

## Section 90 Applications

### *Recission and variation of care orders*

Section 90 (s90) of the *Children and Young Persons (Care and Protection) Act 1998*, **Recission and variation of care orders**, provides the legal framework to change existing care orders for children and young people (child).

Recission means revoking the substantive care orders and replacing those orders with new care orders or to revoke the substantive care orders without replacing them with any orders. In the context of Permanency Support Program (PSP), recission of a care order placing a child in the parental responsibility of the Minister (PRM) generally means this order is revoked, returning common law parental responsibility to the parent or parents.

Variation generally means a more minor alteration or amendment of the care orders. For example, changes to the existing contact orders or to section 73 (s73) undertaking or section 76 (s76) supervision may be considered a variation of the original orders. Significant changes to the allocation of parental responsibility which alter the nature or substance of the original orders may more appropriately be considered a “recission” of the original orders, with new orders made to replace them.

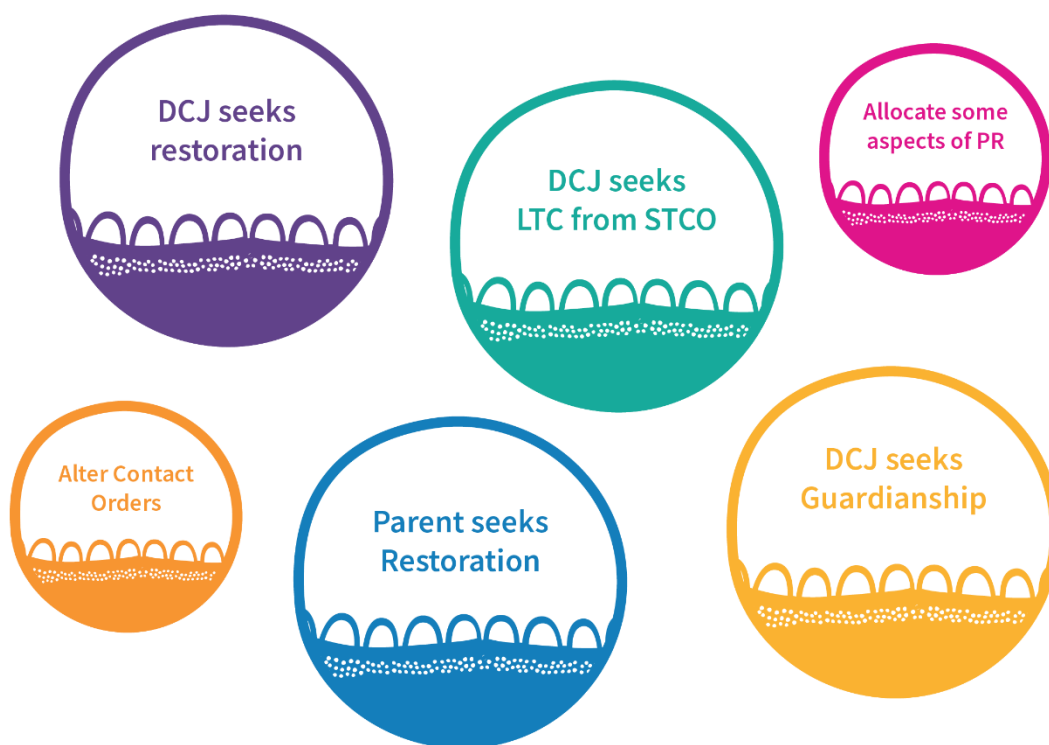
A s90 application is a key mechanism to go back to court when there have been significant changes in the circumstances of the child and parent. It allows parents who have committed to change to seek to get their children back where the children’s needs are not being met by their placement, such as when a placement has broken down or changed or when it is the consistent view of the child. A s90 gives grandparents and carers a mechanism to seek permanency for a child they love through a guardianship order supported by DCJ.

In reopening the case, a s90 application can sometimes create confusion, anxiety and emotional distress for the children, families and carers involved. Applications which are not initiated by DCJ can also be complex as PSP service providers and DCJ need time to reach a consensus and collate evidence.

### When are s90 Applications Used?

Section 90 applications are most commonly used:

- when the minimum outcomes of a restoration plan have not been met and longer terms care orders (LTCO) are required
- when restoration is being sought by a parent
- when DCJ and a PSP service provider support restoration to a parent
- where an application for guardianship is being made.



However, they can also be used to alter contact arrangements or to allocate some aspects of parental responsibility (PR) to a certain person. Once a s90 application has been made, the Court can make whatever order it considers will be in the child's best interest and is not limited to making the order sought in the application. For example, a parent may file a s90 application requesting rescission of the current orders and restoration, but the magistrate may make an order for guardianship to the carers.

## Who Can Make a s90 Application?

A s90 application can be made by:

- DCJ
- the child or young person
- a person who has parental responsibility for the child
- a person from whom parental responsibility has been removed
- any person who considers him or herself to have sufficient interest in the welfare of the child (which could be grandparents, carers or other significant people).

## Fundamental Elements of a s90 Application

Not all s90 applications progress through the court process to a hearing. Whenever a s90 application is made, the Magistrate must be satisfied that there have been significant enough changes to hear (progress) the application and grant leave (the courts permission to progress the application).

The primary considerations (s90 (2B)) for granting leave are as follows:

- the views of the child (taking into consideration their developmental stage and capacity)
- the length of time the child has been with the carer and the stability of that care,
- if the Children's Court considers the present care arrangements are stable and secure, the course that would result in the least intrusive intervention into the life of the child and whether it would be in their best interests.

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Additional considerations (s90(2C)) are:

- the age of the child
- the nature of the application
- the plans for the child
- whether the applicant has an arguable case,
- matters concerning the care and protection of the child or young person that are identified in a report under section 82, or a report that has been prepared in relation to a review directed by the Children's Guardian.

The Magistrate can dismiss a s90 application for leave, if:

- it is satisfied that the application is frivolous, vexatious or an abuse of process (s90(2D))
- the application has no reasonable prospect of success (s90(2Ea)), and
- the applicant has previously made a series of applications for leave under this section that the Court dismissed (s90(2Eb)).

## Hearing a s90 application

If the application is progressed, then the Magistrate will hear the application and make a decision. When making their decision to rescind or vary a care order, the Children's Court will consider under s90 (6):

- the child's age
- the child's views and the weight given to their views
- the stability and length of present care arrangements
- the strength of attachments to birth parents and present caregivers
- the capacity of the birth parents to care for the child
- the risk of psychological harm as a result of variation or rescission of the current order.

If the Court is satisfied with the application, it can then vary or rescind an order. They may also make another order under s90.



## PSP Service Providers and Restoration

Some important issues to consider when supporting a restoration are:

- Timing matters. The applicant needs enough time to demonstrate significant change, but if too much time passes the case may not be considered as the magistrate may consider the child is too settled in their current placement and that a disruption would not be in the child's best interests.
- There must be a solid plan for the child, including:
  - where the child will live
  - how significant relationships for the child formed while in care (for example with the carers) will be maintained
  - identifying schools, health services and family support to promote stability
- If the applicant has a new partner, it is important that the partner is included in the assessment and affirms their commitment to the child.

## PSP Service Providers and s90 Applications

PSP Service Providers do not usually initiate s90 applications, but are likely to contribute towards them in a variety of ways:

- If you have obtained approval from DCJ to change a child's permanency goal from long term care to **restoration**, you will need to support DCJ to file a s90 application at the Children's Court. Your role will be to conduct a restoration assessment, prepare an affidavit detailing casework (including any attachments that are needed), and provide ongoing support to the child, carers and family. See [Restoration: Legal Process from Long-Term Care \(PRM-18\)](#) and [Section 90 Evidence Checklist - Restoration](#).
- If you have obtained approval from DCJ to change a child's permanency goal from long term care to **guardianship**, you will support DCJ to file a s90 with a care application requesting guardianship at the Children's Court. Your role will be to conduct a guardianship assessment, prepare an affidavit detailing casework (including any attachments), and provide ongoing support to the child, carers and family.
- In both of the above scenarios it is important that you do not communicate a commitment to restoration or to guardianship, or take significant casework steps towards restoration, until a s 90 application has been lodged and the Children's Court has accepted that restoration is a viable option.
- The **parent of a child** case managed by you **may independently lodge a s90** at the Children's Court. In this instance, you will liaise with DCJ's Child and Family District

Unit (CFDU) and possibly your Permanency Coordinator about whether DCJ should support the application and provide updated information (evidence).

- You are working with a parent and new baby in a family preservation program who is also seeking a s90 restoration for older children and you may need to provide updated information (evidence) about the parent's progress with the program.

For more information, see: [Affidavit the Basics](#) and [Writing An Affidavit: Tips and An Example](#) and [Guardianship Orders](#).