

Inquiry into Child Protection

Legal Aid NSW Submission to the
General Purpose Standing
Committee No. 2

July 2016

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged. In the context of child protection, Legal Aid is particularly focussed on the needs of children and young persons.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW welcomes the opportunity to provide comments to the General Purpose Standing Committee No. 2 (the Committee) in response to the Inquiry into child protection (the Inquiry).

Legal Aid NSW is uniquely placed to provide comments in response to the

Committee through the experiences of our specialist legal services that provide legal advice, minor assistance and representation to children, young persons and adults prior to and in the context of care litigation. In addition we provide assistance, casework and representation to young people in Out-of-Home Care (OoHC).

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Terms of reference

In May 2016 Legal Aid NSW provided a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse on the subject of institutional responses to child sexual abuse in Out-of-Home Care. In view of the commonality of subject matter with this Inquiry we have provided the General Purpose Standing Committee No. 2 with the substance of the earlier submission to assist with consideration, in particular, of the following terms of reference:

- c) the amount and allocation of funding and resources to the Department of Family and Community Services for the employment of casework specialists, caseworkers and other frontline personnel and all other associated costs for the provision of services for children at risk of harm, and children in out of home care
- d) the amount and allocation of funding and resources to non-government organisations for the employment of casework specialists, caseworkers and other frontline personnel and all other associated costs for the provision of services for children at risk of harm, and children in out of home care
- g) specific initiatives and outcomes for at risk Aboriginal and Torres Strait Islander children and young people.

In addition we include submissions for consideration in relation to the following terms of reference:

- a) the capacity and effectiveness of systems, procedures and practices to notify, investigate and assess reports of children and young persons at risk of harm
- b) the adequacy and reliability of the safety, risk and risk assessments tools used at Community Service Centres
- f) the structure of oversight and interaction in place between the Office of the Children's Guardian, Department of Family and Community Services and non-government organisations regarding the provision of services for children and young people at risk of harm or in out of home care.

Recommendations of Legal Aid NSW

In response to terms of reference of the Inquiry, Legal Aid NSW recommends:

1. establishing a nationally consistent therapeutic care framework for residential OoHC service delivery.
2. when developing a national therapeutic framework, emphasis is placed on reducing interaction with police and decriminalising children and young people in residential OoHC.
3. developing and implementing a strategy to professionalise the residential care sector, including the introduction of a minimum qualification. This would recognise the highly specialised role required for working with children and young people with complex needs.
4. developing national standards for the training and accreditation of residential carers in OoHC settings.
5. expansion of resources allocated to the residential OoHC sector to:
 - a) establish a larger range of targeted placements to provide more options in the continuum of care, and
 - b) increase staff to client ratios in houses so there is appropriate supervision and support of young people in residential OoHC.
6. increasing the leaving care age from eighteen to twenty-one years.
7. greater accountability around the commencement and completion of leaving care planning, including:
 - a) the development of a uniform system across the residential OoHC sector for the leaving care planning process
 - b) monitoring of leaving care planning by the Office of the Children's Guardian (the Guardian)
 - c) automatic notification of the NSW Ombudsman where a young person leaves care without a leaving care plan, and
 - d) reporting on leaving care outcomes achieved by residential OoHC services and the NSW Department of Family and Community Services (FaCS), including the participation of young people in the process, and the rates of culturally appropriate plans developed for Aboriginal children and young people.
8. establishing a centralised and separate leaving care team within FaCS to advise on the development of leaving care plans and supporting young people after care.
9. establishing separate case worker positions dedicated to supporting young people leaving care within each designated agency that has case management of young people in statutory OoHC.

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10. allocating more resources to the aftercare sector, including more Aboriginal specific organisations, taking into account the significant over-representation of Aboriginal children and young people in OoHC.
 11. establishing systematic reporting and monitoring arrangements for ensuring timely and efficient identification and processing of victims compensation matters.
 12. establishing accessible avenues for a child or young person in care to seek legal advice or make a complaint around issues that they are experiencing while in care.
 13. consideration be given to establishing a separate casework team with responsibility for making the decision to assume a child or young person into care and to prosecute the matter in the Children's Court.
 14. reviewing the risk assessment tools used by FaCS to determine if a child or young person is at risk of harm sufficient to warrant assumption or removal into care.
 15. increased resources be directed to training caseworkers in the application of risk assessment tools and the criteria that mandates the assumption or removal of a child or young person into care.
 16. extensive research be undertaken to inform decisions about contact for children found to be in need of care and protection, with a focus on adopting a case by case model.
 17. establishing protocols for communication between legal representatives and caseworkers to allow for constructive, collaborative negotiations to take place in relation to early interventions.
 18. establishing protocols for communication between children's lawyers, both independent legal representatives (ILR) and direct legal representatives (DLR) to enable children's lawyers to speak directly with caseworkers working with the children they represent.
 19. in any early interventions with FaCS, parents are given a proper opportunity to obtain legal advice and to have representation if requested.
 20. ADVOs must not be used as a means of removing a child or young person from the care of their primary care giver.
 21. allocating more resources to the exploration of all alternative placement options with family and kin or other people significant to a child or young person.
 22. exploring all alternative placement options be made a casework priority.
 23. assessment of alternative family and other placements include assessment of interim or short term options as a preferred way of caring for children while decisions are being made about their care.
 24. specialist consultation be undertaken in the preparation of assessments of Aboriginal and Torres Strait Islander families and kin to care for children.

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25. extending the power of the Children's Court to order supervision reports pursuant to section 76 of the Act for a period of up to two years.
 26. that consideration be given to extending the power of the Children's Court to order section 82 parental responsibility reports pursuant to the Act for a period of up to two years.
 27. extending the power of the Children's Court to relist and review matters if, on the basis of either a section 76 report or a section 82 report, the court is not satisfied as to the parental responsibility arrangements for the child or young person.
 28. consideration be given to establishing an independent body through which authorised carers can seek a review of the actions of the NGO with case work responsibility.
 29. developing consistent and transparent information for carers to manage their expectations with respect to the permanency of the placement of children in their care and that FaCS be directly involved in this process, given its historical expertise as an OoHC provider.
 30. developing transparent and consistent protocols for communicating the role of FaCS and NGOs in each set of proceedings.

Terms of Reference c, d and g

Delivering specialist legal services to vulnerable young people

Legal Aid NSW has extensive experience working with vulnerable young people, including those in, or with a history of, OoHC. The Family Law Division of Legal Aid NSW advises and represents children and young people in care and protection matters before the Children's Court through its specialised care and protection litigation service. Legal Aid NSW also provides extensive early intervention legal advice and assistance to parents, children and other parties who come into contact with the child protection system, both through its litigation service and through the Early Intervention Unit.

In response to the October 2014 reforms to the care and protection legislation. Legal Aid NSW partnered with 22 CLC 'care partners' to provide early intervention services to families coming into contact with the care and protection system. Legal Aid NSW provides ongoing training and mentoring to the care partners. Legal Aid NSW also advises and represents children in mediations to change contact orders and care arrangements after final orders have been made.

The Children's Legal Service of Legal Aid NSW (CLS) advises and represents children and young people under the age of eighteen involved in criminal cases before the Children's Court.

The Children's Civil Law Service (CCLS), established in 2013, provides a targeted and holistic legal service to young people identified as having complex needs. The CCLS works in collaboration with criminal lawyers in the CLS, the Aboriginal Legal Service NSW/ACT and Shopfront Youth Legal Centre to provide joined up legal services to vulnerable young people.

Legal Aid NSW care and protection solicitors represent children and young people under the age of eighteen in care and protection proceedings. Legal Aid NSW works closely with multiple services to assist the Children's Court to make well informed decisions about care arrangements for children and permanency planning for children. Solicitors representing children work closely with the Children's Court Clinic, established to provide expert reports about care arrangements and permanency planning for children and young people. Legal Aid NSW funds specialist expert reports in care and protection proceedings in some circumstances.

Care and protection solicitors observe that the entry of children and young people into OoHC is more often than not in traumatic circumstances, involving removal from parents or significant others. Children and young people are provided with little information about the reasons for their removal or the transition into OoHC and sibling groups are regularly separated. On arrival in OoHC placements little if any information is provided to children about their living circumstances. Often several days, sometimes weeks, pass following removal before children and young people have contact with parents or people significant to them, including siblings.

Children and young persons, particularly those with special or complex needs, often experience a number of placement changes during the course of litigation. In relation to each transition, little or no information is provided to the child or young people about each placement.

Children and young people who are already traumatized can suffer further harm due to the removal process and as a result can be more vulnerable to multiple placements. Children and young people can then go on to suffer further abuse in care or from a sub-standard level of care in the OoHC system.

Many children and young people come into contact with the child protection system having experienced significant trauma, including sexual abuse and family violence. Children and young people in OoHC remain vulnerable to further sexual abuse, either by carers or staff through child sexual exploitation or through child to child sexual abuse when placed with other young people in OoHC placements.

Lawyers in both the CLS and CCLS have observed that young people with complex needs are over-represented in their client base, in particular young people with a history of OoHC. A 2013 study indicated that the vast majority of Legal Aid NSW's most frequent service users' between 2005 and 2010 were under eighteen, and many of these users had multiple and complex needs. More than half were homeless, 94% had spent time in a juvenile detention centre and 46% had spent time in OoHC. In a 2011 Issues Paper, *The Drift from Care to Crime*,¹ Legal Aid NSW also identified a growing trend towards the criminalisation of young people in OoHC.

Care and protection solicitors observe a significant difference in the apparent level of risk to a child or young person before the Secretary of the Department of Family and Community Services (the Secretary) will assume the care of a child or remove a child or young person and file an application for a care order. This difference is evidenced in the initiating report and bundle of documents commencing proceedings in the Children's Court. In addition there are significant differences in the timeframes within which the Secretary will file an application for a care order. Some of these differences appear to be regionally inconsistent. For example, Legal Aid NSW observes that the risks to a child or young person that might give rise to an application in the Children's Court in Parramatta, would not give rise to an application in Dubbo.

Legal Aid NSW's comments in response to the terms of reference (c), (d) and (g) are based on our experience with children and young people in residential OoHC.²

¹ Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper*, October 2011, available at: http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0019/18118/The-Drift-from-Care-to-Crime-a-Legal-Aid-NSW-issues-paper.pdf

² Defined as an OoHC placement in a residential building for children and young people where there are paid staff

Some relevant factors to note when looking at the cohort of children and young people who are in residential OoHC include:

- this cohort comprises only 2.9% of the OoHC population in NSW (503 young people)³
- residential OoHC is mainly used for children and young people who have complex needs,⁴ and
- they have experienced multiple placement breakdowns prior to entering residential OoHC.

Therapeutic responses in residential Out of Home Care

Legal Aid NSW recommends the establishment of a nationally consistent therapeutic framework for OoHC service delivery. The implementation of a therapeutic care framework is particularly important in the residential OoHC setting, given the increasing representation of children and young people with complex needs.

The provision of care within a residential OoHC setting should be a trauma informed response. It should aim to provide a safe and supportive environment to address the combined impacts of abuse, neglect and separation from family. Currently in NSW, no prescribed therapeutic framework underpins the provision of services in the residential OoHC sector, which has resulted in vastly varying and inconsistent standards of care for young people in residential OoHC.

Reliance on police as a behaviour management tool

Many young people in residential OoHC have experienced complex trauma. For young people, the impact of past experiences of trauma can manifest in a range of disruptive and difficult behaviours, often characterised by a limited capacity to regulate behaviours and emotions.

The lack of a consistent therapeutic framework has proved problematic in relation to managing challenging behaviours of young people in residential OoHC. For Legal Aid NSW, a key issue is the inappropriate use of police as a behaviour management tool by residential OoHC providers.⁵ This has resulted in unnecessary and frequent interaction of this group of vulnerable young people with the criminal justice system. Often these young people come before the Children's Court having been charged for absconding from placement, or for relatively minor assault charges or property offences that occur in the residential OoHC environment.

³ Australian Institute of Health and Welfare, *Child Protection Australia 2013-14*, Child welfare series no. 61, 2015.

⁴ Ibid.

⁵ Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper*, October 2011, available at: http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0019/18118/The-Drift-from-Care-to-Crime-a-Legal-Aid-NSW-issues-paper.pdf

In addition, Legal Aid NSW submits that an over-reliance on apprehended violence orders results in the criminalisation of behaviour that would normally be dealt with as a disciplinary matter if it had occurred in a family home. This leads to an ongoing cycle of conflict, and the unnecessary criminalisation of a vulnerable young person.

Case study: SD

SD is 16 years old and lives in a residential OoHC placement. She was removed from her mother as a baby and placed in various foster care placements. After numerous placement breakdowns, SD was placed in residential OoHC at the age of eleven. SD has a diagnosis of ADHD and ODD and is medicated for these conditions.

During a Friday afternoon, workers were aware that SD was feeling unsettled and on edge. A worker took SD's mobile phone from her as a punishment for her misbehaviour which upset SD. SD attempted to get the mobile phone from the worker who then threw the mobile phone to another worker. SD then grabbed the worker from behind to try and get her mobile phone back. SD then kicked the walls and caused damage.

The workers called Police who arrested SD and took her to the police station where she was then charged with assault and destroying/damaging property and released on bail. Police also took out an apprehended domestic violence order against SD on behalf of the worker.

Challenging behaviours need to be managed in the residential OoHC environment in a way that not only supports the young person who is exhibiting the behaviours but also ensures the safety of all residents and workers. Legal Aid NSW submits that the over-use of police as a behaviour management tool is punitive in nature and inconsistent with a therapeutic response. For a child or young person who has experienced significant trauma, the presence of the police can have an additional harmful impact on the young person.

Legal Aid NSW has led systemic change and advocacy around this issue through our recent work with the NSW Ombudsman's Office in the development of a State wide *Joint Protocol to Reduce the Contact of Young People in Residential Out of Home Care with the Criminal Justice System* (the Protocol). The Protocol sets out guidelines for appropriate responses to young people with challenging behaviours by both the residential OoHC service provider and NSW Police, emphasising a trauma informed response. It is a multi-agency collaborative effort which aims to reduce the frequency of interactions between young people in residential OoHC and the NSW Police.

The launch of the new NSW Child Safe Standards by the NSW Children's Guardian (the Guardian) has also reinforced the need to better support young people with challenging behaviours in OoHC.⁶ Standard 11 'Behaviour Support' now requires residential OoHC agencies to have clear protocols regarding the use of police as a behaviour management strategy or in response to risk taking behaviour by children and young people.

Recommendations

Legal Aid NSW recommends:

1. establishing a nationally consistent therapeutic care framework for residential OoHC service delivery.
2. when developing a national consistent therapeutic framework, emphasis is placed on reducing the interaction of police and decriminalising children and young people in residential OoHC.

Enhancing placement stability

Multiple placements and instability

Many of the young people who are clients of the CLS and CCLS have experienced multiple placement breakdowns, particularly those in residential OoHC. Research around key vulnerable periods for children and young people in OoHC reveals that the stability and number of placements that a young person experiences is indicative of the likelihood of the young person engaging in criminal behaviour. The transitioning between placements is known to increase the risk of post-placement offending.⁷

In Legal Aid NSW's experience, it is not uncommon for a young person to have spent short, transient periods of time in a residential OoHC placement, with frequent bouts of time spent in juvenile custody as a result of ongoing conflict within residential OoHC houses with other co-residents and staff. The interrupted time spent in custody often means that there is little opportunity for the young person to meaningfully create attachments with care workers, and does little to encourage a young person to view their allocated placement as a safe place, let alone a home environment.

Legal Aid NSW considers there to be several key factors that contribute to the instability of placements within the residential OoHC sector. One is the lack of professional, specialist and highly trained staff working with and caring for young people with complex needs and a history of trauma. Legal Aid NSW has observed vast differences in the quality and skills sets of workers employed in various residential OoHC service providers. There is no current specialised training or qualification required in order to be

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http://www.kidsguardian.nsw.gov.au/ArticleDocuments/449/ChildSafeStandards_PermanentCare.pdf.aspx?Embed=Y

⁷ Cashmore, Judy "The link between maltreatment and adolescent offending: Systems neglect of adolescents" – Family Matters No, 89 2011.

employed in the residential OoHC sector. The positions in residential OoHC services are often poorly paid and there are limited resources to support staff to participate in specific training. By comparison, FaCS workers are in a professionalised workplace and have degrees in social work or psychology. The case management of young people in residential OoHC in NSW has recently transferred from FaCS to the non-government (NGO) sector. The disparity in training, qualifications and skills between the government and non-government sector is of great concern as it has such a significant impact on young people in OoHC.

The work force in the residential OoHC sector is also highly casual, in particular for workers who are rostered during the weekends or the night. Staff have limited knowledge of the individual young person and their needs. The constant turnover of workers in a young person's life means that they are less likely to create and form connections. These workers often lack the skills or knowledge of the young person to manage their behaviours and de-escalate confrontational situations appropriately, which often results in police involvement.

Legal Aid NSW has also observed an inappropriate client mix in the allocation of placements. There is very little client matching applied to placements to take into account the particular needs and vulnerabilities of the young person. Legal Aid NSW's experience has been that a client is not so much matched to a placement, but allocated to the only placement that might be available because of limited resources available in the sector. This often results in young people being placed in houses with other young people who might be an entirely inappropriate mix for them, including, for example, a twelve year old child being placed in a house with seventeen year old youths with criminal histories. This increases the risk of further trauma being caused by conflict with, or victimisation by, other young people living at the service.

There are also inappropriate geographical placements to locations where the young person has no attachment. This often results in the young person absconding from the placement to return to a familiar area and where they have closer contact with their families. The importance of maintaining connections to family and community is a key factor in minimising the impact of being in care, and this is often overlooked in decisions about placement.

Further, there are inappropriate client to house ratios. Many of the young people that are seen by Legal Aid NSW complain about having too many young people in a house (usually around five young people) with limited staff support. In view of the vulnerabilities and complexities of young people who are placed in residential OoHC, having fewer young people in each house would decrease conflict, ease anxieties and allow greater capacity for staff to care for each young person.

Finally, there are limited resources and funding for more targeted placements to provide greater options in the continuum of care. A range of alternative placement options should be available to provide varying degrees of assistance and care tailored to the needs of young people. An appropriate client mix and consideration around appropriate placements is key to minimising placement instability in residential OoHC services.

Case study: EN

EN is a fifteen year old from a refugee background. He has experienced significant trauma as a result of family violence, neglect and exposure to drugs and alcohol. He was placed into care when he was 14 and moved into a residential OoHC placement two hours away from where he had settled in NSW, and where his family live.

EN had said that he would like to be placed in a residential OoHC placement closer to where his family live and where his FaCS caseworker is based, but he has continually been placed back in the same residential OoHC service. Because of the length of time it takes EN to travel on public transport to see his family and return to placement, EN will often abscond from his placement by remaining overnight with family and friends. As a result of his frequent absconding, EN is breaching his bail conditions by not returning to his placement. This has resulted in further contact with police and EN spending frequent periods of time in custody.

Recommendations

Legal Aid NSW recommends:

3. developing and implementing a strategy to professionalise the residential care sector, including the introduction of a minimum qualification. This would recognise the highly specialised role required for working with children and young people with complex needs.
4. developing national standards for the training and accreditation of residential carers in OoHC settings.
5. expanding resources allocated to the residential OoHC sector to:
 - establish a larger range of targeted placements to provide more options in the continuum of care, and
 - increase staff to client ratios in houses so there is appropriate supervision and support of young people in residential OoHC.

Increased support when leaving care and in post-care life

A key component of the legal assistance and casework that the CCLS undertakes for clients involves advocacy around the statutory entitlements of young people transitioning out of care. This has included:

- advocating for the development of a young person's leaving care plan (LCP) targeted to their needs
- advocating for greater involvement and support from FaCS or the NGO providing residential OoHC case management in supporting a young person transitioning out of care

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- ensuring that a young person's entitlements to Victims' Support have been canvassed in a timely manner prior to leaving care, and
 - seeking access to entitlements pursuant to a young person's LCP once the young person has left care.

Leaving Care Plans (LCP)

The types of assistance that may be provided to a young person leaving care is set out in Part 6 of Chapter 8 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the Care Act). Section 165 of the Care Act allows the Minister to provide or arrange such assistance for children and young persons who leave statutory out-of-home care from the ages of 15 until 25, having regard to their safety and welfare.

Section 166 of the Care Act mandates that the 'designated agency having supervisory responsibility for a child or young person must prepare a plan, in consultation with the child or young person, before the child or young person leaves out-of-home care'. This plan must include specific supports and assistance to the young person across a range of areas, including access to health assistance, education, employment, housing and legal assistance.

In Legal Aid NSW's experience, young people are not provided with adequate planning and support from either FaCS or the residential OoHC service before they leave care. Many of our clients have left care without having a LCP developed at all, despite the statutory obligation on designated agencies to do so. Where our clients have a LCP, the vast majority are template plans developed with limited or no participation from the young person and bare little relevance or resemblance to their needs or circumstances.

The issues around the preparation of LCPs were canvassed in the NSW Ombudsman's report, *The continuing need to better support young people leaving care* (August 2013).⁸ This report found that only 22% of young people left care with an endorsed LCP. Other key findings included:

- five months after exiting care, 19% of the cohort still did not have a LCP
- of the care leavers for whom a LCP was provided, planning of the LCP commenced in a timely manner for only 17% of care leavers
- of the care leavers for whom a LCP was provided, the planning and support was considered inadequate for almost half of them, and
- leaving care planning and support was inadequate for the care leavers who were in Juvenile Justice detention in the 12 months prior to exiting care.

⁸ https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0017/10880/The-continuing-need-to-better-support-young-people-leaving-care-web.pdf

Legal Aid NSW's experience advocating for clients leaving care mirrors the findings made by the NSW Ombudsman. In addition, we have identified systemic issues around:

- inconsistencies in the quality of the development of LCPs and the skills sets within FaCS staff and residential OoHC staff to develop LCPs
- a lack of participation and involvement of the young person in the leaving care process and developing the LCP
- different approaches from agencies around the leaving care process. In some cases, there appears to be motivation to close files quickly which has compromised the planning process and had a detrimental impact on the care leaver
- significant issues around the timeliness in the preparation of leaving care plans and inadequate support provided
- rigidity and inflexibility in developing tailored and targeted LCPs for care leavers. Legal Aid NSW has experienced barriers in advocating for more support or services within a young person's LCP, such as financial entitlements or counselling support. An example includes a worker declining to put in place provisions for financial support for counselling as the young person, who had been a victim of sexual assault, had not engaged with a counsellor/psychologist while she was residing in the residential OoHC placement. In Legal Aid NSW's view, the inflexible application of the Minister's Guidelines for assistance⁹ is partly due to the inexperience and knowledge of workers preparing the LCP, as well as a perceived pressure to save resources. It is not uncommon for Legal Aid NSW to be told that a particular form of assistance would not be approved by the District Directors from FaCS
- young people leaving care without adequate identification or supporting documentation, which leads to barriers when obtaining a driver's license, employment and access to Centrelink allowances.

Case Study: KJ

KJ is an Aboriginal young man who was placed in a residential OoHC service eight months before he turned eighteen. KJ had come into contact with the criminal justice system due to his frequent absconding from his placement to return back to his family and friends. The residential OoHC service started the leaving care planning process with KJ two days before he turned eighteen. The meeting took place over the course of half an hour and failed to provide supports. Of most concern was that the residential OoHC service did not have any accommodation options in place for KJ. KJ's worker had not submitted a Housing NSW application for priority housing, or arranged other referrals to supported accommodation services.

⁹ Guidelines on the provision of assistance after leaving out-of-home care

The only way KJ was not exited into homelessness was by FaCs extending the funding to the residential OoHC service to allow KJ to stay with them for a further four weeks to enable the service additional time to undertake proper leaving care planning.

Aboriginal Young People

The CCLS works with Aboriginal young people in partnership with the Aboriginal Legal Service (NSW/ACT) at the Youth Koori Court (the YKC).¹⁰ A significant proportion of young people in the YKC are in statutory OoHC. Many of these young people have received limited case work or other assistance from FaCS and their experiences of leaving care and receiving support while in care have been significantly compromised by a range of factors, discussed below.

The application of the Aboriginal Child Placement Principles has had unintended consequences. In Legal Aid NSW's experience, young Aboriginal people who are placed in kinship placements often do not get the benefit of casework assistance and support from FaCS. When kinship placements break down (usually for our clients, at an older age), FaCS may not have had any involvement with the young person for a significant period of time. These young people are typically not engaged with any service and it is often not until Legal Aid NSW advocates with FaCS on their behalf that a case worker is allocated to either provide support and assistance, and to develop a LCP.

High rates of incarceration of Aboriginal young people have also meant that the assistance young people receive in care is compromised due to frequent periods of detention. There is often little contact or engagement from designated agencies where a young person is in custody, and there is nominal consultation and participation of the young person in planning the leaving care process.

There is limited support to develop culturally appropriate plans in the leaving care process. Legal Aid NSW's experience has been that there is a significant lack of Aboriginal identified staff to provide appropriate cultural planning as part of the leaving care process.

In Legal Aid NSW's experience, there also appears to be significant distrust by Aboriginal families and young people about involvement from government agencies who have been responsible for the separation and intergenerational removal of children from their families. This can act as a significant barrier in a young person's capacity to engage with FaCS and other agencies, and the perception of non-compliance or non-engagement further limits the provision of any meaningful support or assistance to the young person. In our view, there needs to be alternative and more innovative ways of engaging with Aboriginal young people, including the funding of other case management services to provide on the ground assistance and support to young people, while acting as a conduit in building a relationship with FaCS.

¹⁰ The Youth Koori Court has been trialed at Parramatta Children's Court since May 2015: <http://www.justice.nsw.gov.au/Pages/media-news/news/2014/NSW-Trials-Youth-Koori-Court-.aspx>

Case study: JT

JT was born in a regional community and removed from his parents at a young age and separated from his siblings. JT experienced significant trauma from the removal and disconnection from his family and his culture. Since the age of twelve, JT has had numerous placements with family, friends or community members and self-placed a number of times.

At seventeen years old, JT was placed in custody serving a period of control. It wasn't until some ten months later that he received a face-to-face visit from FaCS. JT's leaving care plan was not finalised until after he turned eighteen. Two days before his eighteenth birthday, JT had a short telephone conversation with his FaCS caseworker in order to prepare his LCP. JT's LCP was signed off and approved without any real involvement or participation by him in this process.

Subsequently JT was referred to Legal Aid NSW, who assisted JT in obtaining an amended LCP to include further cultural support while in custody and to include a referral to Aftercare services. FaCS also agreed to provide JT with his original birth certificate.

Case study: SA

SA was removed from the care of his parents at the age of two and placed in foster care placements. He experienced chronic homelessness, leaving his placements from the age of eleven and self-placing with relatives and friends. SA also was affected by the passing of his mother just before he turned eighteen, which resulted in ongoing loss and grief for which he had no appropriate cultural or clinical support.

While involved with the YKC, Legal Aid NSW made enquiries on his behalf with FaCS in relation to his LCP.

Legal Aid NSW were advised that there was no open plan for SA and that a LCP had been developed and signed off without SA's participation or consultation as SA was homeless and non-contactable. Legal Aid NSW made submissions on his behalf to FaCS to seek funding for intensive casework support to be provided to SA from another agency, in view of the level of distrust that SA had towards FaCS. This was granted and another agency started working with SA and has successfully assisted him with housing, access to relevant services and finalising a LCP that is more targeted and relevant to his needs.

After care support

It has been abundantly clear in the course of our work that there are limited resources to provide aftercare support for young people transitioning out of care and who have left care. The aftercare services that currently do exist assist young people to the extent that their resources allow, but they are significantly underfunded.

There are significant barriers experienced by care leavers who have turned eighteen to have a LCP developed (if they left care without a LCP) or to seek access to entitlements pursuant to an approved LCP. The experiences of some of our clients has been that the process is excessively administrative and assumes a high level of systems navigation, for which many care leavers do not have the skills or capacity. This often results in the young person not accessing any of the support or assistance to which they may be entitled.

Case study: NP

NP is an Aboriginal young woman who has an extensive history of trauma, including chronic neglect, domestic violence and substance abuse. NP was removed from her family at the age of four and has diagnoses of ADHD, ODD, anxiety, depression and PTSD.

NP was nineteen years old when her youth worker assisted her in trying to get information about her LCP and what support she could access. NP contacted her local FaCS office and was told that there was no open matter for her within that office. NP was advised that she would need to call the FaCS Helpline and make a request to reopen her matter, before her local FaCS office could discuss her LCP with her. Without the assistance of NP's aftercare worker to navigate through the process, NP would have given up on trying to access her LCP.

Legal Aid NSW recommends the allocation of more resources to the aftercare sector to ensure that young care leavers have adequate support in the transition from care. Legal Aid NSW also believes that there is a clear need for specialist leaving care workers within FaCs and/or the designated agency. This would provide a centralised point of contact for a young person who has left care to seek sufficient information and assistance around their LCP and other entitlements.

Access to information

A young person leaving care has a statutory right to access their personal information pursuant to section 168 of the Act. The designated agency that had supervisory responsibility for the young person is required to provide an appropriate person to support and assist the person seeking access to information at the time when access to the information occurs.

It is Legal Aid NSW's experience that where young people have sought access to their own files, there have been significant delays around the processing of these requests. While we note that FaCS has recently committed to provide these requests in a more timely manner,¹¹ this can be delayed where a large number of applications have been received.

¹¹ Currently listed as 8 weeks: <http://www.community.nsw.gov.au/parents,-carers-and-families/fostering,-guardianship-and-adoption/foster-care/were-you-in-out-of-home-care>

Case Study: NP (continued from above)

After accessing her LCP, NP advised that she wanted to seek access to her files and care records. Legal Aid NSW assisted NP with her application and experienced significant delays in the processing of this application. An application was initially made in September 2014 for NP to access her records under the *Government Information (Public Access) Act 2009* (NSW) (GIPA). In December 2014, NP's GIPA application was refused on the basis that the request would constitute an unreasonable and substantial diversion of the agency's resources.

In January 2015, an application for NP was then made to the Care Leavers Records Access Unit in FaCS for access to her personal records. After repeated attempts to follow up the request, a complaint was lodged with the NSW Ombudsman's Office in May 2015 about the delay NP experienced in accessing her files. Following that complaint, NP's files were received in June 2015.

It took NP nine months to receive her care files. It is questionable whether a young care leaver without the assistance of a lawyer would have received their files in a timely manner or indeed at all.

The timely access to a young person's file is an important part of the process of leaving care and a statutory right. It recognises the importance of a young person understanding their history and being able to access personal information about their care held by a government agency. It can be a powerful and important part of the healing process where a young people feels ready to view their own files. Excessive delays in the processing of such requests are unnecessary and lead to frustration with a system which many young people already resent.

Timely access to Victims' Support

The provision of appropriate and timely support to victims of violence is central to a therapeutic approach to young people in OoHC. A significant majority of young people who are placed in OoHC have been victims of violence, including family violence and sexual assault.

It is imperative that statutory agencies responsible for the care of children and young people have systematic processes in place to ensure that adequate support services are provided as part of a trauma informed practice. In addition, appropriate and timely identification of eligibility for victims' compensation and assistance in lodging these claims is crucial.

Legal Aid NSW recommends that there should be clear and uniform systems in place throughout the OoHC sector to ensure children and young people have timely access to victims' support. Legal Aid NSW is encouraged by the introduction of a FaCS policy around the auditing of a young person's file before they leave care in order to identify relevant legal claims, including eligibility to claim victim's compensation.

However, it is Legal Aid NSW's experience that this process is not systematically applied throughout the residential OoHC sector. The audit process usually occurs close to the time when a young person leaves care, which leaves little opportunity to follow up or support the young person in a claim if this is required.

Legal Aid NSW has also experienced barriers in the support of victims once they have turned eighteen, with many care leavers either not having gone through the audit process or having little information about further support being available. Legal Aid NSW submits that all care leavers should be supported by FaCS in determining their eligibility for victims' compensation and in lodging relevant claims.

Recommendations

Legal Aid NSW recommends:

6. increasing the leaving care age from eighteen to twenty-one years.
7. greater accountability around the commencement and completion of leaving care planning, including:
 - a) the development of a uniform system across the residential OoHC sector for the leaving care planning process
 - b) monitoring of leaving care planning by the Office of the Children's Guardian
 - c) automatic notification of the NSW Ombudsman where a young person leaves care without a leaving care plan, and
 - d) reporting on leaving care outcomes achieved by residential OoHC services and FaCS, including the participation of young people in the process, and the rates of culturally appropriate plans developed for Aboriginal children and young people.
8. establishing a centralised and separate leaving care team within FaCS to advise on the development of leaving care plans and supporting young people after care.
9. establishing separate case worker positions dedicated to supporting young people leaving care within each designated agency that has case management of young people in statutory OoHC.
10. allocating more resources to the aftercare sector, including more Aboriginal specific organisations, taking into account the significant over-representation of Aboriginal children and young people in OoHC.
11. establishing systematic reporting and monitoring arrangements for ensuring timely and efficient identification and processing of victims compensation matters.
12. establishing accessible avenues for a child or young person in care to seek legal advice or make a complaint around issues that they are experiencing while in care.

Terms of Reference a, b and f

Legal Aid NSW comments in relation to Terms of Reference (a), (b) and (f) are based on our experiences in advising and representing parents in early interventions by FaCS, representing children and parents in care and protection litigation and applications and mediations in relation to care arrangements for children including contact, after final orders have been made.

Assessments of children and young people at risk of harm

In Legal Aid NSW's experience the circumstances in which the Secretary decides to take action in relation to a child or young person differ quite significantly from case to case. Legal Aid NSW is aware of many cases in which multiple risk of significant harm (ROSH) reports are made in relation to a child or children. There can be as many as thirty, forty or fifty reports, over many years, without either effective intervention or children being removed.

Legal Aid NSW is aware of many cases in which more children are born into a family in relation to which ROSH reports have already been made. The birth of another child or more children escalates the risk of harm. Legal Aid NSW becomes aware of these matters when the Secretary ultimately files proceedings in the Children's Court having already removed all of the children. In these cases, by the time the Secretary intervenes, children are exhibiting a number of physical, psychological and emotional problems which can include violent or sexualised behavior, making it more difficult to find OoHC placements or to provide effective treatment. This delay in taking action in relation to sibling groups with growing complex needs, also makes it more likely siblings will be separated on removal.

In other cases Legal Aid NSW is aware of children being removed following the first or after only a very few ROSH reports. Sometimes this can be because an alternate family placement is available but this is rare. In some of these cases, the family may have only just become known to FaCS.

It is difficult to objectively understand the difference in risk assessments in relation to a child or young person, when the ROSH reports mostly contain details of similar risk issues which are commonly neglect, domestic violence, drug and alcohol abuse, homelessness, lack of engagement with services including children not attending school, mental health and I disability, which negatively impacts parenting.

Case Study

Three children aged two years, (not born when FaCS commenced working with family), three and six years were the subject of an application for a care order filed September 2015. The father's criminal record showed a history of violence since 2004.

Between August 2012 and December 2013 FaCS conducted 43 home visits, made referrals and undertook extensive casework with the family. Further ROSH reports were received in 2014 and in 2015.

In January 2015 the matter was closed due to competing priorities. In February 2015 a further ROSH reported a child thrown across a room, children exposed to family and sexual violence perpetrated against their mother, a child not attending school and exhibiting sexualised behaviour. The matter was closed due to competing priorities. On 16 February 2015 and on 10 April 2015 there were further ROSH reports from a mandatory reporter about the neglect of the children and the children being exposed to violence and mother's drug addiction.

A safety plan was entered into with the children's mother on 12 May 2015. At that time, the children were considered to be in need of care and protection and the case was re assigned. The safety plan not complied with.

More ROSH reports were received August and September 2015. The children were removed 14 September 2015. The immediate physical concerns were chronic and severe lice and flea infestation and significant dental intervention required including the removal of teeth.

Legal Aid NSW is aware that there can be a high turnover of FaCS caseworkers and that in some cases this can lead to difficulties with accountability for casework in relation to a child or young person. It can also lead to a lack of continuity of casework management making it more likely that the needs of a child or young person will not be consistently managed during the currency of proceedings and thereafter in OoHC or in the event of restoration.

Case Study

Two children were born in 2012 and 2013. One has a genetic mutation leading to global developmental delay. The children were removed in 2013 after the younger child was found to have a broken leg. Both children were placed into foster care. A social worker employed by FaCS prepared an assessment and the children were returned to the mother. Due to ongoing risks they were subsequently removed and placed in foster care (OoHC).

Following a further report by the same social worker, the children were placed with the father. After six months the day-care staff and family doctor began to notice regular black eyes, bruising to the forehead, cheek, chest and back and in other places where bruising was not normally expected on children. A number of ROSH reports were made during this period by the school, daycare and medical staff.

The father had a history of DV related offences. Following a report by an expert, commissioned by the children's Legal Aid NSW lawyer, the children were removed from the father after twelve months and again placed into foster care. Between removal and final orders the children passed through three different placements. .

The children's lawyer was aware that the changes in the children's placement and the caseworker during proceedings, resulted in the children's medical needs not always being met and a lack of continuity in casework. In a parental responsibility report pursuant to section 82 of the Act it became apparent that one of the boys had sustained a fractured nose and cheekbone at some point and that this had been impacting on his ability to breathe.

Both children developed some extreme behaviours as a result of trauma, contributed to by changes in placement.

Legal Aid NSW acknowledges that caseworkers are placed in the very difficult position. On the one hand they are asked to work with parents to maintain children in their care, which means building rapport and working to build a relationship of trust and co-operation, while on the one hand they are asked to make the decision to take children into care and to actively prosecute the case against the parents. This inevitably involves using as evidence the material gathered while working with the family to prosecute the case against them.

This somewhat conflicted role may go some way to explaining the apparent lack of consistency in risk assessments and on occasion what appears to be a lack of transparency in decisions made in relation to children. In the experience of Legal Aid NSW, any therapeutic or workable relationship between parents and in some cases children and caseworkers that has been achieved, can be destroyed as a result of this process and create an impossible situation if the Court determines that a child or young person should be restored. Parents are then required to work co-operatively over a restoration period and period of shared PR or supervision, with the same caseworkers.

It is the experience of Legal Aid NSW that caseworkers can take a defensive and inflexible positions in litigation. We are aware of a number of cases in which a parent has genuinely addressed the minimum outcomes needed for restoration of their child between the filing of the final care plan and hearing. However, notwithstanding this evidence, the FaCS casework team has refused to change their original view of the parent.

Case Study

Legal Aid NSW acted for the mother. FaCS removed her son on the basis that she behaved towards the FaCS workers in a way they perceived as aggressive. The caseworkers were of the view the mother was unable to engage and work co-operatively with them.

The mother was not in a relationship with the father. However, they lived together and were committed to co-parenting. There were no identified issues with the father, but for his tendency to not assert himself with the mother. There were some minor issues surrounding visibility in the community and non-engagement.

A psychologist prepared a clinic report and recommended immediate restoration. The expert was critical of removal and the lack of investigation of alternatives. He considered that the mother's attitude towards case workers was the result of the abuse she had suffered in care. She had witnessed her mother and the mother's partner kill her brother, and was placed in care, where she was sexually abused. She had a deep distrust of community services. The psychologist said it was counter intuitive to expect her to engage with FaCS. He recommended another service and said this should have been done prior to removal of the child.

The child was restored to father with parental responsibility for two years, then to revert to common law.

The implication for the child was that he had his connection with his primary care givers disrupted at an important stage of his development.

Legal Aid NSW is also aware of a lack of flexibility in relation to two other important aspects of care and protection proceedings. Firstly and most significantly is the amount of contact ordered or approved in Care Plans for parents and other people significant to children when children are not to be restored or are restored to one parent to the exclusion of another parent or family members. The second aspect is the changing of the care arrangements or contact arrangements for children after final orders have been made and in the face of changed circumstances.

It is the experience of Legal Aid NSW that the approach taken by FaCS and NGOs to contact for children with parents, siblings and extended family is formulaic and rarely based on expert opinion on the nature of the contact that would be in the best interest of the child or young person in the particular case.

Legal Aid NSW understands the importance of maintaining and protecting OoHC placements and the tension between exposure to parents and family and the need for children to settle into OoHC. However, Legal Aid NSW observes that the formula of four to six visits per year, with supervision, forms the basis of most decision making about children's ongoing relationships for parents but also applies to grandparents, aunts and uncles and, of most concern, siblings.

In the experience of Legal Aid NSW the formula for contact is now so integral to the decision making in care and protection proceedings that it prevents intelligent analysis of what might be appropriate contact in a given case. One example is that the requirement for supervision is often extended to grandparents without evidence of any risk to the child or young person that would be posed by unsupervised contact. Another example is when siblings are separated in OoHC the Secretary does not seek orders for sibling contact and the Court is reluctant to make orders for contact because of the submission commonly argued, that children's needs change over time. Sibling contact is rarely more frequent than the formulaic four to six times a year and is often supervised.

Many solicitors who represent parents and children in care proceedings, also represent parents and children in family law proceedings. In family law proceedings 'spend time with' orders are made to reflect the individual case and can range from no contact with a parent, supervised contact, or day time contact only through to shared care. While Legal Aid NSW accepts the jurisdictions are fundamentally different, Legal Aid NSW observes that there is significantly more use of independent social science expertise in the framing of orders for individual families in the family court than in the care and protection jurisdiction. Legal Aid NSW also observes the making of orders for contact that attempt to accommodate the changing needs of the subject children as they get older.

Case Study

Legal Aid NSW provided advice to a paternal grandfather who has the care of his two grandchildren aged nine and five and who are in the PR of the Minister.

The parents of the children are his son and partner (the parents). They care for three children that were born to them subsequent to the order of PR to the Minister in relation to the two children in the care of the grandfather.

The contact arrangements between the children in the care of the grandfather and the parents remains supervised and scrutinised by FaCS, who otherwise have little or no involvement with the family. FaCS have indicated that contact must be supervised, but that the parents can collect the children from school if the grandparents are unavailable and that the parents can attend school events.

The paternal grandparents wish to slowly move to restoration of the two children to the parents given that the risk issues have been resolved but they are very concerned that any attempt on their behalf may aggravate FaCS and undermine the placement of the children in their care.

The file for the two children has moved between three different FaCS offices with no one office retaining responsibility for the matter.

FACS had a meeting with the parents and grandparents in February 2016 to discuss contact and restoration but the file has now been moved to another office and no action has been taken to assess or otherwise consider or support a restoration of the children to the care of their parents.

The children's family is Aboriginal and it is the view of the family that restoration to the parents would enable the children to have a more normal cultural upbringing and sibling relationships.

In response to the 2014 reforms to the Care Act and specifically section 86, Legal Aid NSW has, in collaboration with FaCS developed an ADR mediation model to consider contact arrangements for children after final orders have been made.

It is the experience of Legal Aid NSW that the transfer of case work responsibility to NGOs has significantly compromised the likelihood of any change in contact arrangements post final orders. It is the experience of Legal Aid NSW that NGOs are very resistant to changing arrangements.

Case Study

Legal Aid NSW recently represented an eight year old child at a Dispute Resolution Conference (DRC), in relation to contact between the child and his mother.

The child was placed with authorised carers and a local Aboriginal NGO was responsible for contact. The Minister had PR for the child.

Contact was supposed to progressively increase and move from supervised to unsupervised but each time the NGO case worker changed, the contact regime reverted to the initial supervised contact regime.

No one from the NGO appeared to take responsibility and the mother appeared quite distraught at the DRC.

FaCS declined to attend the DRC. The NGO representatives initially did not attend until numerous phone calls were made and eventually a casework manager and caseworker from the NGO arrived. They had no first-hand knowledge of the matter and could not contribute to the DRC.

Recommendations

Legal Aid NSW recommends:

13. consideration be given to establishing a separate casework team with responsibility for making the decision to assume a child or young person into care and to prosecute the matter in the Children's Court.
14. reviewing the risk assessment tools used by FaCS to determine if a child or young person is at risk of harm sufficient to warrant assumption or removal into care.
15. increased resources be directed to training caseworkers in the application of risk assessment tools and the criteria that mandates the assumption or removal of a child or young person into care.
16. extensive research be undertaken to inform decisions about contact for children found to be in need of care and protection, with a focus on adopting a case by case model.

Inconsistent standards of casework

In addition to inconsistency in the assessment of the level of risk that must exist before action is taken in relation to children, the experience of Legal Aid NSW is that there is a significant difference in the standard of casework undertaken in relation to families that come into contact with the child protection system.

Legal Aid NSW becomes aware of this difference in the standard of casework both at the point of giving early advice and providing minor assistance to parents and when representing children and parents in litigation. At the point of early advice and minor assistance, it is the experience of Legal Aid NSW that caseworkers can be reluctant to speak to legal representatives and to provide them with information necessary for the legal representatives to properly advise the parent.

In one typical example arises in the context of drafting a Parent Responsibility Contract. Some caseworkers are keen to discuss issues of concern over the phone, with the consent of the parent, and to work collaboratively to negotiate a contract that would support the parent to achieve positive outcomes. However, other caseworkers will not take calls or refuse to engage with legal representatives or provide information.

Case Study

A mother was given a Temporary Care Agreement (TCA) by FaCS in relation to her five children and was told that she needed to sign it by 4pm on the day or the children would be removed. The mother self-referred to the Legal Aid NSW Early Intervention Service which was very close to the FaCS office in question. The mother told the Legal Aid NSW solicitor that when she asked the FaCS casework manager about legal advice, she was told by she wasn't entitled to legal advice and that there were no lawyers in the area to help her.

After we provided our client with legal advice, attempts were made to negotiate with FaCS in relation to a Safety Plan and a culturally appropriate family arrangement which would keep all of the children and their mother together. These negotiations were unsuccessful and ultimately the five children were separated into three different family placements. On advice, the mother signed the TCA before the 4pm deadline to prevent assumption of the children into care.

Once the Secretary files in the Children's Court, this difference in the standard of case work is evident in the level of early intervention work undertaken with the parents as set out in the initiating report and bundle of documents accompanying the application. The difference is also apparent from the referrals to services, the supports and assistance provided to parents and ultimately the way the decision to assume children into care is communicated and undertaken.

Another important indicator of effective casework is the record of attempts to seek out and involve extended family and kin and to undertake assessments of family and kin as supports for parents and potentially as alternative placements for children. In the case of Aboriginal children, this early casework should extend to an exploration of their culture and their community.

Sometimes the initiating report will detail the caseworkers' attempts to work with parents. The initiating report will include details of safety plans, meetings with parents and services, referrals, clear expectations that have been communicated, negotiations and an evaluation of outcomes achieved. Similarly supports and services provided to children are documented.

It is the experience of Legal Aid NSW that thorough and well documented casework is essential to assist the Children's Court to identify the risk factors that ultimately lead to the removal or assumption of a child or young person and to understand the Secretary's case for the child or young person being in need of care and protection.

The October 2014 amendments to the Care Act were designed to encourage early interventions with families coming into contact with FaCS. One amendment removed the presumption of a need for care and protection arising in the event of a breach of a Parent Responsibility Contract (PRC). Another amendment introduced Parent Capacity Orders (PCO). The purpose of both early interventions was to encourage parents to improve parenting skills and to take a greater level of responsibility for parenting outcomes. An additional positive aspect of the amendments is that a PRC can be entered into with expectant parents.

Legal Aid NSW is of the view that these opportunities for parents to engage with services to improve parenting should form part of any assessment of the risks to children in the care of their parents. Legal Aid NSW thoroughly supports the intention that these opportunities or directives, in the case of a PCO, be coupled with supports and assistance aimed at improvements in a families overall functioning.

There has been virtually no uptake by FaCS of PRCs and PCOs since the 2014 amendments. Legal Aid NSW is aware of only two PCOs and less than sixty PRCs negotiated with parents across NSW since October 2014.

Section 38 of the Care Act provides for the development of care plans through alternative dispute resolution prior to commencement of care and protection proceedings. It is the experience of Legal Aid NSW that these care plans are rarely if ever negotiated with parents before removal of a child or if they are, nothing is documented in the initiating report.

In the experience of Legal Aid NSW it is sometimes possible to negotiate a care plan on the first mention day of an application for a care order. This can prevent children being removed. However, given that most applications for a care order are made after children have been removed, agreement to a care plan is more likely to result in children being restored more immediately, subject to parents' compliance with the care plan.

Parties can be referred to an external mediation facilitated by Legal Aid NSW, with the consent of the President of the Children’s Court. In addition, the Children’s Court has Children’s Registrars available to facilitate Dispute Resolution Conferences (DRCs) at any time during proceedings. These are two available options for mediating in care and protection proceedings. Legal Aid NSW is not aware of FaCS requesting an ADR through either service at the very early stages of care proceedings or as an alternative to removing children or retaining children who have been removed, in OoHC.

The advantage of both of these models is that they are lawyer assisted forms of mediation, facilitated by a qualified mediator. It is the experience of Legal Aid NSW that when parties are legally represented in ADR processes, the agreed outcomes are more likely to be reasonable and practicable, and understood by parents. Legal Aid NSW understands that it was for this reason that the Wood Special Commission into Child Protection recommended that Children’s Registrars be legally qualified and that parties be legally represented at Dispute Resolution Conferences in care proceedings.

Legal NSW also suggests that the ADR process can also build co-operative relationships between FaCS, parties and their legal advisors making it more likely that arrangements can be changed by agreement if required.

Recommendations

Legal Aid NSW recommends:

17. establishing protocols for communication between legal representatives and caseworkers to allow for constructive, collaborative negotiations to take place in relation to early interventions.
18. establishing protocols for communication between children’s lawyers, both independent legal representatives (ILR) and direct legal representatives (DLR) to enable children’s lawyers to speak directly with caseworkers working with the children they represent.
19. in any early interventions with FaCS, parents are given a proper opportunity to obtain legal advice and to have representation if requested.

The Role of ADVO’s in the Removal of Children and Young People

Legal Aid NSW would be concerned if ADVOs were used to remove children from parents. Legal Aid NSW is aware of the following case.

Case study

In June 2016, a seventeen year old mother took a six month old baby for an X ray, which revealed a spiral fracture in her arm. The Joint Investigation and Response Team of the NSW Police Force (JIRT) took out an ADVO preventing the mother from having contact with the baby except under the direction of JIRT for the purposes of breastfeeding.

FaCS arranged for placement of the baby with a paternal aunt. The mother's breast feeding was to be supervised by JIRT workers or the paternal aunt each day for one hour. The ADVO hearing was set down in August 2016.

The Legal Aid NSW Early Intervention Unit, who were advising the mother, wrote to FACS and to the clinic, requesting that a safety plan be devised and for medical evidence as to the cause of the fracture. There was no response to this correspondence.

The mother met with FaCS in mid-July and at that meeting was told that the expert medical evidence showed the fracture could have been caused by an accident and that the Police would remove the provisions in the AVO prohibiting her from visiting the baby at the aunt's house. They were however, retaining the ADVO with the mandatory provisions. By that time the baby had been out of the mother's care for a month.

Recommendation

Legal Aid NSW recommends:

20. ADVOs must not be used as a means of removing a child or young person from the care of their primary care giver.

Assessment of alternative placements with family and kin

In the experience of Legal Aid NSW, it is sometimes the case that on the first mention day of an application for a care order in relation to a child or young person, it becomes known that there is a member of extended family, often a grandmother, interested in caring for the child or young person. It is almost without exception the case that the Court will be told by FaCS that it will take six weeks to assess the person as a suitable carer, even on an interim basis. Adequate reasons for the delay in assessing the person, or the length of time required are rarely given. This is even the case when the person has been known to or known of, by the caseworker before making the decision to remove the child or young person.

While the six week assessment is being undertaken, the child, in some cases a newborn baby or young person will be placed in OoHC. Not only are there risks inherent with OoHC placements, there is no guarantee that the child or young person will not experience more than one placement, even during the six weeks it takes to assess the relative or kin. It is also not uncommon for a child or young person in this situation to have very limited contact with family. As a consequence, the experiences of trauma that a child or young person may already have experienced are exacerbated by the processes designed to protect them from harm.

Recommendations

Legal Aid NSW recommends:

21. allocating more resources to the exploration of all alternative placement options with family and kin or other people significant to a child or young person.
22. exploring all alternative placement options be made a casework priority.
23. assessment of alternative family and other placements include assessment of interim or short term options as a preferred way of caring for children while decisions are being made about their care.
- 24.

Case study

D is a ten year old Aboriginal boy who at the time of his removal had lived with his aboriginal maternal grandmother for five years during times when his mother was unable to care for him due to her drug use and incarceration. D's female teenage cousin had always lived with D's maternal grandmother pursuant to a Court order from another state.

When D's mother was released from custody, D's grandmother returned him to her care. Shortly thereafter D's mother overdosed and D was removed from her care.

FaCS did not make contact with D's grandmother and D was placed into OoHC. FaCS eventually assessed D's grandmother as unsuitable to care for D. D was moved to a second placement in OoHC. The grandmother successfully prosecuted a joinder application. Some months later, D's carers decided to move and D again changed OoHC placements. By this stage D's behaviour had deteriorated.

Proceedings were commenced some thirteen months after D's removal. By this time D was living in a 1:1 residential placement with other young people with behavioural problems and he was not attending school. D was sexually abused in that placement on more than one occasion.

Following three days of contested hearing and evidence about the sexual abuse, the Court with some reservation due the evidence not being complete, made it clear that D should be placed with his grandmother on an interim basis. Following a further two days of contested hearing, final orders were made placing D in the parental responsibility of his maternal grandmother. His grandmother told D's lawyer that D was unrecognisable on his return to her care.

Legal Aid NSW notes with concern, that Chapter 16 of the Act has now been amended to remove the capacity of a potential carer, for example D's grandmother in the above case scenario, to appeal a decision to refuse to authorise them as a carer.

Culturally sensitive assessments of family and kin

In the case of D above, D's Independent Legal Representative (ILR) commissioned an expert report in relation to the maternal grandmother's capacity to care for D. The report was written by a psychologist, who was also aboriginal. He said in his report that the assessment of the grandmother undertaken by FaCS was not culturally sensitive or appropriate. The expert recommended that D be placed with his grandmother and detailed a number of benefits to D of living in his community. The expert assessed these benefits as outweighing concerns about of the grandmother that he shared with FaCS.

Recommendation

Legal Aid NSW recommends:

24. specialist consultation be undertaken in the preparation of assessments of Aboriginal and Torres Strait Islander families and kin to care for children.

Intervening in parenting cases in the Family and Federal Circuit Court when children are identified as being at risk

Legal Aid NSW provides representation for children in Family and Federal Circuit Court proceedings. Legal Aid NSW is aware that periodically the Court will find that there is no safe placement or 'live with' option available in relation to the children the subject of the proceedings and will invite the Secretary to intervene. Legal Aid NSW is not aware of the percentage of matters in which the Secretary has intervened on invitation from the Court but in our experience, the Secretary intervenes in very few matters where a Judge has identified risks to children. In these matters there will usually have been an independent children's lawyer (ICL) appointed who will be asked to invite the Secretary to intervene.

In the experience of Legal Aid NSW, when the Secretary does intervene, the options available to the Court in relation to children can be significantly enhanced because of the casework resources and safety mechanisms that can be offered by FaCS. Without the intervention by the Secretary the Federal Court is left with compromises in relation to placing children at risk.

Case Study

The father of an aboriginal boy made an application to the Family Court for his son to live with him. The son was in an informal placement with his maternal grandmother and two of his half siblings. The ICL subpoenaed the FaCS records in relation to the children and maternal grandmother. The records showed multiple ROSH reports had been received over a two year period including high levels of domestic violence in the household, non-attendance at school, medical needs not being met (teeth/asthma), excessive use of alcohol by other people and family members while the children were present, drug use, violence against other community members, and possible risk of sexual abuse. Police and FaCS would not attend the residence. FaCS had assessed the children as unsafe in the placement but had not intervened.

Requests to the Secretary to intervene in the proceedings were made by the Court, the ICL and the solicitor for the father. The Secretary declined.

Final Orders were made by consent that the boy live with his father and have unsupervised weekend contact with his maternal grandmother.

Support and assistance provided to family placements

Children in need of care and protection often have complex needs and when they are placed with family or kin, additional supports are needed to maintain the children in the placement. This can also be the case when children are restored to parents.

Legal Aid NSW is aware of cases where the necessary supports have not been provided and consequently the placements have broken down, with devastating results for the children. It is the experience of Legal Aid NSW that this can occur when the Secretary opposes the decision of the Children's Court to restore children. As in the case of D above, the Secretary would not authorise the maternal grandmother as a carer, which meant she could not claim an authorised carers' payment.

Case Study

Legal Aid NSW appeared for two children who were placed in the parental responsibility of their grandfather. He lived with the children's step-grandmother and step-great grandmother. An older sibling was not able to be placed with the grandfather due to his behaviour and was placed in foster care. At the time of accepting the children, the grandfather and FaCS had agreed that regular respite care would be available to the grandfather and financial assistance would be provided to meet the children's needs.

The respite and financial assistance did not materialise. The grandfather attempted on a number of occasions to negotiate respite and assistance without success. The regular visits to the home of the older sibling were increasing stress in the family and over twelve months later an application to vary the final order was made pursuant to section 90 of the Act and ultimately the children were placed in OoHC.

Recommendations

Legal Aid NSW recommends:

25. extending the power of the Children's Court to order supervision reports pursuant to section 76 of the Act for a period of up to two years.
26. that consideration be given to extending the power of the Children's Court to order section 82 parental responsibility reports pursuant to the Act for a period of up to two years.

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27. extending the power of the Children’s Court to relist and review matters if, on the basis of either a section 76 report or a section 82 report, the court is not satisfied as to the parental responsibility arrangements for the child or young person.

Outsourcing of casework responsibility for children and young people to NGOs

Consistent with the recommendations of the Wood Special Commission into Child Protection, about 60% of casework has now been outsourced by FaCS to NGOs. It is the experience of Legal Aid NSW that this complicates decision making and accountability for decision making in relation to children who have been found to be in need of care and protection. The case examples below illustrate some of this added complexity. An issue that is currently arising is the extent to which the Secretary can delegate parental responsibility in circumstances in which the Minister has parental responsibility for the child or young person and the Department of Family and Community Services is the responsible statutory authority under the Care Act.

Case Study

Legal Aid NSW was approached to give advice to the Aboriginal mother of four children aged thirteen, twelve, nine and seven months.

The nine year old has spina bifida and is very high needs. The thirteen year old has mental health issues and struggled to cope when his mother was incarcerated for a period of four months, at which time the children lived with the maternal grandmother. The local FACS office transferred casework responsibility to an NGO who provided the following early intervention services.

1. Changed the location of the mental health treatment for the thirteen year old.
2. Negotiated with hospital staff, without consultation with the mother for her and the other children to visit only after 4.30pm.
3. Organised for the thirteen year old to be released into the care of an aunt.
4. The mother has little knowledge of the aunt and no information about where the child is going to school.

No application has been filed in either the Children’s Court or the Family Court. The child has been seeking out contact with his mother and siblings without the knowledge of the NGO. The mother has received written correspondence from the NGO stating they are no longer providing casework to her. She does not know if they are still providing casework to the thirteen year old.

The client sought legal advice to address the situation where she has parental responsibility for a child who has been placed by an NGO, into the care of a third person.

Case Study

Legal Aid NSW represented a child, A. An older sibling from the family, B had already entered the care system and was the subject of an order for PR to the Minister until the age of 18. B had been transferred to an Aboriginal NGO in the local area and they managed the OoHC placement. When A was assumed into care, the same NGO managed this short term placement until Final Orders.

In the course of inspecting subpoenas from the NSW Department of Health the legal representative for A, discovered some disturbing reports about the current care and neglect of B. The information suggested the child's care was very inadequate.

A's lawyer was advised that FaCS was having trouble getting any information from the NGO and the FaCS caseworkers had been denied any access to either of the children. A's representative asked how this could be the case when the Minister retained PR of both children and FaCS was responsible for them.

At the final hearing A's representative was able to get an order pursuant to section 82 of the Act that included a review of both children but this was to take place after several months. FaCS did not object to B being included because they claimed to have no access otherwise to information pertaining to that child.

Case Study

A child born 23 March 2014 was placed with the authorised carer when she was 5 months old. The placement was authorised as short term by the NGO. Final orders allocating parental responsibility to the Minister until the age of eighteen were made on 26 November 2015. Parental responsibility was delegated to the NGO. The child remained placed with the authorised carer.

In early 2015 the authorised carer approached the NGO seeking to apply to the find-a-family Adoptive and Permanent Care Program or to alternatively be assessed as a long term foster carer so the child could remain in her care permanently. All reports on the placement were extremely positive. The child had formed an attachment to the authorised carer and there were no criticisms made of her care of the child. The carer was advised by the NGO that she did not meet the financial criteria for the Find-a-Family Program and therefore a formal assessment could not proceed. The carer was also advised by the NGO they would not assess her as a long term carer as adoption was the preferred option for the child.

At the time that decision was made the child had been with the carer for over 18 months. The carer was then advised by the NGO that the child would be transitioned to a prospective adoptive placement in June or July 2016. The carer asked FaCS to intervene but they refused as PR had been delegated to the NGO. The carer then filed an application under section 90 of the Act seeking leave to apply for PR orders and the matter is ongoing.

FaCS became involved and undertook not to change the child's placement while they investigated the matter. Early indications are that FaCS will support the child remaining with the current carer.

Recommendation

Legal Aid NSW recommends:

28. consideration be given to establishing an independent body through which authorised carers can seek a review of the actions of the NGO with case work responsibility.

Case Study

Legal Aid NSW acted for the mother of an eight year old child in proceedings to vary or rescind a final order. Final Orders had been made allocating PR to the Minister until eighteen years of age. During the original proceedings the mother enrolled in a residential rehabilitation program. While in the program she gave birth to another child and that child remained in her care by a court order in the ACT.

Two expert assessments were carried out in those proceedings noting that the mother was making progress but that it was early stages and recommending that if the mother continue to make gains, restoration occur. This was not supported by FaCS and the mother conceded that at that time there was no realistic possibility of restoration. The mother unsuccessfully pursued a hearing for a higher degree of contact. This application was supported by the expert but opposed by FaCS. The child was subsequently placed with a foster family through an NGO Find-A-Family program in December 2012.

The mother successfully completed the residential rehabilitation program, maintained her abstinence in the community, obtained stable housing and had appropriate supports in place while retaining care of her youngest child. In July 2014, the mother filed the application to vary or rescind. The NGO was the respondent and opposed the application. Leave was granted to the mother's application after a contested hearing and an updated assessment paid for by the NGO and Legal Aid NSW, the court recommended restoration of the child to the mother. The foster carer had indicated to the expert that if the child was to be restored she would have no further contact with the child.

The NGO opposed restoration until FaCS became involved. The solicitor who had been appearing for the NGO also appeared for FaCS in the hearing despite their different initial positions in relation to restoration. Contrary to the mother's application for a gradual transition into her care, the child was immediately restored with no further contact with her carer or her children.

It is the experience of Legal Aid NSW that the position NGO's in care proceedings seems driven by the wishes of their 'client', the authorised carer, rather than the best interests of the child. Legal Aid NSW is concerned that foster carers in programs such as the Find-A-Family program have an expectation they will be the long term carers for a child or young person placed with them and many hope to eventually adopt. In the case above it may have been preferable for FaCS to have been involved from the outset of the matter to encourage a more child-focused approach and to have better managed the carer's expectations.

Recommendations

Legal Aid NSW recommends:

29. developing consistent and transparent information for carers to manage their expectations with respect to the permanency of the placement of children in their care and that FaCS be directly involved in this process, given its historical expertise as an OoHC provider.
30. developing transparent and consistent protocols for communicating the role of FaCS and NGOs in each set of proceedings.

Changes to the Child Protection (Working With Children) Act 2012

Changes to the *Child Protection (Working With Children) Act 2012*, mean that all authorised carers are required to undergo a Working with Children's Check (WWCC) to obtain a clearance in order to engage in child related work. Child related work is extensively defined under the Act.

This process is undertaken by the Office of the Children's Guardian (the Guardian).

In practice the legislation can have a very deleterious impact on children, creating a whole new set of risks associated with sudden and often unexplained loss of security and stability, loved ones, home and school. These consequences often befall children who have already suffered significant trauma, disadvantage and dislocation.

When a child in the care of an authorised carer is under the parental responsibility of the Minister and the carer has not made an application for a WWCC or has been refused a clearance, FaCS has a statutory obligation to remove the child from the authorised carer with 48 hours, unless satisfactory arrangements can be made, such as the carer leaving the home.

Often children will have been in these placements for a considerable amount of time. In many of these situations, children are being removed from their homes and families. More often than not, these are indigenous children but almost all children who are caught up in this regime are likely to have already suffered significant trauma, insecurity and instability in their young lives.

Where the Minister has PR for a child or young person the Secretary appears to be operating on the basis of a presumption that the mere lack of a WWCC clearance or a refusal of such a clearance, means the child or young person is at significant risk of harm and that FaCS has a statutory obligation to remove children within 48 hours of being notified in relation to the WWCC. Legal Aid NSW understands that there is no mandate to remove children who are not in the parental responsibility of the Minister. In relation to those children, the Secretary files an application in the Children's Court and asks the Court to determine risk.

Payments to authorised carers are suspended pending the determination of a clearance and during any consequent proceedings in NCAT either to review the Guardian's decision to refuse a clearance or in relation to an order overcoming a schedule 2 disqualification. This can create extreme financial hardship for carers. This additional financial hardship is created at a time of significant stress for a family. While payments will be back paid if carers obtain a clearance, the delays in processes makes this unsustainable for most families and negatively impact the children the legislation was drafted to protect.

The changes to the legislation have a very significant impact on many kinship placements within indigenous families. Members of indigenous communities are more likely to have a criminal record and so more likely to fail a WWCC. The tragic and unacceptable consequences for these families of having children removed from their care needs no explanation or emphasis.

Many refused clearances are based on conduct falling short of a criminal conviction for an offence of sexual misconduct or violence against a child.

Many offences leading to a failed WWCC occurred in the distant past and have little if any relevance to a carer's capacity to care for children or the extent to which they pose a risk to children. Owing to the age of many offences, carers often find themselves trying to defend themselves against offences they cannot remember or accurately recall

The scope of the Schedule 1 and 2 offences means that hundreds of authorised carers are caught in the net. Legal Aid NSW is seeing a steady increase in the number of clients who have been notified of a failed WWCC. This is increasing delays, exacerbating the dreadful consequences for families and children.

In addition to the regime impacting on authorised carers, it also impacts on any adult living in the household of an authorised carer.

The assessment process undertaken by the Guardian can take a considerable amount of time, during which families can be in a state of high anxiety due to uncertainty about their futures and financial hardship.

During the assessment process, the Guardian seeks information from various sources including the carer. Usually the carer does not have the benefit of legal advice at the preliminary stages of the process and so does not respond adequately, if at all. It is also often the case that at the early stages of communication from the Guardian, the carer does not understand the potential consequences of the process. In our experience the Guardian does not give sufficient support and help to carers in the preliminary stages of their involvement and this creates more stress for families and it also prolongs and complicates matters.

The Guardian is often reluctant to indicate an attitude to the application until quite late in the process. This is unhelpful and costly for carers.

It has been the experience of Legal Aid NSW that the Guardian will not provide carers or their legal representatives, copies of the documents taken into account in the assessment process. The Guardian insists that the carer needs to make a GIPA application to obtain this material. This is unrealistic in terms of resources and time frames and is generally unhelpful.

Interim Bars cannot be appealed for six months and can take up to twelve months to determine. This can have disastrous consequences including the removal of children, a loss of employment, loss of income and a denial of future employment.

NCAT has the power to stay the operation of a decision of the Guardian but there is a lack of clarity about how stay applications should be heard and dealt with. In our experience stay applications require as much preparation as running a final hearing.

Case Study

The child was an eleven year old aboriginal girl who had been in kinship care with the maternal grandmother. Legal Aid NSW represented the maternal uncle. The maternal grandmother was suffering significant health issues and as a result the family came to a decision that the child would have a better quality of life if she was integrated into the maternal uncle's family. FaCS were notified and an assessment was undertaken approving the uncle as a kinship carer. The child was placed with the uncle and his family which included his wife and six children. The child was in the care of her uncle for about two years and was considered family.

The uncle was then refused a WWCC and the child was removed from his care on 24 hours' notice and placed back with the maternal grandmother. The basis of the refusal was the uncle's acquittal in relation to a child sex offence in 2005. Notwithstanding the acquittal the Guardian determined that the uncle remained a risk to children, noting that while the matter was progressing through the criminal justice system there was an AVO protecting the complainant from the uncle.

NCAT confirmed the decision of the Guardian despite an expert risk assessment suggesting that the uncle was not a risk to children. In running the case the FaCS material was produced which clearly indicated that in their placement assessment of the uncle, he had been frank in relation to the sexual assault allegation and that it had been taken into consideration when authorising the placement with respect to the child. As a result of legislation designed to protect the child, she has been removed from a stable, long term family placement and separation from family and a sibling group agreed by her community.

Case Study

Our adult male client originally applied for a WWCC clearance when seeking to be an authorised carer for his granddaughter. A decision was made not to place the child with our client due to her being settled and attached to her carers. FaCS facilitated regular contact between our client and the child, each weekend and school holidays. This contact was important as the child was in a non-Aboriginal placement and her contact with our client was her connection to kin.

Our client was refused a WWCC clearance on the basis that he was a disqualified person. Notwithstanding this FaCS continued to facilitate contact for approximately 18 months. The child's case management was then transferred to an NGO, who restricted our client's contact to supervised contact only on the basis of his WWCC refusal. A contact mediation was organised, but ultimately did not proceed because the NGO was not prepared to change its position.

Case study

Our client had shared PR of his partner's niece and nephew with his partner and the Minister. After our client was refused a WWCC the Secretary took action in the Children's Court under section 90 of the Act to vary or rescind the final order. The Secretary did not seek to remove the children, insisting that the children remain in their placement, but instead sought to re-allocate all aspects of PR to our client's partner in response to the different risk assessments conducted by the Guardian and FaCS.

Legal Aid NSW has already made extensive recommendations in relation these legislative changes in its submission on sentencing of sexual assault offenders.¹²

¹² see link: JSC on Sentencing of Child Sexual Assault Offenders - Legal Aid NSW response March 2015.pdf JSC on Sentencing of Child Sexual Assault Offenders - Legal Aid NSW response March 2015.pdf