

29 March 2019

Adoptions Taskforce
Community Services Directorate
Human Services Policy
GPO Box 158
Canberra ACT 2601
By Email: adoptionstaskforce@act.gov.au

Dear Taskforce Members

DISPENSING WITH CONSENT DISCUSSION PAPER

Thank you for the opportunity to provide this submission to the Dispensing with Consent discussion paper.

The Women's Legal Centre ACT is a specialist legal service based in Canberra, providing legal and non-legal support to Canberra's most vulnerable women. We provide free advice, assistance and, in some instances, representation to women about a range of issues concerning family, Victims of Crime, discrimination and employment law. In providing these services we are often involved in advising on issues regarding the children of the women we support, and we are strongly committed to protecting the best interests of these children, who like their mothers are often in vulnerable situations.

In particular, the Women's Legal Centre has had a long history of working with Aboriginal and Torres Strait Islander women in contact with the Child Protection system, including mothers, Aunts, Grandmothers and kin who care for children in need of assistance when their biological parents are unable to provide it. This is particularly the focus of the Women's Legal Centre's Mulleun Mura - Aboriginal and Torres Strait Islander Women's Access to Justice Program. This submission is informed by our deep experience as practitioners in the field and the experiences of our clients and their families.

About Mulleun Mura

Mulleun Mura is an Aboriginal woman-led service offering culturally appropriate law and justice services for Aboriginal and Torres Strait Islander women in the ACT. It is the only civil law and justice service dedicated to Aboriginal women and subsequently, their families, in the ACT and surrounding region. It is a culturally safe service for Aboriginal women in the ACT and surrounding region to access wraparound law and justice services using a strengths-based approach.



Thanks to the Aboriginal professionals amongst us, we have deep organisational understanding of how Aboriginal and Torres Strait Islander people are affected by intergenerational trauma and how generations of Aboriginal people have been taken from their families and communities by non-Indigenous people making decisions without adequate cultural sensitivity and knowledge. We recognise Aboriginal children are too often placed in care outside their families and communities, rather than families being adequately supported to stay together, and that system-wide changes are required to improve this.

Thank you for the opportunity to contribute to this discussion.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Kath Taplin', with a horizontal line above it.

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PRELIMINARY COMMENTS

The Women's Legal Centre believes that there are several underlying assumptions in the discussion paper that must be acknowledged before proceeding to consider the questions posed.

Firstly, a key focus in the discussion paper is the effect of these laws in relation to children in out-of-home care. The consequence of this is that any decisions made when considering these children would disproportionately affect children from Aboriginal and Torres Strait Islander communities. Children from these communities are significantly overrepresented in out-of-home care, with the most recent figures from the Australian Institute of Family Studies¹ and the Australian Institute of Health and Welfare² indicating that 90.1 out of 1000 Indigenous children in the ACT were in out of home care at 30 June 2017, compared with 6.5 out of 1000 non-Indigenous children on that same date. Because of this overrepresentation, it is essential to ensure particular consideration is given to the interests of these children and their communities in considering potential reforms. This is especially critical considering the existing history of removing Aboriginal and Torres Strait Islander children and the devastating impact of the Stolen Generations on these communities.

Secondly, the paper focusses on adoption without addressing other legal mechanisms that serve similar functions. Historically, adoption was one of the only means by which a person who was not a birth parent could exercise parental rights over a child. In modern times, there are a range of mechanisms that enable a person who is not the birth parent to exercise parental rights over a child, including Parenting Orders under Part VII of the *Family Law Act 1975* (Cth) and enduring parental responsibility provisions in Care and Protection Orders under Part 14.6 of the *Children and Young People Act 2008* (ACT). Unlike adoption, these mechanisms do not have the effect of removing the name of a birth parent from the child's birth certificate and other legal documents. This may have a practical benefit of enabling a child to easily identify a birth parent, such as to find information on the child's family medical history. It would also retain the child's legal entitlements in relation to their birth family, including in relation to property, estates and citizenship. But it may also serve an important social function as a record of the child's connection to their birth family, which may be important to the child's sense of identity later in life.

It is understandable that potential adoptive parents would see adoption as desirable given the social recognition of parenthood that is associated with adoption. But while this social recognition may benefit the potential adoptive parents, **there does not seem to be anything specific about adoption that would necessarily safeguard the best interests of the child more than other legal mechanisms for obtaining parental rights.** Because of this, it may be beneficial to educate potential adoptive parents of the alternatives to adoption, especially at the time that adoption is being considered, to ensure that the mechanism chosen truly reflects the best interests of the child.

¹ See <<https://aifs.gov.au/cfca/publications/children-care>>.

² See <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2016-17/data>>.



Thirdly, where adoption occurs in the context of out-of-home care, this will often result in the end of monitoring by CYPS. **While this may be a benefit from an administrative perspective, this may also place the child at increased risk in some circumstances.** For example, if a child has been having contact with their birth parents or other members of their birth family that has been facilitated by CYPS, after adoption there is no legal basis to prevent the adoptive parents from cutting off or reducing contact with the family. This may damage the child's relationship with their birth family and may traumatise them or damage their connection to their community or culture.

Lastly, while the paramount consideration in adoption matters should be the best interests of the child, it is important to remember that the adoption process can be a traumatic one for the birth parents. Often the birth parents of children in out-of-home care are socially disadvantaged and may have an existing history of trauma themselves.

The Women's Legal Centre works with many women who have not been able to provide proper care of their children because of domestic and family violence or separation from a partner. These women are usually in a position of socio-economic disadvantage. Often, they are not aware of their legal rights and require assistance to properly advocate for their interests and their children's interests. This is particularly the case with Aboriginal and Torres Strait Islander women who are often mistrustful of government departments because of injustices perpetrated against them and their families.

It is important to consider these disadvantages and how the adoption process may compound issues for these women and their children, in particular. Even in cases where a woman consents to the adoption process, the potential for abuse if her position of disadvantage may mean that she feels that she has no option but to consent. This is particularly the case when community legal centres and Legal Aid are unable to assist women in these cases due to a lack of funding for such cases. These issues become even more important when a woman does not give her consent and an application is being brought to dispense with consent.

QUESTION ONE: How should the circumstances of children in out of home care influence the grounds for dispensing with consent?

The fact that a child is in out of home care should not itself influence the grounds for dispensing with consent.

Although factors that resulted in the child being in out-of-home care may also be relevant to whether it is appropriate to dispense with consent, this should not be presumed. Some factors that lead to children being in out-of-home care may be temporary, while others may be longer term or entrenched. There may be different causes that require additional services or support to properly resolve. Because of this, each factor should be considered individually taking into account the best interests of the child.



Additionally, the relationships that form between children and their carers in an out-of-home setting are often complex. Even in circumstances where the carers have formed a close bond with the child, this does not necessarily mean that it is in the interests of the child to formally sever legal connection with their birth parents. Similarly, even though a child has a better bond with their carer than their birth parents, this does not necessarily mean that the child would not have a better bond with another member of their family or community.

This is particularly an issue for children from Aboriginal and Torres Strait Islander communities, where the child may have been placed with a family outside their community due to a temporary unavailability of kinship carers, or an initial failure to properly assess the child's Aboriginality and identify and assess kinship carer options. (We at Women's Legal Centre have worked on a number of such cases.) Because of this, if out-of-home care is presumed to be a relevant factor, there is a risk of unnecessarily separating a child from their culture and community. While the relationships a child forms while in out-of-home care may be relevant, there should not be any assumptions made about these relationships just because of these circumstances.

QUESTION TWO: How should grounds for dispensing with consent reflect contemporary language, particularly with respect to a person's capacity to consent?

In relation to a birth parent's capacity to consent, this should reflect the tests used in relation to other legal capacities, such as the capacity to engage legal counsel or to form a testamentary intention. These existing legal tests are already strictly construed, and this is particularly appropriate in this context because dispensing with consent is a significant violation of a person's parental rights that must be justified by the circumstances. A failure to do this would result in an unnecessary violation of the person's autonomy.

Because of this, it is not appropriate to refer to the person's physical capacity in this regard, as a person may have extremely limited physical capacity and may still be mentally capable of giving consent. Similarly, a person may be suffering from mental illness or have a neurological disability that affects their day-to-day life but does not affect their capacity to give consent. The danger of the language in s 35(1)(b) of the *Adoption Act 1993* is that by including a reference to the physical or mental condition of the person, the focus is on the person's disadvantages rather than their capacity to consent. This runs the risk of conflating the two, and so the wording of the test should be focussed on the person's capacity to consent and not on particular causes.

QUESTION THREE: How should the capacity to care for and protect a child or young person be considered in an adoption proceeding?

The capacity to care for and protect a child is a relevant consideration in adoption proceedings, but it should be approached in the correct manner and should not be given undue weight.

In assessing this capacity, it is important not to prescribe any form of test that directly compares the capacity of the birth parents to those of the proposed adoptive parents. Often families that



volunteer to take children in out of home care are those who are already financially and socially well off. These families then generally receive a range of services and supports to care for the child. By contrast and as discussed above, most of the birth parents, and particularly mothers, whose children are in out of home care have themselves come from disadvantaged backgrounds. They have often not been eligible to access the kinds of services and supports that are provided to carers. Because of this, a direct comparison of the capacity to care for and protect a child would almost always put the birth parents at an unfair disadvantage.

We would recommend that the following steps be taken when considering the capacity of the birth parents to care for the child:

- Identification of the factors affecting the ability of the birth parents to care for the child;
- Identification of the causes of these factors, including whether there are multiple causes;
- Consideration of whether appropriate resources are available to assist the birth parents to overcome these factors;
- Consideration of whether the birth parents have made appropriate use of the resources available to them, or otherwise demonstrated effort to address the issues; and
- Assessment of the likely duration of these factors.

These steps should then be considered holistically. For example, the Women's Legal Centre has worked with a number of women dealing with drug and alcohol dependency that has affected their ability to care for their children. A key difficulty faced by these women is accessing services to treat this dependency at the appropriate time. The demand for treatment services far outstrips supply and women are often not able to access services in a timely manner, if ever. This can extend the duration of the dependency and can make it harder to treat in the long term. However, it would not be fair to take this into account because ultimately it is outside of the woman's control when these services will become available.

QUESTION FOUR: In what circumstances is dispensing with consent justified?

The circumstances for dispensing with consent should be limited to extreme circumstances where the best interests of the child would clearly be served by dispensing with consent.

An example of this is where the birth parents or birth family cannot be located and are unlikely to be located in the future. In these circumstances, it will generally be in the best interests of the child to be adopted. It is important to note though that in many communities within Australia, parents are not considered to be the only people with caring responsibilities in relation to children. For example, other birth relatives such as their grandparents, aunts and uncles, or cousins, may not necessarily be aware of the existence of the child, but may be willing to take on the care of the child if contacted. Because of this, **this ground should include these family members as well as the birth parents**, as adoption may impede a child's ability to locate their extended family in the future.



Similarly, circumstances of violence and abuse may justify dispensing with consent. This would include where lasting physical or psychological damage to the child is likely if the child is returned to or remains with the birth parents. However, it may also include circumstances where the violence or abuse is being inflicted on another person, such as another parent or guardian. The clearest example of this would be where one birth parent has murdered or attempted to murder another parent or guardian. But there may also be less serious forms of violence and abuse that may justify dispensing with consent.

For example, the Women's Legal Centre is aware of a case where a woman left her ex-partner due to stalking and intimidating behaviour towards her and their children contrary to court orders. After she relocated with the children, her ex-partner used his access to the children's records to find the woman's new address and continue to contact and intimidate her. In these situations, where parental rights are being exercised with the sole motive of facilitating abuse, it may be appropriate to allow the court to dispense with the consent of the birth parent that is perpetrating well-evidenced and significant, ongoing abuse.

Dispensing with consent may also be appropriate in very limited circumstances where the birth parent is unable to care for the child or unable to arrange for suitable care for the child in the foreseeable future because of their physical or psychological condition. It is important that in these circumstances the focus is on the child receiving suitable care, rather than on the parent's capacity to personally provide this care. This is because there is a significant risk of this ground being applied in a manner that unjustifiably discriminated against birth parents with disabilities, which is discussed further below in question five.

As for circumstances where it is in the best interests of the child to be adopted by the proposed adoptive parents, the Women's Legal Centre agrees with this in principle. But this depends on the considerations that apply in determining the child's best interests. If these are not appropriately tailored, there is an unacceptable risk of discrimination and injustices not in children's best interests to occur. This is discussed further in question six below.

QUESTION FIVE: In what circumstances is dispensing with consent not justified?

As already discussed above, a key risk in determining the grounds for dispensing with consent is the risk of direct or indirect discrimination against already marginalised and disadvantaged groups. Considering this, there are circumstances that may appear relevant to ensuring the best interests of the child, but which can result in indirect discrimination contrary to the child's short- and long-term best interests.

The first area of risk is relative social and economic advantages. As mentioned previously in question three, it is very common for proposed adoptive parents to be more socially and economically advantaged than the birth parents of children in out of home care. Because of this, relative socio-economic advantage of the proposed adoptive parents when compared with the birth parents would not justify dispensing with consent.



The second area of risk is focussing on the length of time that a child has been separated from their parents rather than on the causes and consequences of this separation. While the length of separation may influence other considerations, such as the child's relationships, it is simplistic and unsafe to use the passage of time to make assumptions about these factors. **It is important that each case is considered on its individual merits.**

Although not raised in the discussion paper is also important that certain reasons for separation are not presumed to justify dispensing with consent. An example of this is where a parent has been imprisoned for an extended period. Where the reason for imprisonment is a crime committed against the child, another family member or a guardian, then this may justify a court to consider dispensing with consent on the basis that there is a risk of harm to the child. But on the other hand, the imprisonment may be totally unrelated to the child and have no bearing on the birth parent's capacity to care for the child. Similarly, where a parent is unable to access appropriate services to develop their parenting skills or deal with personal issues such as drug or alcohol dependence, which may increase the time that they are separated from their children. In these circumstances, **it is important that the social stigmas attached to these kinds of issues are not used to make assumptions about the parent's abilities or relationship with their child.**

The third area of risk is in relation to birth parents with disabilities. As mentioned above, in some limited circumstances this may justify dispensing with consent. However, the mere existence of a disability is not enough to justify dispensing with consent. There are many parents with disabilities who are excellent parents and highly resourceful and creative in meeting their children's needs. This may include utilising the support of family, friends or paid carers where necessary. Therefore, provided that there are no other risks to the child's welfare, dispensing with consent would be totally inappropriate in these cases.

Lastly, dispensing with consent is not justified where strenuous efforts have not yet been made to find culturally appropriate arrangements for the care of the child (which is not a rare occurrence in Australia nor in the Australian Capital Territory), and it appears unlikely that such arrangements will become readily available in the future. This is essential for Aboriginal and Torres Strait Islander children considering the harms already caused to communities by the Stolen Generation. Although the Aboriginal and Torres Strait Islander Child Placement Principle³ has been in effect in the Australian Capital Territory for over 30 years, the numbers of Aboriginal children placed with non-Aboriginal families or inappropriate residential services for Aboriginal youth has increased. **While this is deeply concerning in the context of out-of-home care, it is a critical issue in relation to adoption because of its potentially permanent nature.** Although these considerations are already included in the context of adoption generally under s 6 of the *Adoption Act 1993*, it would be appropriate to include this in the provisions for dispensing with consent specifically. A parent refusing to dispense with consent on the ground that the adoption is not culturally appropriate may be entirely justified, and this should be recognised within the Act.

³ *Children and Young People Act 2008* (ACT) s 513.



QUESTION SIX: What criteria are necessary for the Court to decide an application to dispense with consent?

Fundamentally, an application to dispense with consent requires the Court to consider and balance the interests of all parties, but first and foremost the Court should consider the best interests of the child. Section 60CC of the *Family Law Act 1975* (Cth) sets out a comprehensive list of factors that are relevant to determining the best interests of children, and it may be appropriate to consider these. Some of the most relevant considerations in the context of adoption include:

- The age and development of the child;
- Any history or risk of harm to the physical or emotional wellbeing of the child, or the child witnessing such harm occurring to another member of their family;
- The nature of the relationship of the child to the applicant(s), their birth parents, and any relationships within their birth family or the applicant(s)' family;
- The child's social, cultural and/or religious background; and
- The views of the child (discussed further below in question seven);
- Whether the child would be able to maintain contact with their birth family following the adoption. This would include consideration whether the adoptive parents may limit access to the child's birth family for any reason (financial, logistical, geographical or other);
- The impact the adoption may have on the child's ability to remain connected with their community and culture;
- If the child has been placed with the applicant(s) while in out-of-home care, whether there is any risk by having CYPS ceasing to be involved with the child;
- Whether genuine strenuous efforts have been made to find culturally appropriate arrangements for the care of the child, and whether it is likely that such arrangements will be available in the future; and
- Whether there are any options other than adoption that may be in the best interests of the child.

Secondly, the Court should consider the circumstances of the birth parents, and the birth parent(s), whose consent may be dispensed with, including:

- Whether one birth parent is consenting, and another is not;
- The attitude of the birth family to the proposed adoption;
- The birth parent's capacity to care for the child (as discussed above in question 3);
- Whether the birth parent has demonstrated an intention to maintain a relationship with the child, beyond refusing to give consent, to the extent that they have been able to do so.
- Any potential harm to the birth parent if consent is dispensed with, including the exacerbation of any pre-existing physical or psychological conditions.

Lastly, the Court should give some weight to the circumstances of the applicant(s). However, these considerations should be given less weight than those relating to the birth parents, given that the



applicant(s)' rights in relation to the children are not being challenged in the adoption proceedings:

- Whether the applicant(s) are related to the child;
- Whether the applicant(s) are part of the child's existing cultural community;
- The attitude of the applicant(s)' family to the proposed adoption; and
- Any potential harm to the applicant(s) if the adoption does not proceed, including the exacerbation of any pre-existing physical or psychological conditions.

Expert reports may be required to assist the Court in making its determination in relation to a number of these criteria. In relation to intercultural adoptions, and particularly the adoption of Aboriginal and Torres Strait Islander children, it is essential that the experts selected to prepare the reports be culturally appropriate (and preferably Aboriginal and Torres Strait Islander) if possible. The Women's Legal Centre has worked with a number of such experts, and considers they are accessible in the ACT and NSW and may be accessed further afield when necessary.

QUESTION SEVEN: Should the views of the young person determine the outcome of a proposed adoption, if they are considered sufficiently mature and capable to make decisions about their life?

The views of a young person should not determine the outcome of a proposed adoption. Instead, it is appropriate for the views of the young person to be considered during the adoption process, and the weight placed on their views should be determined by their age, maturity and other factors.

The key issue with allowing a young person to determine the outcome of a proposed adoption is that it is difficult to tell whether they are subject to inappropriate biases in making the decision. Even if the young person is capable of making decisions about their life in general terms, the unusual circumstances that usually precede adoption may mean that they cannot make a properly informed decision. Of particular concern is where a young person has grown up in circumstances of abuse but may not recognise the abuse as that. Instead, the young person may think of their circumstances as normal. This could be because they have not had enough life experience to have an appropriate point of comparison, or because the abuse has been normalised by an abusive person (or both). The young person might even view the abuse as an expression of love or concern for them. This could inappropriately influence their reasoning in deciding whether to go ahead with the proposed adoption. Another concern is that a young person may feel like adoption is preferable to being reunited with their birth parents but may not have been made aware of options other than adoption.

For these reasons that it is more appropriate for the Court to take into account the young person's views, but to retain the ability to apportion the appropriate weight to those views. This may require an expert report into the young person's decision-making ability and any factors that may be inappropriately influencing their decision. Because it may be difficult to distinguish appropriate



and inappropriate factors, it would be essential for the expert chosen to be culturally appropriate to the child.

It would also be appropriate to require the child to be informed of the nature of adoption and alternatives to adoption prior to asking them for their views and ensure that the young person has access to independent legal advice. This is similar to the consultation requirements prior to an adoption order is made⁴ and what must currently be offered where consent to adoption is sought from a parent under 18.⁵

With all of this in mind, we note that if a young person expresses a strong view that they do wish to be adopted (and the proposed adoptive parents agree), they will still be able to proceed with the adoption after they have turned 18 without the consent of their birth parents.⁶

QUESTION EIGHT: How might birth parents be better supported to engage and remain engaged in child protection matters, prior to an adoption proceeding commencing?

There are a number of ways that birth parents could be better supported prior to adoption proceedings commencing.

At the outset, the most helpful step would be to ensure that sufficient support is provided to parents to ensure that they have an **opportunity to develop the required skills and capacities to fulfil their role as parent**. This includes **early intervention programs** to help prevent children being placed in out-of-home care in the first instance. It also includes access to **specialised programs** at all stages to help parents address issue that are impacting their parenting abilities, such as drug and alcohol dependency or domestic and family violence issues. Currently these services, where they exist, are difficult to access due to high levels of demand. Ultimately, this is not in the best interests of parents or their children.

After a child has been taken into out-of-home care, the most significant issues that have been reported by clients of the Women's Legal Centre is a lack of communication, transparency and in many cases trust between CYPS and birth parents and families. A lack of cultural awareness and an inability to access Aboriginal and Torres Strait Islander Team Leaders and Case Workers (due to a lack of each) is cited by all Aboriginal and Torres Strait Islander women and families we work with.

In relation to communication, a number of mothers have reported that it is quite rare for CYPS to contact them promptly about their children or to check in on their progress. Rather, it seems more common for mothers to have to reach out for information from CYPS, and that on occasion CYPS have been delayed in providing a response. This causes a lot of frustration for mothers and can

⁴ *Adoption Act 1993* s 39E.

⁵ *Adoption Act 1993* s 27.

⁶ *Adoption Act 1993* s 10.



cause them to feel like their efforts to engage are ineffective. Having CYPS take the initiative to keep parents updated regularly and in a timely manner would greatly assist with engagement.

As for transparency, two key issues have been reported. The first is that some mothers have reported that they have sought advice on CYPS on how they can build better relationships with their children and increase their abilities as parents but have not been given this information. This can leave parents feeling like they do not know what to do in order to get their children back and can create a sense of hopelessness. If CYPS (or services it contracts) would provide advice to parent of the reasons for removal, provide information and assist parent's access to services to address barriers to reunification, this would assist in improving parent's perceptions of the role of CYPS.

The second issue has been around decisions about contact between children and their birth parents and broader birth family. A common complaint is that contact visits are frequently cancelled at the last minute with minimal or no explanation. While it is understandable that cancellations may be unavoidable at times, when appropriate reasons are not given promptly it can leave parents feeling distressed and frustrated. It is important that CYPS provide proper reasons for even these seemingly small decisions where there is no safety risk or other proper reason not to give them.

Exacerbating tensions further is that when poor decisions are made (as sometimes happens in any government agency) there are no internal or external means of having the decision reviewed. Unaccountable power creates a power dynamic between CYPS and (often disadvantaged) parents that is not amenable to a trustful, conducive working relationships. Rather, a relationship of fear more often exists, with Aboriginal and Torres Strait Islander women greatly affected due to historical perceptions of 'child protection removing Aboriginal children' in Australia.

Lastly, on an application for adoption being filed, all birth parents on low incomes should be made eligible to receive legal advice in relation to the proceedings. All affected children should have independent lawyers appointed. Given the important nature of parental responsibility, and children's rights at stake and that a relatively limited number of these applications are currently made, it is important that disadvantaged birth parents are able to understand the consequences of the application and to be able to properly understand and engage with the proceedings regarding their biological children.

CONCLUSION

Adoption is by its nature a complex process. While the fundamental focus of any adoption proceedings should be on preserving and advancing the best interests of the child, assessing the child's best interests is a complex process with the outcomes having potentially very severe consequences on birth parents, families and communities. Particular families are able to be greatly disadvantaged by the process, such as parents with disabilities and Aboriginal and Torres Strait Islander parents, and their children. Safeguards must be incorporated into the law to attend to



the risks these disadvantaged families, including their children, face. Most importantly, increased attention and resourcing must be invested in early intervention supporting disadvantaged children and their families, to attend to the risks of separation of biological families before it occurs.