



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLIC:CBsh301123

30 November 2023

Ms Zoë Robinson
NSW Advocate for Children and Young People
Ground Floor
219-241 Cleveland Street
Strawberry Hills NSW 2012

By email: specialinquiry@acyp.nsw.gov.au

Dear Ms Robinson,

Special Inquiry: Children and Young People in Alternative Care Arrangements (ACAs)

Thank you for the opportunity to make a submission to the Special Inquiry into Children and Young People in Alternative Care Arrangements. The Law Society's Children's Legal Issues Committee contributed to this submission.

ACAs in NSW are intended as a form of short-term emergency care.¹ They are to be used in accordance with the permanent placement principles set out in the *Children and Young Persons (Care and Protection) Act 1998 (Care Act)*, which prescribe a hierarchy of short-term, long-term and permanent care arrangements,² and the Permanency Support Program which intends that all cases have a 'permanency' outcomes within two years.³

The Law Society considers that, overall, the legislative framework governing ACAs is appropriate for the use of emergency care arrangements. We are concerned, however, about the apparently increasing use of ACAs, as outlined below, often for extended periods. This is inconsistent with their intended purpose as emergency care, and contradicts the permanent placement principles and relevant principles in international law, as discussed in more detail below.

ACA placements occur most commonly in the absence of alternative placement options for children and young people entering care, and on the breakdown of foster care placements. These pathways suggest that there may be opportunities to address the over-use of ACAs by strengthening the foster care system. We suggest considering improving the remuneration, training and support available to volunteer foster carers, promoting the volunteer foster care sector, and investing further in professional care models.

¹ *Children and Young Persons (Care and Protection) Act 1998*, s 46; NSW Office of the Children's Guardian, *Annual Report 2021-22*, p 44, https://ocg.nsw.gov.au/sites/default/files/2022-10/R_OCG_2021-22AnnualReport.pdf.

² *Care Act*, s 10A.

³ NSW Government, Department of Communities and Justice, *What is the Permanency Support Program?*, <https://dcj.nsw.gov.au/service-providers/oohc-and-permanency-support-services/permanency-support-program-oohc/permanency-support-program/what-is-the-permanency-support-program.html>.

Our responses to relevant Terms of Reference are set out below.

Term of Reference A - the pathways, trajectory and factors relating to:

- **children or young people being placed in an ACA, including factors such as complex needs, disability, neurodivergence, psycho-social behaviour and experiences of trauma; and**
- **transitions between placements, including different types of emergency care arrangements.**

The Law Society is concerned that the use of ACAs in NSW is increasing. In 2021-22, in NSW there were 542 occasions of ACA provided,⁴ compared to 530 in 2020-2021,⁵ and 484 in 2019-2020.⁶ We are also concerned that, despite statutory safeguards requiring that a child or young person (**CYP**) should ordinarily be in ACA for no longer than 14 days,⁷ CYPs can be in ACA placements for unacceptably long periods of time. In 2021-2022, a third of the ACA placements in NSW lasted for 90 days or more.⁸ These figures suggest that while ACAs may be regarded as emergency care, in practice the use of these arrangements is no longer exceptional. This contradicts the permanent placement principles, and the principle in international law prioritising continuity in a child's upbringing.⁹

In examining the factors underlying this increasing use of ACAs, we note that the two most commonly reported reasons for placement in ACAs are:

- the breakdown of a foster placement; and
- the lack of options for children entering statutory out-of-home care (**OOHC**).¹⁰

Each of these is discussed below.

Placement breakdown

The experience of our members, who advise designated agencies, government agencies and CYPs in care, is that foster care placements are increasingly at risk of breaking down, due to carers finding themselves ill-equipped to manage the complex and challenging nature of foster care. Many CYPs in OOHC have complex needs, whether due to past trauma, disability, neurodivergence or psycho-social behaviour. CYPs often enter OOHC following exposure to adverse childhood experiences, including:

- exposure to domestic and family violence;
- incarceration of a parent or caregiver;
- child sexual abuse;
- early exposure to alcohol and other drug abuse;
- cultural dispossession; and
- homelessness.¹¹

⁴ NSW Office of the Children's Guardian, *Annual Report 2021-2022*, p 44.

⁵ NSW Office of the Children's Guardian, *Annual Report 2020-2021*, p 44.

⁶ NSW Office of the Children's Guardian, *Annual Report 2019-2020*, p 36.

⁷ Care Act, s 46.

⁸ Note 4 above, p 44.

⁹ United Nations, Convention on the Right of the Child, Article 20.3: "When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background", <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

¹⁰ Note 4 above, p 45.

¹¹ The *Bugmy Bar Book*; AIHW 2021-22 *Out-of-Home Care*, p 1, https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBB_OOHC_chapter-Sep2021.pdf.

Placement breakdown often involves the most vulnerable CYPs, who have experienced significant behavioural, psychological and emotional difficulties and higher than average placement instability.¹² The CYPs involved are increasingly placed in ACAs due to lack of an alternative appropriate care arrangement.

Lack of options for children entering statutory care

Our members report that ACAs are increasingly used at the point of entry into statutory OOHC, due to a critical shortage of foster carers. The general shortage of foster carers across Australia is well recognised.¹³ Certain culturally and linguistically diverse (**CALD**) and Aboriginal and Torres Strait Islander communities are also underrepresented amongst foster carers.¹⁴ According to our members, there is a particular need for carers trained in managing CYPs who have acutely complex needs and behaviours, as outlined above. There are also difficulties placing sibling groups, and CYPs in regional and remote areas.

Term of Reference C - the treatment of children and young people whilst in an ACA, including:

- **the suitability of the placement, including its facilities and condition, and the standard of care provided;**
- **the availability, access to and adequacy of provision of education, recreation, health, psychological supports, and other services;**
- **the appropriateness of the location for the child or young person; and**
- **follow-up support and care after being placed in an ACA.**

The Law Society welcomes the recent amendments to the *Children's Guardian Act 2019* (NSW), which clarify that the Child Safe Standards apply to residential carers engaged through designated agencies, including through labour hire models.¹⁵

We note that the regulatory framework governing the care workforce has allowed for greater casualisation of staff providing care in ACAs,¹⁶ with CYPs in ACAs often experiencing multiple carers on rotating shifts. We consider that, while not ideal, these arrangements are acceptable for the delivery of short-term emergency care.

However, we have concerns that the use of this model for CYPs who are in ACAs for periods of weeks or months can deliver an inadequate standard of care. Our members report that the lack of continuity of care disrupts the CYP's daily routine, and erodes support for the CYP's attendance at school, extra-curricular activities, and medical and other therapeutic care appointments. There is also less opportunity for carers to deliver holistic therapeutic care through forming relationships with other support providers, such as teachers, counsellors, case workers and health care providers.

Term of Reference D - the short, medium and long-term impacts of ACAs on the safety, welfare and wellbeing of children and young people, including:

- **the social, emotional, psycho-social and physical health impacts;**
- **connection to family, friends, community, culture and supports; and**

¹² H Wilkinson and A C Wright, *Barriers and motivations to recruiting carers for children and young people in care aged 9+ years*, 2019, p 15, <https://www.myforeverfamily.org.au/wp-content/uploads/2022/10/Recruitment-Literature-Review-FINAL.pdf>.

¹³ Note 12 above, p 4; ACT Government, *Next steps for our kids 2022-2030* (ACT strategy for strengthening families and keeping children and young people safe), Appendix B – Review of Contemporary practice in out of home care, 2022, p 7, https://www.communityservices.act.gov.au/__data/assets/pdf_file/0007/2009563/APPENDIX-B-Review-of-Contemporary-Practice-in-Out-of-Home-Care.pdf.

¹⁴ Note 12 above, p 16.

¹⁵ *Children's Guardian Amendment Act 2022* (NSW).

¹⁶ *Children and Young Persons (Care and Protection) Regulation 2022* (NSW), cl 22.

- **other impacts experienced by children and young people.**

As noted in our response to Term of Reference C, CYPs who are placed in ACAs for significant periods can experience disruption to their education, daily routine and access to support services. This contradicts the principle underpinning child protection practice in NSW that CYPs are entitled to “long-term, safe, nurturing, stable and secure environments through permanent placement”.¹⁷

These conditions may also have adverse longer term outcomes. While OOHC leavers have poor social, employment, housing and health outcomes overall, there is evidence to suggest that consistent post-care support from former carers may improve life stability, and help care leavers to access services and navigate life challenges. However, placements (such as ACAs) with inconsistent support and frequent changes of carers tend to erode the ability of CYPs to form these critical relationships.¹⁸

The over-use of ACAs may also have longer term outcomes for CYPs in relation to the criminal justice system. The overrepresentation of children in OOHC in the criminal law system is a well recognised issue. Indeed, as reported by the Australian Institute of Criminology:

children who come to the attention of statutory child protection services due to abuse, neglect or parental incapacity are at least nine times more likely than other young people to offend and come under the supervision of youth justice services.¹⁹

Term of Reference F - alternative approaches to the use of ACAs, including any local or global examples, and the social or economic benefits of such alternatives.

Many Australian jurisdictions are implementing reforms of their OOHC systems which incorporate prevention and early intervention strategies, with a focus on family restoration and diverting families away from institutional care systems, as well as investment in intensive therapeutic care.²⁰ We note that NSW responses include the cessation of residential care, in favour of the Intensive Therapeutic Care program, which offers CYPs over the age of 12 with acutely complex needs temporary one-to-one intensive therapeutic care, followed by a family based placement or a program supported by therapeutic care team.²¹

While the Law Society’s long-standing position has been to advocate for prioritising investment in early intervention, family preservation and restoration, we are cognisant that foster care remains an integral part of the NSW OOHC system. In this context, a foster care system that does not appear equipped to meet the demands placed upon it on a number of levels is a key factor in the increasing and sustained use of ACAs. We suggest that measures focused on strengthening the foster care sector may be one key lever to reduce the over-reliance on ACAs.

Strengthening the volunteer foster care sector

A key factor underlying the shortage of volunteer foster carers may be the low level of remuneration for carers. The dominant foster care model in NSW relies on volunteerism, providing a modest allowance to cover expenses, while assuming that carers are not in full-

¹⁷ Care Act, ss 8 (a1), 9(2)(f).

¹⁸ ACT Strategy, note 13 above, p 46.

¹⁹ S Baidawi and R Sheehan, ‘Crossover kids’: *Offending by child protection-involved youth*, Trends & Issues in crime and criminal justice, No 582, 2019, p. 2, citing Australian Institute of Health and Welfare, *Child protection Australia 2016–17*, 2018.

²⁰ ACT Strategy, note 13 above.

²¹ NSW Government, Department of Communities and Justice, Residential Care Placements, <https://dcj.nsw.gov.au/service-providers/oohc-and-permanency-support-services/intensive-therapeutic-care-interim-care-model.html>.

time paid employment and available to devote significant time to caring. In 2019, the most commonly reported barrier to becoming a foster carer is the carer's personal circumstances, including the need to work full-time.²² In our view, attracting greater numbers to the volunteer foster care sector may require improving carer allowances.

Public awareness campaigns focused on promoting and providing information about foster caring may also support recruitment in the volunteer care sector.²³ There is evidence to suggest that combining broad-based recruitment campaigns with campaigns targeted at population groups with the greatest need for carers (such as particular Aboriginal and Torres Strait Islander communities) may be most effective.²⁴ We note that a barrier to recruiting more appropriate Aboriginal and Torres Strait Islander carers has been the working with children check (**WWCC**). We understand from our members that some Aboriginal and Torres Strait Islander people who would otherwise likely be safe and appropriate carers are not able to pass a WWCC due to, for example, historical convictions. We suggest that more thought is required to design a screening tool that is nuanced enough such that it does not unnecessarily exclude appropriate carers.

We suggest that building resilience in the volunteer foster care sector requires greater investment in trauma-informed therapeutic training, both before and after carers commence providing care. It also requires positioning designated agencies to coach and mentor foster carers and facilitate wrap-around support services for CYPs. Volunteer carers have also reported the need for more training and support, including training for carers which is culturally appropriate, where trainers are part of, and intending to work with, particular cultural groups.²⁵

Increasing investment in professional foster care models

We also suggest consideration be given to supplementing the volunteer-based model of foster care with increased investment in professional care models, such as the Professional Individualised Care (**PIC**) model.²⁶ We note that in NSW, the PIC model has been in limited use via the NSW Intensive Foster Care (**IFC**) program, which only provides for CYPs over the age of 12 with complex needs.²⁷ Other forms of PIC have been implemented to some degree in other Australian states and territories, Northern Europe and North America.²⁸

Under the PIC model, carers with industry recognised qualifications and extensive relevant work experience are engaged by government on a full-time basis to provide one-on-one, trauma-informed care for CYPs with high support needs. The PIC carer's ability to respond to challenging behaviour is supported through consultation with other professionals, including psychologists. Usually, the carer receives a full-time professional salary or equivalent.²⁹

Research conducted for the Commonwealth Government Department of Families, Housing, Community Services and Indigenous Affairs in 2016 recommended making greater use of PIC for several categories of care recipient, including for children aged between 8-12 years of age

²² Note 12 above, p 14.

²³ Ibid, pp 27-8.

²⁴ Ibid, pp 17, 20.

²⁵ Ibid, p 15.

²⁶ PIC website, <https://pic.care/>.

²⁷ NSW Government, Department of Family and Community Services, *Consultation Report – Developing a Framework for Therapeutic Out of Home Care in NSW*, 2016, p. 25, https://dcj.nsw.gov.au/documents/service-providers/out-of-home-care-and-permanency-support-program/itc-icm-and-sil/TC-Fwk_Consultation-Report-for-public-consultation.pdf.

²⁸ ACIL Allen Consulting, Report to Commonwealth Government Department of Families, Housing, Community Services and Indigenous Affairs, *Professional Foster Care: Barriers, Opportunities and Options*, 2013, pp 13, 21, https://www.dss.gov.au/sites/default/files/documents/08_2014/professional_foster_care_final_report.pdf.

²⁹ The IFC model engages carers as contractors and provides a fee of up to three times the allowance available to volunteer carers: note 30 above, p. 25.

already in residential care, or at risk of entering residential care; adolescents with a long history of trauma and placement instability, who are currently placed in emergency care; and complex sibling groups too challenging for the foster care system and residing in ad hoc and costly living arrangements.³⁰ In contrast to ACAs and volunteer foster care arrangements, the PIC model provides a safe and stable environment and continuous access to therapeutic care, assisting the CYP to start the process of trauma recovery. Increased use of this approach may address the issue of quality of care, enlarge the overall pool of foster carers, provide more appropriate care in complex and high risk cases, provide alternatives to ACAs in instances of foster care breakdown, and provide options that enable CYPs to exit ACAs after a shorter period. If more investment is directed toward expanding this program, we note the views expressed in the 2016 research in respect of unintended consequences, including ensuring that the recruitment and training regime does not unintentionally exclude individuals from providing foster care, particularly Aboriginal and Torres Strait Islander carers or CALD carers.³¹

The research also found that developing the right remuneration model is key to attracting suitable professional carers.³² There is evidence to suggest that, as a pathway to sustainable home-based placements, and in addition to the non-economic benefits that accrue from appropriate and stable care, the PIC model is likely to be cost-effective in comparison to less stable care trajectories such as ACAs, intensive foster care and intensive residential care. The PIC model yields further economic benefits when consideration is given to the higher contribution made by PIC recipients who have better educational, health and lifestyle outcomes.³³

Thank you again for the opportunity to contribute to this Inquiry. If you have any further questions in relation to this letter, please contact Sue Hunt, Senior Policy Lawyer on [REDACTED]

Yours sincerely,

[REDACTED]

Cassandra Banks
President

³⁰ Note 31 above, pp 35-36.

³¹ Ibid, pp 37-38.

³² Ibid, pp 34.

³³ Ibid, p 36.