

Changes to the Children and Young Persons (Care and Protection) Act 1998 (NSW)



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Liz Snell on 15 December 2014. This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- Jurisdiction
- Permanent placement
- Guardianship orders
- Parent responsibility contracts (PRCs)
- Parent capacity orders (PCOs)
- Legislated timeframes

Jurisdiction

There are two jurisdictions in Australia where decisions about children can be made, It's important to know that depending upon how early your clients get legal advice may determine which jurisdiction they can access, refer your clients for free legal advice as early as possible. The jurisdictions are:

1. Children's Court

- In Australia, the power to make laws and decisions about the care and protection of children is generally given to the States and Territories. The Children's Court deals with disputes between the State and families
- In NSW, Care and Protection proceedings come about because:
 - (a) The Department of Family and Community Services (FaCS) have **concerns** for the **safety, welfare and wellbeing** of a child or children.
 - (b) FaCS considers a child is in need of protection and they may remove the child due to **exposure to or risk of exposure to harm**
- It is up to the Children's Court whether a child should be removed from their family whether temporarily or permanently, for how long, how much contact the child has with their birth parents while in out of home care and who has parental responsibility for the child

2. Family Court or Federal Circuit court

- In the family law jurisdiction, parents, grandparents or any person concerned with the care, welfare or development of the child can seek parenting orders in the Family Court or Federal Circuit Court.
- Orders can include no contact orders or supervised contact orders - where such orders will protect children from harm

Practical tip! Community workers can provide evidence to support a family law application seeking no contact or supervised contact. Support clients to stay in the Family Law system if possible

Legislation

- The current relevant legislation in NSW governing Care and Protection is *Children and Young Persons (Care and Protection) Act 1998* (NSW)
- **'Safe Home for Life'** reforms to the legislation came into effect on 29 October 2014

The 2014 Safe Home for Life reforms

Aims

- Permanent placement of children with an emphasis on early intervention to support parents so children can remain with their families
- Increase parental accountability
- Increase parental capacity

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Focus of the reforms:

- Permanent placement of children and early intervention to support parents so children can remain with their families
- Alternative dispute resolution
- Access to early intervention services to build parental capacity

Practical tip! It's important to be help call for adequate funding of early intervention services so we don't set parents up to fail. You can do this by writing to the Premier or the Minister for Family and Community Services, Minister Upton or your local MP. See, www.parliament.nsw.gov.au/prod/parlament/members.nsf/V3Home

What do the reforms change?

The reforms remove:

- Presumption child is need of care when a parent breaches a Parental Responsibility Contract (PRC)
 - Previously parents have been reluctant to sign parent responsibility contracts because before the changes to the law once a PRC was breached, a contract breach notice was filed at court and there was a presumption the child was in need of care – the matter would automatically go to court and then the parents would have to argue why their child was not in need of care
 - Under the new law, this presumption has been removed. However, depending upon the seriousness of the breach, it is still possible for the matter to go straight to the Children's Court

The reforms add:

- Hierarchy of permanent placement principles
- Parent Capacity Order (PCO): a new type of early intervention order
- Guardianship orders
- Focus on early intervention & better collaboration between FaCS, NGOs & families to keep kids safe & at home
- Legislated timeframes

Hierarchy preferred placement

The Permanent Placement principles (s10A)create a hierarchy of preferred placement:

- 1) The first priority, if it is practicable and in the best interests of the child is to restore the child to his/her parents to preserve the family relationship.
- 2) If that is not practicable or in the best interests of the child, the next option is guardianship.
- 3) If that too is not practicable or not in the best interests of the child of the child the next option is adoption , except for Aboriginal and Torres Strait Islander children for whom this is a last resort
- 4) Finally, if that's not practicable or in the best interests of the child, generally the last resort is parental responsibility to the Minister – that is except for Aboriginal and Torres Strait Islander children.

Aboriginal and Torres Strait Islander Children under the reforms

- The Aboriginal and Torres Strait Islander placement principles continue to be a significant part of the legislation and now also apply to the new guardianship orders
- There are also new definitions for 'relative' and 'kin' which are particularly relevant to the new guardianship orders
- Before the changes to the law it was possible for Aboriginal and Torres Strait Islander children to be adopted. Given the new hierarchy of permanent placement principles, adoption is only a last resort for Aboriginal and Torres Strait Islander children

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- It is therefore important that children who are Aboriginal or Torres Strait Islander are properly identified. An Aboriginal or Torres Strait Islander child is defined differently under the child protection system to under family law
 - In the Child Protection system, the definition of 'Aboriginal person' is taken from the Aboriginal Land Rights Act 1983. Its defined in a 3 prong test, the person must be 1) a member of the Aboriginal race 2) who identifies as Aboriginal and 3) who is accepted by the Aboriginal community as an Aboriginal person (s4)
 - This is compared to in family law where the definition is far more flexible and an Aboriginal child this defined as a child who is a descendent of the Aboriginal people of Australia (s4)

Practical Tip! Include a question on your intake form asking parents if they identify as being Aboriginal or Torres Strait Islander. If there are issues around proving a child is Aboriginal or Torres Strait Islander, help your client with advocacy or refer them to Link Up NSW, the Australian Institute of Aboriginal and Torres Strait Islander Studies or the (Family Records Unit) of Aboriginal Affairs NSW who may be able to assist:

- Link Up NSW: www.linkupnsw.org.au
- AIATIS: www.aiatsis.gov.au
- Family Records Unit, Aboriginal Affairs NSW: www.aboriginalaffairs.nsw.gov.au/about/family-records-unit

Guardianship orders (s79A)

- A “guardian” is someone who has been allocated parental responsibility in all aspects for a child who is in out of home care or found to be in need of care and protection. They are allocated parental responsibility until the child turns 18
- Guardianship orders:
 - Must abide by Aboriginal and Torres Strait Islander placement principles
 - If a child is 12 years of age or older and capable of giving consent, consent of child is required
 - Can allocate guardianship jointly to more than one person
 - Can only be made as a final order
 - All parties must have a reasonable opportunity to get independent legal advice

Parent Responsibility Contracts (PRC) (s38A)

- Before a Care Application is made to the Court, FaCS are able to enter into a PRC with parents of children they believe may be on track for a Care Application. PRCs are not new, and are intended to improve parenting and parental accountability
- PRCs need to be signed by all parties and registered with the Children’s Court
- Parents must be given reasonable opportunity to obtain independent legal advice
- PRCs last for a specified period – not exceeding 12 months (used to last for a maximum of 6 months)
- PRCs can force a parent to attend a course
- So as not to set parents up to fail it’s important that PRCs are:
 - Clear
 - Realistic and achievable – need input from the parent or primary caregiver
 - Time bound or tied to a specific event
 - That the services exist and are available – ie, there’s no waiting list so parents/primary caregivers can engage with services immediately
 - The service is culturally safe and trauma informed (especially given many care and protection matters involve domestic violence)
 - The service is accessible – transport and child care may be required

Practical tip! In keeping with the spirit of the ‘early intervention’ reforms, make an early referral for your clients to obtain legal advice from WLS NSW or another free legal service.



Parent Capacity Orders (PCO) (s91E)

- A PCO is an order requiring a parent or primary caregiver to attend a program, service, course, therapy or treatment
- A PCO may be made whether or not a care application or care order has been made – ie, it can be a stand alone order or it can be made at any stage in care proceedings
- A PCO can be made by consent and can be made following an alternative dispute resolution process. They can also be imposed by the Court and there is an appeal mechanism
- A PCO has effect for a specified period of time or by reference to a specified future event
- A PCO can be varied or revoked if there has been a significant change in any relevant circumstances since the order was made
- The Children’s Court can make a PCO in relation to a parent or primary care-giver of a child if satisfied:
 - (a) There is an identified deficiency in parenting capacity that has the potential to place the child at risk of significant harm and it is reasonable and practicable to require the parent/primary care-giver to comply with an order; and
 - (b) The parent/primary care-giver is unlikely to attend or participate in the program, service or course or engage in therapy or treatment required unless the order is made

Legislated timeframes (s83)

A decision about realistic possibility of restoration of the child to his/her parents must be made (s5):

- **(a)** when the child is **less than 2 years old, within 6 months** after the Children’s Court makes an interim order allocating parental responsibility to a person other than the parent.
- **(b)** when the child is **over 2 years old, within 12 months** after the Children’s Court makes an interim order allocating parental responsibility to a person other than the parent.

There is discretion for the court to allow more time – having regard to the circumstances of the case and the best interests of the child.

Practical tip! Be aware of the legislated timeframes so you can refer your clients for free legal advice as early as possible!

Referrals

- Ask LOIS past webinars/factsheets at www.asklois.org.au:
 - FaCS and Child Care and Protection Basics
 - Restoration Orders
- LawAccess: **1300 888 529**
- Women’s Legal Services NSW: **8745 6988**
- As part of the reforms, Legal Aid, Community Legal Centres and the Aboriginal Legal Service have been funded to provide early legal advice in care and protection matters. More information will be available about these services in 2015