

# Shaping a Better Child Protection System: Responses to frequently asked questions

| <b>Alternative dispute resolution (ADR)</b>  |   |
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| <p><b>Difference between ADR and FGC</b></p> | <p>FACS must now offer all families ADR before a care application is made in the Children’s Court.</p> <p>ADR is a process where an accredited independent person helps people reach an agreement. There are different models of ADR that families can consider. More information on ADR can be found <a href="#">here</a>.</p> <p>The Department of Family and Community Services (FACS) promotes the use of Family Group Conferencing (FGC) as the preferred ADR process. FGC supports family-led decision-making to resolve child protection concerns. It has been shown to be successful in NSW and internationally in keeping families together and preventing entries into care.</p>  |
| <p><b>Access to legal advice</b></p>         | <p>Families can obtain independent legal advice before deciding to accept an offer of ADR.</p> <p>Where no Children’s Court proceedings have commenced, families are able to access free legal advice through <a href="#">LawAccess NSW</a> or their local Community Legal Centre. Families can also seek legal advice and assistance from other free legal services such as Salvos Legal or through the NSW Law Society’s pro bono scheme. Families can also obtain legal advice and representation from their own lawyer.</p> <p>When Children’s Court proceedings have commenced, or where a registered care plan and consent orders are proposed under section 38 of the <i>Children and Young Persons (Care and Protection) Act 1998</i> (Care Act), families can apply for a Legal Aid grant to obtain free legal advice and representation in relation to ADR and legal proceedings.</p> <p>Evidence of matters discussed during ADR, the conduct of the parties and documents prepared specifically for the ADR process are inadmissible in any proceedings before the court or tribunal.</p> |
| <p><b>Referral</b></p>                       | <p>Participation in ADR is voluntary and confidential.</p>  |

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|  | <p>Consent from the family must be received prior to an ADR referral being completed. Once consent is obtained FACS will make the referral to an independent facilitator.</p> <p>For Aboriginal families, this process can be supported by an Aboriginal caseworker and facilitator or the facilitator and the family can talk about other cultural support needed.</p>   |
| <p><b>Guardianship orders by consent</b></p>     |   |
| <p><b>Access to legal advice</b></p>             | <p>All parties consenting to an order that allocates parental responsibility away from a parent must receive independent legal advice. The Children’s Court must be satisfied the parties have received independent legal advice, that they understand the nature and effect of the proposed order and their consent has been freely given.</p> <p>When Children’s Court proceedings have commenced, or where a section 38 registered care plan and consent orders are proposed, families can apply for a grant of Legal Aid to obtain free legal advice and representation in relation to ADR and legal proceedings.</p> <p>A guardian can seek to be a party to the proceedings and would therefore obtain legal advice. Legal Aid can provide advice to a proposed guardian.</p> |
| <p><b>Guardianship assessment process</b></p>    | <p>The assessment process for guardians remains the same. A suitability assessment, suitability statement and care plan still need to be filed with the Children’s Court. Evidence of quality cultural planning is also required.</p> <p>The assessment is robust and lengthy because a guardian has to demonstrate their ability to look after a child without the involvement of FACS or a funded service provider that provides out-of-home care (OOHC).</p>   |
| <p><b>Ongoing support and family contact</b></p> | <p>Guardians receive the guardianship allowance to help them meet the needs of the child or young person. The guardianship allowance is the same as the carer allowance. In some circumstances additional guardianship support payments are available. Guardians may also be eligible for benefits and concessions from the Australian Government Department of Human Services (Centrelink). Guardians can also access training and support provided by <a href="#">My Forever Family NSW</a>.</p> <p>A contact order can now be made for children on guardianship orders up until the child is 18 years of age. The expectation that the guardian maintains and supports the contact remains. If contact</p>   |

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|   | <p>isn't proceeding as planned either party can approach Legal Aid NSW for free mediation. Contact orders can be amended through mediation and the change registered with the Children's Court.</p>  |
| <p><b>Restoration</b></p>   |  |
| <p><b>Timeframes</b></p>  | <p>The Children's Court can now decide whether there is a realistic possibility of restoration in a 24 month period, allowing the Court to consider whether restoration will be possible into the future. This should lead to more children being safely restored because restoration is assessed over a longer period of time. An application to extend a court order can be made if more time is needed to achieve restoration.</p> <p>If a shorter term court order has been made with a goal of restoration, children can be restored to their parents anytime during the 12 months prior to the date the order expires.</p> <p>If the restoration does not proceed before the expiry of the court order, FACS will need to apply to vary or rescind that order and provide evidence about why the restoration has not been achieved within the required time frame.</p> |
| <p><b>Evidence supporting the restoration of a child to their parents</b></p> | <p>The evidence threshold for parents to achieve restoration remains the same. As always, children need to be safe.</p> <p>The court will want to see a comprehensive plan detailing the supports provided to the family and concrete steps of what FACS and the parents need to achieve by certain dates.</p>   |
| <p><b>Section 90 considerations</b></p>                                       |  |
| <p><b>Views of children</b></p>   | <p>Consistent with a child's rights, their views will be sought regardless of age. The weight given to those views by the court will depend on the child's age and development.</p> <p>Children and young people over 12 years of age provide direct instructions to their legal representative. For children under 12 years, their legal representative acts in their best interests.</p>   |
| <p><b>Open adoption</b></p>   |  |
| <p><b>Guardianship is not a pathway to adoption</b></p>                       | <p>Guardianship and adoption are separate permanency options. Guardianship is not a pathway to adoption and guardians do not have preferential access to adoption.</p>   |

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| <p><b>FACS involvement in applications by guardians</b></p>            | <p>A guardian can seek to adopt a child in their care. This requires the adoption assessment process to commence which is different to the assessment process for becoming a guardian. Only in exceptional circumstances would FACS make the adoption application on behalf of a guardian.</p> <p>For a relative guardian, a relative can make an adoption application without consulting FACS. For a non-relative guardian, FACS would need to either consent to the adoption application or be the applicant.</p>   |
| <p><b>Adoption of Aboriginal children and young people</b></p>         | <p>Adoption is the last permanency option for an Aboriginal child or young person.</p> <p>The safeguards to ensure that Aboriginal children and young people remain with family, kinship groups or community wherever possible have not changed. This includes the Permanent Placement Principles and the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles relating to self-determination, participation in decision-making, and placement of children in OOHC.</p> <p>The <i>Adoption Act 2000</i> makes specific provisions that address the needs of Aboriginal children, families and communities and sets out additional requirements specific to adoption applications for Aboriginal children.</p> <p>The Secretary of FACS must agree to the adoption of any Aboriginal child from OOHC.</p> |
| <p><b>Miscellaneous</b></p>  |   |
| <p><b>Do the legislative changes permit forced adoptions?</b></p>      | <p>There are many legal safeguards that protect against forced adoptions, including providing parents with mandatory written information about adoption and the adoption process. Birth parents must be provided with the mandatory written information and receive counselling from a registered adoption counsellor before they can give consent to their child’s adoption. Birth parents must be notified of any adoption application and can oppose that application in the Supreme Court. The NSW Government remains committed to open adoption in recognition of the benefits for children where both families (birth and adoptive) remain in contact with each other after an adoption order is made.</p>  |
| <p><b>Is there a two-year limit on children remaining in care?</b></p> | <p>Shorter-term court orders will only apply where the permanency plan is restoration, guardianship or adoption. For permanency plans involving restoration, guardianship or adoption, the maximum period for which an order may be made allocating all aspects of</p>  |

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|  | <p>parental responsibility to the minister will be 24 months, unless the Children’s Court is satisfied that special circumstances exist.</p> <p>In practice, the time between a care application being made and a permanency plan being implemented extends this period to 30-36 months depending on the age of the child.</p>  |
| <p><b>Will all children be adopted from care after two years?</b></p>  | <p>No. Children will not be automatically adopted from out-of-home care. The <i>Permanent Placement Principles</i> and the <i>Aboriginal and Torres Strait Islander Child and Young Person Placement Principles</i> within the Care Act determine the preferred order for placing a child or young person safely in a permanent home. Adoption remains the last resort for Aboriginal children.</p>   |
| <p><b>Can parents still apply to get their children back?</b></p>  | <p>Yes. Parents will still be able to apply to the Children’s Court to have the care orders for their children varied or rescinded (cancelled). The opportunity for a parent to bring a section 90 application under the Care Act to change a care order has not been removed. The Children’s Court may grant leave to vary or rescind the order if there has been a significant change in circumstances since the order was last made or varied.</p> <p>The Children’s Court must now prioritise the views of children and young people in applications for leave to vary or rescind a care order. This will assist a parent’s application in some cases.</p> <p>The changes do give the Children’s Court power to dismiss a section 90 application in certain circumstances including where it is an abuse of process or where a person has brought a series of unsuccessful applications and the current application has no reasonable prospects of success.</p> |
| <p><b>What support do birth families get in Court in relation to orders for guardianship and adoption?</b></p> | <p>The amendments provide that parties consenting to a guardianship order must receive independent legal advice. The Court must be satisfied that the parties understand the nature and effect of the proposed order and that their consent has been freely given. The Court can also appoint a legal representative for a child or young person. The Court must also be satisfied that the guardianship order will not contravene the principles of the Care Act (including that the principle that the safety, welfare and wellbeing of the child or young person is the paramount consideration).</p> <p>For adoptions, the Secretary of FACS must ensure that parents are given mandatory written information before they consent or refuse to consent to an adoption. The information provided to parents includes detail on where they can obtain legal advice. <a href="#">Legal Aid NSW</a> also provides free legal advice in relation to adoptions.</p>   |

**How were stakeholders consulted in developing the legislative amendments?**

More than 100 written submissions were received in response to the discussion paper *Shaping a Better Child Protection System* discussion paper from a diverse range of stakeholders. FACS also held seven workshops with stakeholders across NSW, including Aboriginal stakeholders. The report on the outcomes of the consultation process is available on the [FACS website](#).