

# Submission to ACT Government Adoption Reform: Dispensing with Consent

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## About CREATE Foundation

CREATE Foundation is the national consumer body for children and young people with an out-of-home care (OOHC) experience. We represent the voices of all children and young people currently in care, and those who have transitioned from care up to the age of 25.

Our vision is that all children and young people with a care experience reach their full potential, in line with our mission to:

- **CONNECT** children and young people to each other, CREATE and their community; to
- **EMPOWER** children and young people to build self-confidence, self-esteem, and skills that enable them to have a voice and be heard; to
- **CHANGE** the care system, in consultation with children and young people, through advocacy to improve policies, practices and services and increase community awareness.


We achieve our mission by facilitating a variety of programs and activities for children and young people in care and developing policy and research to advocate for a better care system.

## Introduction

CREATE welcomes the opportunity to comment on the ACT Government's proposed adoption reform exploring provisions for dispensing with consent of the *Adoption Act 1993*. CREATE is committed to advocating for improved outcomes for children and young people in OOHC, and recognises that legislative, policy, and practice changes such as dispensing with consent decisions significantly impact children and young people in care .

This submission will specifically examine how the circumstances of children in OOHC influence the grounds for dispensing or not dispensing with consent and whether the views of the young person should contribute to determining the outcome of a proposed adoption, where they are sufficiently mature and capable to make decisions about their life. In particular we present CREATE's position within the following themes:

- Placement stability and permanency;
- Sibling relationships and family connection;
- Participation of young people in decision making.



CREATE acknowledges that issues relating to adoption are complex, and that ultimately decisions regarding implementing permanency options for children and young people need to be considered in the context of their unique circumstances, on a case by case basis. Uniform or universal platforms for decision-making about life and family connection can discount or minimise factors for potential change, identity, and belonging. CREATE also acknowledges and supports the position the ACT Government has taken in listening to Aboriginal or Torres Strait Islander advocates so that adoption will not generally be considered for Aboriginal or Torres Strait Islander children and young people in the ACT. Maintaining birth right and connection to culture in light of past practices is a position that needs to be reflected in all responses to Aboriginal and Torres Strait Islander children, families and communities.

## Responses to Discussion Questions


**How should the circumstances of children in out of home care influence the grounds for dispensing with consent? In what circumstances is dispensing with consent justified?**

### **Adoption is not a panacea for solving instability**

CREATE has developed a position paper (CREATE, 2014) on the issue of adoption as a permanency option, and contributed to a previous submission relating to adoption in the ACT (CREATE, 2016). Our awareness of research on this topic stems from our shared concern that children and young people in care need to experience stability in their placements, but that there are areas of caution and clarification as yet unresolved.

Instability in out-of-home care is predictive of adverse outcomes, such as mental health concerns and behavioural and conduct issues (McGuire, Cho, Huffhines, Gusler, Brown, & Jackson, 2018; Rubin, O'Reilly, Xianquan, & Localio, 2007). Placement instability also increases the risk of academic problems (Clemens, Klopfenstein, Lalonde, & Tis, 2018), increased risk of having contact with the youth justice system (Ryan & Testa, 2005), increased likelihood of substance abuse (Stott, 2012), and poorer outcomes leaving care, such as unemployment and housing instability (Cashmore & Paxman, 2006). Recent research by the CREATE Foundation has identified that placements in the ACT are particularly unstable, with most young people experiencing between three and six placements (McDowall, 2018).

CREATE supports measures that improve stability in out-of-home care, and supporting young people to establish and maintain significant relationships with individuals which can ameliorate some of the negative impacts of early trauma and disrupted attachment. Adoption is one means of achieving



stability through conveying Legal Permanence, but it is not a panacea. Enduring Parental Responsibility Orders can provide physical and relational permanence, and there is little evidence that adding Legal Permanence actually makes a significant difference to a young person's feelings of stability. Stability within long term foster care placements, particularly relational stability, is predictive of positive outcomes post-care, such as education attainment and financial stability, whereas there is limited data on the long term outcomes of adoption in Australia (Cashmore & Paxman, 2006; Gay, 2015).

In a recent consultation with young people in out-of-home care (2018) regarding their perceptions of stability, key themes that emerged were consistency, safety and emotional connection.

*Stability means a home that I know I can go back to everyday. The same people. The same home. The same school. Things not changing at a whim. Being able to know who you can go to. (Female, 19)*

*Staying and asking people to help you when you feel unsure. (Female, 15)*

*Someone who can help you with your problems. (Male, 15)*

*A constant state of being. Feeling safe and something staying the same. (Male, 18)*


Decisions to dispense with consent must be made with consideration of whether stability achieved through adoption could similarly be achieved through long term guardianship orders. In the ACT context, an Enduring Parental Responsibility order may similarly achieve stability for a young person, while also mitigating stigma of being in care and enabling the carer to have a greater degree of autonomy in decision-making whilst still accessing support.

### **Ensuring sibling relationships**

Sibling relationships are one the most significant relationships not only during childhood, but across the lifetime. However, many young people in care are separated from siblings within their placements. CREATE Foundation recently found that 36% of young people with siblings also in care (nationally), were separated from all their siblings (McDowall, 2018); in the ACT just over a third of young people are in separate placements from their siblings. For young people who have experienced neglect or abuse, a sibling may provide emotional and practical support during the distressing period of being placed into foster care and separated from parents (Wojciak, McWey, & Waid, 2018). Siblings offer a sense of safety and continued connection to family, and positive connections with siblings have been demonstrated to significantly mediate the association between experiencing trauma and internalizing symptoms (Wojciak, McWey, & Helfrich, 2013).

*I really don't like moving places and I don't like to move away from my brothers because there is really nothing to do without my brothers I have no one else to play with and that's what I like to do- play. (Male, 10)*

*Probably just being separated from your other siblings because that was the hardest thing, not actually living with them and not ending up living with them. (Female, 17)*




*Ensure that siblings can be placed together as this can cause some distressing feelings for a young child as they don't understand what is happening. (Female, 16)*

CREATE advocates that the importance of maintaining the sibling relationship is reflected and protected in proposed changes to legislation and policy, and decisions to dispense with consent, as in all adoptive circumstances, also need to take into consideration the impact on sibling relationships. Provisions must be made to ensure that siblings have consistent and meaningful contact with one another as dispensing with consent may predominantly lead to the adoption of one child and not his or her siblings into the one adoptive family. The ACT Government is urged to consider the international experience, for example in the UK: “Unless placed together for adoption, children cease to have a legal relationship with the birth family. Therefore, any contact between an adopted child and a birth sibling living elsewhere is almost always reliant on an informal agreement between the involved parties” (Cossar & Neil, 2013). The same paper reinforces that the “psychological, inter-personal and ethical implications associated with the decision, determined by the state to sustain, disrupt and/or create sibling bonds through adoption cannot be underestimated” (Meakings, Coffey & Shelton, 2017, p. 1794).

### **Open Communication**

The *Adoption Act (1993)* states that support and information is to be provided to all individuals in the adoption process. This includes ensuring that a young person is provided with information in a developmentally appropriate manner about the proposed placement, and is provided with the opportunity for counselling (s35B). CREATE research however has found that young people lack knowledge of what they can expect while in care, and what to expect from the carers they were placed with (McDowall, 2018). Further, almost 56% of children and young people in care do not know about their case plan, highlighting the need to involve young people in decisions regarding care planning, their life. If young people are not adequately informed about possibilities in their lives, they would be unable to contribute significantly to decision-making even if consulted.

It is vital that the decision to dispense with parental consent is communicated appropriately to a young person in a manner consistent with trauma-informed principles so as to minimise potential distress, and that they also comprehend the decision. This involves taking time to build the relationship with the young person, and to ensure, through training, that professionals with responsibility for supporting the young person through this process are able to present the information in a variety of ways, and on several occasions. The ongoing challenge to the system is to provide timely, responsive, and accurate information to the young person.



*I would like to be told the whole truth about my situation, like why I am in care, at a younger age so I understood why. I would have liked my carer with me when I saw my lawyers. For the lawyers to say exactly what I say, not make their own judgement. (Female, 17)*

### **Knowledge of Personal History**


Contact with birth family, where safe, can be a positive experience for young people concurrent with the benefits of a stable placement, especially as birth parents are key sources of family history and connection vital for identity formation. When deciding to dispense with consent, the impact this will have on relationships with birth parents, and in turn the impact on a young person's knowledge of personal history, must be given primary consideration. Ensuring parents are informed and supported post-adoption will increase the likelihood of positive contact being maintained.

However, prior research has identified that parents often are confused as to why child protection responses were necessary regarding removal of their children, which raises concerns as to how to ensure parents are adequately informed and engaged throughout the process of dispensing with consent (Trotter, 2006). Provisions must be included that reinforce that the parent is adequately informed, and support is made available, as it will enable potential family contact, connection, and identity formation for the young person. Where contact with family is not possible or likely, the decision to dispense with consent must consider how the young person may know of, and be connected with their family and/or history (Michail & Heit, 2013).

### **Post-Adoption Support**

Children and young people in out-of-home care have often experienced neglect and abuse (psychological, physical, sexual, and complex interactions of these), and as a result many develop trauma responses. Experiencing trauma can also increase the risk of young people developing emotional difficulties and challenging behaviour, factors identified as precipitating disrupted adoptions, particularly when the adopting parents have lower levels of parenting skills (Rosenthal, Schmidt, & Conner, 1988). It is important that these children and young people, and their adopting families, have access to support to maintain an ongoing safe and secure environment (Michail & Heit, 2013).

The *Adoption Act (1993)* currently has provisions for financial support for children and young people adopted from OOHC, where the Director-General had daily care responsibility or long-term care responsibility, or adoptive parents had daily care responsibility, or long term care responsibility as carers under the *Children and Young People Act (2008)*. Currently, financial assistance can be provided where the child or young person has complex or high needs and the burden of meeting the child's or



young person's needs without any financial assistance might prevent an adoption order which would otherwise be in the best interests of the child or young person.

However, many young people in OOHC have needs which may not reach the required thresholds of complexity, but who still require support such as ongoing counselling. Adoption, while having the potential to lead to positive outcomes via stability, can also lead to feelings of loss and rejection of young people by their birth family and feeling different and unwanted within their adopted family (Kenny, Higgins, Soloff, & Sweld, 2012; Neil, 2012).

Carers may also need ongoing support. For example, while contact with family may be safe at the time of adoption without supervision of caseworkers, in a recent consultation with CREATE around permanency planning, young people identified that risks may change over time and carers may need support to manage this complexity. Further, young people in this consultation identified a need to ensure that young people would remain safe in permanent placements, such as through mechanisms to ensure young people knew their rights and how to access the Children's Commissioner if they felt unsafe.

*[What are your thoughts on Permanency Orders?] Bad. Not having a CSO involved or community visitor. The carer could just up and move the kid. (Young person)*


*Some family visits need to be supervised. If something were to happen you might need the Department. With my family, my visitations with brothers didn't need to be supervised because they were under 18. Later on we found that one of them was a paedophile. Nothing happened but something could have. When you have supervised visits, parents aren't allowed to go off to toilets or anywhere with chances of abuse or kidnapping. Supervised visits would reduce the risks of that. (Young person)*

*I think the Department should still be involved. Carers may still need assistance. They still have their case worker in case there are any issues. (Young person)*

*What happens if a placement breaks down? I feel like there needs to be a little bit of Department contact every now and then. (Young person)*

## **Should the views of the young person determine the outcomes of a proposed adoption, if they are considered sufficiently mature and capable to make decisions about their life?**

CREATE acknowledges the complex balance between making decisions in the best interest of the child's safety and well-being, and giving weight to the young person's views and wishes, particularly when they seem in opposition. However, a young person's right to meaningful participation is enshrined in the United Nations Conventions on the Rights of the Child Article 12.1, which states that children with the capacity of forming their own views have the right to express those views, and these views be "given due weight in accordance with the age and maturity of the child". CREATE argues that



this right has equal standard to other rights, such as that “in all actions concerning children... the best interests of the child should be a primary consideration” (Article 3.1). These rights are not to be viewed as discrete, or one having primacy over the other (Archard & Skivenes, 2009).

Factors that may be considered when balancing rights include the young person’s reasons for their opinion, the consistency with which they express an opinion, and their understanding and appreciation of consequences. CREATE’s recent national survey involving 1275 children and young people with a care experience demonstrated that young people are capable of developing informed opinions and views regarding permanency, adoption and reunification, based on their unique, individual circumstances.

*People in care should be talked to about Guardianship and Adoption when they are made permanent wards of the State by the Courts and there is no chance that they will be restored to their birth parents in the future. (Male, 14)*

*Every child has the right of saying who they want to live with, especially after 6 years of being in care! I would really love for my Carers (Mum and Dad) to have Guardianship over me and my younger sister or even to be able to adopt us!! They have loved us unconditionally, it should definitely not be based on culture differences we ARE all EQUALS. I’ve been in and out of care since I was two years old [and] been to 10 different carers until Mum and Dad these beautiful angels from above. (Female, 13)*


*We all want to go back to our mums and dads. Not fair we spend most time at other people’s houses. (Male, 10)*

*Parents given 12 months to "get act together" or forfeit rights to child therefore permitting child to be adopted at early age and therefore have stable family life. (Female, 25)*

CREATE urges the ACT Government through this review to examine how young people’s decisions regarding an adoption may be obtained, what checks and balances can be implemented to monitor that professionals are obtaining their views, and how caseworkers can ensure that young people understand what is being asked of them. This involves resourcing and prioritising to ameliorate barriers to participation. Young people, for example, may not feel comfortable expressing their views, due to lacking a trusting relationship with their caseworker, and organizational pressures may limit the caseworker’s ability to adequately listen to young people (Tregeagle & Mason, 2008). This lack of trust and difficulty in voicing opinions may be further exacerbated by high turnover of caseworkers (Strolin-Goltzman, Kollar, & Trinkle, 2010).

*It is very bad that all the time when a child is going in and out of home care, they are always getting brand new caseworkers, and they then have to build a new relationship with him or her, which I do not agree on doing, due to your having to then share all your own private and confidential information, with a stranger! (Male, 13 years)*





Formal decision making processes (such as case conferences and review meetings) can also be intimidating and alienating for young people, especially if they are not provided with sufficient information or they feel unsupported (Cashmore, 2002). In CREATE's recent survey, for example, young people reported attending formal meetings just 38% of the time, and only two-thirds of young people said they feel like they had a say about important decisions that affect their lives (McDowall, 2018).

*There were a few foster families that I wish adopted me but I never got that option. I'm actually still in contact with the very first foster home I was in and they're a good family and I would have felt like I belonged. I would have felt that my birth parents will always be my birth parents but for whatever reason, they can't look after me and it's not safe. But if a family says to a 7 or 8 year old, 'Your parents can't look after you but I'd love you to be my child' – that would make you feel like you belonged somewhere. Especially having the same last name... (Female, 23)*

*Generally if you have a good caseworker then they are more likely to understand your whole situation and what you want and what is best for you, so that would probably be better than a judge. That would be better, as you can build up a rapport with a caseworker – they are much closer to the situation, it would be much better to let them decide about visitation..... (Female, 23)*

## Conclusion

Children and young people need to be involved in decisions regarding dispensing with consent on an individual case-management level and within systemic level discussion and debate. CREATE urges the ACT Government to ensure that it has sought the views of children and young people within this legislative review process, so that they may directly influence decision making. Young people are not all informed or involved in their current care planning, do not as a standard have contact with their siblings and can articulate their needs when appropriately supported. CREATE re-emphasises that adoption is only one means of achieving stability and permanency for children and young people.

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