



# Early legal assistance in child protection

Is it time for lawyers and child protection workers to work together to keep children safe at home?

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# 1. Introduction

In delivering his national apology to the stolen generations on 12 August 2008, the Prime Minister of Australia, Kevin Rudd, said:

‘We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians... A future where we embrace the possibility of new solutions to enduring problems where old approaches have failed.’

Despite extensive law reform, policy changes and numerous reports focused on solutions, Aboriginal and Torres Strait Islander children continue to be eleven times more likely to be removed from their families than non-Indigenous children.

Understandably, given past policies, Aboriginal and Torres Strait Islander people remain highly distrustful and in many cases unwilling to engage with child protection workers when there are safety concerns about their children.

In June 2022, the three largest agencies working in the child protection area in New South Wales, Legal Aid NSW, the Department of Communities and Justice and the Aboriginal Legal Service executed the ‘Legal Assistance for Families: Partnership Agreement’ (‘LAFPA’). LAFPA heralds the beginning of a new and innovative era in child protection and a new chapter in the way these agencies will work together and with families.

For the first time ever in New South Wales (NSW), parents, families and kin will be referred for legal advice at their first point of contact with child protection workers. Families will be provided with advice and representation from culturally competent legal services where they choose to receive it. Highly skilled lawyers will work alongside families to divert families away from the child protection system with the goal of keeping more children safe and with their families and kin and away from the out of home care system.

## 2. The NSW child protection landscape

It has consistently been the experience of Legal Aid NSW that it is incredibly rare for families coming into contact with child protection to obtain legal advice and representation before their children are assumed into care.

In more recent years, and in line with policy changes within DCJ, the experience of Legal Aid NSW has been that families will work with DCJ for extended periods of time and still not engage with a lawyer to obtain independent advice as to their rights, their legal options and the consequences of the decisions they may make when they are involved with DCJ.

It is a common occurrence that upon being presented with the Court documents that set out the basis upon which the children have been assumed into care, there are easily identifiable flash points or critical incidents for a family where the involvement of a lawyer for the purposes of advice and representation, may have supported a family to keep their children safe at home and not enter out of home care.

There is very little research that focuses upon lawyers, families and the child protection system in Australia. However, Walsh and Douglas in their paper titled '*Lawyers, Advocacy and Child Protection*'<sup>1</sup> summarise some of the difficulties for parents when working with a child protection authority as follows:

*'From a legal perspective, serious power imbalances exist between the parties in child protection matters. In most child protection cases that proceed to court, a government department has removed, or is seeking to remove, a child from his or her family unit because child protection officers believe the child is at risk of harm or otherwise in need of protection. Most parents are extremely distressed at the thought of losing their children and, in many cases, the parents will contest the intervention. Other parents will want to contest the intervention but will not know how or feel too disempowered to do so.'*

In interviewing lawyers and community service providers, Walsh and Douglas<sup>2</sup> discovered:

*'Parents without an advocate can unwittingly compromise their case during the initial stages of an investigation. For example, during informal interviews with child protection authorities, parents may unknowingly make admissions or provide information that is prejudicial to themselves. Many of the respondents in our studies stated that because parents are so distressed, angry and terrified that their children will be removed from their care, they may be willing to comply with any request for information or access, without considering their legal rights or how it might affect their case in the future.'*

Ultimately the lawyers and community service providers interviewed by Walsh and Douglas all said that they strongly believed that parents required access to an advocate as early as possible so that

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<sup>1</sup> '*Lawyers, Advocacy and Child Protection*' 2011, Melbourne University Law Review, Volume 35, Pages 621-650. This can be found here: [Walsh, Tamara; Douglas, Heather --- "Lawyers, Advocacy and Child Protection" \[2011\] MelbULawRw 21; \(2011\) 35\(2\) Melbourne University Law Review 621 \(austlii.edu.au\)](#)

<sup>2</sup> Ibid, Page 630

they did not unwittingly compromise their chances of retaining the care of their children and to ensure that they did not sign any agreements without receiving comprehensive and independent advice<sup>3</sup>.

Ultimately, Walsh and Douglas concluded that *'given the power wielded by child protection departments compared with the educational, literacy and emotional deficits experienced by many the parents, some form of advocacy support is necessary.'*<sup>4</sup>

This is significantly exacerbated for Aboriginal and Torres Strait Islander families who come into contact with DCJ. In a paper prepared for Legal Aid NSW, Forensic Psychologist Stephen Ralph<sup>5</sup>, wrote:

*'The involvement of child welfare authorities in the lives of Aboriginal Australians has been marked by profound distress and suffering on the part of Aboriginal people, both historically and in contemporary times.'*

In referencing the Wood Inquiry<sup>6</sup>, Professor Ralph noted<sup>7</sup>:

*'The inquiry found that not one family had escaped the effects of forcible removal, and that most families have been affected, in one or more generations by forcible removal of one or more children.'*

In 2019, Professor Megan Davis, undertook an independent review of Aboriginal Children and Young People in Out of Home Care. This review ultimately made 125 recommendations for whole system change and improvement. Professor Davis closely examined the practices of DCJ when working with Aboriginal and Torres Strait Islander families before their children were assumed into care. She noted that numerous organisations and peak bodies who had provided submissions had advocated for greater priority to be given to early intervention in the child protection system for decades.

Similarly, to Walsh and Douglas, Professor Davis<sup>8</sup> concluded:

*'Families articulated that they often felt as though they did not have the knowledge, they needed to engage with FACS<sup>9</sup> effectively. Families were acutely aware of the power imbalance in their relationship with FACS. One stakeholder informed the Review that 'people don't fight FACS because it's too hard', while another noted that carers and families were concerned that if they did not follow FACS' rules they would lose their children.'*

Professor Davis ultimately concluded that early legal advice for parents would support them to navigate

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<sup>3</sup> Ibid, Page 632

<sup>4</sup> Ibid, Page 649

<sup>5</sup> 'Child Protection and Indigenous Children', Stephen Ralph, Forensic Psychologist, Prepared for Legal Aid NSW in 2022, Page 1. A copy this paper can be found here: [Care and Protection: Representing Children - Legal Aid NSW](#)

<sup>6</sup> 'Report of the Special Commission of Inquiry into Child Protection Services in NSW', 2008, Honourable James Wood. This report can be found here: [Inquiry into Child Protection Services in NSW - Premier & Cabinet](#)

<sup>7</sup> 'Child Protection and Indigenous Children', Stephen Ralph, Forensic Psychologist, Prepared for Legal Aid NSW in 2022, Page 1.

<sup>8</sup> Ibid, Page 157

<sup>9</sup> FACS was the previous name of the child protection authority in NSW. It is now the Department of Communities and Justice.

the system, understand their rights and request support from DCJ for alternatives to removal or less intrusive options rather than an immediate move to child removal<sup>10</sup>.

For Aboriginal families in particular, LAFPA provides a culturally safe avenue for families and kin to engage with the child protection system, within a lens of family preservation. This approach is a significant shift from the historical engagement Aboriginal families have had with the child protection system in NSW.

Aboriginal families in NSW have historically been subjected to intrusive and arbitrary actions by the child protection system, under the guise of 'protection'. In 1909, the *Aborigines Protection Act (NSW)* gave power to the Aborigines Protection Board to assume the full custody and control of any Aboriginal child if a court found them to be neglected. A further amendment in 1915 provided powers to the Board to remove Aboriginal children from their families without needing to establish in court that they were neglected. This meant that Aboriginal children were removed from their families and their country and placed in missionary homes in an arbitrary and harmful way.

Aboriginal children were not permitted to practice culture or speak language. Aboriginal female children were trained as domestic help, and Aboriginal male children were trained as farm or station hands. Upon reaching their teenage years, Aboriginal children were sent to the homes of white families, whereby Aboriginal girls would work in the home and boys in the yard. They were not compensated for their work, and their wages were stolen by the NSW government.

These practices continued well into the 1970s, and were explicitly defined under a national assimilation policy in 1937, at which time the Commonwealth and state governments adopted a native welfare assimilation policy:

“The destiny of the natives of [A]boriginal origin, but not of the full blood, lies in ultimate absorption ... with a view to their taking their place in the white community on an equal footing with the whites.”<sup>11</sup>

Resultant from the Stolen Generations and assimilation policy were Aboriginal families with many generations of family who had been forcibly removed from their families and country, for no reason other than their Aboriginality. The *Bringing Them Home Report* concluded that:

*“Between one in three and one in 10 Indigenous children were forcibly removed from their families and communities in the period 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in 10. In that time not one Indigenous family has escaped the effects of forcible removal... Most families have been affected, in one or more generations, by the forcible removal of one or more children.”*<sup>12</sup>

Consequently, intergenerational trauma has significantly impacted upon Aboriginal people in NSW. The Healing Foundation states that intergenerational trauma occurs if people don't have an opportunity to heal from the past, they may unknowingly pass their trauma on to others. The trauma of forcible

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<sup>10</sup> 'Family is Culture Review Report: Independent Review of Aboriginal Children and Young People in OOHC' in 2019, Page 167

<sup>11</sup> Royal Commission into Aboriginal Deaths in Custody National Volume 2 - The Assimilation Years. Available at: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/IndigLRes/rciadic/national/vol2/278.html?stem=0&synonyms=0&query=-%20assimilation>

<sup>12</sup> Human Rights and Equal Opportunity Commission, (HREOC), "Bringing Them Home", Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander Children from their Families, Chapter 2, April 1997.

child removal, and its resultant impacts, “can be transferred from the first generation of survivors that have experienced (or witnessed) it directly in the past to the second and further generations of descendants of the survivors ... [this] is defined as the subjective experiencing and remembering of events in the mind of an individual or the life of a community, passed from adults to children in cyclic processes as ‘cumulative emotional and psychological wounding’<sup>13</sup>.

For these reasons, it was imperative that cultural safety be central to any proposed actions to address the disproportionate numbers of Aboriginal children in out of home care and acknowledging the impacts of historical child removal policies on Aboriginal caregivers and children. Cultural safety is defined as “an environment that is safe for people: where there is no assault, challenge or denial of their identity, or who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning, living and working together with dignity and truly listening”<sup>14</sup>. All three organisations acknowledge the need for Aboriginal families and kin to feel safe when accessing early intervention legal and non-legal services.

The Family is Culture Report as well as the Closing the Gap agreement and targets<sup>15</sup> gave Legal Aid NSW the platform upon which to advocate for significant change in this space and propose the new and innovative approach that is encapsulated in the Legal Assistance for Families: Partnership Agreement (‘LAFPA’).

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<sup>13</sup> Atkinson J (2013). Trauma-informed services and trauma-specific care for Indigenous Australian children. Canberra / Melbourne, Australian Institute of Health and Welfare & Australian Institute of Family Studies. page 5.

<sup>14</sup> Williams, R., ‘Cultural Safety: what does it mean for our work practice?’ (2008) Australian and New Zealand Journal of Public Health 213-214.

<sup>15</sup> In 2019 the Australian Federal Government, all states and territory governments, Australian Local Government Associations and the Coalition of Aboriginal and Torres Strait Islander Peak Organisations entered into a Partnership Agreement to develop a framework to ‘close the gap’ that exists between non-Indigenous and Indigenous Australians. In short, the objectives of ‘closing the gap’ is to achieve equality for Aboriginal and Torres Strait Islander people in all aspects of their lives. This includes reducing the number of children who enter out of home care.

### 3. The development of the Legal Assistance for Families: Partnership Agreement ('LAFPA')

Legal Aid NSW has independently committed to achieving the Closing the Gap outcomes and targets internally and to working with external stakeholders, community, the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and our clients to achieve the priority reforms, outcomes and targets. Target 12 focuses upon reducing the overrepresentation of Aboriginal and Torres Strait Islander children in out of home care by 45 percent. Legal Aid NSW was keen to develop and implement pieces of work that would assist with meeting this target.

The Aboriginal Legal Service ('ALS') is the primary legal service for Aboriginal people in NSW. They are a peak body and an Aboriginal Community-Controlled Organisation who provide legal services in care and protection. They also advocate for change to the law, policies and procedure.

Given the role of the Aboriginal Legal Service and the importance of increased collaboration and partnership with Aboriginal Community-Controlled Organisations (otherwise known as 'ACCOs'), it was imperative for Legal Aid NSW to work in partnership with the ALS to progress this project. ACCOs have a key role to play in the implementation of policy and agreements impacting upon Aboriginal people. ACCOs are governed by and are accountable to Aboriginal communities. As part of this accountability and governance, an ACCO should ensure that local Aboriginal people have input into service design, delivery and performance, with a view to deliver holistic and culturally appropriate services to Aboriginal communities<sup>16</sup>.

It was also imperative for us to work closely with DCJ as most of what is set out in the agreement requires their commitment and genuine buy in to be successful.

Over a period of 12 months, an intensive program of work was undertaken between the three agencies to collaboratively develop the governing principles of the agreement itself and settle upon the priorities of the agencies collectively. This involved regular working group meetings which were attended by senior executives as well as legal practitioners currently working on the front line. Additionally, extensive consultation was undertaken with staff (including Aboriginal and Torres Strait Islander staff).

While DCJ, the ALS and Legal Aid NSW have always coexisted and had some level of involvement with each other, this was the first time that all three agencies had worked together on a project of this magnitude. One of the principles of LAFPA itself is to continue to work together to ensure there is an ongoing commitment to finding ways to keep children with their families where it is safe to do so.

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<sup>16</sup> Clause 44, *National Agreement on Closing the Gap*.



## 4. The Legal Assistance for Families: Partnership Agreement

It is intended that the agreement itself will be a document that is not subject to change over time. The agreement itself contains the overarching principles and objectives that all organisations should be constantly striving for in all the work the agencies do with each other and separately.

The key principles are:

- Respect
- Communication
- Early intervention
- Family led decision making and agency.

In short, it is expected that all employees from each agency will commit to ensuring they are respectful of the role they each play within the system, that they keep communication lines open and look for opportunities to develop better channels to communicate. It is also expected that each agency will prioritise early intervention work with families and that families are given multiple opportunities to make their own informed decisions for their family and given agency in the process.

### 4.1 Objective One: Opportunities to Collaborate and Communicate

In simple terms, objective one is focused upon ensuring that all three agencies build upon the work that was done to develop the agreement by meeting on a regular basis and having regular forums for discussion.

Despite the overlap and interconnectedness of the work done by all three agencies, there has never been a forum for the agencies to come together regularly to discuss things like new services, new policies, training opportunities and potential collaborative projects.

Now, under the LAFPA agreement, senior executives from each organisation will come together to discuss the other objectives of LAFPA, monitor their implementation, discuss organisational changes and identify training and other opportunities to work on joint initiatives.

The agreement also encourages staff from each agency to make similar arrangements at a local level to develop local solutions for local issues and ensure that the objectives of LAFPA are being met at a grass roots level. This is in recognition of the fact that what may work in Sydney may not work in a small regional community like Broken Hill.

### 4.2 Objective Two: Prioritise Early Intervention

In her report<sup>17</sup>, Professor Davis referenced the following case study to highlight the lack of early intervention work done with families:

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<sup>17</sup> 'Family is Culture Review Report: Independent Review of Aboriginal Children and Young People in OOHC' in 2019, Page 167, Page 153

'In Case 350, several ROSH reports were made about P in the two years prior to her removal. These reports indicated that P was subjected to violence by her parents. However, FACS did not engage in any preventative casework prior to P's removal. The care application indicated that P's parents did not engage with FACS. However, this was inaccurate as P's mother returned phone calls and both parents attended a FACS office after the decision was made to remove P from her home. P's mother indicated she wanted to work with an Aboriginal caseworker 'who is able to demonstrate cultural sensitivities. She was not provided with an Aboriginal caseworker.'

Objective two puts into practice a mandate that families will be advised by DCJ of their ability to receive free legal advice from the ALS and Legal Aid NSW at their first point of contact with them when concerns are raised about the safety of children. It also expects that families won't just have one chance to receive this advice but numerous opportunities through their engagement with DCJ. It is envisaged that this will allow families to choose when and if they want to engage with a legal service.

The legal work could take many forms, whether that be:

- Communicating and negotiating with DCJ to ensure risk issues and expectations for addressing these issues are clearly identified and understood by families so that appropriate action can then be taken;
- The exploration of alternatives to removals, for example shorter term arrangements where children live with a family member while their parents spend time working on the risk issues before the children are returned to their care;
- Assisting families to enter into long term arrangements for children to live with family or kin where risk issues are not able to be addressed that don't involve children entering out of home care;
- Supporting families to enter other Court systems that are better designed to support family led decision making and are more culturally safe<sup>18</sup>.

Objective two is the most significant change to current practice. It also has the most potential for genuine change and impact. Using the above case study as an example, LAFPA envisages that a referral for legal assistance would have been made at the first point of contact with this family. A legal practitioner from a culturally safe and competent legal service would then be able to enter into discussions with DCJ and work with the family to reduce the risk to P to an acceptable level.

The families working with DCJ will also have the ability to decide how they are referred for this assistance. With their consent, families will be able to be referred for advice<sup>19</sup> by DCJ completing a specially developed referral form that will be provided to the ALS and Legal Aid NSW for actioning.

They will also be able to contact either the ALS or Legal Aid NSW themselves to seek advice using a brochure<sup>20</sup> that has been developed by the agencies to assist families to make contact.

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<sup>18</sup> For example, the Federal Circuit and Family Court of Australia has a specialist Indigenous List for families who need to resolve disputes about parenting arrangements. Lawyers, judicial officers and support services working within this list have high levels of cultural competency and the systems and processes have been modified to make this list a safer place for Indigenous families than the child protection system.

<sup>19</sup> The Early Intervention Referral Form can be found at page 22

<sup>20</sup> The brochure 'Is DCJ talking to you about your kids?' can be found at page 26

A specific diagram<sup>21</sup> has also been developed for use by all agencies to illustrate when referrals should be made for legal advice. The idea of this diagram is that it can be stuck above the desk of a child protection case worker and is a visual aide for when a family should be referred for legal advice.

It is understood by each agency that this objective will require the most significant culture shift. As legal practitioners, we are commonly associated with and associate ourselves with being experts at conducting litigation and advocating for clients within a Courtroom.

It became clear from feedback from DCJ staff, that there was a pervasive view that legal practitioners were combative, unhelpful and did not add value when involved with a client prior to the commencement of Court proceedings. We received feedback that child protection workers were of the view that lawyers consistently gave advice not to sign documents prepared by DCJ and that we would often delay and interfere with their work with the family.

This feedback is understood in its context, being that child protection workers usually only interact with legal practitioners in a Court environment<sup>22</sup> and in circumstances where concepts like legal privilege and other professional obligations are likely to be foreign to non-lawyers.

It is also a significant shift of thinking for legal practitioners. While legal practitioners who practise in the family law jurisdiction regularly participate in pre-Court processes like mediations and sending letters of offer, they do not routinely work with a client interacting with the child protection system in a similar fashion. Generally, they will only become engaged with these clients when Court proceedings have commenced.

To combat this, the agencies have collaboratively developed training that attempts to help shift these paradigms.

### 4.3 Objective Three: Embedding of electronic provision of Court documents

Prior to the pandemic, there were a variety of different practices in place across NSW when it came to how DCJ would notify Legal Aid NSW and the ALS about children coming into care and the commencement of proceedings. In some locations, advanced notice would be provided and legal representatives for parents and children would be able to be organised well in advance of the initial Court date.

In other locations, documents were simply left for our collection at the Court and parents and children would be able to meet with a lawyer for the first time on the day that the Court was going to determine the interim arrangements for the children.

During the periods that NSW was in lockdown, DCJ was forced to change its processes and serve all documents upon each agency electronically and in advance given there were no in person Court appearances occurring.

This practice was welcomed by both Legal Aid NSW and the ALS as it allowed earlier notice and therefore the ability to engage with a parent or a young person before the day of Court. The efficiencies

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<sup>21</sup> The diagram 'Key LAFPA referral points' can be found at page 23

<sup>22</sup> This is usually when they are being cross examined by practitioners and this is understood to universally be a stressful process where the work that child protection workers have done is closely scrutinised.

and the benefits to families of these processes meant the agencies were very keen to ensure that this practice continued post the pandemic. This objective embeds this process into practice permanently.

Additionally, all three agencies worked collaboratively on a form<sup>23</sup> that would be completed by DCJ child protection workers and provided to the other agencies at the time of service. The contents of the form were informed by the experiences of Legal Aid and ALS staff when assisting highly vulnerable parties in these child protection proceedings.

This form now asks DCJ at the outset to provide the other agencies with additional information which will ensure a better service is able to be provided to parents, children and other family members. DCJ now need to advise about things like whether a parent is in custody<sup>24</sup>, whether they are Aboriginal or Torres Strait Islander, whether they have a disability or require an interpreter or are in hospital.

It is often the case that this information is not easily ascertainable from the Court documents and a lot of time is wasted during busy Court days trying to ascertain the information and ensure that procedural fairness is accorded to these parents and children. It is hoped that the completion of this form will ensure there is greater participation, engagement and exercising of rights by parents and children in these proceedings from their commencement.

#### 4.4 Objective Four: To give precedence to alternative dispute resolution

In 2018 the *Children and Young Persons (Care and Protection) Act 1998* was amended to include a requirement that DCJ offer families an opportunity to participate in alternative dispute resolution ('ADR') when they considered the children to be at risk of significant harm.

The primary means by which DCJ have chosen to offer families ADR is through a family group conference ('FGC'). These conferences do not have legal representatives in attendance nor permit non-legal advocates to attend and participate.

Anecdotally, Legal Aid NSW understands that Aboriginal and Torres Strait Islander families have not found the FGC process to be one which allows them to have agency over decisions for their children. Aboriginal and Torres Strait Islander families have reported feeling that there is a significant power imbalance in the FGC process, which has resulted in families feeling that their views are not considered in decisions arising from the FGC. Furthermore, Aboriginal and Torres Strait Islander families have reported not being able to exercise self-determination in relation to care arrangements for children, including how to keep children safe, and families are ultimately felt feeling as though they must cede to the views of DCJ workers. Other significant barriers reported by Aboriginal and Torres Strait Islander families include the exclusion of kinship members, in particular, matriarchal kin who hold cultural shared decision making for children.

Legal Aid NSW has a well-established Family Dispute Resolution Unit which convenes conferences which are always attended by lawyers. It was agreed by all of the agencies that it was important for families to have choice, that each family be recognised as unique and that there should not be a one size fits all approach where an FGC was the only available option.

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<sup>23</sup> The 'information to be provided by DCJ to Legal Aid NSW and ALS' form can be found at Page 25

<sup>24</sup> Parents in custody often have great difficulty in participating in these proceedings often due to the difficulties DCJ have with notifying them of the proceedings, serving them with the documents and the uncertainty of whether corrective services will support them to actively participate.

In the context of this project, Legal Aid NSW has developed an early intervention care and protection ADR model which has been specifically designed to meet the needs of families who are interacting with the child protection system. For example, given that these conferences need to occur in circumstances where DCJ have identified a risk of significant harm, these conferences need to be able to be arranged quickly and efficiently. They also need to be able to be flexible and accommodating of the attendance of case workers, lawyers and extended family members.

Again, like objective two, this objective involves a significant shift in thinking for all three agencies. DCJ child protection workers will have been extensively trained and mandated to offer families family group conferences and not to engage with lawyers and participate in lawyer assisted conferences.

This objective works alongside objective two and in many respects relies upon the successful uptake of objective two by DCJ. If a family is referred to an agency at their first contact with DCJ, then a legal representative will be able to explain the options available to them and the advantages and disadvantages of each model of mediation. Without the successful implementation of objective two, it will be significantly harder for the agencies to ensure that families have genuine self determination and can make informed decisions about participation in ADR.

## 5. The Implementation Phase- June 2022 to Now

The LAFPA agreement itself was finalised in June 2022. From there, the three agencies developed a plan as to how to embed the agreement and its objectives into each agencies existing practices and procedures. A project plan was developed by each agency and collectively to assist with embedding the objectives internally and externally.

It was agreed that the agreement and its objectives would be trialled in three locations before being rolled out across NSW. This approach was adopted as it was felt that agencies could more closely monitor the roll out, progress and success at three discrete locations. It was also agreed that if the objectives could be implemented with success, then this success could be used to support its implementation and uptake more widely.

The three trial sites were determined by senior executives of each agency based on factors like the stability of the staffing, the leadership of the teams, whether the teams were flexible, adaptive and able to manage change. The demographics of the population in these locations and the need to ensure both larger and smaller regional locations were able to trial the arrangements were also considerations.

Once these trial sites were finalised, Legal Aid NSW developed a training package for in house staff which focused upon an explanation of the what, the how, the when and the why. Senior executives then travelled to these sites and met with the teams, providing training and obtaining their input and feedback.

All three agencies then came together to develop and train DCJ casework managers<sup>25</sup> to ensure they could support their staff to implement the objectives. All three agencies recognised the significant cultural paradigm shift that would need to occur within DCJ based on the feedback already obtained, so a portion of the training specifically focused on 'myth busting' about the role of lawyers and their obligations. Specific myths like 'lawyers always tell clients not to sign anything' and 'sometimes lawyers say ridiculous things on behalf of their client' were unpacked with a focus on the solicitors conduct rules and our obligations to our clients and the Court.

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<sup>25</sup> Casework managers supervise child protection case workers who work with families when there are child protection concerns.

## 6. Monitoring the Implementation and Success of LAFPA

Each agency has been tasked with developing their own strategies for building capacity to meet the objectives and support their staff at the trial sites to implement LAFPA. Ultimately it is envisaged that the objectives will become part of the 'business as usual' approach of each agency. At Legal Aid NSW, senior executives will support their trial sites by meeting with them regularly as a group to discuss data, the referrals received, successes, failures, risks and blockages. This information will then be fed into the executive level working group for discussion, evaluation and review.

It was always anticipated that the implementation and uptake of the objectives of LAFPA would take time and genuine commitment from each agency. Each agency is undertaking this piece of work within its existing resources and there are no dedicated roles or sources of funding to support it. It is therefore the role of the senior executives within each agency to champion this work and lead their individual practices to overhaul long standing practices and paradigms.

While the trial technically commenced in February 2023, there has been little uptake of the new processes so far. The agencies are still working on the terms of the evaluation and the plan for the communication of the agreement and its objectives to external stakeholders and the community.

It is clear at this stage that each agency needs to consider new strategies to continue to raise awareness and increase the uptake of the objectives. It is also clear that further work by all three agencies jointly is required to ensure that employees of each agency see that this piece of work is a collaborative piece that is supported at the most senior levels of each agency.

Whilst progress may be slow, the few referrals we have received have resulted in positive outcomes. In responding to Legal Aid NSW's first referral, one solicitor at one of our trial sites has provided the following case study.

### LAFPA Case Study

I appeared in the Children's Court for an Aboriginal grandmother this morning which brought to a close my work on our first LAFPA referral.

DCJ referred this client to us for advice on a section 38 care plan. Our client was the prospective guardian for three young children and she also has the care of two older children. The care plans and financial plan were thoroughly prepared by the CW team and there was a strong guardianship assessment. The mother of the children ultimately agreed that her mum was best placed to care for the children.

This morning (after some back and forth) a guardianship order was made by consent of the parties. There were happy tears and it was a lovely end for this family – particularly our client!

To make things even better for today, the CW team received internal approval within DCJ to backpay our client about \$127,000 in the carer allowance that she stopped receiving for the older children in 2018 until it was reinstated in December 2022. Our client told the CW team that she hadn't been receiving this allowance during the course of their casework with the younger children and they took steps to rectify this for her. This was a fantastic outcome for our client who has looked after all of her grandchildren through some very trying times.

It has been common ground between the three agencies since the execution of LAFPA that a significant amount of time, effort and commitment was going to be required to ensure its success. It was never going to be easy to shift entrenched paradigms of those working within a system which is already subject to constant change and criticism. It was therefore expected that the uptake of ground breaking and novel processes would be slow. However, each agency continues to be committed to making the child protection system better for families and committed to working together towards reducing the number of children that enter out of home care unnecessarily. As was stated in the Uluru Statement from the Heart<sup>26</sup>:

*'When we have power over our destiny our children will flourish.*

*They will walk in two worlds and their culture will be a gift to their country.'*

Legal Aid NSW recognises the importance of the provision of culturally safe legal services to Aboriginal families and kin in the implementation of LAFPA. Whilst working on developing LAFPA, Legal Aid NSW created an Aboriginal-led team of lawyers and allied professionals to deliver services to Aboriginal people across the state, including the provision of outreach legal services to regional and remote Aboriginal communities. This specialist team provides holistic legal and non-legal services to communities across the state and focuses on early intervention for families and kin involved in the child protection system. Whilst this team accepts LAFPA early referrals, the team can provide non-legal

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<sup>26</sup> The full Uluru Statement from the Heart can be found here: [View the Statement - Uluru Statement from the Heart](#)



mental health caseworker support and support of specialist Aboriginal Field Officers to assist families in meeting and addressing any child protection concerns at the early intervention stage.

Legal Aid NSW is committed to continuing the work we have started to implement LAFPA and support those families engaging with child protection to take back the power over their destiny.

## 7. The Legal Assistance for Families: Partnership Agreement document

### **Legal Assistance for Families: Partnership Agreement (LAFPA)**

An agreement focused on working collaboratively to achieve the best and safest outcomes for families. This agreement is relevant and applicable to all families who have contact with the child, youth and family division of the Department of Communities and Justice.

#### **Statement of Intention**

The Legal Assistance for Families: Partnership Agreement ('LAFPA') heralds the beginning of a new collaborative relationship between Legal Aid NSW ('Legal Aid'), the Aboriginal Legal Service ('ALS') and the Department of Communities and Justice ('DCJ'). It also consolidates existing processes in the one place.

All organisations recognise that they are working to achieve the same goal - to keep children safe at home with their families.

Children and families who interact with all these organisations can be vulnerable and require assistance from highly skilled practitioners at the earliest opportunity to ensure the best possible outcomes are achieved.

The interests of children, young people and families are best served when arrangements for their care and protection are resolved in a timely manner and ideally through early intervention assistance rather than litigation.

Early intervention legal work for the purposes of this document includes all work done with a family outside of a formal Court process. It can include working with a family in response to a report of significant harm, representation and/or advice in relation to alternative dispute resolution, discussion around temporary care arrangements, contact mediations, discussions around adoption (up to the stage of a hearing) and section 90 applications.

Early intervention work by all organisations helps to reduce the acrimony that often results from litigation and fosters cooperative relationships between caseworkers, carers, children and families.

A co-operative working relationship between all organisations aims to keep practice child-centred and avoid the duplication of effort and resources.

This Partnership Agreement sets out the expectations that all organisations have for their employees when working alongside each other.

#### **Key Principles**

- Respect;
- Communication;
- Early Intervention;
- Family led decision making and agency.

All organisations agree to review the schedules to this agreement (and the objectives themselves if necessary) every six months in the first twelve months and then on an annual basis to ensure that they continue to meet the needs of vulnerable families. The review process will involve obtaining feedback from legal practitioners, DCJ practitioners, families, communities and other relevant stakeholders. All

organisations agree that they want to be accountable to the objectives of this agreement and intend to evaluate the implementation and effectiveness of these objectives regularly.

### **Objective One: Regular Opportunities to Collaborate and Communicate**

All organisations recognise the importance of regular communication and collaboration to assist vulnerable children and families. All organisations agree to participate in quarterly working group meetings to share information and collaborate.

All organisations agree that the Director of the Family Law Division of Legal Aid NSW, the Director of Child Protection at DCJ and the Principal Solicitor (Care & Protection/Family Law Practice) of the ALS shall attend the working group ('the LAFPA working group') and that they will additionally nominate one senior practitioner from each organisation to participate in each working group.

All organisations agree that other persons (including external practitioners) can attend these meetings as agreed between the parties.

Both parties agree that the working group should focus on:

- a. Early intervention with families prior to a child or young person's removal/assumption into care;
- b. Developing relationships and mapping contact and escalation points between the parties;
- c. Identifying opportunities to work collaboratively and to share information;
- d. Identifying any training opportunities including joint training opportunities;
- e. Measuring the enablers and barriers to implementing this approach;
- f. Any other issues considered to be of importance by the working group
- g. Transparent and open communication in relation to policy and decision making;
- h. Assessing the effectiveness of this agreement.

All organisations encourage their staff to work with their local offices and districts to make local arrangements for working groups and develop tailored implementation plans based on the individual needs of their local areas. It is expected that staff from all organisations will ensure that feedback about the agreement is provided to their relevant director/principal solicitor to ensure that any issues can be addressed quickly and efficiently in the larger working group.

### **Objective Two: To Prioritise Early Intervention Work**

#### *DCJ's Obligations*

DCJ will:

- Ensure that DCJ practitioners (including caseworkers and managers casework) are aware of LAFPA and its objectives;
- Ensure that training is developed and delivered jointly with Legal Aid and the ALS that explains LAFPA and highlights the benefits of early collaboration and the referral process;
- Ensure LAFPA and its objectives are embedded into casework practice;
- Where the family's consent is given, ensure that referrals are made for legal advice for an individual or a family to Legal Aid NSW or ALS at key flash points including but not limited to:
  - o When active casework commences with a family (including when a document like a safety plan has been developed, a family action plan is being agreed to by a family or a family is agreeing to execute a document like a temporary care agreement);
  - o When a Family Group Conference is being contemplated (or any other form of Alternative Dispute Resolution is being offered to families);

- Before the filing/signing of a care plan by consent, parental responsibility contract, parenting capacity order, temporary care arrangement or when any discussions with a family are occurring which involve a child leaving the care of a parent (including informal arrangements, referrals for advice relating to the commencement of family court proceedings or ADVO proceedings);
- Where practicable, before the commencement of s90 proceedings, transfer proceedings pursuant to Chapter 14A, adoption proceedings, parents patriae proceedings (including secure accommodation proceedings).

Referrals are to be made using the 'Early Intervention Referral Form' which is Schedule 1. Schedule 2 is a visual representation of all organisations expectations of key referral points.

#### *Legal Aid & ALS's Obligations*

Legal Aid NSW and ALS will:

- Ensure that front line employees (including legal officers and other relevant staff) are aware of LAFPA and its objectives;
- Ensure that training is developed and delivered in conjunction with DCJ and ALS that explains the objectives and highlights the benefits of early collaboration and the referral process;
- Ensure LAFPA is embedded into relevant practice and procedure manuals;
- Establish clear referral pathways for families to be referred to legal advice with a view to this advice being provided wherever possible by offices closest to the family or units best able to meet the needs of the family;
- Confirm the receipt of the referral and likely turnaround time for the provision of the legal advice
- Triage the provision of legal advice based on the information provided by DCJ and the client and prioritise the giving of advice as soon as is reasonably practicable based on the urgency of the individual family's situation.

#### **Objective Three: To embed the electronic provision of initiating applications**

##### *DCJ's Obligations*

DCJ will:

- (a) Ensure that Legal Aid and ALS are provided with new Applications as early as possible (no less than 24 hours after filing unless there are exceptional circumstances) to the appropriate email address as set out in Schedule 3;
- (b) Ensure that reasonable attempts are made to ascertain and provide contact telephone numbers for parents and children (if the child is over 12) at the same time as the provision of new applications;
- (c) Ensure that both Legal Aid and the ALS are provided with the information as set out in Schedule 4.

##### *Legal Aid NSW & ALS's Obligations*

Legal Aid and ALS will:

- (a) In accordance with the protocol entered into in 2016 by ALS and Legal Aid, the ALS will determine representation first, in accordance with the principle of self-determination and consistent with the principles in the *Children and Young Persons (Care and Protection) Act 1998*. Thereafter, Legal Aid will apply its policies;
- (b) Ensure that new applications are allocated to any private practitioners involved in proceedings prior to the first Court event;

- (c) Take all necessary precautions to prevent the reproduction or copying of new applications, except to the extent reasonably necessary for the provision of legal aid and other legal services to the persons to whom the new application relates, including:
- (i) Forwarding electronic copies of new applications to its personnel and private practitioners on a need-to-know basis;
  - (ii) Take all necessary precautions to prevent loss, unauthorised access to, unauthorised copying, misuse, modifications or disclosure of new Applications, including by treating the new Applications received from DCJ under these principles in accordance with the “Sensitive: Personal” Classification;
  - (iii) Unless Legal Aid is required by law or the Legal Aid *Functional Retention and Disposal Authority* (FA 272) to retain the new Applications, Legal Aid will use its best endeavours to destroy or cause to be destroyed (in such a manner as to prevent its retrieval, recovery or reconstitution) all copies of new Applications which are in its possession, custody, power or control seven (7) years after last providing the person whom is subject of the new Application with legal aid or legal services in respect of the offence for which the new Applications were provided.
  - (iv) Complying and ensuring its Personnel comply with any obligations imposed by Privacy Legislation;
  - (v) Complying and ensuring its Personnel comply with the privilege provisions in the *Legal Aid Commission Act 1979* (NSW);

Complying with all relevant security and other requirements specified in their respective legislative and administrative frameworks and guidelines, including the NSW Cyber Security Policy (or any policy that may replace it).

#### **Objective Four: To give precedence to Alternative Dispute Resolution**

All organisations agree Alternative Dispute Resolution (including contact and adoption mediations and ADR pursuant to section 37 of the Act) provides important and valuable opportunities for the organisations to work with families to achieve the best possible outcomes for children and young persons.

All organisations are committed to continuing to work collaboratively and on an ongoing basis in relation to processes, policies and procedures concerning:

- Contact mediations; and
- Pre and post filing adoption mediations;
- Other FDR/ADR models.

#### *Alternative Dispute Resolution*

The primary means by which Alternative Dispute Resolution (‘ADR’) is offered to families who are both participating and not participating in Court processes by DCJ is by way of Family Group Conferences (‘FGC’). The primary means by which ADR is offered to families by Legal Aid NSW is by way of lawyer assisted Family Dispute Resolution (‘FDR’).

#### *Family Group Conferences*

It is not envisaged that legal representatives will attend at Family Group Conferences that are convened outside of Court proceedings. This does not prevent parents, children, young people and other interested family, kin and significant others from seeking confidential legal advice prior to or during a family group conference. All referrals should be made for legal assistance in accordance with Principle 2 of this partnership agreement.

Both organisations agree that there will be some matters where a family member or a child/young person may benefit from having or request that a legal representative be present at an ADR, whether this be an FGC or a lawyer assisted mediation funded by Legal Aid NSW.

Both organisations agree to consider the appropriate form for ADR on a case by case basis and particularly in matters where there are concerns about domestic and family violence.

The attached schedule 5 outline the practices and procedures for each model of Alternative Dispute Resolution.

# Schedule One: Early Intervention Referral Form

## Legal Assistance for Families: Partnership Agreement (LAFPA)

### Schedule 1

#### Early intervention referral form

#### 1. Primary contact

**Parent or person requesting advice:**

Name:

Date of birth:

Phone:

Email:

Address/Location:

Relationship to child:

Identifies as Aboriginal or Torres Strait Islander:  Yes  No

Community of belonging/important familiar or kinship connections/cultural considerations (if known):

Has the client indicated a preference for a particular solicitor or particular legal service?  Yes  No

If yes, please choose one:  ALS  Legal Aid NSW  Other

#### 2. Parent (if not listed above) or other secondary contact or significant person in relation to the matter

Name:

Date of birth:

Relationship to child:

Identifies as Aboriginal or Torres Strait Islander:  Yes  No

Interpreter required?  Yes  No

#### 3. Children

Name	Age	Date of Birth	Cultural Identity
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>


More than 4 children

#### 4. Consent from parent/s or primary carer obtained?

Yes  No

If no, please indicate why consent hasn't been obtained:

#### 5. Any current or previous orders, including AVOs?

Yes  No

Additional information:

#### 6. Is any parent in custody?

Yes  No

#### 7. What are the primary worries/concerns for this child?

Safety/risk assessment outcomes (e.g. mental health and parental drug use, failure to thrive), history of prior interventions, strengths and protective factors

#### 8. Current status of the matter

(e.g. family long term clients considering removal)



**9. How long have you been working with the family/have they been known to DCJ?**

**10. Time pressures and basis for any time pressure (for example legal intervention is needed)**

**11. Nature of the referral**

(e.g. legal advice – before possible entry into care, early intervention advice and support (including prenatal), s 90 application, FGC, family law proceedings, advice re safety plan, TCA, PRC, consent orders etc.)

**12. Attach any other relevant documents**

(e.g. safety plan, TCA, PRC, case plan/permanency plan, risk assessment, referrals to Federal Circuit and Family Court of Australia etc.)

**Referral made by:**

	Name	Phone	Email
Caseworker	<input type="text"/>	<input type="text"/>	<input type="text"/>
MCW	<input type="text"/>	<input type="text"/>	<input type="text"/>
CSC	<input type="text"/>	N/A	N/A
District	<input type="text"/>	N/A	N/A

**13. Who should the solicitor contact for further information or clarification?**

Name:

Position:

Phone:

Email:

# Schedule Two: Key LAFPA Referral Points

## Legal Assistance for Families: Partnership Agreement (LAFPA)

### Schedule 2 – Key referral points



#### Stage 1: Initial engagement with the family

Risk of significant harm report received. Family is screened and it is determined the Department of Communities and Justice will have contact. There are opportunities now to refer families to the early intervention pathway where they are asked to:

- agree to a family action plan/there is a safety plan
- engage with services
- make informal care arrangements
- be part of a temporary care arrangement (TCA), parent responsibility contract (PRC), parent capacity order (PCO) or alternative dispute resolution (ADR).

LAFPA objectives 2 and 4, schedules 1 and 5.



#### Stage 2: Commencing/during proceedings

Where removal/children's court proceedings have commenced, follow the normal service processes and representation will be arranged by Legal Aid NSW and the Aboriginal Legal Service.

LAFPA objective 3, schedules 3 and 4.



#### Stage 3: Post proceedings

Refer using the early intervention pathway when issues arise about things like:

- contact
- cultural planning
- guardianship or adoption orders, and
- new siblings
- restoration (section 90) and self-placement.

LAFPA objectives 2 and 4, schedules 1 and 5.

# Schedule Four: Information to be provided by DCJ to the ALS and Legal Aid NSW

## Legal Assistance for Families: Partnership Agreement (LAFPA) Schedule 4

### Information to be provided by DCJ to Legal Aid NSW and ALS

**1. Contact details of parties and child (if over the age of 12)**

	Name	Phone
Party 1		
Party 2		
Child (if over the age of 12)		

**2. Is any party in custody?**  Yes  No

MIN:

Location:

**3. Is any party in hospital?**  Yes  No

Location:

**4. Have the children been identified as being Aboriginal or Torres Strait Islander?**  Yes  No

If yes, please indicate which parent identifies as Aboriginal or Torres Strait Islander:

Mother  Father  Both

**5. Are there security risks with Court attendance?**  Yes  No

Provide short summary:

**6. Does a party require an interpreter?**  Yes  No

Which language:

**7. Does a party have a disability?**  Yes  No

Provide short summary:

**8. Has any party not been served?**  Yes  No

Reasons:

# Is DCJ talking to you about your kids?

## Is DCJ talking to you about your kids?

Your questions answered



### Why is DCJ asking about my kids?

The Department of Communities and Justice (DCJ) is the main government agency in NSW that protects children. In the past, DCJ has been called FACS and DOCS.

DCJ might be talking to you because it is worried about your children's safety.

DCJ might also be talking to you because something is happening for your kids that you need to know about.

Just because DCJ is involved with your family does not mean your children will automatically be taken away. If possible, DCJ will work in partnership with you, your family and your community to keep your children safe and well cared for.

It's really important that you understand why DCJ is involved, what they are asking you to do and why.

### What will DCJ ask me to do?

Each family is different and may be asked to do different things. You might be asked to sign something, go a meeting, visit a counsellor or do a course. You might just need to talk to DCJ.

You are entitled to have a say in this process and so is your family. It's really important your voice is heard.

## What help can I get?

Legal Aid NSW can help explain your options and how the law works. Legal Aid NSW are independent from DCJ and can give you independent, free legal advice.

The Aboriginal Legal Service (NSW/ACT) (ALS) has specialist family law services for Aboriginal and Torres Strait Islander people. The ALS helps mums, dads, grandparents or other family members worried about what is going on for kids.

Legal Aid NSW or the ALS can also talk to DCJ for you, and in some cases can represent you or give you some advice about alternative dispute resolution (sometimes called ADR, Family Group Conferences or FCGs).

## How do I get legal help?

You can call the numbers below, or you can let your caseworker know you want some advice and we will call you.

### LawAccess NSW

LawAccess NSW is a free government service that provides legal information and referrals for people in NSW. LawAccess NSW can refer you to a Legal Aid NSW family lawyer or book an appointment for you at your local Legal Aid NSW office. Call them on **1300 888 529** or access their webchat function at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)

### Aboriginal Legal Service

Call **1800 733 233** for family matters or visit [www.alsnswact.org.au/care](http://www.alsnswact.org.au/care)

This publication is a general guide to the law. You should not rely on it as legal advice, and we recommend that you talk to a lawyer about your situation.

The information is correct at the time of printing, however it may change. For more information contact LawAccess NSW on **1300 888 529**.



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For more information about Legal Aid NSW services:



### Do you need help to contact us?



If you need an interpreter, call the Translating and Interpreting Service (TIS National) on **131 450** (9am – 5pm) and ask for LawAccess NSW.

### Do you find it hard to hear or speak?



If you find it hard to hear or speak, call us through the National Relay Service (NRS) on **133 677** and ask for LawAccess NSW or visit: [www.relayservice.gov.au](http://www.relayservice.gov.au)



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