



# DISPENSING WITH CONSENT

**Discussion paper**

Community Services Directorate

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## TABLE OF CONTENTS

<b>CONTENTS</b> .....	<b>2</b>
<b>INTRODUCTION</b> .....	<b>3</b>
Scope .....	3
<b>IMPORTANT TERMS AND CONCEPTS</b> .....	<b>4</b>
Court terms: Applicant / Respondent / Party.....	4
Best interests.....	4
Birth Parents.....	4
Care and protection orders .....	4
Care and protection staff.....	4
Out of Home Care.....	4
Enduring Parental Responsibility.....	4
Child and young person.....	4
Parental responsibility.....	5
<b>WHAT ISSUES HAVE ALREADY BEEN IDENTIFIED?</b> .....	<b>5</b>
Catering to out of home care circumstances .....	5
Voice of the child or young person.....	5
Reflecting best practice in adoption.....	5
Legislative guidance in the contemporary practice.....	5
<b>PERMANENCY</b> .....	<b>6</b>
Adoption .....	6
What is a domestic adoption? .....	6
What legislation governs the adoption process? .....	6
What about processes for Aboriginal or Torres Strait Islander children? .....	7
Out of home care.....	7
What is out of home care? .....	7
Who cares for children and young people in out of home care? .....	7
How does out of home care relate to adoption? .....	7
<b>DISPENSING WITH CONSENT</b> .....	<b>8</b>
What is dispensing with consent? .....	8
How is dispensing with consent decided? .....	8
What other considerations must the Court make? .....	8
How does subsection 35(1) work in practice?.....	8
(a) the person cannot, after reasonable inquiry, be identified or found.....	8
(b) the physical or mental condition of the person is such that they are not capable of considering properly the question of whether consent should be given .....	10
(c) the person has abandoned or deserted, or has neglected or ill-treated the child or young person.....	10
(d) the person, for a period of not less than one year, failed without reasonable excuse, to discharge the obligations of a parent or guardian of the child or young person.....	11
(e) any other circumstances that justify the requirement for the consent being dispensed with.....	12
<b>ISSUES TO CONSIDER</b> .....	<b>14</b>
Navigating Court processes .....	14
Best interests of children and young people.....	14
Human rights .....	15
Families and children.....	15
People with disability.....	15
Culture and identity.....	15
<b>WHAT DOES THE ACT GOVERNMENT WANT TO KNOW?</b> .....	<b>16</b>
<b>OPTIONS TO CONSIDER</b> .....	<b>16</b>
Queensland.....	16
United Kingdom.....	16
<b>DISCUSSION QUESTIONS</b> .....	<b>17</b>
<b>HOW CAN I BE INVOLVED?</b> .....	<b>17</b>
Written submission .....	17
Verbal submission .....	17
<b>APPENDIX A: JURISDICTIONAL COMPARISONS</b> .....	<b>18</b>

# INTRODUCTION

In August 2016, the ACT Legislative Assembly agreed to a motion that established a cross-directorate Domestic Adoptions Taskforce (the Taskforce) to identify issues and make recommendations about the timely and appropriate completion of the adoption process, to further enhance permanency for children and young people under *A Step Up for Our Kids – One Step Can Make a Lifetime of Difference (Out of Home Care Strategy 2015–2020)*.

In March 2017, this work culminated in the *Final Report: Review of the domestic adoption process in the ACT* (Final Report) that reflected the views, expectations and experiences of the community regarding timeliness in the adoption process. The Final Report made six recommendations, all agreed by the ACT Government:

1. The Community Services Directorate establishes a communication plan to identify key stages where communication with all parties should be supported.
2. The Community Services Directorate improves the availability of information online about the domestic adoption process.
3. The Community Services Directorate, with the support of the Justice and Community Safety Directorate, explore dispensation of consent provisions in the *Adoption Act 1993* to allow the ACT to better respond to the complexity of out of home care circumstances.
4. The Community Services Directorate supports the provision of specialist resources within Child and Youth Protection Services to improve the assessment process and delivery of adoption services and support with, and between, government directorates and the community sector.
5. The Community Services Directorate continues to transition the delivery of permanency support services to the community sector, as outlined under *A Step Up for Our Kids: One Step Can Make a Lifetime of Difference (Out of Home Care Strategy 2015-2020)*.
6. The Justice and Community Safety Directorate, with the support of Access Canberra and the Community Services Directorate, explore integrated birth certificates to better support the recognition of both birth parents and adoptive parents and maintain the identity and heritage of children who are adopted.

Recommendations 1, 2 and 5 are complete. In relation to Recommendation 4, which is ongoing, the 2018–19 ACT Budget announced \$3.46m over four years for specialised resources to continue to support an increase in permanency for children and young people, where restoration is not possible, through an Adoption or an Enduring Parental Responsibility Order.

In 2018, the Community Services Directorate and the Justice and Community Safety Directorate established an additional working group to explore recommendations 3 and 6. The working group brings together relevant expertise to consider issues that may apply to both recommendations. This work will continue into 2019 with consultation to include key community members and to ensure the voices of children and young people are considered.

This discussion paper aims to assist interested community members to contribute to implementation of Recommendation 3, the ACT Government's exploration of provisions for dispensing with consent in the domestic adoption process. It includes information about adoption, out of home care, the dispensing with consent process and issues that may be considered.

The ACT Government encourages community members and stakeholders to share their views and experiences of dispensing with consent as part of the adoption process, and identify changes that may better respond to complex and challenging out of home care circumstances.

## Scope

This discussion paper is focused on exploring legislative, policy and practice changes so that dispensing with consent decisions in domestic adoptions may better cater for children and young people in out of home care.

Matters that will not be actively considered are issues and processes relating to intercountry adoption, surrogacy, step-parent adoption and informal familial arrangements with no statutory or Court intervention.

# IMPORTANT TERMS AND CONCEPTS

## Court terms: Applicant / Respondent / Party

The **applicant** is the person or organisation who applies to the Court for orders.

The **respondent** is a person or organisation named as a party to the case (who may or may not respond to orders sought by the applicant).

A **party** is a person or organisation involved in a court case; for example, the applicant or respondent.

## Best interests

The **best interests** of the child or young person is a child-rights principle that supports all aspects of health and wellbeing. Where appropriate, decisions should reflect the experience and views of the child or young person. In adoption decisions, **best interests** also considers the child's existing relationships and their particular needs, including culture and identity.

## Birth Parents

For the purposes of this discussion paper, **birth parents** are the biological parents of a child or young person. This term is used rather than the alternative of **natural parents**. **Birth parents** is considered to be a more neutral term, acknowledging the complex circumstances involved in adoption.

## Care and protection orders

**Care and protection orders** are granted by the ACT Children's Court in child protection matters.

An **emergency care and protection action** may be used if there is an urgent need to protect a child or young person. This allows Child and Youth Protection Services to temporarily remove the child and place them in the care of the Director-General, Community Services Directorate, for an initial period of no more than two working days.

An **interim order** is usually granted at the first application for orders, as a means of putting in place short-term protective arrangements for a child or young person and evaluating them prior to finalising the order. This provides time to see how the child is responding to the new arrangements and to consider any changes the parent(s) may make in that period.

A **final care and protection order** is granted when the Court is satisfied it has sufficient information to determine that the child is in need of care and protection in the longer term and the order is in their best interests. A care and protection order can be made for either 12 months, two years or until the child reaches 18 years.

## Care and protection staff

**Care and protection staff** are individuals who work in the community to provide child protection related services and support families and children through the adoption process.

## Out of Home Care

**Out of home care** arrangements provide a stable home for a child or young person who can no longer live safely with their family. Arrangements may include kinship care, foster care, or residential care.

## Enduring Parental Responsibility

**Enduring Parental Responsibility** (EPR) is an alternative pathway that transfers responsibility for day to day and long-term decisions for a child or young person to a carer, without severing legal ties between the child or young person and their birth family.

## Child and young person

For the purposes of this discussion paper, a **child** is a person who is under 12 years old and a **young person** is a person who is 12 years old or older, but not yet an adult (i.e. under 18).

## Parental responsibility

**Parental responsibility** is the responsibility of each parent or legal guardian to make decisions about the care, welfare and development of their child(ren). These responsibilities may be varied by agreement or by a court order.

# WHAT ISSUES HAVE ALREADY BEEN IDENTIFIED?

## Catering to out of home care circumstances

The *Adoption Act 1993* is more than 25 years old and is based on legislation that was enacted over 50 years ago. During this time, subsection 35(1) has remained substantially unchanged. This means that the ACT Supreme Court (the Court) must consider contemporary out of home care circumstances with grounds for dispensing with consent that may not reflect a modern understanding of community issues, such as disability and domestic violence. It also means that best practice principles are applied to longstanding legislation to enable contemporary interpretation.

Children and young people in out of home care are increasingly exposed to more challenging and complex circumstances. Where adoption is considered, the Court's discretion to dispense with consent under the *Adoption Act 1993* is limited. This impedes the Court's ability to cater for these unique and challenging situations.

## Voice of the child or young person

The voices of children and young people are not consistently considered in the adoption process. The best interests of the child or young person should be the paramount consideration in any decision made under the *Adoption Act 1993*. However, the absence of guidance for the court and the existing structure of provisions for dispensing with consent make it difficult to incorporate best interests considerations, particularly when the provisions are primarily directed at the conduct of adults.

The best interests of children and young people are also served by ensuring the voice of the child or young person is heard in decisions made about them. Court rules<sup>1</sup> that permit children and young people to be separately represented in proceedings about them are reflected in child protection legislation, but are not reflected in the *Adoption Act 1993*. As a result, children and young people are provided an independent children's advocate for child protection matters, but this practice is not common in adoption matters.

## Reflecting best practice in adoption

The legislation in the ACT does not fully reflect best practice when considering adoption, particularly in out of home care circumstances. To enhance best practice, possible changes to provisions for dispensing with consent should be considered in the context of the positions held by other jurisdictions (See **Appendix A** for a summary of provisions for dispensing with consent across Australia).

In the ACT, grounds for dispensing with consent are limited in scope and no longer respond to the complex nature of adoption in the ACT. In addition, the grounds have not been substantially amended or updated since 1993. By looking at Australian jurisdictions and international practice, the ACT Government can consider changes that better cater to out of home care circumstances and balance human rights.

## Legislative guidance in the contemporary practice

The legislation provides little guidance on how to consider the grounds for dispensing with consent. This means that the Court must establish its own reasoning to be satisfied that its decision aligns with the *Adoption Act 1993*, the best interests of the child or young person, and contemporary practice.

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<sup>1</sup> *Court Procedures Act 2004* s 74E.

An ongoing tension exists between circumstances that enliven child protection matters, and those relevant to making decisions about consent in adoption matters. The differing views in decisions made by the Court affect how the grounds under s 35(1) are articulated.

As a result, a level of uncertainty exists around what the Court requires to make a decision, as judges can hold different views. For example, in an adoption from out of home care matter, one judge may accept evidence provided to the Children's Court in a child protection matter, while another judge will require that evidence be refreshed and resubmitted. This means the time required to complete an application to the Court can differ, depending on the sitting judge's expectations and preferences.

For example, Penfold J distinguished the term 'neglect' under section 343 of the *Children and Young People Act 2008* (CYP Act) and stated 'that factual findings concerning 'neglect' under the CYP Act did not translate to factual findings under the [Adoption] Act, although the same evidence might be relevant in the separate proceedings'.<sup>2</sup> Other judges have accepted Children's Court evidence without requiring fresh evidence to support it.

There are also inconsistencies between requirements of the *Adoption Act 1993* and the *Parentage Act 2004*, and what the Court requires to make an informed decision about dispensing with consent.

## PERMANENCY

Adoption and permanent care provide a stable and secure family life for children and young people who, for various reasons, cannot live with their birth family. Permanency can take various forms, some of which are outlined below.

### Adoption

#### What is a domestic adoption?

Adoptions in the ACT can be categorised as intercountry or domestic (local or known) adoptions.

Intercountry adoption occurs when an Australian citizen or permanent resident, who is residing in Australia, adopts a child or young person from overseas through the authorities in his or her Australian state or territory.

Domestic adoption involves a child or young person who was born or permanently residing in Australia before the adoption and includes children and young people who have no previous contact or relationship with the adoptive parent(s) and those who have a pre-existing relationship with the adoptive parent(s), who may be a long-term carer, step-parent or relative.

In 2017-18, the ACT finalised five known adoptions, in which the child was already known to the adoptive parents.<sup>3</sup> Given the small number of adoptions that occur in the ACT, this discussion paper will draw from other jurisdictions to demonstrate the considerations relevant to dispensing with consent.

#### What legislation governs the adoption process?

Domestic adoptions in the ACT are arranged within a highly regulated framework. Legislation that guides the adoption process includes the *Adoption Act 1993*, the *Children and Young People Act 2008*, the *Parentage Act 2004*, and the *Human Rights Act 2004*.

Adoption permanently transfers all the legal rights and responsibilities of being a parent from the child's birth parents (or anyone with parental responsibility for the child) to the adoptive parents. This means that an adopted person no longer has any claim to the birth family, including property, estates or citizenship.

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<sup>2</sup> *In the matter of the adoption of MSN* [2017] ACTSC 92 at [63]-[71] in [In the matter of an adoption of PT \[2018\] ACTSC 14](#) at [48].

<sup>3</sup> Australian Institute of Health and Welfare, *Adoptions Australia 2017-18* Table S21.

## What about processes for Aboriginal or Torres Strait Islander children?

Adoption in Australia is a sensitive process that elicits strong views, due to the legacy of the stolen generation and forced adoption practices. While much has been done to attempt to repair the damage caused by past practices, the consequences of these practices are far reaching. This has caused harm, anguish and suffering for those affected, including mothers, fathers, people who have been adopted and other family members.

Under the *Adoption Act 1993*, the Court may not make an adoption order in respect of an Aboriginal or Torres Strait Islander child, unless it is satisfied that the choice of adoptive parents has been made with regard to the desirability of the child being placed with a person from an Aboriginal community and whether the child will be able to maintain contact with its parents.

Most Aboriginal or Torres Strait Islander advocates do not support adoption of Aboriginal or Torres Strait Islander children or young people due to past abuses and because adoption changes a child's legal identity, severing legal connections to the birth family. This means that adoption will not generally be considered for Aboriginal or Torres Strait Islander children and young people in the ACT.

## Out of home care

### What is out of home care?

Where a child or young person is in need of care and protection, and there is no parent willing and able to care for them, they are placed in out of home care. This means that the child or young person is placed with a foster or kinship carer who can provide a safe, stable and secure environment. Out of home care may be short in duration or may result in a care and protection order being issued by the Children's Court for the child or young person to remain in out of home care until the age of 18, or until the order is rescinded.

### Who cares for children and young people in out of home care?

Parental responsibility for children and young people in out of home care is transferred to the Director-General of the Community Services Directorate. The Director-General is then responsible for placing these children with foster or kinship carers, or in residential care.

A foster carer is a person who is not related to the child or young person, while a kinship carer is a person who is a relative or significant person. Foster and kinship carers are delegated the responsibilities of a parent for a period of time, to provide a safe, stable and secure family environment for children and young people in out of home care.<sup>4</sup>

### How does out of home care relate to adoption?

Where a child or young person enters out of home care, the focus is on providing a safe, stable and secure environment. In certain circumstances, foster parents may seek to adopt the child to provide a stronger, more normalised sense of family and belonging for the child.

This means that adoption decisions are made in a competing environment of preventing harm by intervening early with families where children are not safe, including as a result of child abuse and neglect, and providing the best stable care for children who cannot remain living safely with their parent. This stable care may include permanency outcomes such as Enduring Parental Responsibility or adoption.<sup>5</sup>

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<sup>4</sup> <https://aifs.gov.au/cfca/publications/children-care>

<sup>5</sup> Judy Cashmore (2015) 'Children in the out-of-home care system' *Family, Policy and the Law* <https://aifs.gov.au/sites/default/files/fpl15.pdf>

## DISPENSING WITH CONSENT

In the ACT, an adoption should not occur unless informed and voluntary consent has been given by each parent and guardian of the child or young person. This principle protects the rights of children and their birth parents. It also reflects Australia's international obligations for children to maintain their family ties<sup>6</sup> and to 'know their parents and, as far as possible, be cared for by them'.<sup>7</sup> In limited circumstances, the Court has the power to dispense with this consent.

### What is dispensing with consent?

Dispensing with consent is a legal mechanism to determine that the consent of a parent or guardian is not required to proceed with an adoption. Dispensing with consent is a difficult, complex and sensitive process that is impacted by the circumstances of each child or young person, the circumstances of each parent or guardian, parental consent to the adoption, and the directions of the ACT Supreme Court.

### How is dispensing with consent decided?

The mechanism to dispense with consent is found in section 35(1) of the *Adoption Act 1993* (ACT). Section 35(1) provides five grounds, at least one of which must be satisfied, to proceed with an adoption without the consent of a parent or guardian:

- (1) On application, the Court may, by order, dispense with the requirement for consent of a person to the adoption of a child or young person if the Court is satisfied that—
  - (a) the person cannot, after reasonable inquiry, be identified or located; or
  - (b) the physical or mental condition of the person is such that he or she is not capable of considering properly the question whether consent should be given; or
  - (c) the person has abandoned or deserted, or has neglected or ill-treated, the child or young person; or
  - (d) the person has, for a period of not less than 1 year, failed, without reasonable excuse, to discharge the obligations of a parent or guardian, as the case may be, of the child or young person; or
  - (e) there are any other circumstances that justify the requirement for the consent being dispensed with.

### What other considerations must the Court make?

When considering one or more of the above grounds, the Court must have regard for the objects of the *Adoption Act 1993* (section 4) and the best interests of the child or young person (section 5). If an applicant does not demonstrate 'proper, genuine and realistic' consideration of the best interests detailed in section 5, the Court is unable to exercise its discretion to dispense with consent under subsection 35(1).<sup>8</sup>

### How does subsection 35(1) work in practice?

When an application is made to dispense with consent, the applicant will identify the grounds on which they rely. The Court will then assess the application against the proposed grounds, according to the circumstances of the child or young person being adopted.

#### **(a) the person cannot, after reasonable inquiry, be identified or found**

Section 35(1)(a) is a ground for dispensing with consent that is common to all Australian jurisdictions but is seldom used in the ACT. This provision allows an adoption process to continue without the consent of a parent if they cannot be located or identified following 'reasonable inquiry'. This means that the applicants seeking to dispense with consent must satisfy the Court that in the circumstances, all reasonable methods of identifying, locating and contacting the parent have been exhausted.

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<sup>6</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1).

<sup>7</sup> *Ibid* Art 8.

<sup>8</sup> [In the matter of an adoption of PT \[2018\] ACTSC 14](#) at [13].

In the ACT, the *Adoption Act 1993* does not elaborate on what constitutes a 'reasonable inquiry'. In the absence of direction, the Court has developed its own criteria. The Court has provided some guidance, as former Justice Refshauge noted that:

'to make no inquiry cannot satisfy the ground but inquiry which shows that there is no reason to believe that the parents could be found or would wish to express views about the adoption could be sufficient'.<sup>9</sup>

In practice, the ACT Government Solicitor (GSO) provides advice to care and protection staff about what is likely to be required to satisfy the Court that reasonable inquiry has been conducted when considering out of home care adoption matters. GSO generally considers:

- the electoral roll;
- Medicare records;
- Centrelink records;
- current and former addresses; and
- information provided by the birth mother or other family members.

Information provided by the birth mother often determines the lengths and resources required to satisfy the Court that a 'reasonable inquiry' has been made. The following example is provided to illustrate this:

The birth mother says that the birth father is an apprentice plumber who worked in Bendigo, named Mark. No other information is available.

Given this information, GSO will enquire with the Victorian Register of Apprenticeship and Traineeship Training Contracts and the Victorian Building Authority to determine if they have an apprentice or recently qualified plumber named Mark, who is registered in Bendigo.

The Register responds with information that three people fit the description, while the Building Authority does not respond. GSO will then contact the three men through certified mail. If the men do not contact GSO and no further information becomes available, no further enquiries will be made and GSO will submit an overview of its actions to the Court. The Court is likely to find that GSO made a 'reasonable inquiry'.

If GSO did not enquire about the three people named Mark, the Court would find that GSO did not undertake a 'reasonable inquiry' and section 35(1)(a) would not be satisfied.

Alternatively, if the Register responded with 20 people named Mark in the Bendigo region who were undertaking a plumbing apprenticeship, and the Building Authority also returned the names of 10 different people named Mark, then too many possibilities are identified. The Court would likely find that it would be unreasonable to pursue all 30 people identified in the Bendigo region.

Some jurisdictions have amended their legislation to prescribe how to satisfy the Court that the person cannot be found.

In Victoria, section 43(2) of *Adoption Act 1984* (Vic) establishes criteria to clarify what actions are required to satisfy this ground. For example, the Act requires the agency progressing the application to satisfy the Court that the address of the person cannot be identified on the electoral roll, a notice has been published in a local newspaper, and enquiries have been made with people who may know where the person may be found.

Similarly in Tasmania, section 37(2) of the *Adoption Act 1988* (Tas) requires that the Court be satisfied that letters seeking consent are sent by certified mail to the person's last known address and to addresses of other people where the person may be found, that the consent has been sought through a notice in a local newspaper, and enquiries have been made of 'such persons, bodies, agencies, and government departments as might reasonably be expected to have known where that person may be found'.

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<sup>9</sup> [In the matter of an adoption of D \[2008\] ACTSC 44](#) at [16].

## **(b) the physical or mental condition of the person is such that they are not capable of considering properly the question of whether consent should be given**

This ground also exists in several jurisdictions, but is seldom used to dispense with consent in the ACT. In the ACT, this ground applies in relation to a birth parent's cognitive capacity to consent and understand the rights they are relinquishing. It is not about a person's capacity to care for the child or young person and has not been used in relation to a physical condition. To determine whether a birth parent's consent should be dispensed with under this ground, the birth parent is requested to undertake a cognitive assessment by a psychologist to determine their ability to give informed consent and understand the consequences.

In the ACT, in cases where this provision has been considered, the Court has noted its discomfort with the incompatibility of the provision with contemporary understanding of disability and mental health.

For example, in one case the Court observed '...a low IQ does not of itself render the mother an unfit parent and this Court ought exercise considerable caution before accepting the applicant's contention that there are no prospects of [the child] being returned to the care of the mother.'<sup>10</sup>

This application is different to some jurisdictions, where similar provisions focus on whether a person's capacity to care is impaired to such an extent that even with all necessary supports, the person is unable to care and provide for the child or young person.

For example in NSW, a birth parent's mental health is considered in the context of what is in the best interests of the child or young person, which in the ACT would be considered under s 35(1)(e). In *Re Samuel*, the Court observed that the birth father had been diagnosed with the psychiatric condition bipolar affective disorder and had previously experienced psychosis.<sup>11</sup> The Court found that the birth father's mental health, considered with his financial and living situation and lack of insight, resulted in him being unable to fulfil Samuel's physical, emotional and educational needs and protect him from psychological and other harm.

## **(c) the person has abandoned or deserted, or has neglected or ill-treated the child or young person**

This ground to dispense with consent is closely related to the work of care and protection, where a child was removed from the care of their parents to ensure their safety from neglect and harm.

### Abandoned or deserted

The words 'abandoned' and 'deserted' have been interpreted to 'involve an element of morally reprehensible conduct'.<sup>12</sup>

This means that a birth parent may be held responsible for abandoning or deserting the child if they have not made contact with the child in several years and have made no attempt to establish a relationship. On the other hand, a birth parent is unlikely to be found to have abandoned a child if they are complying with a Court order that limits contact with their child.

### Neglected or ill-treated

Section 35(1)(c) has been interpreted to account for certain circumstances where evidence of family violence, substantiated allegations of abuse or neglect, or other similar circumstances have resulted in the removal of children or young people from their birth family and placement in long-term out of home

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<sup>10</sup> [In the matter of an adoption of PT \[2018\] ACTSC 14](#) at [76].

<sup>11</sup> [Re Samuel \[2013\] NSWSC 550](#) at [22].

<sup>12</sup> [Re X and Adoption of Children Ordinance 1965 \(ACT\) \(1984\) 2 FCR 533](#) at 537.

care. In addition, ill-treatment of a child requires the parent to have ‘knowingly and without moral justification, caused physical pain or mental suffering to the child’.<sup>13</sup>

Where birth parents have been convicted of neglect or abuse of the child, the Court is likely to determine that they have ‘neglected or ill-treated’ the child for the purposes of dispensing with consent. This becomes more complicated where adoption is proposed for siblings.

For example, where the eldest child was subject to neglect and abuse that resulted in their parent’s conviction, other siblings may have been removed at birth or soon after for their protection. Under current provisions to dispense with consent, consent would be dispensed with for the eldest child under this ground. The consent with respect to the other siblings could not be dispensed with, despite the parents posing an unacceptable risk of harm.

As a result, the Court tends to take ‘other circumstances’ under (e) into consideration to overcome this situation. This demonstrates the interrelationship between these grounds when considering the unique and challenging circumstances for children and young people in out of home care.

### **(d) the person, for a period of not less than one year, failed without reasonable excuse, to discharge the obligations of a parent or guardian of the child or young person.**

This ground to dispense with consent is also closely related to the work of care and protection staff, where a child or children are removed from the care of their parents to ensure their safety and wellbeing.

The ‘obligations of a parent’ refers to a parent with no special qualifications or training. This includes the duty of a parent to show affection, care and interest towards their child, as well as the duty of a parent to maintain their child in the financial or economic sense.<sup>14</sup>

The Court has also considered the issue of ‘a reasonable excuse’ for not discharging the obligations of a parent or guardian. Specifically, where a child is placed in out of home care, and a parent seeks the return of the child to them and engages with the necessary processes to do so, the Court cannot find that the parent failed to support the child without reasonable cause.<sup>15</sup>

In the following case study, the Court was not persuaded to dispense with consent.<sup>16</sup> In this case, a care and protection order was in place that limited the birth parents from discharging their obligations. Where a birth parent is seeking to maintain and increase their presence in their child’s life, without undermining the child’s safety and stability, an adoption will not proceed on this ground alone.

Jessica is seven years old and has lived with her current foster carers since she was nine months old. She was removed from her birth parents, Stephen and Chelsea, when she was one month old. Since that time, Jessica has been in long-term out of home care through a series of emergency, interim and then final care and protection orders made in the Children’s Court.

Assessments of Chelsea observed that she was co-operative and did not have a history of substance misuse. However, Stephen was found to have problems with anger management and behaved in a controlling way. Chelsea and Stephen are no longer in a relationship.

Initially, contact between Chelsea and Jessica occurred monthly, but the case manager later reduced this to three times per year. Chelsea continued to attend all supervised contact and was warm and engaged when interacting with Jessica. She later sought to restore regular monthly contact visits.

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<sup>13</sup> [In the matter of an adoption of D \[2008\] ACTSC 44](#) at [21].

<sup>14</sup> *Re P (infant)* [1962] 1 WLR 1296; 3 All ER 789 [In the matter of an adoption of D \[2008\] ACTSC 44](#) at [23].

<sup>15</sup> *Re an infant K and the Adoption of Children Act [1973]* 1 NSWLR 311 at 345-6 [In the matter of an adoption of D \[2008\] ACTSC 44](#) at [25].

<sup>16</sup> The issues explored in this case study draw on the judgement of [In the matter of an adoption of PT \[2018\] ACTSC 14](#). Jessica is not the child’s real name.

Six years after Jessica entered out of home care, an application was brought before the Court seeking to dispense with consent. Jessica's present carers indicated that they would like to adopt her. The Court was asked to consider three grounds to dispense with consent: (c), (d) and (e).

With regard to s 35(1)(d), the Court rejected the submission that Chelsea had failed to discharge her parental obligations. Chelsea had, in fact, demonstrated consistent affection and care towards Jessica during visits, despite the reduced frequency of contact (which was outside her control). Further, Chelsea had sought to increase the frequency of contact while complying with care and protection orders, but also acknowledged that Jessica's present care situation was a positive and stable one.

The Court's finding firmly states that a birth parent's compliance with care and protection orders cannot be used as grounds to dispense with their consent under s 35(1)(d), without the inclusion of other more substantial evidence.

## **(e) any other circumstances that justify the requirement for the consent being dispensed with**

Section 35(1)(a)-(d), discussed above, are primarily concerned with the conduct and capacity of each parent or guardian, with decisions based on what they failed or ought to have done. In contrast, section 35(1)(e) is child-focused, enabling proper consideration of the child or young person's best interests.

Where adoption is proposed to be the best pathway to permanency for a child in out of home care, the Court is generally asked to consider sections 35(1)(c), (d), and (e). Therefore, the reasons given for dispensing with consent under each of these subsections are often interrelated and the narrative is brought together under (e).

The Court has relied on this ground in out of home care circumstances where adoption serves the best interests of the child or young person being adopted, but their circumstances do not reflect the other grounds available (section 35(1)(a)-(d)).

This ground has become a 'catch-all' provision that allows the Court to adapt the adoption process to new and challenging circumstances, given the lack of flexibility in other provisions. It allows the Court to focus on the child, rather than only considering the conduct of the parent or guardian. It is often used where the culmination of factors gives rise to 'other circumstances' that serve the best interests of the child or young person, rather than any independent factor that may justify dispensing with a birth parent's consent so as to pave the way for adoption.<sup>17</sup>

While it is a broad provision, the Court has established a high threshold to establish 'other circumstances', often importing 'special' or 'exceptional' circumstances, referring to provisions in other jurisdictions and to previous iterations of the legislation. To satisfy this ground, and without further guidance or flexibility, the Court applies each best interests consideration listed in section 5 with the objects of the *Adoption Act 1993* in section 4. The conduct of the birth parent that led to the child being removed from their care is not decisive, but may be sufficient reason for the Court to engage (e) and inquire further.

The Court may, but is not required to, consider the:

- facts of the child's relationship to the person whose consent is material as relevant;
- facts that brought the child into a relationship with the applicants;
- facts that have occurred since the applicants came into contact with the child;
- intention of the applicants and government agencies concerned; and
- consequences for the child if no adoption order were made.

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<sup>17</sup> [In the matter of an adoption of PT \[2018\] ACTSC 14](#) at [84].

It is important to note that the Court does not consider who would be the better parent or who could provide the best opportunities, but rather 'other circumstances'. This does not mean that the special circumstances must be exclusive of, or unrelated to, the subject matters of other grounds. This view has been affirmed through consideration of the international context.<sup>18</sup>

Section 35(1)(e) is particularly important in responding to the unique and challenging circumstances of children and young people in out of home care, where there is little possibility of restoration and they are in a safe and stable environment.

This is illustrated in the adoption of Toby:<sup>19</sup>

Toby is six years old and has been in out of home care since he was three months old. During this time, Toby has remained with the same carers, who are seeking to adopt him. Final care and protection orders were granted when Toby was two years old.

Toby's birth mother, Anne, has provided her informed consent to the adoption, but his birth father, Jason, has not. Care and protection staff engaged with Jason during the year following Toby's birth to consider options for contact and assess his ability to care for Toby. While Jason indicated that he wished to be involved in Toby's life, he has only seen Toby on limited occasions since his birth.

Jason experienced significant trauma as a child and did not receive counselling to assist him in resolving issues related to this. Jason also has a criminal history and issues related to the misuse of pain medication, which contributed to his poor relationship with Toby.

The Court found that Toby is likely to feel greater stability and certainty following an adoption by his present carers, who are the only parents he has known. Formalising this bond through adoption is likely to strengthen the relationship as Toby grows up, and would not preclude Anne's ongoing contact with him. Similar contact arrangements could be made with Jason if he is willing.

The application to dispense with consent is based on s 35(1)(e). The Court observed that consideration of s 35(1)(e) should not depend on whether the child's life with the adoptive parents would simply be preferable.

The Court also considered Toby's physical, emotional and educational needs. Toby exhibits challenging behaviours and is observed to have a slight developmental delay. His carers have actively sought support for him. While Jason's low literacy and lack of employment may be barriers in him providing similar assistance, this was not given weight in the Court's consideration, as Toby's carers are likely to continue to be responsible for his care, even if the adoption does not proceed.

The decision made in this case demonstrates the complex process required by the Court to satisfy the high threshold established by section 35(1)(e). As a whole, section 35(1) is not sufficiently flexible to apply in Toby's situation unless the 'catch-all' provision (e) is used, requiring meticulous consideration of each relevant factor in order to determine his best interests and justify dispensing with Jason's consent.

The action of 35(1)(e) may also be seen in the earlier example in (c), under which dispensing with consent for siblings of a child who was neglected would be unavailable, the Court is able to use its discretion under (e) to justify dispensing with consent.

In each of the examples in this paper, section 35(1)(e) may be relied on to demonstrate that given all the circumstances, the adoption should progress without the consent of the parent or guardian. By bringing together the stories of each child in submissions under (e), the Court can overcome the inflexibility of section 35(1)(a)-(d) to consider the child's life story and circumstances, as well as the social, identity and psychological benefits of adoption for that child.

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<sup>18</sup> *YC v the United Kingdom*, no. [4547/10](#).

<sup>19</sup> The issues explored in this case study draw on the judgement of [In the matter of an adoption of CD \[2017\] ACTSC 411](#). Toby is not the child's real name, and Anne and Jason are not the parent's real names.

# ISSUES TO CONSIDER

## Navigating Court processes

Navigating statutory processes in child protection and adoption matters is a sensitive and complex task that requires ongoing and difficult conversations about the serious decisions involved. Consultation undertaken in 2016 noted the difficulty in navigating the process in a supportive and sensitive manner.

Dispensing with consent to an adoption requires time to allow birth parents to fully consider their options and ultimately make an informed decision. Decisions about the permanent removal and adoption of a child are complex. Ensuring that adoption is in the best interests of the child takes time and is often affected by complex family-based issues and organisational procedural requirements.

### Compounding issues relating to trauma experienced by birth parents

Trauma resulting from the loss of a child 'to the system' can affect a birth parent's ability to connect to their child in care and can compound issues that increase the difficulty of navigating statutory processes. For example, contact sessions can engage conflicting emotions and may be emotionally painful to attend.<sup>20</sup> Ultimately, this trauma affects the birth parents' ability to advocate for their interests and navigate the system. When adoption is being considered, the finality of the process often triggers a first and final effort to maintain a connection to their child, even if in name only.

David, James and Sandra were placed in long-term out of home care due to a violent relationship between their birth parents.<sup>21</sup>

The birth mother, Julia, was made aware of her rights in relation to her children, including her rights to challenge orders and seek involvement in the children's lives. She was also made aware that she could seek a review of the final care and protection orders every 12 months.

In the four years since David, James and Sandra entered the care of their foster parents, Julia had no face-to-face contact with the children and failed to attend scheduled appointments with care and protection staff.

Julia was later informed about permanency planning for David, James and Sandra and was encouraged to be involved in these discussions. Arrangements to meet their proposed adoptive parents and to build a supportive relationship with them and the children did not occur. While Julia did state her intentions to seek a review of the orders and seek restoration of David and Sandra to her care, no applications were made.

Ultimately, the Court dispensed with Julia's consent because she did not demonstrate her capacity to appropriately care for the children and reasonably meet their needs. The Court also observed that the best interests of David, James and Sandra were served by the stability, security and long-term attachment to their adoptive parents.

As Julia was unable to advocate for her interests through the Court, seek greater involvement in her children's life, or make positive changes to demonstrate her capacity to provide a safe and loving environment for her child, an application to dispense with consent succeeded. This decision was supported by the fact that care and protection staff had encouraged her involvement and discussed her rights.

## Best interests of children and young people

Section 5 of the *Adoption Act 1993* requires that decisions made under the Act must consider the best interests of the child or young person as paramount. As demonstrated earlier, subsection 35(1) can be a barrier to the Court's consideration of the best interests of the child or young person. Considerations of

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<sup>20</sup> Dr Phillipa Castle 'Birth mothers' experience of open adoption' (2014)

<https://www.psychology.org.au/inpsych/2014/august/castle/>

<sup>21</sup> The issues explored in this case study draw on the judgement of [In the matter of the adoptions of SC and QC Citation: \[2016\] ACTSC 268](#). David, James and Sandra are not the children's real names. Julia is not the birth mother's real name.

moral and social factors, and the child's ongoing welfare, will often indicate whether adoption is in the best interests of the child or young person.

Provisions for dispensing with consent under section 35(1) are understood in terms directed at the conduct and capacity of birth parents and guardians, with the exception of (e) 'any other circumstances', which is directed at the child or young person. This emphasis allows the Court discretion to make judgements on their fitness to parent, based on past conduct and present circumstances, including what the parents or guardians failed or ought to have done.

However, despite the best interests of the child or young person being the paramount consideration, the terms under section 35(1) hinder the application of this principle, which effectively limits consideration of the best interests to section 35(1)(e).

## Human rights

The *ACT Human Rights Act 2004* recognises fundamental rights subject only to reasonable limitations. Given the ACT is a human rights jurisdiction, it is important that decisions made under the *Adoption Act 1993* consider the rights of individuals involved and balance them accordingly.

## Families and children

The *UN Convention on the Rights of the Child* and the *Universal Declaration of Human Rights*, which are reflected in the *Human Rights Act 2004*, recognise that families have the right to be protected by society. They also recognise that children and young people have the right to be especially protected to have their identity preserved.

Each person is entitled to the protection of family, and disrupting and severing legal ties to family is a serious decision. However, concepts of family differ. A birth parent's conception of family, which includes their child, may not equate to that child's understanding of family. For a child who was removed from their birth family to protect their safety and wellbeing, and the carers they have known as parents for their entire life, their concept of family can be different.

When considering adoption matters, these rights are often at odds with each other. As a result, justification is needed for a decision to place reasonable limits on these rights to achieve the best outcome for children and young people. This requires consideration of the individual circumstances of the child or young person, having regard to their best interests.

## People with disability

Under Article 12 of the *United Nations Convention on the Rights of Persons with a Disability*, individuals with disability are guaranteed equal recognition before the law and enjoy legal capacity. All safeguards that are implemented must support legal capacity and must be proportional and tailored to the person's circumstances.

## Culture and identity

Culture and identity is particularly important when considering adoption. The *UN Convention on the Rights of the Child* endorses the value and importance of a child's identity, which is equally supported by the *Universal Declaration of Human Rights*. In addition, the *UN Declaration on the Rights of Indigenous Peoples* enshrines the rights of Indigenous Peoples to strengthen and enjoy their culture and determine their own identity.

# WHAT DOES THE ACT GOVERNMENT WANT TO KNOW?

The ACT Government is interested in two key areas:

1. The experiences of dispensing with consent as part of the adoption process, including where the child is involved in child protection.
2. The identification of changes to the existing grounds for dispensing with consent, to better reflect contemporary practice and respond to out of home care circumstances.

Establishing an understanding of individuals' lived experience of the dispensing with consent process, as well as their experience of considering consent to an adoption, will inform proposals to improve relevant provisions.

The ACT Government would like to understand whether the legislation in this area should be changed and if so, how best practice may be achieved.

## OPTIONS TO CONSIDER

The ACT Government is considering options to improve provisions for dispensing with consent to better respond to out of home care circumstances, reflect the best interests of children and young people and align with the *Human Rights Act 2004*.

Below are two approaches that represent possible avenues of change, which are provided as examples to help guide consideration. The options both incorporate human rights and the principles of the best interests of the child or young person, but address these considerations differently. Please note that the ACT Government is not limited to the following illustrative options.

### Queensland

Queensland has implemented provisions over and above the provisions available in the ACT (see **Appendix A** for a comparison). The *Adoption Act 2009* (QLD) prescribes the grounds to dispense with consent in greater detail and with more conditions. For example, Queensland provides at least eight grounds that are more child-focused and respond to contemporary circumstances, such as those posing an 'unacceptable risk of harm' to the child or young person, while imposing limitations so that the grounds are only enlivened in certain circumstances. In addition, this approach recognises that consent must not be dispensed with unless it is in the best interests of the child or young person that the adoption process continues.<sup>22</sup>

### United Kingdom

Alternatively, the United Kingdom has long since abandoned the grounds for dispensing with consent that remain in section 35(1) and has significantly reduced the grounds available. The *Adoption and Children Act 2002* (UK) currently contains two grounds for dispensing with consent:

- (a) the parent or guardian cannot be found or is incapable of giving consent, or
- (b) the welfare of the child requires the consent to be dispensed with.<sup>23</sup>

The UK legislation recognises the *European Convention on Human Rights*, acknowledging that the child's interests are the paramount consideration. This includes the importance of the child's relationship with their parents and their ability and willingness to provide the child with a secure home and other requirements to meet their needs.

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<sup>22</sup> *Adoption Act 2009* (QLD) s 39(3).

<sup>23</sup> *Adoption and Children Act 2002* (UK) s 51(1).

## DISCUSSION QUESTIONS

1. How should the circumstances of children in out of home care influence the grounds for dispensing with consent?
2. How should grounds for dispensing with consent reflect contemporary language, particularly with respect to a person's capacity to consent?
3. How should the capacity to care for and protect a child or young person be considered in an adoption proceeding?
4. In what circumstances is dispensing with consent justified?
5. In what circumstances is dispensing with consent not justified?
6. What criteria are necessary for the Court to decide an application to dispense with consent?
7. 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?
8. How might birth parents be better supported to engage and remain engaged in child protection matters, prior to an adoption proceeding commencing?

## HOW CAN I BE INVOLVED?

### Written submission

You can have your say by providing a written submission at: [adoptionstaskforce@act.gov.au](mailto:adoptionstaskforce@act.gov.au)

or via the post:

Adoptions Taskforce  
Community Services Directorate  
Human Services Policy  
GPO Box 158  
Canberra ACT 2601

### Verbal submission

If you would like to provide a verbal submission, please contact:

Adoption working group  
Community Services Directorate  
T | (02) 6207 9401

**Please Note:** small extracts from your submission may be quoted in published material. Please let us know if you do not want your submission to be used in this way. Any personal information, such as names, will remain confidential.

## APPENDIX A: JURISDICTIONAL COMPARISONS

Key Concept	ACT	TAS	SA	WA	VIC	QLD	NT	NSW
<b>The Court may dispense with consent of a person if the Court is satisfied that:</b>								
The person cannot be identified or located.	✓	✓	✓	✓	✓		✓	✓
The physical/mental condition of a person is such that they are not capable of properly considering the question of consent.	✓	✓	✓	✓	✓	✓	✓	✓
The person has abandoned, deserted, neglected or ill-treated the child.	✓	✓	✓	✓	✓		✓	✓
The person has, for a period of not less than one year, failed, without reasonable excuse, to discharge the obligations of a parent/guardian.	✓	✓		✓	✓		✓	
There are any other (special) circumstances that justify the requirement for dispensing with consent.	✓	✓	✓	✓	✓	✓	✓	
Any person has such a physical and mental disability or is so impaired that the person is unable to meet the needs of the child.		✓			✓			
For any reason the child is unlikely to be accepted into, or to accept, a family relationship with the person;		✓			✓			
Except in the case of a proposed adoption by a step-parent, the person is a birth parent but does not have the responsibility of the daily care of the child or a parent and child relationship with the child and is unreasonably withholding consent to the adoption.				✓		✓		
There would be an unacceptable risk of harm to the child or mother if the relevant parent were made aware of the child's birth or proposed adoption.						✓		
If the child has any views and is able to express those views, the court must consider the views having regard to the child's age and ability to understand.						✓		
If the person is an authorised carer of the child, the child has established a stable relationship with the carer, the adoption will promote the welfare of the child and, if the child is an Aboriginal child, alternative to placement for adoption have been considered under section 36 of the Act.								✓
Any person has seriously ill-treated the child to the extent that it is unlikely that the child would accept, or be accepted by the person within, the family of that person.		✓			✓			
The child is 16 or more years of age and consents to being adopted by a prospective adoptive parent who is a step-parent, relative or carer of the child.				✓				
Where the person is the child's father, the person has been convicted of an offence which resulted in the child's conception, compensation has been awarded to the child's mother under the <i>Criminal</i>				✓		✓		

Key Concept	ACT	TAS	SA	WA	VIC	QLD	NT	NSW
<i>Injuries Compensation Act</i> in relation to an offence which resulted in the child's conception or the person is a lineal relative of the child's mother.								
It would be in the best interests of the child for arrangements for an adoption to continue.						✓		✓
If the relevant parent is believed to be the father of the child, the Court may not give dispensation within 30 days after notice is given to the relevant parent under section 33 or if the Court has reason to believe that there is a current application under the <i>Status of Children Act 1978</i> or the <i>Family Law Act 1975</i> (Cwlth) for a declaration of paternity or a parenting order for the child.						✓		



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