adoption proceedings have access to quality legal advice and representation. Many birth parents of children in OoHC suffer significant disadvantage. Often, they are from culturally and linguistically diverse backgrounds, have a disability, have been the victim of family violence, or themselves were in OoHC as children. Some are illiterate and have great difficulty navigating the legal system.

In addition to these disadvantages, there is often a substantial power and resource imbalance between birth parents and FaCS, an adoption agency or proposed adoptive parents.

To ensure that birth parents and other family members are properly consulted about, and have input into, the plans for their children in the event that an adoption order is made, there should be a greater use of mediation in adoption proceedings.

To ensure that respondents have access to justice, agencies such as legal aid commissions must be properly resourced to provide quality legal representation in adoption applications. This includes resources for training and education in adoption law.

Recommendations

- **Guiding principles should include, as a primary principle, the importance of procedural fairness for birth parents and respondents to adoption applications, including the importance of notifying and consulting with birth parents about a proposed adoption of their child.**
- **Guiding principles should make provision for mediation in adoption proceedings.**
- **Guiding principles should recognise the importance of resourcing agencies which provide legal advice and representation to birth parents and respondents to adoption applications, to ensure access to justice for birth families.**

Aboriginal and Torres Strait Islander children

Guiding principles should recognise the particular principles which should be applied for Aboriginal and Torres Strait Islander children for whom adoption is to be considered. It must be recognised that the preference for Aboriginal or Torres Strait Islander children is to be cared for by a relative or kin, or, where that is not possible, by a member of the Aboriginal or Torres Strait Islander culture to which the child belongs.

There have been many inquiries into and reports on the appropriateness of adoption for Aboriginal or Torres Strait Islander children. These include the Australian Law Reform Commission, *Report 31: Recognition of Aboriginal Customary Laws* (1986); the Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997); and the NSW Law Reform Commission report, *Review of the Adoption of Children Act 1965 (NSW)* (1997).

In New South Wales, it is recognised that adoption for Aboriginal or Torres Strait Islander children should only be considered where it is not practicable or in the best interests of children to be returned to their parents, cared for by family or kin, or placed under the parental responsibility of the Minister for Family and Community Services.⁸

Where adoption is considered the only practicable option in the best interests of an Aboriginal or Torres Strait Islander child, the *Adoption Act 2000 (NSW)* contains the Aboriginal child placement principles and the Torres Strait Islander child placement

⁸ See *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, section 10A.

principles.⁹ These principles recognise the importance of children remaining with their extended family, community or culture.

The Act also sets out requirements to ensure consultation with Aboriginal people and organisations when the adoption of an Aboriginal and Torres Strait Islander child is proposed.¹⁰

Legal Aid NSW recommends that guiding principles be developed in consultation with Aboriginal and Torres Strait Islander organisations, who can provide input about the inclusion of principles relating to Aboriginal and Torres Strait Islander children.

Legal Aid NSW recommends that, at a minimum, guiding principles reflect the Aboriginal and Torres Strait Islander child placement principles contained in the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* and *Adoption Act 2000 (NSW)*.

Recommendations:

- **Guiding principles should be developed in consultation with Aboriginal and Torres Strait Islander organisations.**
- **Guiding principles should reflect the Aboriginal and Torres Strait Islander child placement principles contained in the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* and *Adoption Act 2000 (NSW)*.**

Post adoption support and services

Once an adoption order is made, FaCS or the relevant agency who has been supporting and monitoring the child's OoHC placement will no longer be involved with the child or their family. It is for the adoptive parents to make decisions about, and arrangements for, birth family contact (subject to any orders made by the Court).

Legal Aid NSW is aware of some cases in which adoptive parents, birth parents and siblings, will require some support to maintain contact. This is not surprising given the myriad of issues that may have led to the removal of the child from their birth family. In some cases, families may need support to re-establish contact. For example, support may be needed where the adopted child has siblings who have also been, or are in the care system, and those siblings have lost contact and are seeking to re-establish communication.

To ensure that families are able to maintain contact, where that is in the best interests of the child, consideration should be given to funding post-adoption services in appropriate cases.

In addition to issues around contact, some children who have experienced trauma will require ongoing therapeutic or other forms of support. Consideration should be given to

⁹ *Adoption Act 2000 (NSW)*, Part 2, Division 2, and Part 2, Division 3.

¹⁰ *Ibid.*

the provision of funding for support following the making of an adoption order, particularly as adopted children are not eligible for the financial and other support available to children leaving OoHC.

Recommendation:

- **Guiding principles should include provisions around post-adoption support and services for children who have been in OoHC.**