

7 December 2021

Ms Janet Schorer
Children's Guardian
Office of the Children's Guardian
By email: accreditation@ocg.nsw.gov.au

Dear Ms Schorer

Office of the Children's Guardian's review of accreditation and monitoring functions

Legal Aid NSW welcomes the opportunity to provide a submission to the Office of the Children's Guardian's (**OCG**) review of accreditation and monitoring functions (**Review**).

The Children's Civil Law Service (**CCLS**) is a specialist service within Legal Aid NSW that provides holistic civil law and youth casework assistance to highly disadvantaged young people in Sydney who are involved with the criminal justice system. Many of our clients are in, or have experience in, out-of-home care (**OOHC**), and this is an area where we provide extensive civil law support for clients. Our service provides civil law casework for individuals and engages in systemic advocacy on behalf of our clients.

This submission provides a response to questions and proposals in the OCG's consultation paper, dated November 2021. We have limited our response to those sections of the consultation paper which are particularly relevant to our OOHC clients and casework experience.

Section 1.3: Applications for accreditation as a designated agency

Key proposal 4: Applications for accreditation are no longer required to include a behaviour management and support policy

Legal Aid NSW is concerned about removing the need for an agency to include a behaviour management and support policy as a part of their accreditation application.

We note that Standard 11: Behaviour Support of the NSW Child Safe Standards for Permanent Care (**Standards**) requires an agency to have a behaviour management strategy, and that an indicator of compliance with this standard is that "[t]he agency

has clear protocols regarding the use of police as a behaviour management strategy or in response to risk taking behaviour by children and young people”.¹

However, in our casework, we frequently see examples of police being used as a behaviour management tool for children and young people in residential OOHC. The overuse and reliance on police to manage challenging behaviour within these settings is highly problematic as it results in increased contact and unnecessary involvement of children and young people with the criminal justice system.

The Special Commission of Inquiry into Child Protection Services in NSW found that young people in OOHC, and particularly those in Intensive Therapeutic Care (ITC) homes, had much higher contact with the criminal justice system.² Legal Aid NSW echoed this finding in our 2011 paper *The Drift from Care to Crime*,³ which identified the continuing rise of apprehended domestic violence orders (**ADVOs**) against young people in ITC homes as a significant issue. In response to these concerns, the *Joint Protocol to Reduce the Contact of Young People in Residential Out of Home Care with the Criminal Justice System (Joint Protocol)* was developed in 2016.⁴

Whilst funded service providers are required to observe and implement the Joint Protocol in providing residential OOHC, we still see issues on the ground. A key area of CCLS’ casework is assisting young people in OOHC to advocate around the criminalisation of their behaviour. We have observed in our advocacy that it is not uncommon for police to be used by carers as a behaviour management tool in contravention of the Joint Protocol, and that the practice varies widely between different funded service providers, and even between different houses within the same agency. This indicates that whilst the Standards may require an agency to have behaviour management strategies with protocols about the use of police, and to then supervise, train and support staff and carers who are responsible for implementing those protocols, this does not always happen in practice.

When advocating for individual clients around behaviour management issues in residential OOHC placements, we frequently encounter difficulties in trying to engage with providers about these issues:

- We observe agencies that appear to have little or no awareness of the Joint Protocol.

¹ Office of the Children’s Guardian, *NSW Child Safe Standards for Permanent Care* (2015). Available at: <https://www.ocg.nsw.gov.au/statutory-out-of-home-care-and-adoption/nsw-standards-for-permanent-care>.

² Special Commission of Inquiry into Child Protection Services in NSW, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Report, 2008). The Commission reported that between 2003 and 2006, 28% of male and 39% of female juvenile detainees had a history of OOHC.

³ Erin Gough, Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid Issues Paper* (Issues Paper, 2011). Available at: https://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0019/18118/The-Drift-from-Care-to-Crime-a-Legal-Aid-NSW-issues-paper.pdf.

⁴ *Joint Protocol to Reduce the Contact of Young People in Residential Out of Home Care with the Criminal Justice System* (2019). Available at: <https://www.facs.nsw.gov.au/download?file=585726>.

- We are sometimes refused access to the behaviour support plans of our clients even where our clients have specifically consented to Legal Aid NSW being able to review their plan in the context of live issues around behaviour management.

We note that the *Family is Culture* report also commented extensively on this ‘care-criminalisation’ of Aboriginal young people in OOHC in Chapter 15, stating that evidence shows that:

placing a child in OOHC increases his or her risk of being involved in the juvenile justice system. This risk, known as ‘care-criminalisation’, arises from the fact that children are often charged with offences against carers or residential home staff due to conduct that would not be criminalised if they occurred in the child’s home environment. Care criminalisation also results from placement instability, a lack of cultural connection and a lack of secure accommodation for children in custody and seeking bail.⁵

Given these issues and the importance of not unnecessarily criminalising the behaviour of young people, especially Aboriginal young people given their overrepresentation in OOHC, we support retaining the requirement that agencies provide a statement about behaviour management upfront in their applications for accreditation. This would help to keep this important issue at the front of mind for providers in delivering their services.

Additionally, as agencies are already required to meet mandatory requirements regarding behaviour management in both the Children and Young Persons (Care and Protection) Regulation 2012 and the Standards, we consider that it would not impose any additional burden on agencies to require them to supply their behaviour management and support policies as part of their accreditation.

Furthermore, we recommend that the OCG make it a formal condition of accreditation that an agency must specifically address the Joint Protocol in their behaviour management strategy as part of the accreditation process, so that it can be monitored and assessed by the OCG.

Section 1.3.2: A new requirement to support an application for accreditation

Do you agree that an application for accreditation should set out how the agency intends to meet the particular needs of Aboriginal children and young people?

Legal Aid NSW considers that providing culturally appropriate and safe care for Aboriginal children and young people in OOHC is critically important.

We support the proposal to require agencies to provide in their applications a policy statement detailing how it will meet the needs of Aboriginal children and young people and implement the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles (**ACPP**). We expect that this statement would require an agency

⁵ Prof Megan Davis, *Family is Culture: Independent Review into Aboriginal Out-of-Home Care in NSW* (Report, 2019) 235. Available at: <https://www.familyisculture.nsw.gov.au/>.

to explain how the ACPP would be applied in practice in the context of the services they will provide to children and young people.

Agencies should also provide clear strategies to deliver culturally safe care, with examples of how their organisation will do this contextually – that is, in frontline service delivery, at a human resources level, and within management, etc. This would allow for more effective monitoring of this accreditation requirement.

We note that the Standards already require an agency to comply with the ACPP.

However, the *Family is Culture* report found non-compliance with the ACPP in NSW, and highlighted possible reasons for non-compliance:

It is difficult to ascertain with any precision the reason why the ACPP is not complied with in practice. It is in all likelihood a combination of factors, including but not limited to a lack of: institutional and individual accountability in relation to implementation of the principle; sanctions for non-compliance; guidance around the implementation of the principle in practice; cultural awareness and confidence among FACS caseworkers; and an institutional culture that does not value genuine partnership with the Aboriginal community.⁶

As this is such an important obligation for agencies, we support the OCG requiring agencies to provide a detailed statement in their accreditation applications of how they will implement the ACPP and deliver culturally appropriate and safe services for Aboriginal children and young people. This would strengthen institutional and individual accountability around these issues, and provide guidance within organisations around how to implement the principles in practice.

Section 1.6: Accrediting ‘models’ of statutory OOHC

- Do you agree with the proposal to accredit an agency to provide statutory OOHC, rather than specifying whether the agency can provide foster care, residential care or both?
- Are there any risks or challenges in providing agencies greater flexibility in how they deliver services?

Legal Aid NSW supports this proposal as it would enhance the ability of agencies to provide better continuity of care for children and young people who may otherwise need to transition between different services as their needs change, which can be disruptive and destabilising.

Agencies as part of their accreditation applications should be required to provide details on how the different types of care services will be delivered. This is particularly essential for services that have predominately provided foster care and may now offer residential services. Residential care settings are very different to other care settings. Residential care requires workers to engage and/or build relationships with young people in a very different way, placing a worker in a parental role. Agencies should

⁶ Ibid 254.

indicate how they will ensure their workers can effectively transition from providing assistance in one type of care setting to the other.

Section 1.8: An alternative accreditation process for short-term emergency care providers

- What are your views on creating a new class of accreditation for providers that provide short-term emergency care only?
- Do you agree that case management and decision making about the child's care should remain with a fully accredited agency?
- What risks or challenges do you foresee with the proposed model?

We submit that providers who provide short-term emergency care only, should be subject to some form of accreditation. In our casework, we have had many complaints from young people who are "cared for" in short-term emergency care by these types of service providers (for example, in hotels). Though some clients experience reasonable care in these settings, we have also seen examples where young people are essentially left to care for themselves in hotel rooms without adequate support, and responsibility for casework services becomes muddled. We observe that many of these emergency care workers have little knowledge of basic OOHC care requirements and obligations. The sector would benefit from accreditation in this space.

We agree that case management and decision-making about a child or young person's care should remain with a fully accredited agency. However, there needs to be accountability in these situations between the fully accredited agency and the provider providing short-term emergency care, to ensure that a lack of communication between the two does not lead to poor service delivery to the child or young person.

Section 1.11: A new approach to monitoring and accreditation

What are your views on the proposal for more regular monitoring of agencies' compliance with the Standards and a more streamlined accreditation renewal process?

We support the OCG's proposal to conduct more regular monitoring of agencies' compliance with the Standards. We broadly support the proposed five-year monitoring structure, in which agencies will receive a monitoring visit every 12 to 18 months, and five core standards as well as additional focus themes will be reviewed at each visit.

We are particularly pleased to see the following standards included as core themes:

- **Standard 4: Identity and Aboriginal Case Management Policy** – These are such important considerations for Aboriginal children and young people, who are overrepresented in OOHC, that we agree this warrants regular annual monitoring.

- **Standard 12: Independent Living** – In our casework, we observe frequent poor compliance with Standard 12, with many of our clients receiving substandard leaving care planning. Leaving care plans are often not well tailored to our clients and fail to address cultural needs. Planning does not commence early enough, and many clients have had limited input into their plans. Sign-off of the final plans can often take a long time, and many remain outstanding when a young person has already turned 18. Many of these issues were reflected in the OCG’s *Report on the Leaving Care Monitoring Program 2020-21* released in early 2021.⁷ In light of poor compliance across providers with leaving care planning, we strongly support this being a focus of regular annual review.

We also submit that Standard 11: Behaviour Management should form one of the core themes for regular annual review, rather than a single review in the second year of the five-year monitoring cycle. Given the continued criminalisation of young people in OOHC from the inappropriate use of police as a behaviour management tool in contravention of the Joint Protocol, we consider this to be a critical and live issue which ought to have a stronger focus in the monitoring process.

Furthermore, we consider that third party input could assist the OCG in reviewing and monitoring accreditation standards. For example, seeking third party reviews or report cards from relevant stakeholders, such as health professionals, Youth Justice, Legal Aid NSW, and the Ombudsman, could provide unique insights into an agency’s compliance with the Standards, and help to identify areas for improvement. Third party reviews could be collected on standard forms provided by the OCG to selected third parties. Agencies should be required to show how this third party has worked with the children or young people they are providing care to.

We also strongly believe that the voice of children and young people should be heard throughout the monitoring and accreditation process. We suggest that direct input from children and young people should be made a formal requirement of the monitoring process, rather than something which currently *can* happen as part of onsite monitoring.

Do you agree that the Children’s Guardian should have discretion to undertake a briefer accreditation renewal assessment where an agency has demonstrated compliance with the Standards and accreditation criteria over the course of its accreditation period?

We note the OCG’s proposal to use the new continuous monitoring process to inform how an agency’s application for renewal will be approached. This would range from requiring a full renewal assessment (where an agency has shown poor compliance with the Standards and demonstrated little improvement in addressing non-compliance) through to direct renewal (where the agency has consistently

⁷ Office of the Children’s Guardian, *Report on the Leaving Care Monitoring Program 2020-21* (Report, 2021). Available at: <https://www.ocg.nsw.gov.au/ArticleDocuments/165/Reportonleavingcare.pdf.aspx?Embed=Y>.

demonstrated compliance with the Standards and has illustrated robust systems), and direct renewal could occur where only the five core themes are reviewed.

We would have concerns with this approach if Standard 11: Behaviour Management were not to form part of the core themes for annual review – particularly considering that key proposal 4 of this Review provides that applications for accreditation would no longer be required to include a behaviour management and support policy.

Section 5: Intersection with the Child Safe Scheme

What are your views on the 10 Child Safe Standards (and additional sector-specific accreditation criteria) becoming the new standards for the accreditation of statutory OOHC and adoption providers in the future?

We support the 10 Child Safe Standards of the Royal Commission into Institutional Responses to Child Sexual Abuse becoming the new standards for the statutory OOHC sector, in addition to sector-specific accreditation criteria.

In our casework, we receive many sexual assault disclosures by clients in OOHC. In advocating for clients around these issues within the current regulatory scheme, we observe that clients' complaints are often not well managed or client focused. We hope, in particular, that adopting Standard 6 of the Child Safe Standards (Processes to respond to complaints of child abuse are child focused) would improve the experience of young people reporting sexual assault in OOHC.

Thank you for the opportunity to provide a submission to this Review. If you have any questions or would like to discuss this submission further, please contact [REDACTED], [REDACTED], on [REDACTED] or at [REDACTED].

Yours sincerely

Monique Hitter
Acting Chief Executive Officer