

What is an open adoption plan?

An open adoption plan is a written document¹ setting out an agreement between those involved in an adoption in relation to:

- how contact with members of the child's birth family will occur to provide opportunities for the building of relationships
- how information will be shared between the birth family and adoptive family
- how the child will be supported to develop a healthy and positive cultural identity and foster links with their heritage².

When negotiating the arrangements set out in open adoption plans, it is important to consider the needs and best interests of the children as they are now, and to anticipate their changing needs through their growing years. Each person signing the plan is taken to be confirming that they are willing and able to follow through with the agreements they have made. Therefore, arrangements detailed in the plan should:

- reflect the individual circumstances of the child and the families involved and be tailored towards those individual circumstances, and
- take into account the history of contact between the child and their birth family, including any current contact arrangements ordered by a Court, and
- take into account the wishes of the child (where age appropriate) and each person involved in the plan, and
- be realistic, practical and factor in ways to make it as easy as possible for everyone to follow through.

Who is involved in an open adoption plan?

The following people are involved in the adoption and open adoption plan³:

- child (for whom adoption is being proposed)
- birth parent(s) who has given consent to the child's adoption
- prospective adoptive parent(s) of the child
- Secretary of the Department of Family and Community Services (FACS)
- Principal Officer of an Accredited Adoption Service Provider.

¹ Section 47, *Adoption Act 2000*

² Section 46, *Adoption Act 2000*

³ Section 46(1) & 46(2B), *Adoption Act 2000*

The signature of these people to the open adoption plan will help demonstrate that they agree to the plan.

A birth parent who has not consented to the adoption of a child is, as far as possible, to be given the opportunity to participate in the development of, and agree to, an open adoption plan in relation to the child⁴.

Where a non-consenting birth parent agrees to an open adoption plan, it does not mean the birth parent agrees to or gives consent to their child's adoption.

When and how is an open adoption plan registered?

Registration of an open adoption plan is generally considered by the Secretary or Principal Officer:

- to provide a mechanism to ensure that the relationship between the child and the birth parent(s) is maintained
- where the birth parent has agreed to the open adoption plan
- where they and the prospective adoptive parents are in agreement that the open adoption plan should be registered to give the birth parent(s) rights to enforce the arrangements in the plan
- where a birth parent is concerned that another party will not follow through with the arrangements made in the open adoption plan should an adoption order be finalised
- where a birth parent formally requests the Supreme Court to consider their views regarding the adoption
- where the child is Aboriginal or Torres Strait Islander.

The Court may register an open adoption plan⁵ provided:

- the plan is in writing and contains the particulars required by the regulations
- the plan does not contravene the adoption principles
- those who agree to a plan understand the provisions (arrangements agreed on) of the plan and have freely entered into it
- the provisions of the plan are in the child's best interests and are proper in the circumstances.

The Secretary or Principal Officer will provide the prospective adoptive parent(s) and birth parent(s) with a copy of any registered open adoption plan. The original signed open adoption plan will be filed with the Supreme Court and retained on the Court file upon registration.

⁴ Section 46(2B), *Adoption Act 2000*

⁵ Sections 47(2) and 50(3), *Adoption Act 2000*

What is the effect of a registered open adoption plan?

Once an open adoption plan is 'registered', it has the effect, on the making of the adoption order, of being a part of the adoption order⁶. It therefore becomes enforceable as an order of the Supreme Court.

How should a registered open adoption plan be written?

A registered open adoption plan is enforceable as an order of the Court. An order of the Court is only truly enforceable where the arrangements are detailed in a clear and specific way, so if there is a breach of the terms, they can be clearly demonstrated. In seeking to register the plan, arrangements especially about contact need to be detailed and specific.

Just as it is important is to have specific terms, it is also important to have flexibility to meet children's changing needs. The flexibility contained within the plan will depend upon the parties and their willingness to reach an agreement after considering the needs of the child at that time. Where an agreement cannot be reached between the adoptive parent(s) and birth parent(s) the arrangements should automatically revert to the specific arrangements detailed in the plan which is also the 'fall-back' position.

As a registered open adoption plan has the effect of being an order of the Court, issues can arise with attempting to informally vary the arrangements in the plan independent of the Court. The open adoption plan itself may contain a provision for the parties to reach alternate agreements, and for such mutual agreements to be in writing.

An application for a formal review of an open adoption plan can be made to the Supreme Court under section 51, Adoption Act 2000.

What rights does a birth parent have?

A non-consenting birth parent, who has not agreed to the child's open adoption plan⁷ cannot:

- apply to have the adoption plan registered⁸, or
- seek to have the adoption plan reviewed by the Court⁹.

This includes a birth parent:

⁶ Section 50(4), *Adoption Act 2000*

⁷ Section 46(2B) & 47, *Adoption Act 2000*

⁸ Section 50(1), *Adoption Act 2000*

⁹ Section 51(1), *Adoption Act 2000*

- who has not consented to their child's adoption because at the time that arrangements were made for their child to be adopted, after reasonable enquiry they could not be located or identified
- who is unable to give consent to their child's adoption due to their mental or physical health
- who choose not to give consent to their child's adoption
- whose consent is not required as their child (who is over the age of 12) has given sole consent to their own adoption.

However, once an open adoption plan is registered, a non-consenting birth parent who has not agreed to that open adoption plan may be able to enforce the plan (as it becomes an order) as if they were a party¹⁰.

Birth parents are encouraged to participate in the making of, and sign the open adoption plan. A birth parent signing the open adoption plan may do so to indicate their agreement to the arrangements detailed in the plan, even though they do not formally consent to the child's adoption.

A non-consenting birth parent who has agreed to an open adoption plan, has the same rights to apply for registration and review of the plan as if they were a consenting birth parent.

Where a non-consenting birth parent agrees to an open adoption plan, it does not mean the birth parent agrees to or gives consent to their child's adoption.

A birth parent who agrees to the open adoption plan or who has been joined in the adoption Court proceedings, has a legal right to make sure the plan is carried out after it is registered. A birth parent is generally joined in adoption Court proceedings at the time when they formally inform the court that they oppose/contest the adoption¹¹.

Depending on the circumstances, a birth parent may also, at a later point, be able to apply for orders under the Family Law Act.

Birth parents are encouraged to seek independent legal advice if they are unsure of what it means to agree to and sign an open adoption plan, or of their rights following the making of an adoption order and/or registration of an open adoption plan.

Who can request registration of an open adoption plan?

Two or more 'parties', who have agreed to the open adoption plan, may apply to the Court for registration of the plan.

¹⁰ Rule 39.49, *Uniform Civil Procedure Rules 2005*

¹¹ Section 118, *Adoption Act 2000*

Where the Secretary or Principal Officer applies for registration of the plan the prospective adoptive parents should, where possible, be in agreement. The prospective adoptive parents are encouraged to seek independent legal advice to ensure they understand the legal effect of a registered open adoption plan.

Where the relationship between the birth parent(s) and prospective adoptive parent(s) has been challenging or where a birth parents experience with DCJ or their out of home care (OOHC) FSP has been challenging, the birth parent may gain peace of mind by having the open adoption plan registered. Some birth parents of children in OOHC have talked about their fears about losing the security of a contact order made in the Children's Court that ensures their rights to see and know about their child through their growing years. They have explained that they feel vulnerable following the making of an adoption order, as they perceive the open adoption plan lacks the certainty of contact they believe a contact order provides. Where a birth parent believes that the open adoption plan should be registered, they are encouraged to discuss their concerns with the child's OOHC caseworker.

What if an agreement cannot be reached regarding contact arrangements after the open adoption plan is registered by the Supreme Court?

Once a plan is registered it has effect as though it is an order of the Supreme Court.

It is important to acknowledge that at times, birth family members may not be able to maintain regular contact throughout a child's life, as set out in the open adoption plan. Although this can be unsettling for a child, many adoptive parents recognise the importance for the child to see their birth parent(s) and siblings and agree to be flexible and support contact when it is able to occur. Additionally, as children grow up, their needs and priorities change. They often have sports, social events and other activities after school and during the weekend that limit their availability. Sometimes these cannot be predicted at the time of agreeing to and registering an open adoption plan. Ideally, it would be hoped that both families understand these changes and are willing to reach an agreement that best suits everyone.

If an agreement between the families is unable to be reached, DCJ's Adoption Information Unit can be contacted for assistance. Examples of where families may need the support of DCJ's Adoption Information Unit include:

- where the adoptive parent(s) and birth parent(s)/siblings cannot agree on a position and mediation may assist everyone to focus on the needs of the child
- for the child and adoptive parent(s)

- where a child is saying they don't want to attend contact as prescribed in the open adoption plan
- to re-engage with their birth parent or siblings, especially if the child is asking about their birth family or it is important to assist with the child's identity
- to gain information about the birth parent(s) such as updated medical or family information
- for birth parent(s) or birth family members
 - to re-engage with the child, especially if it has been an extended period of time since the last visit
 - to gain updated information about the child.

All efforts should be made by both the birth and adoptive families to discuss any concerns with each other, with the best interests of the child in mind and with the intent of coming to a mutual agreement (where a mutual agreement recorded in writing has been provided for as part of the original registered open adoption plan). Where possible, mediation to reach agreement is always preferable.

How can a registered open adoption plan be reviewed?

If circumstances change whereby the provisions of the open adoption plan are no longer meeting the best interests of the child, anyone involved in the open adoption plan is able to apply for a formal review of that plan by the Supreme Court¹².

A birth parent who has not agreed to (and not signed) the open adoption plan cannot apply to the Court for a formal review of a registered open adoption plan.

Where a birth parent agreed to the open adoption plan that is registered¹³, or they are named in a registered open adoption plan¹⁴, they have the right to ensure the provisions of the plan are met. Where a birth parent believes that there has been a breach of the registered open adoption plan, they may bring an application back to the Supreme Court. If a birth parent or adoptive parent is unsure of their rights and obligations, or is concerned about a breach of an order, they should obtain independent legal advice as soon as possible about their available options.

¹² Section 51(1), *Adoption Act 2000*

¹³ Section 46(2B), *Adoption Act 2000*

¹⁴ Rule 39.49, *Uniform Civil Procedure Rules 2005*

An open adoption plan can be reviewed by the Supreme Court, even if it was not registered.

What are the possible outcomes of a review of a registered open adoption plan?

When reviewing an open adoption plan, the Court makes an order that they consider is in the best interests of the child and proper in the circumstances¹⁵.

Following a review, the Court may order:

- changes (if any) to the provisions of the open adoption plan as it considers appropriate, or
- revoke the plan, or
- confirm the arrangements in the plan remain unchanged.

If the Court makes changes to the open adoption plan, the new plan replaces any previous open adoption plan¹⁶.

Who should I contact if I have further questions?

Prior to an adoption order being made you should discuss any questions you have with your child's OOHC caseworker or the OOHC duty officer.

To seek independent legal advice or to request contact details for services that might be able to assist contact:

Community Legal Centres NSW

Phone: 02 9212 7333

Email: clcnsw@clc.net.au

Law Access NSW

Phone: 1300 888 529

www.lawaccess.nsw.gov.au

Legal Aid NSW

www.legalaid.nsw.gov.au

¹⁵ Section 51(3) & 51(4), *Adoption Act 2000*

¹⁶ Section 51(5), *Adoption Act 2000*