



FaCS and Child Care and Protection: Basics

This fact sheet summarises the Ask LOIS webinar on this topic, presented by Janet Loughman, Principal Solicitor, Women's Legal Services NSW on 11 July 2013. This webinar can be downloaded for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- Guiding principles when FaCS removes children from their families
- Who are the players in the care system?
- Emergency care and protection orders
- What steps must FaCS take before court?
- What are your clients options?
- What are the types of orders the Children's Court may make?
- Handy hints for clients when dealing with FaCS

Introduction

- In Australia there are about 35,000 children in Australia in out of home care
- While family law in Australia is federal law, child protection laws and systems are state based, so there are significant differences around the country. Eg, around twice as many children are removed from their families in NSW than in Victoria
- A high proportion of children in care are Indigenous:
 - In NSW at June 2011 there were 6060 Aboriginal children and young people in out of home care
 - Nationally, the rate of substantiation of notifications for an Indigenous child is 9 times the rate for non-Indigenous children

United Nations Convention on the Rights of the Child (CROC)

- Guiding principles:
 - Children have the right to protection
 - The best interest of the child must be primary consideration when decisions are made about children
 - Children have the right not to be separated from their parents unless necessary and following law and procedure – including judicial review
 - Children separated from their parents have the right to maintain identity, contact with family unless contrary to their best interests
 - Children have the right to express their views
 - Out of home placements should be periodically reviewed

Children and Young Persons (Care and Protection) Act 1988 (NSW)

- Guiding principles:
 - Best interest of the child
 - Participation of children in decision making
 - Must take account of culture, disability, language, religion and sexuality of the child
 - Least intrusive intervention to protect
 - Permanent placements as well as retention of relationships
- Children are represented by an independent children's lawyer (ICL)



- Children aged 12 and over they are presumed to be able to give direct instructions to their lawyer and have a direct legal representative
- For children under 12 years, their lawyer acts in their best interests, not on their direct instructions
- Both presumptions can be rebutted

Kinship care – it's the law!

- FaCS must try to place children within their Aboriginal or kinship group (as recognised by the community) or with someone else in their community or some other Aboriginal family or extended family or kinship group.
- If one parent is not Aboriginal they can be placed with a non Aboriginal family but they must maintain contact with their Aboriginal family, community and culture

Players in the care system

- Government “child welfare authority” – in NSW that is the Department of Family and Community Services (FaCS, formerly DoCS) and includes the Director-General, case workers and managers
- NGOs – for eg, foster care agencies, family support services, early intervention services
- Foster carers
- Parents
- Children
- Legal aid solicitors
- Independent children’s lawyers
- Children’s Court Magistrate

FaCS and the Children’s Court

- If child at ‘risk of serious harm’, FaCS have the authority to remove children from their families without going to court first.
- In this scenario a ‘Emergency Care and Protection Order’ is made:
 - The emergency order lasts for 14 days and can be extended once
 - FaCS have to bring paper work to court within 72 hours and let parents know court date
- The Children’s Court then provides judicial review of FaCS decisions to remove children
- Children’s Court has to decide:
 - That the child is in need of care (called ‘establishment’)
 - How the child will be cared for in the future (called ‘placement’)
- There are specialist Children’s Courts in Glebe, Parramatta , Broadmeadow, Kembla, Woy Woy and Wyong, in all other locations, the Children’s Court sits in the Local Court
- Proceedings in the Children’s Court are always closed (the public cannot sit in)

Steps before court

1. Parents will be served with court papers called a Bundle 1. This includes the following:
 - Where and when the first mention at the Children’s Court is
 - The reason child has been removed
 - What evidence FaCS has that the child is at risk
 - What things FaCS have done to work with the parents to improve things
 - Copies of medical or other reports
 - Reports about the parents
2. Take the paperwork to a solicitor as soon as possible



3. Tell the caseworker if there is a family member who could look after the child, but assessment is required
4. Make sure client turns up at court
5. Prepare for waiting at court, it may be a while before the matter is mentioned – take food, water, a support person
6. Look for duty solicitor at court and advise your client to arrive early if they need assistance from Legal Aid. Legal aid is available for parents and children

Court Process

The Court must make two findings to make orders for the children's removal:

1. An 'establishment' decision – to determine there was a serious risk leading to the removal of the children. This decision is usually not challenged
2. A 'placement decision'. This is the decision that is more commonly contested, these surround the circumstances surround where/with whom the children should be placed
 - The Court has flexible options in making orders, for example it may make an order:
 - To refer the matter to Alternative Dispute Resolution
 - To work with parents towards restoration through a restoration plan. This outlines what parents need to do before their children can come home
 - Your client should raise any issues to try to make the order achievable
 - Your client should ensure they get a copy of the order
 - An order for contact with parents
 - An order to place in foster care until child turns 18
 - A guardianship order

After final orders

- Your client can appeal the decision of the Children's Court
 - Your client must apply to the District Court within 28 days of the decision
- Alternatively, your client can make a section 90 application to change the final orders
 - The parents must show that they have made the necessary changes and that their child will be safe if returned to them

Handy hints for your client

If FaCS come knocking what should your clients do?

- Don't ignore FaCS or refuse to talk to FaCS
- Listen to what they say
- Try to focus on the children. Try to stay calm
- Tell them you want to get legal advice
- If FaCS tell you they want to meet with you tell them that you want to get legal advice first
- Take a support person to a meeting
- Write down what is said at the meeting
- Keep a diary of all your conversations with FaCS
- Don't sign anything!!! Take the paperwork and get legal advice first
- Use the WLS booklet–*10 Things You Need to Know if FaCS Remove Your Kids* – see <http://www.asklois.org.au/node/693>