



Family &
Community
Services

Issues Paper – Establishing an Institute of Open Adoption



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1 Purpose of project

In January 2015, the NSW Premier announced a \$2.85 million package to establish an Institute of Open Adoption. The institute will focus on matters relating to open adoption for children and young people in out-of-home care (when reunification with their family is not appropriate). It will be the first institute of its kind in Australia to be publicly funded.

This issues paper

- provides information and details how open adoption differs from past adoption practices
- provides information on the importance of open adoption in providing children with a stable and nurturing home
- seeks input from the non-government, academic, community and business sectors on the proposed objects, functions and structure of the institute to inform the minimum requirements of the tender

2 Background

The NSW Government's 2014-2018 reform agenda Safe Home for Life aims to strengthen the child protection system. It aims to keep children and young people with a long-term, stable environment to help keep them safe and enable them to fulfil their potential. Wherever possible children should live at home with their families or be placed with kin. However, when it is unsafe to do so other placements options may be explored including long term care with a guardian or an adoptive family. Parental responsibility to the Minister is the least preferred placement arrangement for non-Aboriginal children.

NSW started this reform process in November 2012 with a discussion paper seeking public views on 29 proposals to support an integrated and contemporary child protection service system, including proposals to streamline adoption. Over 280 people and 140 organisations provided comment and submissions to help shape the reforms. The legislative changes were debated and passed by Parliament. These commenced on 29 October 2014.

The 'permanent placement principles' were a key addition to *Children and Young Persons (Care and Protection Act) 1998*. The principles aim to provide the best outcomes for children and young people in out-of-home care. These principles give greater prominence to open adoption as a means of providing some children with a safe home for life. While not all adoptions involve contact between the birth and adoptive families, it is essential that there is an attitude of

openness within the adoptive family to help the child learn about their family and cultural heritage.

In addition to these legislative changes, the NSW Government has announced it will contribute to research and best practice in open adoption through the establishment of the Institute of Open Adoption. The NSW Government has recognised that although adoption is not appropriate for all children in out-of-home care, more can be done to explore this option when children can not be reunited with their families.

An integral component of the institute's focus will be ensuring that progress in improving and promoting open adoption practice avoids repeating mistakes of past adoption practices.

The institute will focus on issues within the control of the NSW Government in relation to adoption of children. However, the development of information, understanding and service delivery around adoption will benefit other adoptions and adoption practice in Australia more generally.

This paper is the next step in NSW shaping the changes being made as part of this reform agenda. It sets out information about:

- why it is important to give children a safe home for life
- how open adoption can assist in achieving this, and
- why research is necessary in bringing this about.

The paper also seeks your views on what the proposed institute will do and how it will do it.

2.1 Consultation process

Comments on this paper are invited from all interested parties, including those with an interest in adoption, those who have been adopted, those whose children have been adopted, children, young people, parents, carers, services providers, government agencies, universities, Department of Family and Community Services (FACS) staff, the legal community, NGOs, and the wider community.

A tender will be held in the last quarter of 2015 seeking offers from agencies (or combinations of agencies) to establish and run the institute. The tender will set out certain minimum requirements that will need to be met and commitments from the NSW Government as to how it will support the institute.

One of the minimum requirements will be that the institute must have commenced functioning during 2016.

The purpose of this issues paper is to enable interested stakeholders and individuals to contribute to the minimum requirements for inclusion in the tender.

Comments will inform the drafting of both the specifications of the proposed institute and the criteria to be met by the successful tenderer as set out in tender documentation. Comment can be made by:

- email to: openadoptioninstitute@facs.nsw.gov.au or
- fax to: 02 9716 2442 (Attention: Special Projects)
- submission to: <https://tenders.nsw.gov.au/>
- post:

Special Projects
Safe Home For Life
Department of Family and Community Services
Locked Bag 4028
Ashfield NSW 2131

Printed copies of this issues paper can also be obtained by calling (02) 9716 2880. Contributions must be received by close of business on Wednesday 29 July 2015. Clarification and comment may be sought on contributions after this closing date. All written contributions will be published on the web site unless it is agreed, in response to a specific request, to not do so.

2.2 The role of the Institute of Open Adoption

Where young children can not live with their families or kin, adoption can be a way of providing a stable, nurturing, safe home for life. Open adoption is regarded as the best available outcome for many non-Aboriginal or Torres Strait Islander children who are in this position. Supporting evidence and descriptions of what is meant by open adoption are described in Section 3 of this paper.

The institute will play a critical role in delivering research-led best practice to increase the number of open adoptions from out-of-home care. The institute will do this by focusing on the following:

- improving the possibility of children in out-of-home care being adopted, where it is in child's best interest;

- understanding what happens, or what should happen, as part of the adoption process and making recommendations, where relevant, to alter these processes
- developing child protection professional's knowledge about the benefits of open adoption for children in out-of-home care and the process of open adoptions
- encouraging people to consider adoption of children in care, by identifying the current impediments they see to adoption and recommending ways to improve the process for people to adopt
- assisting accredited designated agencies in out-of-home care to explore permanency options for children whose placements they are supervising
- assisting courts by providing, as part of the application, expert information on what will best address a child's need for permanency
- helping the sector and greater community to understand when open adoption (both generally and for individual children) should occur and why
- supporting people who have adopted or are adopted with the right services.

This institute will be committed to learning from past tragedies and mistakes. There is no justification for forced adoption, nor is there justification for adoptions to occur that are not in the interests of the child's safety, welfare and wellbeing. The risks associated with cultural identity loss for Aboriginal and Torres Strait Islander children through adoption mean that their safety, welfare and wellbeing will only be advanced by adoption in exceptional circumstances.

The institute will not work against these fundamental principles.

2.3 Independence from the NSW Government

The institute will be independent and not part of FACS.

Independence is important so that the new body can:

- focus and develop expertise in open adoption
- enhance credibility of material developed
- provide independent advice to non-government organisations as well as government
- develop independent expert reports to support applications or submissions made to courts
- allow for the development of a business model that enables the institute to access a variety and combination of funding sources including funds

derived from outside of government, grants, gifts or fee for service earned from government or non-government sources.

An independent institute will have autonomy to provide advice on out-of-home care and open adoption in a way that, while efficient and ethical, is unhampered by the policies and procedures that apply to government departments. The government has announced it will provide seed funding to establish the proposed institute but following its establishment it will need to remain financially sustainable. While the structure of the institute is discussed below, the business model will be predicated on the requirement it is independent of government to optimise the opportunities for financial stability.

2.4 Objectives and functions

The proposed Institute of Open Adoption should become a leader in the practice of open adoption. It will do this by partnering with a research body, to ensure both the quality and relevance of its work.

To inform the development of the institute, the following questions need to be considered in relation to the tender:

- what direction should be provided about the type of work to be undertaken and how the work is to be performed?
- what parameters should be formalised to achieve the outcomes and functions of the institute?
- is there sector knowledge of what works, or does not work that should be incorporated?

The objectives of an institute of this kind are normally set out in an overarching constitutional document. While not all institutes are established by legislation, a survey of the legislated institutes in NSW show that there is a diversity in how to balance the objectives of quality and practical relevance. For example:

- in some there is a specific delineation of tasks, for example “to engage in the preparation, manufacture, cultivation, distribution and sale ...of any vaccine”¹
- others specifically limit the role of the body to research and the provision of training²

¹ *McGarvie Smith Institute Incorporation Act 1928*, section 5

² *NSW Institute of Psychiatry 1964*, section 4

- some specifically limit the objective of the body to provide research and the direct use of the resulting expertise, for example “to operate as a service of expertise on cancer control for ... health service providers”³
- others expressly allow for the research to actively provide related services: “to provide such services in the field of human medicine”⁴ or “to provide resources, services and facilities”⁵
- finally there are those bodies that have broad outcome based objects: “the advancement in life, to the greatest extent practicable, of deaf and blind children.”⁶

The following matters should be considered, in relation to the possible functions of the institute:

- while a much greater proportion of children might be considered for adoption than is currently the case, it is acknowledged that adoption is neither possible nor appropriate for every child in out-of-home care. The legislation is clear that adoption is rarely suitable for an Aboriginal child.⁷ As noted above, the research, while not conclusive, does indicate that the older the child the justification for adoption is likely to change
- there is evidence suggesting that, the current low rates of open adoption as a means of establishing permanency derive from negative views of adoption held largely amongst professionals working in this area. This presumably arises in part from the legacy of our history - a recent history of forced, secretive adoption as represented by the Forgotten Australians and the Stolen Generation. Out-of-home care adoptions can be perceived as inherently involuntary⁸ and irreversible, even when they are a logically response to finding that there is no realistic possibility of restoration of the child to the family, and this adds to fears. These issues, combined with limited knowledge of open adoption and the retention of myths which incorrectly define the consequences of open adoption can wrongly lead people to view open adoption negatively despite the benefits identified by research
- it is necessary to address these professional attitudes respectfully, but in a way that shows that alternative views are both credible and justifiable. Secondly, it is recognised that training and educational material alone will

³ *Cancer Institute (NSW) Act 2003*, section 5

⁴ *Garvan Institute of Medical Research Act 1984* section 5; *Centenary Institute of Cancer Medicine and Cell Biology Act 1985*, section 5

⁵ *Institute of Sport Act 1995*, section 5

⁶ *Royal Institute for Deaf and Blind Children 1998*, section 6

⁷ *Adoption Act 2000* section 36; *Children and Young Persons (Care and Protection) Act 1998* sections 13, 78A

⁸ *Adoption Act 2000* section 67(1)(d)

be inadequate. This effort must alternative approaches that support open adoption and demonstrate, or model, how contemporary research can be effectively applied

- in addition to the views of professionals, some out-of-home carers will not consider adoption as an option and their reasons need to be explored in more detail
- expert opinion must be independent, impartial and based on objective research
- the work of the proposed institute is expected to result in material that shows how adoption will be inappropriate for certain children
- the institute will develop evidence-based resources for children, young people and their families on open adoption and their permanency needs
- the institute, while not conducting advocacy that impairs impartiality, will conduct evaluations and produce papers that inform policy development
- the institute may assess the permanency needs of individual children.

2.5 Issues for decision

Interested parties are invited to comment on what should be included in the tender, based on issues raised in the following questions. These questions are only intended to provide a guide. Each issue set outs an aspect of the institute that may be necessary to decide prior to finalising the tender documentation.

Issue 1:

How should the proposed institute become a leader in the development of best practice for open adoption?

In considering this issue, and in order to lead the development of policy and best practice, what are the key matters that should be reflected in the governance documents for the institute?

Issue 2:

What are the core activities that should be undertaken by the institute? (i.e applied research, service provision or other functions)

There are existing bodies that have established Centres for Excellence in the area of adoption. For example, Barnardos has established a Centre for Excellence in Open Adoption, to enhance its practice. Adopt Change has stated that it is considering a Centre of Excellence in the area of post adoption. By contrast the work of the proposed institute will not be governed by a single agency and will develop applied research and resources for a range of stakeholders across all areas of the out-of-home care sector.

The work of the proposed institute will not be to advocate for, and support, individuals as they navigate the adoption processes. However, it will develop applied research that will benefit birth families, adoptive applicants, children and those working with open adoption. The proposed institute will address the ‘why’ of an open adoption rather than concentrate its efforts primarily on addressing the ‘how’ a particular open adoption took place. The proposed institute is unlikely to have an advocacy function.

International models of institutes follow different approaches, for example:

Model for Existing Institutes	Example
Means of collaborative approach	Pritzker Consortium on Early Childhood Development at University of Chicago
Clearinghouse of information	Institute of Child and Family Policy, Columbia University
Research combined with education campaigns and advocacy	Donaldson Adoption Institute, Illinois State University Centre for Child and Family Research, Loughborough University
Research combined with education and training, resources, systemic reviews, evaluation of programs evaluation of individual interventions and expert advice	Hadley Centre for Adoption and Foster Care Studies, University of Bristol Institute of Child Development, Texas Christian University

The role of the institute must also recognise that it will be required to operate alongside other bodies such as the Children’s Guardian in her capacity as the accreditor of adoption service providers, or other bodies such as the Advocate or Ombudsman.

This paper seeks input on which of these approaches is most appropriate for the institute and how best to distinguish it from functions performed by existing bodies.

One proposal is that an activity of the institute might be to provide expert reports as part of an application in a particular care or adoption matter. It is recognised that care courts in both England and NSW, in particular, have commented on insufficient expert advice being supplied to the Court to permit it to make the decisions required by legislation. The courts have emphasised that:

“this point is crucial. The judicial task is to evaluate all the options, undertaking a global, holistic and multi-faceted evaluation of the child’s welfare which takes into account all the negatives and the positives, all the pros and cons, of each option.....We have real concerns, shared by other judges about the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption, both in the materials put before the court by local authorities and guardians and also in too many judgments. This is nothing new. But it is time to call a halt.”⁹

In NSW, the Supreme Court must establish adoption as “clearly preferable in the best interests of the child than any other action.”¹⁰ This requires similar analysis as referred to in the English judgment.

The provision of expert reports in the NSW care jurisdiction, by an independent body, already exists in the form of the Children’s Court Clinic. The role of this clinic¹¹ is to make expert clinical assessments of attachment and parenting capacity and submit reports to courts.¹² This clinic was established to provide an independent body of knowledge applied to the particular circumstances of a family. It is freed of the bias inherent in parties to litigation and able to build and apply research and expert knowledge to assist courts reach better decisions.¹³ The question arises whether an independent body, building a bank of research and expertise in the area of permanency and the relevance of adoption to the needs of a child might address a similar deficiency that has been identified by the courts.

When the Children’s Court Clinic was established, there was a rejection of the counter position that expert knowledge should fall within the remit and expertise of the case worker with carriage of the care or adoption application applicable to that child. This reliance on third party reports in the care jurisdiction has been criticised as an “an unhelpful cycle of producing what has been described, quite properly, as anodyne and inadequate assessments and statements that do not address the heart of the matter which is central to the case [is] a sloppy practice that must now stop.”¹⁴ This outcome has been avoided in the case of the

⁹ *Re B-S (Children)* [2013] EWCA Civ 1146; *Re B (A Child) (Care proceedings: Threshold Criteria)* [2013] UKSC 33

¹⁰ *Adoption Act 2000* section 90(3)

¹¹ *Adoption of BS (No 3)* [2013] NSWSC 2033; *Adoption of SRB, CJB and RDB* [2014] NSWSC 138; *Adoption of NG* [2014] NSWSC 680.

¹² *Children’s Court Act 1987*, section 15B

¹³ Children’s Court Clinic (2003) Formulating applications for an assessment order *Children’s Law News* 10 at 5

¹⁴ Blackmore, S & Thomas, J (2014) *Reforming Family Justice – A guide to the Family Court and the Children and Families Act 2014* (Bristol, Family Law) p 124

Children's Court Clinic according to a former Senior Children's Magistrate who described the situation as:

"No longer is there likely to be the cacophony of conflicting reports which bedevilled care proceedings and, for that matter, family law proceedings in earlier times. Instead, highly professional and expert reports, prepared in a relatively non-adversarial atmosphere are furnished to the court, relatively certain of a thoughtful and respectful reception among the parties and by the court".¹⁵

One possible activity for the institute may therefore be to create a comparable role to that of the Clinic. While the Clinic's role is focussed on attachment and parenting capacity, the institute would focus on permanency placement.

This institute could have a role in improving the quality of child protection casework by modelling appropriate responses and informing the development of casework decisions of those supervising out-of home care placements.

Issue 3:

What is the most appropriate service delivery model for the proposed institute to achieve its objectives and why?

Issue 4:

What needs to be included in the tender process so the institute is in a sound position to receive funds from a combination of philanthropy, grants and fee for service?

Issue 5:

Should the institute play a role in the evaluation of individual interventions and the provision of expert evidence in individual matters? Why or why not?

Issue 6:

What priority areas of applied research should be addressed by the tender? What needs to be done in the formation of the institute to ensure these specific functions of applied research are to be undertaken?

Issue 7:

How broadly should this term 'open adoption' be interpreted?

¹⁵ Senior Children's Magistrate Mitchell quoted in Allerton, M (2013) *How to get the most out of the Children's Court Clinic* (Sydney, author)

More specifically:

- should the institute concern itself with who is adopted and how open adoption occurs?
- should the institute consider the assistance or support needed by those who have been adopted?
- should any other objectives or functions be included and considered?

Issue 8:

What specific powers to access information and data should the proposed institute have?

For example, as an independent body, should the institute have access to personal information on adoption cases held by FACS and accredited adoption service providers?

Notwithstanding open adoption being practised in NSW for over quarter of a century this does not mean that information about a particular adoption is openly available. There are restrictions on the Supreme Court and FACS and other people or organisations from disclosing information.¹⁶ Because of the small number of adoptions currently taking place, even the supply of generic information in certain instances might conceivably identify individuals affected by adoption.

2.6 Proposed structure of the institute

The structure of the proposed institute should be designed so the objects and functions of the institute flourish rather than to control or confine them. Understanding how the structure may impede or facilitate the agreed objects and functions is therefore an important task.

Without being prescriptive, and in no particular order, elements of the structure which may help these objects and functions would be to:

- encourage collaboration between disparate bodies such as a research body and a service provider
- permit the use and disclosure of sensitive personal information that might not otherwise be available
- help develop philanthropy
- foster accountability and fiscal efficiency and probity
- allow the seeking and management of grants

¹⁶ For example such legislative provisions concerning confidentiality like *Adoption Act 2000*, section 186 or *Privacy and Personal Information Protection Act 1998*.

- permit evaluations, case reviews, provision of expert opinion and other aspects of applied research
- develop independence and integrity
- become a world leader delivering quality work in a specialist area
- allow new ideas to flourish unencumbered by policies and practices of well established bodies
- target the activities of this group amid the myriad of activities of its collaborator agencies
- allow recruitment and employment of staff so their focus is on the objects of the institute
- provide a means of risk management and provision of relevant insurance coverage for liability.

There are no presently identified constraints on the structure of the proposed institute which would stop it from being either an adaptive use of an existing structure or else built by the successful tenderer(s). In either case, the tender may require the successful tenderer(s) to incorporate or exclude certain specified elements in what they use or construct.

Issue 9:

What structural elements should be included in the tender specifications and why?

Issue 10:

What structural elements should be excluded from any proposed structure and why?

Issue 11:

What specific matters need to be dealt with to allow the proposed institute access to, and maintenance of security of, all requisite information and data for the undertaking of the applied research?

Issue 12:

What issues need to be considered to ensure a healthy partnership between the researcher and non government service provider responsible for the institute?

Issue 13:

While the institute will be independent of government, should there be connections between the institute and the NSW Government that need to be contained in the documentation establishing the institute and, if so, what needs to be achieved. Are there any other governance issues that should be considered?

3 Open adoption and permanency placements

3.1 What are the key elements of adoption that the institute is to address?

The *Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption 1993*, while focussed on intercountry adoption, sets out in Article 26 core elements of any adoption:

- a) the establishment of a legal parent-child relationship between the child and his or her adoptive parents
- b) the legal parent-child relationship is one in which parental responsibility is exercised by the adoptive parents for the child
- c) there is a termination of the pre-existing legal relationship between the child and his or her mother and father.

In NSW these core elements are reflected in the *Adoption Act 2000*, section 95:

“An adoption order made by the Court gives sole parental responsibility for a child to the parent or parents named in the order [so that]:

- a) the adopted child has the same rights in relation to the adoptive parent, or adoptive parents, as a child born to the adoptive parent or adoptive parents
- b) the adoptive parent or adoptive parents have the same parental responsibility as the parent or parents of a child born to the adoptive parent or adoptive parents
- c) the adopted child is regarded in law as the child of the adoptive parent or adoptive parents and the adoptive parent or adoptive parents are regarded in law as the parents of the adopted child.”

These broad propositions are then clarified in sections 96 to 101, *Adoption Act 2000* as to the effect of an adoption on pre-existing court orders, property, relationship to other children, liability of trustees and names. Where an adoption in another country is recognised, recognition extends to any court order that gives an adoptive parent “a right superior to that of the adopted person’s birth parents,” that is even adoption orders that do not terminate the relationship with birth parents can be recognised.¹⁷

¹⁷ *Adoption Act 2000*, section 116

3.2 What are the elements of open adoption?

Open adoption is where the adoptive arrangements promote both the building of a relationship between the birth and adoptive families through ongoing contact and also the sharing of information and conversations between the birth and adoptive families about the adoption arrangement. Building the relationships that form an essential part of open adoption requires people, both as carers and adoptive parents, to assume active roles in the child's contact with birth family. Open adoption contains the notion that contact will generally be promoted unless it can be demonstrated that it will not be beneficial (usually, but not necessarily) to the child.

Open adoption provides benefits for the child by providing opportunities to:

- honestly understand their background
- develop relationships with people who are likely to be significant in their life
- assist in the development of their identity
- remove elements of the unknown and of mythologising about what the child's birth family was like.

When combined this gives the adopted person a better sense of who they are and a security about themselves and their background. These can be elements of 'felt security' that permit a person to develop permanency.

3.3 Adoption and Aboriginal or Torres Strait Islander children

NSW recognises that:

- adoption is not a concept that exists in Aboriginal customary law and is therefore an inappropriate care option for Aboriginal children as a general rule¹⁸
- customary adoption is a concept known to Torres Strait Islanders but is different to the concept as defined in Australian law.¹⁹

Therefore NSW adoption laws for both Aboriginal and Torres Strait Islander children, emphasise the "placement principles" that apply whenever state intervention occurs for the child's safety welfare and well-being.²⁰ Aboriginal

¹⁸ *Adoption Act 2000*, sections 35(1), 36

¹⁹ See generally: Marshall, A & McDonald, M (2001) *The many sided triangle: adoption in Australia* (Melbourne University Press, Melbourne) pp 148-170.

²⁰ *Adoption Act 2000*, sections 35 (Aboriginal child) and 39 (Torres Strait Islander child)

people should be given the opportunity to participate with as much self-determination as possible in decisions.²¹ In the majority of NSW cases where Aboriginal children in out-of-home care have been adopted since 2011, their Aboriginal heritage became known after placement and during the adoption process and/or the children were of an age to give consent to their own adoption.

Adoption law and practices recognise that the paramount consideration is the welfare and best interests of the child, both at the time adoption is being considered and in later life.

In NSW, adoption is the last preference for Aboriginal and Torres Strait Islander children.²² Nothing in this issues paper implies that adoption should be anything but “the last preference” for Aboriginal and Torres Strait Islander children.

This issues paper therefore proceeds on the basis that the objects, functions and structure of the proposed institute should be designed without reference to the adoption of Aboriginal and Torres Strait children.

3.4 History of adoption

3.4.1 International background

Adoption has been used across the world in different cultures over the centuries where a child is raised, loved and nurtured as part of a new parent-child relationship. For most of this time adoption contained few elements of secrecy.²³ Traditionally adoption in many countries was often about giving adoptive parents an heir and new avenues of financial assistance to the birth family.²⁴

The parliament of the State of Massachusetts (United States) was first to pass laws for adoption in 1851. Western Australia was the first State in Australia (in 1896) to establish legislation for a new parent-child relationship which could not be challenged by the birth family. Similar concepts were then included in the *NSW Child Welfare Act 1923*. This contrasts to the position of the Adoption Act in England in 1926 which did not sever property and succession connections of the birth family.

²¹ *Adoption Act 2000* section 35(1)

²² *Children and Young Persons Act 1998* section 10A (3) (e).

²³ Bridge, C & Swundells, H *Adoption: the modern law* (Family Law, 2003) p2

²⁴ For an historic example see the support gained by the author Jane Austen from her brother who was adopted: http://en.wikipedia.org/wiki/Jane_Austen_ref-20 accessed 20 May 2015

3.4.2 Why NSW can not always rely on overseas research to inform its approach to open adoption?

The Australian experience of adoption differed from what was happening overseas.

In colonial Australia a surfeit of neglected children and a shortage of labour led to adoption laws emphasising not succession-planning but the guarantee that a child's labour was attached to the new family that cared for the child. The first Australian adoption legislation therefore set out its object as "to provide for the adoption of children and to see that when they are adopted they cannot be taken away from those who have adopted them when, perhaps, they are becoming useful."²⁵ A related question at this same time concerned the welfare of children.²⁶

In seeking to create a new sacrosanct family, Section 7, *Western Australia Adoption of Children Act 1896* emphasised that the object of the legislation was to create a new parent-child relationship which could not be challenged by the birth family:

"When an Order of Adoption has been made, the adopted child shall, for all purposes, civil and criminal, and as regards all legal and equitable liabilities, rights, privileges, and consequences of the natural relation of parent and child, be deemed in law to be the child born in lawful wedlock of the adopting parents."

Similar concepts were then included in the *NSW Child Welfare Act 1923* sections 120 to 127.

This was in contrast to the position in England where the *Adoption of Children Act 1926* did not sever property and succession connections of the birth family.

The 'clean break' model of creating a new adoptive family was therefore more clearly accepted in Australia than, for instance, in England where the emphasis was on the granting of legitimacy to the child and the new adoptive family.²⁷ Likewise in Australia questions of the creation of a new family and the welfare of the child assumed greater prominence than family succession planning.

²⁵ *Western Australia Parliamentary Debates* 1896 p 335

²⁶ For example see the NSW Royal Commission on the Decline in the Birth Rate (1903) which found that illegitimate children were 3 times more likely to die in their first year of life than were legitimate.

²⁷ Lowe, N., (2000) *English adoption law: past, present and future* in Katz, S, Eekelaar, J & Mclean (Eds) *Cross Currents* (Oxford, Oxford University Press) ; Cretney, S (1998) *Law, Law Reform and the Family* (Oxford, Oxford University Press)

More recently, from the early 1970s, a significant social trend commenced which led to the rapid reduction in the number of Australian children being adopted. This trend was qualitatively as well as quantitatively different in Australia than in other countries such as England or the United States.²⁸ These differences are reflected in the negligible stigma in Australia today of 'illegitimacy.' One result of this social trend was that it reduced the number of children for whom adoption might be considered. The current situation is that those children born in NSW, who might be considered for (by someone who is not a relative or kin) are most likely to be those in out-of-home care.

These various differences in our history and current practices to those overseas mean that caution should be taken when comparing research on adoption practice in Australia and elsewhere overseas.

3.4.3 Why was there a move away from open adoption, that the institute is now seeking to correct?

As set out above, secrecy was not originally a necessary component of adoption laws. In the United States it was first introduced by amendments to the adoption law of Minnesota in 1917. In NSW it was not until 1939 that amendments to the *Child Welfare Act* included a new certificate that concealed the birth identity of the child and not until the 1960s when administrative practice removed the name of the birth parents from the copy of the adoption order supplied to the adoptive parents.²⁹ These provisions were introduced in various jurisdictions for a range of reasons, including limiting the ability of the birth family to seek advantages from the adoptive family; avoidance by the child of the stigma of illegitimacy, and enabling emphasis on the child welfare motive of growing a new family unencumbered by any connection with the child's earlier family.

For the contrary point of view to the beneficial impact of secrecy, a well cited 1973 Scottish study demonstrated the importance to adoptees, once they became adults, of searching for their birth identity.³⁰

In response to this type of evidence, the trend in NSW, after just over a half century towards confidentiality and secrecy in adoption, started to be reversed when in 1981 the Supreme Court made its first adoption order in conjunction with an order for contact. The Department in its submissions to the Court argued that:

²⁸ Best, R (2008) Adoption from care: a New South Wales response, *Developing Practice*, 22, 12-16

²⁹ Marshall & McDonald, p36

³⁰ Triseliotis, J., (1973) *In search of origins: the experience of adopted people* (London, Routledge and Kegan Paul)

“if it is clear that the continuance of the parent-child relationship will not be damaged by lack of final separation then the sole test that should be applied is whether or not adoption will promote the welfare and best interest of the child.”³¹

In 1990 NSW passed its first legislation which allowed some access to information that linked the child with both birth and adoptive families.³² This trend has continued.

Concurrent with the continued removal of secrecy and confidentiality provisions in relation to adoption has been growing knowledge of damaging and wrong practices in the removal and placement of children for forced adoption. NSW made a formal apology for forced adoption practices on 20 September 2012.³³

3.5 Why should agencies seek expert advice on permanency?

Contemporary research consistently recognises that placement changes for children in out-of-home care exacerbate the impact of instability and maltreatment felt by a child who has been removed because of care and protection concerns.³⁴ Repeated moves result in poorer outcomes for the children on a range of indicators including physical and mental health issues, behavioural problems, difficulties at school and higher rates of unemployment and homelessness in later life.³⁵

³¹ Quoted Marshall & McDonald (2001), p40. In England, the Court of Appeal held that in principle contact was permissible under its different legislative regime that placed greater emphasis on maintaining legitimacy see: *Re B (MF) (an infant)* [1972] 1 AllER 898. In practice however, few contact orders were made: Murch, M et al (1993) Pathways to adoption quoted in Bridge & Swindell (above) fn8, p13

³² *Adoption Information Act 1990*

³³ www.parliament.nsw.gov.au/prod/web/common.nsf/key/Apologyforforcedadop accessed 20 May 2015.

³⁴ Healy, CV & Fisher P.A. (2011) Young children in foster care and the development of favourable outcomes *Children and Youth Services Review*, 33, 1822-1830; Osborn, A., Delfabbro, P., Barber, J (2008) the psychosocial functioning and family background of children experiencing significant social placement instability in Australian out-of-home care *Children and Youth Services Review* 30, 847; Brydon K (2004) Barriers to permanency planning: what the literature suggests, *Children Australia*, 29, 16-21

³⁵ Healy, CV & Fisher P.A. (2011) Young children in foster care and the development of favourable outcomes *Children and Youth Services Review*, 33, 1822-1830; Aarons, GA., James, S., Mann, A R., Raghaven, R., Wells, R S & Leslie, L K., (2010) Behaviour problems and placement change in a national welfare sample: a prospective study. *Journal of the American Academy of Child and Adolescent Psychiatry*, 46, 70-80; Barth, R P ., & Fernandez, E., A synthesis of research findings and direction for policy, practice and research in social care in Fernandez, E., & Barth, R P ., (Eds) *How does foster care work? International evidence on outcomes* (London, Jessica Kingsley Publishers); Cashmore, J., (2011) The link between child maltreatment and adolescent offending: systems neglect of adolescents *Family Matters* 89; Tzoumi, D., & Nathansen, D., (2008) Health needs of children living in out-of-home care *Pediatrics*, 121 S99; Gauthier Y, Fortin G & Jéliu, G. (2004) Clinical application of attachment theory in

Placement instability may also result in health needs going unrecognised, friendships being disrupted and schooling interrupted.³⁶ Placement instability is more likely to result in children feeling less secure, loved and cared for.³⁷

While placement stability is an indicator it should not, by itself, be the measure of success of any placement. The measure of success should be around factors of resilience like a greater sense of perceived emotional security, better health, better education, better employment, less substance abuse and better relationships with others when compared to children at risk who remained or returned to their birth home.³⁸

Where these indicators of resilience can be established then this will be a key element in breaking inter-generational and personal cycles of young people transitioning from out-of-home care into anti-social behaviour and the criminal justice system.

3.6 What needs to be considered about placement instability in out-of-home care in giving expert opinions

The *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993) sets out in its preamble:

“that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding, [and that as a result] each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin, [and yet] intercountry adoption

permanency planning for children in foster care: the importance of continuity in care, *Infant Mental Health Journal*, 25, 379-396.

³⁶ Healy, CV & Fisher P.A. (2011) Young children in foster care and the development of favourable outcomes *Children and Youth Services Review*, 33, 1822-1830; Kaltner, M & Rissel, K (2010) Health of Australian children in out-of-home care; needs and carer recognition, *Journal of Paediatrics and Child Health*, 47, 122-126; Fernandez, E (2011) Growing up in care: an Australian longitudinal study of outcomes in (Eds) *How does foster care work? International evidence on outcomes* (London, Jessica Kingsley Publishers).

³⁷ Cashmore, J & Paxman, M (2006) Predicting outcomes for young people leaving care. The importance of ‘felt security’ *Child and family social work*, 11, 32-241; Ellerman, C R (2008) Influences on the mental health of children placed in foster care *Family and Community Health* S23-S32; Schofield, G (2002) The significance of a secure base: a psychosocial model of long-term foster care, *Child and Family Social Work*, 7, 259-272.

³⁸ Cashmore, J (2003) *Predicting outcomes four years on: young people leaving care* Presentation to the CFWAA Symposium, Canberra; McGloin, JM & Spatz Widom, C (2001) *Development and Psychopathology*, 4, 1021-1038

may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”

Australian children in out-of-home care are far more likely to experience placement instability than children who have been adopted.³⁹ The impact of placement instability, or even the insecurity of the placement continuing, lessens the sense of ‘felt security.’ Studies have indicated that adoption provides stronger attachments to carers,⁴⁰ better developmental outcomes⁴¹ and ‘higher levels of emotional security, a stronger sense of belonging and a more enduring psychosocial base in life’ than foster care.⁴² Even without placement insecurity, inherent to long term foster care is the fact that at the conclusion of care, the young person often faces a more abrupt transition to independence without the emotional, financial and practical supports provided by families.⁴³

These comments on the importance of adoption for placement stability can be qualified by research that looks at adoption breakdown. That research suggests that possible indicators needing to be explored might include the age of the child at time of placement as well as any emotional or behavioural difficulties of the child.⁴⁴

³⁹ Australian Institute of Family Studies, (2012) *Children in Care* (Melbourne, author); Australian Institute of Health and Welfare (2011) *Adoptions Australia 2010-2011* (Canberra, author); Selwyn J, Sturgess W, Quinton D & Baxter C (2006) *Costs and outcomes of non-infant adoptions* (London, BAAF)

⁴⁰ Selwyn J, Sturgess W, Quinton D & Baxter C (2006) *Costs and outcomes of non-infant adoptions* (London, BAAF);

⁴¹ Lloyd EC & Barth R P (2011) Developmental outcomes after five years for foster children returned home, remaining in care or adopted *Children and Youth Services Review*, 33, 1383-1391; Maluccio A, Ainsworth F & Thorburn J (2000) *Child Welfare Outcome Research* (CWLA Press); Thorburn J & Courtney ME (2011) A guide through the knowledge base on children in out-of-home care *Journal of Children's Services*, 6, 210-227.

⁴² Triselotis, J (2002) Long term fostering or adoption: the evidence examined *Child and Family Social Work*, 7, 23-33; Commission for Children and Young People and Child Guardian (2012) *2011 views of children and young people in foster care survey: health and wellbeing* (Brisbane, author); Biehal, N., Ellison, S., Baker, C., & Sinclair, I., (2010) *Belonging and permanence: outcomes in long term foster care and adoption* (London, BAAF); Biehal, N., Ellison, S., Baker, C., & Sinclair, I., (2009) Characteristics, outcomes and meanings of three types of permanent placement – adoption by strangers, adoption by carers and long term foster care (Social Policy Research Unit, University of York); Sinclair, I, Baker, C Wilson, K & Gibbs I (2005) *Foster children: where they go and how they do?* (London. Jessica Kingsley).

⁴³ Stein, M (2006) Research review: young people leaving care *Child and Family Social work*, 11, 273-279.

⁴⁴ Cashmore, J., (2014) Children in the out-of-home care system in Hayes, A. & Higgins, D (Ed) *Families, policy and the law: selected essays on contemporary issues for Australia* (AIFS, Melbourne); Van Den Dreis, L., Juffer F., Van Ijsendoorn, M H., & Bakermans-Kranenburg, M J (2009) Fostering security? A meta analysis of attachment in adopted children *Children and Youth Services Review*, 31, 410-421; Rushton A, & Dance C (2006) The adoption of children from public care: a prospective study of outcome in adolescence *Journal of the American Academy of Child and Adolescent Psychiatry*, 45, 877-883; Rosenthal JA, Schmidt DM & Connor J (1988) Predictors of special needs adoption disruption: an exploratory study, *Children and Youth Services Review*, 10, 101-117; Smith SL & Howard JA (1991) A comparative study of successful and disrupted adoptions, *Social Service Review*, 65, 248-265. Also see for England the information that: “three quarters of children who experience a disruption were more than 4 years old at placement with their adoptive family. Children who were 4 years old or older at placement

An example of how the Supreme Court determines on permanency grounds what might be the preferable order for a child is contained in *Director-General, Department of Community Services v D and Ors* [2007] NSWSC 762. This citation allows people to locate the entire judgment and an extract from that case relevant to determining permanency is included as an Appendix to this paper.

3.7 Considering adoption in care proceedings

Where the state removes a child from whoever has been caring for the child, the state must put the matter before the Children's Court within three working days (section 45). The Children's Court is to determine that the child is in need of care and protection (section 72) and, if not, the child is to be returned to the previous carers.

Following a determination by the Children's Court that the child is in need of care and protection, FACS makes a casework decision as to whether there is no realistic possibility of restoration to the child's parents. Upon making that decision, FACS puts before the Children's Court the justification for its decision and a permanency plan (section 78A) setting out the long terms arrangements for the child (section 83). To ensure the child is not disadvantaged by undue delay in decision-making, the Children's Court has strict time frames in which to decide on the realistic possibility of restoration (section 83(5)). Long term arrangements are to reflect the permanent placement principles (section 10A) amongst which is the principle that unless the safety, welfare and wellbeing of the child otherwise requires, adoption is preferred as a placement option to the Minister being allocated parental responsibility for all bar Aboriginal and Torres Strait Islander children.

While FACS has the responsibility to place this information before the Court, where a NGO holds case management for the placement the relevant information (if not the actual report) must necessarily come from the supervising NGO. Increasingly, the NGO will therefore need to understand the permanency considerations of a child in OOHC.

The permanent placement principles are that wherever practical a child should firstly be restored to the care of the child's birth family, but if this is not possible

were 13 times more likely to disrupt than those who were placed as infants." Quoted in *Re P (A child: Assessment of Kinship Carers)* [2014] EWFC B73 quoted in Blackmore & Thomas p 230. For further research of less frequency of breakdown the younger the age of the child at placement see: Kadushin A & Seidl F (1971) Adoption failure: a social work postmortem, *Social Work*, 16, 32-38; Barth RP, Merry M, Yoshikami, R Goodfield RK & Carson ML (1988) Predicting adoption disruption, *Social Work*, 33, 227-238.

the preferences and order of consideration are guardianship, adoption and, only as a final option, long time foster care. As discussed above, this order changes where the child is Aboriginal or Torres Strait Islander.

After considering the information and applying these principles, the Children's Court is to both decide whether to accept FACS assessment about the absence of any realistic possibility of restoration and to find that the plan appropriately and adequately addresses permanency (section 83).

Where the Children's Court approves a permanency plan that includes the possibility of adoption, the Children's Court does not make an adoption order but rather approves a permanency plan contemplating an application for adoption being made in the Supreme Court.

Neither of the options for reform that were recently advanced to streamline this process were supported during the related public consultation. They were not therefore included in the subsequent legislation. In particular it had been proposed to grant the Children's Court a power to make adoption orders (rather than re-litigating similar issues in the Supreme Court) and limiting the right of birth parents for future involvement in adoption proceedings before the Supreme Court when their views could be fully considered prior to the Children's Court determining that there was no realistic possibility of restoring the child to them.⁴⁵

Thus, where the Children's Court does find the plan appropriately and adequately addresses permanency this neither precludes nor facilitates the bringing of an adoption application to the Supreme Court. In response to each adoption application the Supreme Court must independently determine whether adoption is the clearly preferred option for the child⁴⁶ and if it decides it is not, may make other orders including allocating parental responsibility to the Minister.⁴⁷

In adoption proceedings before the Supreme Court, that court must find that adoption is 'clearly preferable' to other orders. The Supreme Court has said that this requires "something more than a slight preponderance of consideration in favour of adoption over the alternatives." This does not require satisfaction "beyond reasonable doubt" but instead that adoption be "obviously, plainly or manifestly preferable to any other action that could be taken by law."⁴⁸

⁴⁵ Department of Family and Community Services (2013) *Safe Home for Life: report on the outcomes of public consultation on the child protection legislative reforms discussion paper 2012* (Sydney, Department of Family and Community Services) pp36-37, 41-44

⁴⁶ *Adoption Act 2000*, section 90(3)

⁴⁷ *Adoption Act 2000*, section 92

⁴⁸ *Department of Community Services v D* 37 FamLR 595 at [25].

Whether adoption should be considered as an option for a child will therefore currently arise once the decision has been made that there is no realistic possibility of restoration of that child to the child's parents. After this, the question of permanency will again arise under contemporary practice in considering the permanent care plan; in any decision to make an adoption application, and in deciding (as part of the process to obtain an adoption order) that adoption is the clearly preferred court order to be made.

Apart from contributing to knowledge about permanency for the designated agency supervising the OOHC placement and at the various stages of court proceedings the institute may also be commissioned to research whether current practice is as effective as it might be.

3.8 The institute needing to understand the limited uptake of adoption from out-of-home care

Notwithstanding legislation and practice requiring a consideration of permanency and despite the research evidence on the potential for children to benefit from open adoption, the number of children in out-of-home care who are adopted remains low. This is an important motivation for establishing the institute.

Between 2013 and 2014, 89 such adoptions occurred across Australia.⁴⁹ 82 of these 89 adoptions occurred in NSW. While NSW is a leader in progressing out-of-home care adoption in Australia it has been suggested that the reason for low numbers even in NSW might include such matters as the acknowledged detrimental impact of past adoption practices, including the forced removal of Aboriginal and Torres Strait Islander children from their families and the forced adoption of children born to young unwed mothers.⁵⁰ It has been suggested that this history has created reluctance among child protection practitioners to consider adoption as an alternative to long term foster care.⁵¹

A review commissioned by FACS concluded that:

“There is a lack of strong messaging across the organisation with regard to adoption and its place within the permanency planning continuum. Feedback from FACS stakeholders indicated that many caseworkers do not fully

⁴⁹ AIHW 2013

⁵⁰ Ainsworth F & Hanson P (2006) Five tumultuous years in Australian child protection: little progress *Child and Family Social Work*, 11, 33-41

⁵¹ Tregeagle S, Cox E & Moggach L (2012) Are we adequately considering children's rights to a family? The importance of open adoption to young people in long term care *Developing Practice*, 31, 64-69.

appreciate or understand the benefits of adoption, and there is some negativity (at all levels of the organisation) toward adoption which impacts practice and decision-making.

Despite adoption being a permanent care option, feedback suggests that adoption is not routinely considered during post-placement reviews, and the option to adopt is not addressed early with birth parents or carers. A number of factors, including staff skills and values contribute to this.

Historically practices such that led to the Stolen Generation and forced adoptions mean that, anecdotally, the potential benefits of adoption for children in out-of-home care (OOHC) are not well understood by the wider community. This is reinforced by general media coverage and personal experiences of adoption in the public domain.”⁵²

International research⁵³ has identified a number of beliefs which appear to be commonly held and may hamper the use of open adoption as a matter for consideration. These ‘myths’ included:

- both birth and adoptive parents will be confused about their respective parenting rights and responsibilities
- birth parents will not get to see their child again
- birth mothers will seek to reclaim their child
- children will be confused as to who is their parent
- children will have difficulty forming relationships with their adoptive parents.

To assist in planning and practice in this area both FACS and Adopt Change have coincidentally, and separately, commenced research on aspects of knowledge and attitudes to adoption. This research may assist in informing the work of the institute.

⁵² KPMG (2013) *Review of Out-of-Home Care Adoption Arrangements* (Sydney, author) pp20-21

⁵³ Child Welfare International Gateway (2013) *Fact sheet for Families: Openness in adoption: building relationships between adoptive and birth families* (Washington, author)

4 Appendix

4.1 Rates of children in out-of-home care (NSW)

The following provides some indicative data on the population of children in out-of-home care.

As set out above, it is expected that children who might be suitable for adoption will come from the out-of home care population of children and young people who are neither Aboriginal nor Torres Strait Islander. Data currently held may not permit a clear understanding of the size of the out-of-home population of children suitable for adoption and this is reflected in the material that follows

Table 1 provides an indication of the size of the relevant out-of-home-care population and the fluctuations in the size over time. The majority of these children would not be considered for adoption because they:

- are only subject to short term care orders
- have care plans which specifically address disabilities where alternatives to adoption are appropriately considered
- have contact needs, such as with siblings, which render adoption inappropriate
- are of an age where adoption is less likely to be appropriate
- have not yet established at stable placement conducive for adoption
- are settled in a placement with family and so adoption may not be appropriate
- carers or the child do not want adoption
- carers do not meet the criteria to be 'approved as suitable to adopt'.

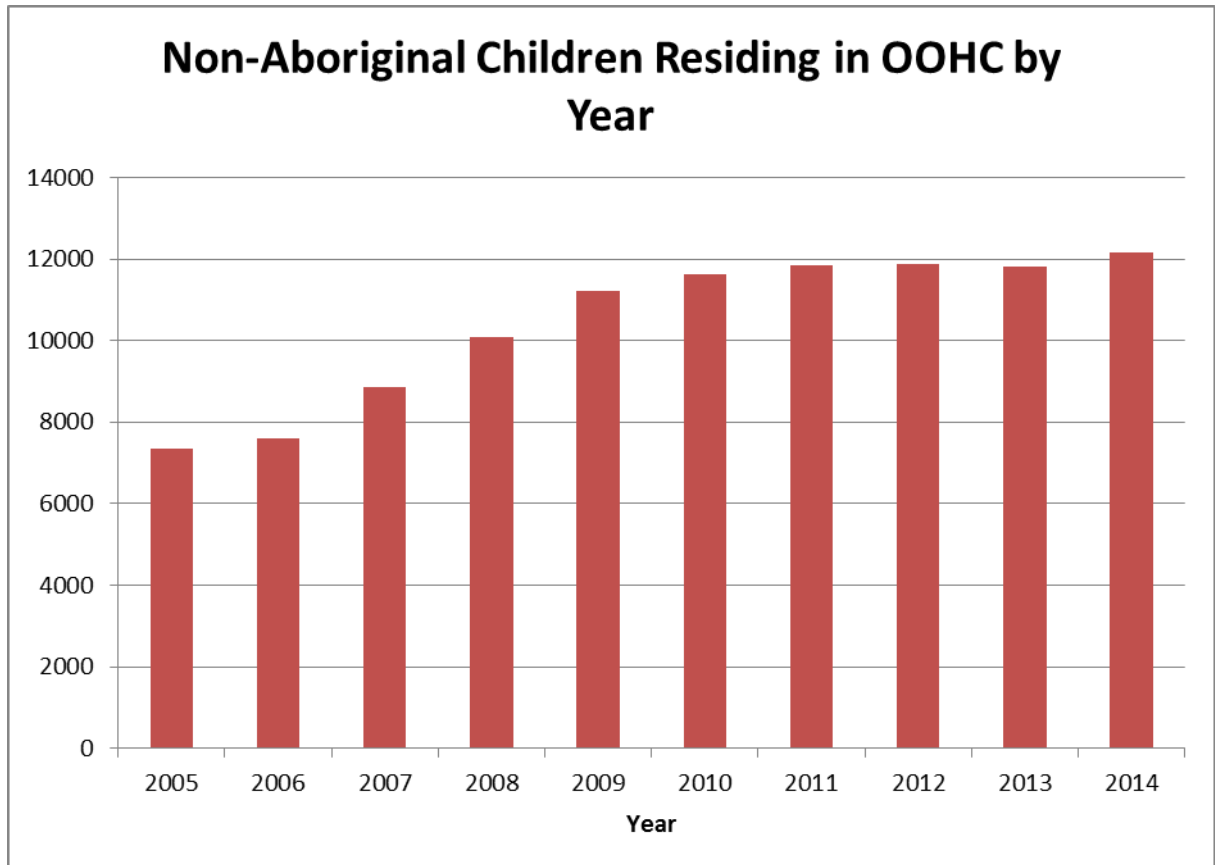


Table 1: The total number of children/young people who were not Aboriginal or Torres Strait Islanders but who were in OOHC for each of the last 10 years

One of the significant recent changes in out-of-home care has been the shift of service provision from FACS to the non government sector, as highlighted in Table 2. It is unknown if this change will affect the number of children and young people in out-of-home care being adopted.

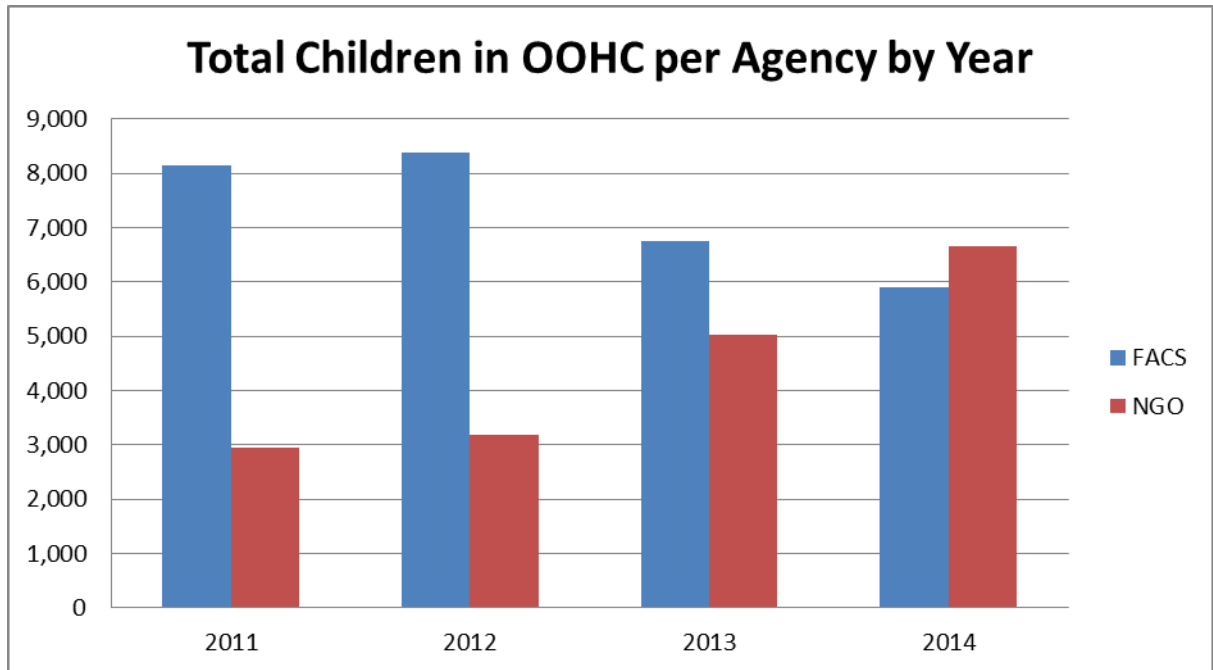


Table 2 : Comparison of the breakdown between FACS and non-government organisations who were the supervisory designated agency for all children/young people in OOHC for each of the last 5 years

As indicated elsewhere in this paper, the institute may undertake applied research on why children entering out-of-home care are not being considered as suitable for adoption. This research may highlight bottlenecks in the adoption process and inform evaluations. The research may need to understand why children enter out-of-home care.

Table 3 shows the total number of children and young people entering out-of-home care. It shows all children and not just those suitable for adoption. In particular Aboriginal and Torres Strait Islander children are included due to difficulties in extracting their numbers.

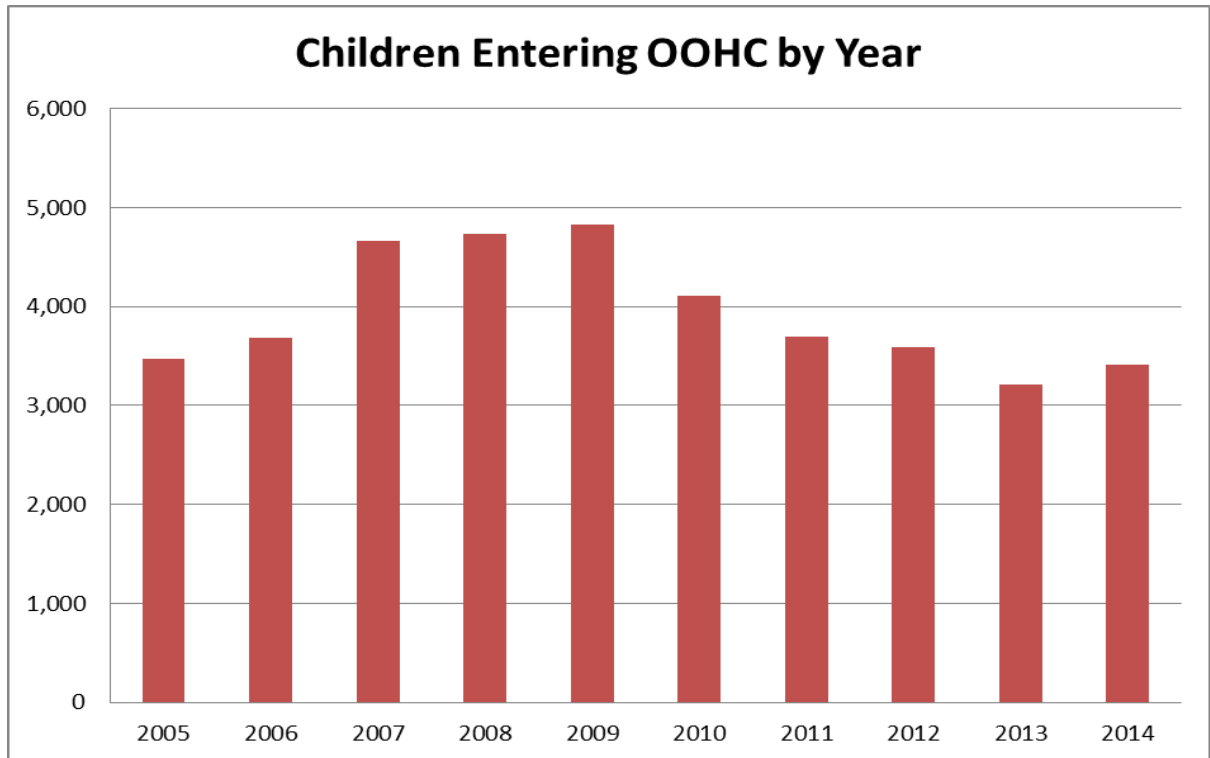


Table 3: All entries of children or young people into OOHC per year for each of the last 10 years

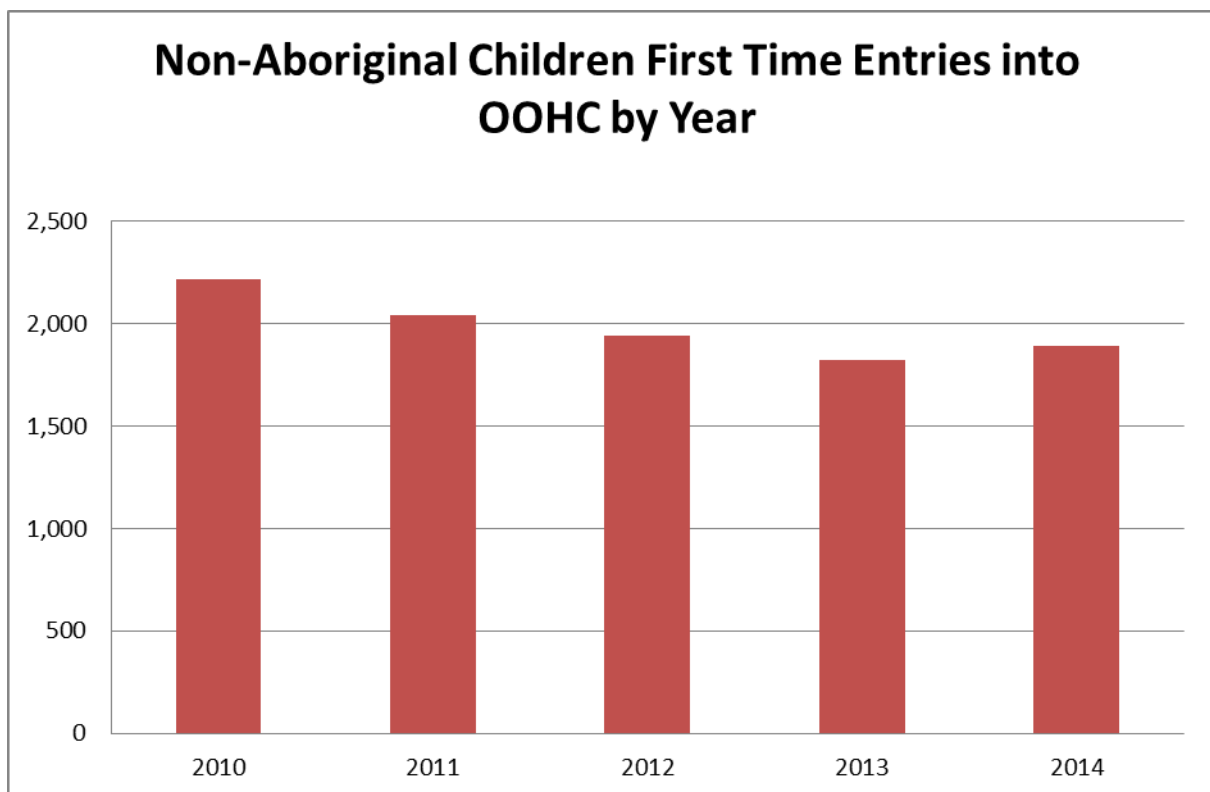


Table 4: First time ever entries of children and young people who are neither Aboriginal or Torres Strait Islanders into OOHC per year for each of the last 5 years

The available data does show the number of non-Aboriginal or Torres Strait Islander children that who entered out-of-home care for the first time.

Research may be able to establish the correlation between such matters as entry into care and failed restoration to birth families or the possible impact of the direction of care orders and the impact of these question on possible adoption.

Current data does not clarify the precise scale of demand for adoption services nor the workload of the proposed institute. Without further work this information must be interrogated before any assumptions can be drawn about the proposed institute, its prospective work and the nature of the populations to be researched and services provided for. The tables do demonstrate the need for additional research into open adoption to be undertaken by the institute.

4.2 Case study: Consideration of parental options

This extract is from the judgment of His Honour Mr Justice Brereton in *Director-General, Department of Community Services v D and Ors* [2007] NSWSC 762.

It illustrates how evidence-based analysis has been used when determining whether adoption is the clearly preferred permanency option for a child. In support of a FACS application, the expert evidence of Professor Selwyn, cited studies that supported open adoption as an approach to achieving permanency.

The case concerned a child from a particular cultural background. The adoptive parents were not of the same cultural background nor had they ever lived in it. During the course of the various court proceedings the mother sought to maintain closer connections with her child than had originally been planned. This extract concerns the part of the judgment in which his Honour discusses the parental options that might be available and why.

“Ms Selwyn⁵⁴ was asked to express an opinion on the respective benefits of adoption and foster care. Her view was that where the aim was to provide a family for life, adoption was preferable, and that research showed that adoption was more stable, produced better psychosocial outcomes for children, and was

⁵⁴ Ms Julie Selwyn (as she then was) was Director Hadley Centre for Adoption and Foster Care Studies, School for Policy Studies, University of Bristol (United Kingdom)

far more likely to provide support for the transition to adulthood. She referred to research showing that when asked, children preferred adoption because it gave them a greater sense of belonging (Triseliotis, 2002), and that the relationship between foster parents and children was influenced by insecurity (Bohman & Sigvardsson, 1990, p105). Her own study (Selwyn, 2006) of the care histories and placements of 130 children all thought suitable for adoption, but not all of whom were placed for adoption, showed that over time, adoptive placements were far more stable than long term foster care placements; and children were far more likely to report that they felt close to and able to confide in adoptive parents than was the case with foster parents. Ms Selwyn explained that the research tended to show that children placed in foster care without the security of an adoption order were left anxious and uncertain about their future, as were their carers, and the impermanency of the situation left those involved wondering what would happen next. The children felt that they belonged to nobody, having a different surname from the adults with whom they resided. This extended to the circumstances of “open adoption”

Q. ... the studies that you have referred to about the comparative success of adoption and long term foster placements, in those studies have cases in which there has been a birth parent on the scene and keen to be involved featured in those studies to any extent?

A. Yes. In my own about a quarter of the children who were placed for adoption, and similarly the foster care group, had contact with birth family members.

When asked whether an adoption order would be appropriate in a context where a hypothetical possibility was that the child might live with Mr and Mrs F but have increasing contact with D, and in adolescence decide that she wanted to live permanently with D, she answered that for a child as young as E the benefits of an adoption order - even if there were such a change in adolescence – would be the stability at an earlier age which would position her to make such a decision later. She gave this evidence

Q. Wouldn't making an adoption order put a further mental or notional obstacle in the way of a relationship between E and D by removing D as a legal parent?

A. That is a possibility, Your Honour, but it may also make the situation much clearer to the parties. It may remove any ambiguity

Ms Selwyn says that parental responsibility without adoption would not give the adoptive parents enough legal and emotional security to parent effectively, and that the potential for future legal challenges would leave them unsure of the future, which could lead to them pulling back from the commitment and

unconditional love that typifies successful adoptions. Ms Selwyn explained that the adopted child's greater sense of belonging was associated with a sense of "this being their place in the world, their home, and their family"; and the corresponding sense of the adoptive parents that this child was theirs, so that all were confident that the child would remain with the adoptive parents, who would be able to parent the child. All this was productive of relatively high self-esteem, at least when compared to children who are fostered.

When asked how and at what age the child could cope with the knowledge that Mrs F was her mother and D was her biological mother, Ms Selwyn said that this happened gradually; she pointed out that in today's society many children had to cope with quite complicated arrangements following divorce and re-partnering, and that children were very able to understand different relationships and who was who: it was the quality of the parenting that influenced the outcome, and it would not be helpful if the birth parent could not accept or tried to undermine the status of the adoptive parents. She thought that the legal status and authority of being adoptive parents would better equip Mr and Mrs F to manage and cope with ongoing contact; where as if they were not adoptive parents they may never feel really secure in their own parenthood, but always fear a further legal challenge and return to court.

Ms Prevatt Goldstein⁵⁵ thought that the value of adoption as opposed to a parental responsibility order was not so clear, and that a parental responsibility order could work, as could adoption, in the appropriate circumstances.

Dr Robinson⁵⁶ explained that in recommending that "the open adoption be re-instated", she had not considered or intended to convey anything as to a preference between parental responsibility and adoption, and that what she intended was that E should live with Mr and Mrs F and have contact with D. But she added that while she had not thought about the scenario of the child living with the F's without them being her legal parents, her understanding was that parents felt more secure when they have a legal order, and the child who is officially adopted will often feel more secure also. She mentioned Mr F's stated opposition to "a shared parenting arrangement" as indicative of the insecurity of Mr and Mrs F as parents if they did not have a legal order. However, it also illustrates that Mr and Mrs F's perspectives and wishes are, in this context, understandably, connected with the fulfilment of their own perceived need to feel secure as parents.

Dr Robinson was asked what were the implications for E if she lived with Mr

⁵⁵ Ms Beverley Prevatt Goldstein had studied, taught and published on race and ethnicity in child care and placement

⁵⁶ Court appointed expert

and Mrs F, understood them to be her mother and father but also came to understand that D was her mother

Q. ... can she comprehend that and is there an age limit at which she could if she can't do it now?

A. I am sure she could – she can, or would comprehend it. I think children who are adopted – other children who are adopted can comprehend that notion.

Q. What age?

A. Look, I think I might have to pass on that one as well. I am not sure.

B. Dr Robinson agreed with Ms Cleary's⁵⁷ suggestion that Mr and Mrs F would be better able to countenance E spending time with D, especially in adolescence, if they were very secure in their legal position with E, whereas if they experienced D as a rival parent then they might "shut down and withdraw", as had been seen in some of their behaviours in the last couple of years during the pendency of the litigation.

When asked whether someone in E's position was able to cope with the concept of having two mums, Professor Katz⁵⁸ said:

That is a very difficult question for me to answer. I think again my answer must be that that depends on how these issues are dealt with by the adults in her life. Because I think that if there is a situation of constant conflict, then obviously that's one situation. But if the adults are able to get together and form some sort of coalition around her, then I think that that obviously would be a positive thing from her point of view. And that would be similar to a divorce situation, a reconstituted family.

On this issue, the evidence supports the following propositions. *First*, an adoption order is permanent; a parental responsibility order may be varied, although usually a significant change of circumstances will be required to justify re-opening the issue. Because of the permanence of an adoption order, the parents are likely to feel more secure and perhaps more committed to the child than if they entertain a concern that there may be a future legal challenge, which might cause them to hold back from the unconditional and unreserved commitment that is a feature of successful adoptions. In this way, the security afforded by an adoption order is in the interests of the child as well as the

⁵⁷ Ms M Cleary was Counsel for the child representative

⁵⁸ Professor Ilan Katz was Acting Director, Social Policy Research Centre, University of New South Wales

parents. *Secondly*, the security of an adoption order may provide a firmer basis for the adoptive parents to be supportive of contact between the child and the natural parent. *Thirdly*, on the other hand, an adoption order represents a permanent legal severance of the relationship between natural parent and child, which a parental responsibility order does not. This may reduce the prospects of the child growing a strong relationship with the natural parent, and exacerbate the identity confusion issues that the child may encounter, particularly in adolescence. *Fourthly*, children can and do cope with complex family relationships, involving multiple parenting arrangements, as is evident in circumstances that follow divorce and repartnering.”⁵⁹

⁵⁹ *Director-General, Department of Community Services v D and Ors* [2007] NSWSC 762 (13 July 2007) per Brereton J.