



**Varying or rescinding  
a Children's Court order  
by a funded agency, parent, or  
other interested party  
(under section 90)**



## Background

Where a child or young person has been placed in Out-of-Home Care by a court order, the responsibility for case management may be transferred to an agency that is receiving all-inclusive-funding<sup>1</sup>.

As outlined in the [OOHC service provision guidelines](#) and Community Services [Case Management Policy](#) one of the driving principles is that case management should occur as closely as possible to casework for the child or young person.

Community Services identifies cases that are eligible for case management transfer by using the criteria outlined in the Case Management Policy. Assessment for eligibility is undertaken by the CSC with current case management responsibility for the child or young person.

Where case management has been transferred to an agency, the need to vary or rescind a Children's Court order may be identified by a parent or carer, the agency or another interested party, including Community Services, at any point during the case management process.

In these cases the agency prepares the affidavit and supporting evidence, and if necessary a new care plan for CFRU endorsement in line with having the most recent knowledge and rapport with the child or young person and their family.

As the applicant, and in line with retaining parental responsibility for the child or young person, Community Services files the application at the Children's Court. In cases where a parent or other interested party is the applicant, Community Service files a response to the application.

## Child & Family Regional Units

As outlined in the [Child & Family Regional Unit functions paper](#) Child & Family Regional Units (CFRUs) have been established in all regions of Community Services to be the key interface between CSCs, the Helpline, and funded agencies. CFRU functions include placement and service matching, maintaining knowledge of vacancies, and coordinating cases eligible for case management transfer.

The function of each CFRU also includes coordinating all aspects of parental responsibility where case management has been transferred to a funded agency, and non-delegable aspects of parental responsibility where parental responsibility has been transferred to an agency.

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<sup>1</sup> The provision of a rolled up funding amount incorporating all organisational costs including staff, carer and child related costs.

## Varying or rescinding a Children's Court order

As case management includes assessment, planning, implementation, monitoring and review to achieve identified goals for a child or young person, agencies with case management responsibility may identify the need to vary or rescind a Children's Court order under section 90 of the Children and Young Persons (Care and Protection) Act 1998 (the Act).

### Why vary or rescind an order?

A care order needs to reflect the current circumstances of the child or young person who is subject to the order.

Applications to vary or rescind a care order may be made with the leave of the Children's Court where a significant change has occurred in any relevant circumstances since the care order was made or last varied, including but not limited to:

- » the views of the child or young person have significantly changed
- » the risk of harm issues have been sufficiently addressed and restoration is assessed to be a long term option
- » an increase in contact is assessed to be in the best interests of the child or young person
- » the carer(s) wish to have parental responsibility for the child or young person
- » the parents of the child or young person concerned have not met their responsibilities under a care plan or restoration plan
- » a finding by the Children's Court following a s.82 report that proper arrangements have not been made for the care or protection of the child or young person

In these cases an application may be made under section 90 of the Children & Young Persons (Care & Protection) Act 1998 to:

- » vary a care order where some aspect is to be changed but the order is to remain (eg the length of time the order is in place)
- » rescind a care order when the order being reviewed is to be replaced by a completely new order, or no order at all

Each child or young person who is subject to an order from the Children's Court requires case management appropriate to their circumstances, whether delivered by Community Services or an agency.

The following brief table has been developed to provide some typical scenarios and responses, including varying an order, rescinding an order, and other actions, which may include an assessment or review; referrals; arranging a case meeting; conducting a home-visit, or other case work tasks:

| Typical scenarios   | Rescind order | Vary order |
|---|---------------|------------|
| A plan to restore a child or young person to a parent or carer is developed   | ✓             | ×          |
| A planned restoration of a child or young person to a parent or carer is unsuccessful   | ✓             | ×          |
| Adoption of a child or young person proceeds  | ×             | ×          |
| An application by carer for sole parental responsibility proceeds   | ×             | ✓          |
| A change in contact arrangements occurs where there is an Order for contact   | ×             | ✓          |
| A contact order is no longer required   | ✓             | ×          |
| An order for supervision is no longer required  | ✓             | ×          |
| There is a plan to reallocate aspects of parental responsibility between parties  | ×             | ✓          |
| Update registered care plan under s. 38(2)  | ×             | ✓          |
| Change of placement   | ×             | ×          |
| A risk of significant harm report is received concerning the child or young person  | ×             | ×          |
| The family relocates to a rural or remote area with little or no non-government presence and Community Services is best placed to provide casework services | ×             | ×          |
| A placement breakdown has occurred and the non-government agency has not been able to locate a new placement  | ×             | ×          |
| A non-government agency is closing its Out-of-Home Care program   | ×             | ×          |

## Who may apply to vary or rescind an order?

An application to vary or rescind an order may be made by:

- » a child or young person to allow for greater participation in decision-making
- » an agency with case management responsibility (through Community Services)
- » the Children's Guardian
- » a person or agency with parental responsibility for the child or young person
- » a person from whom the child or young person has been removed
- » any person with sufficient interest in the welfare of the child or young person, including previous parties to proceedings
- » NSW Community Services

## What needs to occur before an order can be varied or rescinded?

A key issue where case management has been transferred to a funded agency is the need for clear and timely communication between the funded agency and the CFRU. This is to ensure that care orders reflect the current circumstances of the child or young person, such as the possibility of restoration to relatives or kin, and the most appropriate contact arrangements are in place.

After the application is made to vary or rescind a care order, the Children's Court must first grant leave to bring the application. Leave can be granted or refused. After leave is granted, the Court will move to the next stage which is to consider the actual application, review the evidence and make a determination whether to rescind or vary the order.

Before **granting leave to vary or rescind a care order** the Children's Court considers:

- » the nature of the application
- » the age of the child or young person
- » the length of time the child or young person has been with the current carer
- » the plans for the child or young person
- » whether the applicant has an arguable case
- » matters concerning the care and protection of the child or young person that are identified in:
  - an update report under section 82 of the Act
  - a report prepared following a review directed by the Children's Guardian under section 85A or a placement review under section 150 of the Act

Before making a determination to vary or rescind the care order placing a child or young person in the parental responsibility of the Minister, or aspects of parental responsibility from the Minister to another person, the Children's Court considers:

- » the age of the child or young person
- » the wishes of the child or young person and the weight to be given to those wishes
- » the length of time the child or young person has been with the current carer
- » the strength of the child's or young person's attachments to the birth parents and current carer
- » the birth parent's capacity to provide adequate care for the child or young person
- » the risk of psychological harm to the child or young person if current care arrangements are varied or rescinded

The Children's Court is not required to hear or determine an application to vary or rescind an order unless it considers the person who made the application to have a sufficient interest in the welfare of the child or young person.

The Children's Court may order a person who applies to vary or rescind a care order to notify other people, except where Court is satisfied that an unacceptable threat to a child, young person or other person would arise.

If the application involves changing who has aspects of parental responsibility, a new care plan will need to be prepared for the child, reflecting the proposed changed arrangements.

## **Engaging families**

Creating respectful, effective and collaborative working relationships is fundamental to protecting children and young persons, which commences at the first point of contact with a person and continues throughout the case management process.

Engaging people who display evasive, resistant, or hostile behaviour can be difficult, and is an important area of practice due to the impact it can have on outcomes for children.

### **Recommendations by an agency with case management responsibility**

An agency with case management for a child or young person may recommend to Community Services that an order is rescinded or varied if they can provide sufficient evidence to support their recommendation and the application.

For the process where an agency has parental responsibility see [Flow Chart: Barnardos Section 90 Applications](#).

The decision to apply to vary or rescind an order may be made following a:

- » report involving risk of significant harm
- » an assessment, case review, or placement review where appropriate, and
- » a case meeting with the child or young person, their parents and / or carers (where appropriate) and development of a case plan, and
- » consultation with a legal representative, as required, and
- » consultation with an appropriate Aboriginal or Torres Strait Islander person or service to provide suggestions on developing culturally appropriate plans as well as the application of Aboriginal placement principles, where appropriate
- » consultation with an appropriate person or service to develop a culturally appropriate plan

Sufficient evidence includes: agency's on-going assessment, case review, placement review, case planning (including cultural planning), consultation with the child or young person, their parents and / or carers (where appropriate) and other key stakeholders / parties to the case plan.

An application to vary or rescind a care order must be made while the order is still current, and may not be made where the order will expire prior to the application being filed, served and listed for mention at court.

### **Affidavit and application**

An application to vary or rescind an order requires the funded agency to prepare the required supporting documents, based on their knowledge and involvement with the matter. The documents to be prepared are an application, and affidavit in support which is then provided to Community Services.

Community Services, as the applicant with parental responsibility, signs the application and prepares their own affidavit in support of the application. The CFRU affidavit will provide a short history of the placement arrangements, confirm that the agency has case management and endorse the agency affidavit which will also be filed in the proceedings. The CFRU files the documents with the Children's Court.

## Cross examination

People who have prepared affidavits or reports may be called for cross-examination. From time to time, the Manager Casework, who may not have submitted an affidavit, may still be called for cross-examination in their capacity as the delegated Applicant for the Director-General and as a signatory to the Care Plan.

## Who does what?

The following steps have been developed to assist with Section 90 applications where case management responsibility has been transferred to a funded agency.

Regions may determine, based on available resources, that some or all casework tasks relating to an application to vary or rescind an order are with a CSC as opposed to the CFRU.

| Process to vary or rescind a court order where case management has been transferred to a funded agency  | By            |
|---|---------------|
| 1.1 Identify the need to vary or rescind an order through an assessment, review, at case transfer meeting, consultation with a legal advisor, or application by a parent or other interested party.   | Agency        |
| 1.2 Provide an affidavit to the CFRU, including any supporting evidence as annexures (see <a href="#">Tips for completing an application to vary or rescind an order</a> ).   | Agency        |
| 1.3 Arrange a case meeting with the child or young person, their parents and / or carers, and other key stakeholders, such as an appropriate Aboriginal or Torres Strait Islander or other culturally appropriate person or service, to discuss the application.        | CFRU & Agency |
| 1.4 Complete an <a href="#">Application for leave to apply for Rescission/Variation of Care Order AND Application for Rescission/Variation of Care Order</a> , and an affidavit in support of the application that endorses the agency's affidavit and recommendations. | CFRU          |
| 1.5 Complete a Care Plan if required  | CFRU & Agency |
| 1.6 Forward the completed application form, supporting affidavit, and attached agency affidavit, Care Plan, and genogram (where available) to the relevant Care Legal Support Legal Officer for review.   | CFRU          |
| 1.7 Update the agency about any feedback provided by the Care Legal Support Officer in settling the application.  | CFRU          |
| 1.8 File the s.90 application, affidavit and any supporting evidence with the Children's Court.   | CFRU          |
| 1.9 Serve the court documents to all parties.   | Agency        |
| 1.10 Attend court proceedings on scheduled days, and all reconvened court hearings to have application heard until the matter is finalised. Instructions to Legal Officer will be provided by CFRU Manager as delegate.   | CFRU & Agency |
| 1.11 Arrange a timely case meeting to update the case plan, including permanency planning, following interim or final orders.   | CFRU & Agency |
| 1.12 Attach a copy of Interim and Final Orders to the child or young person's Legal record in KiDS.   | CFRU          |
| 1.13 Forward the application, supporting evidence, and orders to the CSC where the child or young person resides for filing.  | CFRU          |

## Applications by a parent or other interested party

Where a parent or other interested party applies directly to the Children's Court, or notifies the agency of their intention to vary or rescind a current order(s), the agency advises CFRU.

The CFRU and agency liaise about whether to oppose leave being granted by the Court for the parent or other interested party to make an application to vary or rescind the order(s).

The agency and CFRU follow the same process outlined above to file a response, Community Services may also have further roles depending on the change of order being sought, for example development of a Care Plan in the case of reallocation of parental responsibility.

To allow sufficient time to prepare a response the Director, Legal Services should be advised of applications to vary or rescind an order:

- » by someone other than Community Services
- » that have been filed where Community Services is not a party to proceedings

## Dispute resolution

As outlined in the OOHC Service Provision Guidelines, where a dispute arises from an agency, another service provider, or from a child, young person or other significant person, there is a dispute resolution process to be followed. This process is based on the *Interagency Guidelines for Child Protection Intervention 2006*, and occurs via the CFRU where case management responsibility has been transferred to an agency.

### Resources

- » [Case management policy](#)
- » [Child & Family Regional Unit functions paper](#)
- » [OOHC service provision guidelines](#)
- » [Tips for completing s.90 applications](#)

### Further information

For further information about varying or rescinding a Children's Court order, or other legal issues that may arise, such as responding to subpoenas, attending hearings, dispute resolution conferences, and applications for an assessment, please contact your local Child & Family Regional Unit (CFRU).