

Open Adoption and the Court

The adoption process is informed by the [*Adoption Act 2000*](#) ('Adoption Act') and [*Adoption Regulation 2015*](#) (Adoption Regulation). They outline how to prepare an adoption application and the evidence the Supreme Court needs to make a decision on an adoption. Your role in making sure the Court has this evidence will include:

- recording your everyday casework and assessments
- gathering relevant information for the adoption assessor to complete an adoption assessment and adoption plan
- providing written evidence for court proceedings.

For more information about the adoption process, see: [Open Adoption Process \(Non-Aboriginal Children Only\)](#)

Legislation and Policy that Guides Adoption

Adoption is supported by a framework of legislation and policy, including:

- [*Adoption Act 2000*](#)
- [*Adoption Regulations 2015*](#)
- [*Children and Young Persons \(Care and Protection\) Act 1998*](#) ('the Care Act')
- [Standards of Out-of-Home Care](#)
- [Permanency Case Management Policy](#)
- [Aboriginal Case Management Policy.](#)

How is Adoption Different to other Permanency Options?

An adoption order is different from other permanent orders available for children and young people in out-of-home care (OOHC) in NSW. The key differences between adoption and other permanent orders are:

- Adoption orders are made in the Supreme Court, not the NSW Children's Court like other permanent orders.
- Adoption orders are permanent and cannot be changed by an application pursuant to [section 90](#) of the Care Act.

- A child’s surname is usually changed. They are issued a post-adoption birth certificate and an Integrated Birth Certificates (IBC). The IBC is a form of birth certificate that includes information about an adopted person’s birth parent’s and older siblings as well as their adoptive family.
- Adoption is a lifelong order, unlike all other permanent orders that expire at 18 years old.
- The adopted child’s inheritance rights transfer from their family to adoptive family. Birth family members can however create a Will to reflect their wishes.

For more information, see: [Foundations of Open Adoption](#), and [Considering Open Adoption \(non-Aboriginal Children Only\)](#).

Key Differences Between Adoption and Guardianship

Guardianship	Open Adoption
Considered first for Aboriginal and Torres Strait Islander children (concurrently for non-Aboriginal children) <	> Least preferred permanent Order for Aboriginal children
Child is legally connected to guardian until 18. Remains legally connected to family for life <	> Child is legally connected to adoptive parents for life
Made in the NSW Children’s Court <	> Made in Supreme Court
Retains legal ties to birth parents <	> Changes legal relationship with family
Doesn’t alter birth certificate <	> New birth certificate created (plus Integrated Birth Certificate)
s90 possible <	> No s90 possible
No impact on inheritance. Guardians can create a Will to reflect their wishes <	> Legal rights to inheritance
Parent consent preferred but not required <	> Minister’s consent needed for all children under 12 or for children over 12 who cannot consent
Child 12+ must consent (unless court dispenses need) <	> Child 12+ must consent (unless court dispenses need)
Guardians manage family time and cultural needs <	> Adoptive parents manage family time and cultural needs
Care allowance continues <	> Post adoption financial support depends on adoptive financial circumstances



For more information about adoption and guardianship see: [Guardianship or Open OOHC Adoption](#) fact sheet.

Pathways to Adoption

Permanency planning that results in a case goal of OOHC open adoption can happen in a variety of contexts, for example:

1. A child has recently entered care and is on interim orders. The permanency planning process determines that OOHC open adoption is the most suitable pathway for the child and this will be their case plan goal. A magistrate may make a [Short-term Care Order](#) (STCO) for a baby or very young child, or Long-Term Care to the Minister (PRM-18) order to allow the casework and assessments to be completed so that an adoption order application can be filed in the Supreme Court.
2. A child has a case plan goal of guardianship, however during the guardianship process, a change in circumstances leads to a decision that OOHC open adoption will best meet the needs of the child. The case plan goal is changed to adoption.
3. A child who was the subject of a final order allocating PRM-18 has formed a significant attachment to their carers and is thriving in their home. Together, the child, carer and PSP Service Provider may request a case plan goal change from PRM to adoption.

For more information, see: [Permanency Planning Overview](#)

Who Lodges an Application for an Adoption Order in the Court?

DCJ and Accredited Adoption Service Providers (AASPs) are able to lodge open adoption order applications in the Supreme Court. If you are from a PSP Service Provider that is not an AASP, DCJ or an AASP must lodge the adoption order application on your agency's behalf.

What Evidence Does the Supreme Court Need to Make a Decision?

The Supreme Court can only make an adoption order for a child where it is satisfied the order is clearly preferable in the best interests of the child to any other action that could be taken by law in relation to the care of the child (see section 90 of the [Adoption Act 2000](#)).

In order to ensure this, the Supreme Court judge will assess how an adoption application complies with the objects and principles of the Adoption Act.

The [objects of the Adoption Act](#) include to:

- emphasise the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice,
- Adoption is to be regarded as a service for the child
- ensure adoption law and practice assist a child and have access to his or her birth family and cultural heritage,
- Recognises the changing nature of practices in adoption
- encourage openness in adoption
- Allow access to information relating to adoptions
- To provide for the giving in certain circumstances of post adoption financial and other assistance to adopted children and their birth and adoptive parents.

The [principles of the Adoption Act](#) include:

- [the best interests of the child](#), both in childhood and later in life, must be the paramount consideration
- adoption is to be regarded as a service for the child
- no adult has a right to adopt the child (This principle makes it clear that adoption is centred on the **best interests of the child**, not the wishes or rights of adults)
- a child being given the opportunity to express views about their adoption freely, in accordance with development and circumstance
- a child's given name or names, identity, language and cultural and religious ties being, as far as possible, identified and preserved
- undue delay in making a decision in relation to the adoption of a child is likely to prejudice the child's welfare
- if a child is Aboriginal – the Aboriginal child placement principles being applied
- if a child is Torres Strait Islander – the Torres Strait Islander child placement principles being applied.

The principles also provide guidance on how to determine what is in the best interests of a child. They include:

- the child's wishes and all relevant aspects of their character which are relevant, including their age, maturity, level of understanding, gender, relationships, background, needs, identity, and any disability a child may have,
- The child's physical, emotional and educational needs including the child's sense of personal, family and cultural identity
- the wishes of the child's parents,
- the child's relationship with their family and other significant people in their life,
- the child's relationship with their proposed adoptive parents,
- the attitudes, suitability, and capacity of the proposed adoptive parents to meet the needs of the child.
- The alternatives to the making of an adoption order and its effects as a result of the order, both in the short term and long term should an adoption order be made so that adoption is determined amongst all alternatives to best meet the needs of the child.

Application for an Open Adoption Order

The adoption order court application contains the evidence the Court needs to make a decision about an adoption order. The evidence is presented to the Court in the following documents:

- the court report – written by the adoption assessor. The court report is prepared by an approved independent assessor or the Principal Officer of an AASP who tells the Court:
 - how the proposed adoptive parent/s are meeting the needs of the child
 - the views of all the people involved in the adoption including the child
 - the stability of the relationship between the child and the proposed adoptive parents,
 - how the proposed adoptive parents are demonstrating openness, encouraging the child's connection with their family and how they will continue to do this should an adoption order be made.
- the adoption plan – signed by two or more parties; the proposed adoptive parents, delegate, birth parents and child where possible.

- affidavits from:
 - the proposed adoptive parent/s
 - the proposed adoptive parent's referees
 - the assessor providing their independent report to the Court
 - the DCJ delegate detailing the reasons why adoption is preferable that includes (amongst other things):
 - recent reports on the child's development from schools, childcare centres, doctors, psychologists, allied health professionals, etc
 - records of family time visits

For more information see: [Open Adoption Process \(non-Aboriginal children only\)](#), [Foundations of Open Adoption](#) and [Family Time and Open Adoption](#).

How does my Casework Impact on the Court's Decision-Making about Adoption?

Your casework is a valuable part of the evidence that will be shared with the Court. During the open adoption process, your casework will be given to the adoption assessor, to help inform their assessment, recommendations and court reports.

Active Efforts

[Section 9A](#) of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act), refers to active efforts. Active efforts should be taken when undertaking any function under the Care Act. Active efforts are the proactive actions taken by casework staff take to support children and families. They include:

- **Engaging Family and Support Networks:** Actively seeking and involving extended family and support networks from the outset and maintaining this engagement throughout our involvement.
- **Family-led Decision Making:** Using family-led decision-making to guide assessments, case planning, and decisions regarding care and restoration.
- **Referrals and Support Services:** Referring families to relevant services, assisting with their engagement, and monitoring their progress.
- **Alternative Options to Removal:** Exploring alternative options to removal, such as Parent Responsibility Contracts, Parent Capacity Orders, Temporary Care Arrangements, and [Alternative Dispute Resolution](#), whenever safe and appropriate.

- **Timely Restoration Support:** Providing timely restoration casework to assist children, parents, and families in safely reuniting children with their families.
- **Case and Family Action Plan Development:** Developing, supporting, and monitoring comprehensive case plans and Family Action Plans.
- **Supporting Family Time:** Facilitating regular family time where caseworkers support parents in enhancing parenting skills, fostering positive interactions with their children, and rebuilding and strengthening family relationships

For more information about active efforts, see: [Family is Culture factsheet](#) and [Information for non-government providers](#).

Your casework will inform the evidence given to the Court that demonstrates:

- substantial and meaningful family finding was done
- the child's cultural identity was explored and understood
- the reasons why restoration is not an option for the child
- the Care Act's [Permanent Placement Principles](#) were followed
- open adoption is in the best interests of the child
- the carer's ability to:
 - provide a permanent, loving, and stable home for the child,
 - meet the child's physical, emotional and medical needs,
 - assist the child to have meaningful connections with their family and culture
- the views of the child, carer, parents, siblings and other significant family members about adoption.
- If the child is Aboriginal:
 - all efforts were made to explore and understand the child's cultural identity,
 - the Care Act's [Aboriginal and Torres Strait Islander Child and Young Person Placement Principles](#) and the Adoption Act's [Aboriginal Child Placement Principles](#) were applied,
 - the child's family, kinship group and community acted with self-determination about the best permanent placement for the child,
 - the Aboriginal Case Management Policy was applied,
 - the additional safeguards in the Adoption Act for Aboriginal children were applied. For more information, see: [Open Adoption and Aboriginal Children](#).

The evidence you provide might be in the form of:

- your case notes, emails, and letter correspondence
- affidavits
- documentation such as case plans, care plans and cultural support plans
- medical, educational, and psychological reports about the child.

Remember that your role in documenting evidence for the court is not to try to write like a lawyer, but to provide a fair and balanced sense of a person, their story, their identity, and a narrative of key events that have shaped their life.

For more information, see: [Quality Documentation in Casework](#) and [Writing An Affidavit: Tips and An Example](#).

Giving Evidence

If an adoption order application isn't being contested, the Judge will make a decision based upon the information that has been provided in the written application. It's unlikely anyone will be asked to give evidence. If, however, the application is being contested, it's likely the Judge will call on people to give evidence. Usually, the adoption assessor who completed the adoption report to the Court, or the DCJ Delegate or AASP representative will be required to give evidence. There may be times when others are required, including the proposed adoptive parent, a birth parent or other family member, you, your manager, a Principal Officer or another 'expert' i.e., doctor or psychologist who has experience working with children and families. If you are required to give evidence, you will receive support and advice from an Adoptions Manager, DCJ Legal Services, the AASP and/or the Crown Solicitors' Office.

Adoption Plans and the Court

An adoption plan is agreed to (signed) by two or more of the following people:

- the child who wants to be adopted
- parents who have given consent to the child's adoption
- parents who haven't given consent to the child's adoption, but have agreed to the adoption plan
- the proposed adoptive parents
- the DCJ delegate or Principal Officer of an AASP.

The Court may register an adoption plan. Once an adoption plan is 'registered', it becomes part of the open adoption order. Therefore, the arrangements in the plan

become enforceable and may be reviewed after adoption, if need be. Often, offering to register an adoption puts a parent's mind at rest they will have a legal avenue to ensure they see and know about their child after adoption. Ideally, families and adoptive parents will be able to find solutions to the issues that may arise around the adoption plan. However, if the adoption plan is not being followed by the adoptive parents, a parent can apply to have a registered adoption plan reviewed by the Court.

If the child is Aboriginal or Torres Strait Islander, DCJs policy is to seek the registration of the child's adoption plan, as an extra step to ensure the child is not disconnected from family, community, and culture. Wherever possible, a person of significance to the child and/or family should be identified in the registered adoption plan. This person may be a support person, friend, community member or kin who can assist the child to remain connected to family, culture, and community after adoption. This person or family member may raise any concerns about the child and their cultural plan with DCJs Post Adoption Information Unit and request a review of the arrangements.

The needs of a child or circumstances for either family may change after adoption. Where families are not able to reach an agreement, DCJ's [Post Adoption Information Unit \(PAIU\)](#) can assist families to understand why circumstances have changed and how to maintain connections moving forward.

For more information see: [Family Time and Open Adoption](#), [Open Adoption Process \(non-Aboriginal children only\)](#), [Open Adoption and Aboriginal Children](#) and the DCJ factsheets [What is an Adoption Plan](#), [Guide to drafting an adoption plan](#), [Registration of adoption plans](#) and [Guide to drafting a registered adoption plan](#).

What is a Contested Adoption Order Application?

Adoption order applications can be contested, ordinarily by one or both of the child's parents. The two most common reasons for this are:

- parents don't believe their child should be adopted. Some parents will want the child to be returned to their care. Others will be happy for the child to remain with their carers in OOHC
- parents are worried about the arrangements in the adoption plan and want it to include more family time

- parents do not want the child's surname to change (often the child's birth surname becomes their middle name and they take on the adoptive parent's surname).

If the adoption order application is contested, the contesting parent/s have the right to seek legal advice and the child may be allocated a separate legal representative. The Judge may decide not to grant an adoption order. More commonly the result of a contested adoption application is either:

- the adoption order is made with no changes to family time
- family time, as set out in the adoption plan, is increased
- changes are made to the name the child will be known by after adoption
- the adoption plan is registered.

If the child's parents are unhappy with a draft adoption plan or are planning to contest the adoption, it's important you work together with everyone to understand the worries and find solutions. If the parents are eligible for Legal Aid, the adoption caseworker can make a referral to Legal Aid to provide adoption mediation between the parents and proposed adoptive parents. For more information, see [Family Time and Open Adoption, Supporting a Family Through the Open Adoption Process, Supporting a Carer Through the Open Adoption Process](#) and [Supporting a Child through the Open Adoption Process](#).

Who Can Be in the Court When the Adoption Order is Made?

Judges generally make adoption orders in their chambers. However, they can make the order in the court room with the child and adoptive family present, if requested. The child's family can also attend; however, this is not common.

References

Dahlstrom, F. Examination-in-Chief.

Available: <https://www.armstronglegal.com.au/criminal-law/evidence/examination-in-chief/>