



12 December 2023

Zoe Robinson
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NSW Office of Advocate for Children and Young People
By Email: specialinquiry@acyp.nsw.gov.au

Dear Ms Robinson,

ALS Response to the Special Inquiry into Alternative Care Arrangements (ACAs) in NSW

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**) and thank you for the opportunity to provide a submission to the ACYP's Special Inquiry into ACAs in NSW.

The ALS is a proud Aboriginal community-controlled organisation and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. We currently undertake legal work in criminal law, care and protection law, and family law, and discrete areas of civil law. We also undertake broader work in law reform and wrap-around programs for community wellbeing. The ALS welcomes the opportunity to provide a submission to the Office of the Advocate for Children and Young People.

We commend the Minister's commitment to the Special Inquiry, noting her comments that "these arrangements with children going into hotels and motels in the absence of enough foster cares is costing an obscene amount of taxpayer money, but worse still, the outcomes are just terrible"¹.

The ALS participated in the Minister's Child and Family Wellbeing Reform Forum in August 2023. One of the Aboriginal community requests of the Government throughout the Forum was for an immediate review of Aboriginal and Torres Strait Islander children and young people currently placed in ACAs. The Minister has identified foster care and kinship carer shortages as one of the reasons for the use of ACAs, however, it is submitted that those shortages are not the only reason for the Department's reliance on these care arrangements.

It is shared sector knowledge that the most harmful form of placement arrangement is a temporary or emergency placement in short-term accommodation, with rotating workers providing care for children and young people. Such a placement is not consistent with the Aboriginal and Torres Strait Islander Children Placement Principle (**ATSICPP**). We acknowledge that there are a number of reasons why this might be considered the only option available at short notice, however, submit that this is not a satisfactory reason for the reliance by the Department of Communities and Justice (**DCJ**) on such

¹ <https://www.abc.net.au/news/2023-09-24/nsw-inquiry-into-kids-in-hotels-motels-due-lack-foster-carers/102895278>

placements as the first option for so many children, and for ACAs being routinely used for extended periods, rather than the emergency circumstances they are intended to cover.

ALS staff have practice-facing experience in relation to the use of ACAs in different contexts. Where final orders are made in the Children’s Court for a child or young person to remain in the care of the Minister until they are 18, beyond Court-ordered reporting opportunities, the ALS care and protection law practice is not made aware of the placement of a child into an ACA after final orders. The experiences of ACAs we speak to in that practice are largely where ACAs are used during the course of active care proceedings. In the experience of our criminal practice, an ACA might be the setting in which alleged criminal offending has occurred, might be the child or young person’s current ‘home’, or might be the placement identified if a child is bailed from a youth detention centre with no other placement type available.

Throughout the body of this response, the ALS has made several recommendations for reform and actions to address the matters raised. They are contained in **Appendix 1**.

Preliminary Observations

The Term ‘ACA’

The ALS recognises that the term ACA is just one of the types of care arrangements that fall within the descriptor of High Cost Emergency Accommodation (**HCEA**). Whilst the term ACA is the most commonly used acronym, it is synonymous with the following criteria, in our experience:

- Temporary short-term accommodation in motels, hotels and caravan parks
- Rotating care or support workers
- Restrictions on the movements of young people, including being confined to hotel and motel rooms with workers
- Limitations on the services and support that are scaffolded around the child due to the ‘instability’ of their placement

Although an ACA is considered a ‘care arrangement’, it is in fact the accommodation type that distinguishes it from other types of HCEA. Whilst this Special Inquiry is focussed on ACAs, the shared characteristics of temporary arrangements with rotating workers in other HCEA types remain similarly concerning – in particular for Aboriginal and Torres Strait Islander children.

Public Access to Relevant Data

Since 2019, to ‘assist in better identifying and managing systemic issues that drive the use of such alternative care arrangements’, all designated agencies have been required to notify the Office of the Children’s Guardian (**OCG**) when a child is placed in a non-home based emergency care arrangement within 24 hours of the placement commencing, develop a plan to transition a child or young person from the emergency care arrangement to a permanency placement (to be submitted to the OCG within 7 days of the placement) and notify the OCG when the placement has ceased.² As part of this commitment, the OCG is able to provide data in its annual reports on ACAs. While making some quantitative data available, this requirement does not appear to have reduced reliance on ACAs since 2019. These annual reports are the only publicly available data on the number of children and young people in ACAs.

² <https://acwa.asn.au/non-home-based-emergency-care-arrangements-important-information-for-out-of-home-care-providers/>

In 2018-2019, there were 361 children in “emergency care placements”³. In 2019-2020, that number had increased to 484 children and young people.⁴ In 2020-2021, that number had risen to 530 into “non-home-based emergency care, also known as alternate care arrangements”⁵, and in 2021 to 2022, it had reached 542 occasions (provided to 372 children and young people).⁶ It is unclear whether the earlier statistics reported had been broken down per occasions of reporting or the individuals themselves. It would appear though, that the number of children in ACAs has been increasing, rather than declining.

The OCG’s 2022-2023 Annual Report does not provide statistics in relation to ACAs or emergency care. It instead reports on the number of notifications of children under the age of 12 whose placements commenced in residential care. There were 40 such notifications in 2022-2023⁷, with that number being an increase from previous years.⁸ These statistics are difficult to compare to other statistics regarding ACAs, given the data reference is ‘residential care’.

The OCG does not report on the data relevant to the number of Aboriginal and Torres Strait Islander children in ACAs within the reporting period.

DCJ’s interactive Quarterly Statistical Report provides only aggregate numbers of the number of children in “residential care” – with the number growing from 781 as at 30 June 2022 to 864 as at 30 June 2023, an increase of 10.6%. That total number does not break down placement type, or Aboriginality. As of 30 June 2023, there were 124 children or young people whose placement is recorded as “other” or “not stated”.⁹ It is not clear whether ACAs fall under the definition of “residential care” or “other”. It is clear though that they do not fall into other placement types.¹⁰

The Aboriginal-led Data Sharing Child Protection and Out-of-Home Care Statistics Dashboard¹¹ provides no information about the number of Aboriginal and Torres Strait Islander children in ACAs.

The limitations of, and gaps in, data in relation to the experiences of Aboriginal and Torres Strait Islander children and young people in out-of-home care (**OOHC**) is not a new phenomenon.¹² The lack of comprehensive, transparent and publicly available data on the number of Aboriginal and Torres Strait Islander children and young people in ACA’s makes it difficult for Aboriginal Community Controlled Organisations (**ACCOs**) operating in the OOHC system to respond to the needs of particularly vulnerable children and young people.

In order to improve transparency, we recommend steps are taken to regularly publish data on the number of Aboriginal and Torres Strait Islander children and young people in ACAs and other HCEA types.

³ Office of Children’s Guardian Annual Report 2018-2019, p34.

⁴ Office of Children’s Guardian Annual Report 2019-2020, p36.

⁵ Office of Children’s Guardian Annual Report 2020-2021, p44.

⁶ Office of Children’s Guardian Annual Report 2021-2022, p44.

⁷ Office of Children’s Guardian Annual Report 2022-2023, p51.

⁸ In 2021-2022, the number of notifications was 29; in 2020-2021, the number was also 29; in 2019-2020, the number was 18; and in 2018-2019, the number was 21.

⁹ <https://public.tableau.com/app/profile/dci.statistics/viz/DCIQuarterlyStatisticalReportonServicesforChildrenandYoungPeople/EarlyIntervention>, reviewing the tab titled ‘OOHC– Keeping children and young people safe’.

¹⁰ Foster care, Relative & Aboriginal Kinship Care, and Independent Living

¹¹ <https://public.tableau.com/app/profile/dci.statistics/viz/Aboriginal-ledDataSharingChildProtectionandOut-of-homeCareStatistics/Tableofcontents?publish=yes>

¹² AIFS, (2021) *What contributes to placement moves in out-of-home care?*, CFCA Paper No. 61

Response to Terms of Reference

1. Decision to Use an ACA

ALS staff interacting with relevant agencies are offered numerous reasons as to why an ACA is an 'appropriate' form of accommodation for a particular Aboriginal child or young person. The below are the most common reasons provided to our solicitors:

- Placement breakdown
- Only option available for Aboriginal and Torres Strait Islander children or young people 'on country'
- Care relinquished at short notice, or removal has occurred without notice
- Unable to place with a foster family due to complex behaviours and the risk the child or young person poses to care givers or household members
- Challenging behaviours of children and young people, with needs greater than those a foster carer can provide for
- Only available placement, short term, after a young person exists youth detention (either on bail or on release).

The Permanency Support "Request to Arrange an ACA" form (Form A) which is required to be filled out every time an agency seeks approval to arrange an ACA includes similar reasons in their drop-down options for "entry reason"¹³. The anticipated reasons for placement provided within DCJ's approval mechanisms is consistent with the experiences of ALS staff.

In 2020-2021, the OCG reported that of the 530 children and young people in ACA's, 32% were due to high needs behaviour, 28% were due to placement breakdown and 14% were due to no available carers.¹⁴ Later Annual Reports have not assisted in providing the greater detail regarding the reasons for entries into ACA's.

The Permanency Support Form A also requires the following criteria to be met for approval, which are relevant to Aboriginal families:

- Have FGC, Family Finding (and other) records reviewed to identify family/kin that may be suitable for provisional authorisation?
- If family/kin is available for placement, explain why not provisionally authorised?

Too often, the ALS is informed of a placement in an ACA after the approval has been sought, and the decision to place has not been informed with family or community input. Contrary to the National Agreement on Closing the Gap, these processes do not embed shared decision-making with Aboriginal communities, including as represented by ACCOs and peak organisations, or a notification process for the intention to place a child in an ACA arrangement involving relevant ACCOs. In practice, we are unable to vigorously challenge whether an application for an ACA has robustly addressed the above criteria. While the decision to place a child in this particular accommodation and care arrangement might be something we scrutinise, there are limited legal options for family members to have input or challenge the decision once the decision has been made.

¹³ The following reasons for "entry reason" in the form's drop-down options to select include: New OOHC entry; OOHC placement breakdown; Emergency protection required; Exit from Youth Justice; No available carers; High Needs behaviours.

¹⁴ Office of Children's Guardian Annual Report 2020-2021, p44.

The current requirement that the OCG be notified of a placement of a child in an ACA does not address the decision-making made prior to the placement, and accountability and transparency in relation to decision-making relating to Aboriginal and Torres Strait Islander children and young people is critical to ensuring positive outcomes and opportunities for self-determination.

The Permanency Support “Request for an ACA extension” form (Form B) requires the following specific information regarding the child or young person already in the ACA to be provided as part of any request to extend that placement arrangement:

- Has Family Finding occurred? What additional steps have been taken to explore all other placement options?
- Provide details of arrangements for family time with parents, siblings and family/kin.
- Has an Aboriginal or Cultural consultation occurred around the ACA? Including identifying *what the cultural needs of the child are and how their cultural needs are being met in the ACA.*

In practice, there is rarely a plan for the above while a child is in an ACA, and, where there is a plan, it is the experience of the ALS that the plan is rarely complied with. It should also be noted that neither Form A: *Request to arrange an ACA* or Form B: *Request for ACA Extension* requires details to be provided of the Transition Plan mentioned earlier in the submission.

Responsibility for examination of the above arrangements lies entirely with DCJ and/or the agency with case management.

We recommend consideration of reforms to this process requiring that appropriate local ACCOs be notified of requests made in relation to Aboriginal young people, and provided an opportunity to inform and participate in the decision-making process. For example, the requirement to notify an ACCO could form part of the mandatory criteria for approval as part of the Permanency Support Form A. Requirements could also be introduced for an appropriate ACCO to co-approve a Request to Arrange an ACA and Request for an ACA Extension, and the Permanency Support Forms A & B should be amended to reflect this.

2. Needs of Aboriginal Children and Young People in ACAs

It is the experience of the ALS that young Aboriginal and Torres Strait Islander persons with complex needs and trauma-based behaviours are often placed in ACAs, particularly when they are entering after placement breakdowns.

Placement of children and young people in ACAs causes disruption to their attendance at school. In our experience, this is because of the emergency nature of the placement (out of school location) or because of the instability of the placement and the possibility that they will need to move. One young person advised their solicitor that “I was not even asked if I wanted to keep going to school – I was just moved – and because it was five hours away, I couldn’t keep going, even if I wanted to”.

Given the emergency nature of ACA placements, it appears consideration of the impact on the mental health of young people in entering those placements is not a factor given priority. A decline in mental health is often a result of a decrease in opportunities for social interactions, and lack of mobility and confinement to hotel and motel rooms where a young person’s behaviour is considered a nuisance or risk to other guests.

One of our solicitors gave the example of a young person, aged 16, with no contact with his family or attendance at school, who was confined 24 hours a day to hotel room as a result of his circumstances

affronting other guests. He was threatening self-harm on a daily basis and had the first opportunity for contact when his solicitor was able to access the placement to obtain his instructions for his court matter.

Another solicitor spoke about a young girl who absconded on a regular basis from her ACA, as a result of feeling unsafe being provided care by male workers (she had a history of sexual abuse) and seeking out contact with friends as a result of the decisions being made by her care providers (which included barring visitors from the home). She had also threatened self-harm within a week of her placement in the ACA. She was also 16 years old, and was criticised for choosing to leave the placement, when her views about her placement were being ignored. Because she absconded, police were involved when she was listed as a Missing Person and no consideration given to whether being pursued by police and being the subject of community surveillance might have on her mental health.

In both above instances, the young person remained in the ACA placement without receiving mental health interventions or support.

It is of interest that the Permanency Support 'Request for an ACA extension' form (Form B) requires the following specific information regarding the child or young person in the ACA to be provided as part of the request:

- Describe any changes to the child's day-to-day functioning
Consider including information about changes to the child's psychological or emotional wellbeing, criminal, risk-taking, self-harming or challenging behaviour

The inclusion of this information in a request to extend an ACA acknowledges that the placement environment may have negative impacts on the child's day-to-day functioning and wellbeing.

We recommend the prioritisation of therapeutic supports and resources for children and young people whose complex needs and behaviours may result in placement breakdowns. For Aboriginal and Torres Strait Islander children and young people, this should also include access to healing programs and culturally safe mental health support.

3. Participation of Children and Young People in Decision-Making about ACAs

Despite principles of participation found in the *Children and Young Person (Care and Protection) Act 1998 (Care Act)*¹⁵, our experience is that children and young people placed in ACAs have little opportunity to meaningfully participate in decisions regarding their placement. Section 10(2)(a) of the *Care Act* refers specifically to the 'plans for emergency or ongoing care, including placement' being the kinds of decisions that are likely to have a significant impact on the life of a child or young person, which they have a right to participate in.

One solicitor provided the example of a 15-year-old girl who was removed from kinship care and placed in two ACAs, both over 4 hours' drive away from her home, school and friends. The placement with the ACA provider resulted in an immediate transfer of case management, and her requests to discuss the proposed move with DCJ met with the response that the decision was 'out of their hands now'. Neither the decision to place her in the ACA or the decision to change location and transfer case management were discussed with the young person.

¹⁵ *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 10.*

Priority should be given to including the child and young person at every practical opportunity, and whenever decisions are being made. This is also consistent with s 12A of the *Care Act*.

4. Case management of ACAs

As far as the ALS is aware, there are presently no ACCOs providing care to Aboriginal and Torres Strait Islander children in ACAs in NSW. According to the OCG's Annual Report for 2022-2023, there are 21 Aboriginal out-of-home care providers in NSW, with 20 accredited to provide foster care and 3 accredited to provide residential care, with "a number accredited for both purposes".¹⁶ As noted above, the statistics provided use the term "residential care", and it is not easily discernible whether those providers are Aboriginal-owned (such as WeCare¹⁷) or ACCOs.

Close the Gap Priority Reform 2¹⁸ commits all parties to the National Agreement on Closing the Gap to build strong Aboriginal and Torres Strait Islander community-controlled organisations to deliver certain services. OOHC service provision is just one example of where there should be a sustained investment in ACCOs. One of the characteristics of an ACCO is its accountability to community – with ACCOs being governed by a majority Aboriginal board with strong governance. In NSW, ACCOs providing OOHC services are represented by their peak body AbSec, who are also responsible for policy development.

The inclusion of ACCOs providing services in the ACA or HCEA space will ensure accountability to community and Aboriginal families.

During Budget Estimates 2023–2024, the Minister for Families and Communities was asked a series of questions about what actions the Minister is taking to reduce the number of children in ACAs. The Minister referenced the "*significant reform work underway*"¹⁹ and discussed "*trying to take back some control of a system that is largely run, especially when we're talking about alternative care arrangements, by private providers – and many of them are for profit – who, in my view, do not belong in the system and ought not to be in the system, but they've exploited the broken child protection that we inherited.*"²⁰

The ALS supports an OOHC system that does not have for-profit providers providing care or placement support to Aboriginal and Torres Strait Islander children and young people.

"Alternative, safer, relationship-based placements"²¹ should be prioritised, and we support the implementation of Recommendation 11 of the *Family is Culture* Final Report, which reads:

Recommendation 11: The NSW Government should amend clause 45 of the *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) and all other related clauses to ensure that only a charitable or non-profit organisation may apply to the Office of the Children's Guardian for accreditation as a designated agency.

¹⁶ Office of Children's Guardian Annual Report 2022-2023, p45.

¹⁷ <https://www.wecarensw.com.au/our-services/child-and-family-services>

¹⁸ <https://www.closingthegap.gov.au/sites/default/files/files/priority-reform-2.pdf>

¹⁹ Transcript PC5 – Budget Estimates 9 November 2023 – at p19

[https://www.parliament.nsw.gov.au/lcdocs/transcripts/3177/Transcript%20-%20PC5%20-%20Budget%20Estimates%20\(Washington\)%20-%209%20November%202023%20-%20UNCORRECTED.pdf](https://www.parliament.nsw.gov.au/lcdocs/transcripts/3177/Transcript%20-%20PC5%20-%20Budget%20Estimates%20(Washington)%20-%209%20November%202023%20-%20UNCORRECTED.pdf)

²⁰ Transcript PC5 – Budget Estimates 9 November 2023 – at p20 (URL above)

²¹ Ibid

5. Staffing Arrangements for ACAs

In preparing this submission, we heard from our staff that one of the primary concerns raised by young people and their families relates to the lack of experience and qualifications required of ACA workers, and the consequent absence of quality care provided. A staff member who had previously worked in the industry reported that they had not personally been required to hold any qualifications other than a NSW Working with Children's Check (WWCC), and that any training offered was not mandatory.

Another staff member referred to the quality of care being akin to "baby-sitting troubled children, putting out fires as they popped up".

Clause 31B of the *Children and Young Persons (Care and Protection) Regulation 2012* states that:

- A designated agency may, in an emergency authorise a natural person as an authorised carer
- A designated agency must not authorise a person under this clause unless the agency has determined that the person is capable and suitable to be an authorised carer.

To be authorised, probity checks are required, along with a "suitability assessment"²². As part of the suitability assessment, the following are "strongly recommended" as checks used to assist in determining suitability:

- 100 point identification check
- Interviews of care workers
- Referee checks of care workers
- Care worker authorisation assessment
- Care worker placement matching assessment
- ChildStory check
- Thorough assessment of the ACA accommodation (including pool compliance)

The Permanency Support Form A referred to above also makes reference to distinguishing the placement type based on the ratio of accredited v's non-accredited agency staffing, rather than on the needs or circumstances of the child or young person. According to that form, if an accredited agency is providing less than 50% of rostered hours during a 7 day period, the arrangement is an ACA. If they are providing more than 50%, the arrangement is an IPA. In addition to our concerns about the assessment of the suitability of individuals, the ALS would support the staffing of all emergency placements by accredited agencies. The ALS welcomes 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.

We also welcome the OCG's recent commitment to looking at more effective ways that designated agencies can implement the ATSCPP and the Aboriginal Case Management Policy. We welcome the commitment by the OCG to working with DCJ to develop a Child Safe Action Plan to include cultural safety and respect for cultural and social difference when providing services to children and young people.²³

However, we remain concerned about the limited training and experience of ACA staff, including formal qualifications and knowledge of trauma-informed practice and experience with young people

²² <https://dcj.nsw.gov.au/documents/service-providers/out-of-home-care-and-permanency-support-program/ACA-STEP-IPA/psp-aca-probity-checks.pdf>

²³Office of the Children's Guardian, "Special Report under section 139(2) of the *Children's Guardian Act 2019*: Family is Culture Review" (March 2022), p12.

with complex needs. Children in OOHC are vulnerable, and those in ACAs even more so. These are not the kinds of placements where on-the-job training is appropriate.

Minimum standards of training and knowledge for workers providing care in an ACA environment must be included in contract arrangements, including ensuring that staff are trained in trauma-informed and culturally safe practice.

6. Supports and Services Available to Children and Young People in ACAs

The Permanency Support “Request to Arrange an ACA” form (Form A) requires the following specific information relevant to this section of our response:

- What services and/or supports will be provided to the child during the arrangement?
- Is there a current Behaviour Support Plan?
- Is there a current Case Plan?
- If the child has a disability, please provide details
- Does the accommodation meet the child’s disability needs?
- Does the child have an NDIS Plan?

The lack of continuity in care and the nature of short-term and emergency accommodation means there is less opportunity to deliver holistic therapeutic care through forming relationships with service providers, including therapists, counsellors and psychologists.

In our experience, it is often the case that ‘instability’ in care arrangements is cited as a reason for the delay in establishment of therapeutic arrangements, or the suspension of them in cases where children have entered ACAs after a placement breakdown. This is contrary to the needs of children and young people who are particularly vulnerable and as a cohort, often have additional and complex needs.

In practice, NDIS Plans are often not followed. In one instance, we heard that NDIS funds were accessed by DCJ to fund a care worker in circumstances where a ratio of 2:1 was identified and the other care worker was paid for as part of the initial contract with the agency. The NDIS funds had been provided to engage an occupational therapist and speech therapist, however this did not occur due to the appropriation of the funds. There was no review of the NDIS Plan undertaken as a result of the placement in the ACA, and it was the placement for that young person for 12 months, pending a decision to restore them to their mother.

In another example from our legal practice, a 6-year-old child in an ACA was not able to have his Behaviour Support Plan accessed as the team providing care within the home did not have access within the agency’s computer system to the documents attached to his records. It was discovered after 6 months of the placement, that only the caseworker had access and not the persons providing care on a day-to-day basis.

These kinds of examples are common, with obstacles facing both ACA workers and services seeking to provide support.

To mitigate against the potential harmful impacts of ACA placements, children and young people must be provided access and support with engaging with therapeutic supports as early as possible. Even if the placement is considered a “therapeutic placement”, it is imperative that the professional supports are external to the care being provided so that children and young persons have the opportunity to discuss their care arrangements as part of that support.

We recommend consideration of urgent reforms to ensure that children and young people in ACAs are referred into wrap-around therapeutic supports within 48 hours of a placement in an ACA, including professional psychological and emotional support.

7. Maintenance of Family and Cultural Connections for Children in ACAs

In our experience, there is minimal commitment to ensuring maintenance of contact with family and culture where Aboriginal and Torres Strait Islander children and young people are in ACA placements. Priority is often given to the child or young person “settling in” in the placement over maintenance of connection with important family and community relationships that can also provide stability and security in periods of disruption to care.

Continued connection to family, culture and Country are requirements under the care legislation²⁴ and are consistent with the ATSICPP.

Regarding “Aboriginal and cultural considerations”, the following information is also required by the Permanency Support Form A:

- Has an Aboriginal or multicultural consultation been completed about this proposed arrangement?
- If the child is Aboriginal, is the arrangement outside of community? *If yes, please provide rationale and detail efforts taken to support the child to return to community*
- If the child is Aboriginal, has s13 Aboriginal and Torres Strait Islander Placement Principles been adhered to?
- Is there a Cultural Care Plan?
- Is there a Cultural Support Plan?

Despite the inclusion of these questions, there is no mandatory requirement to adhere to s 13 placement principles and require the preparation of a Cultural Support Plans for children in ACAs. The language of Form A, and the associated practice guidelines and policies, should be changed to ensure that the “Aboriginal and cultural considerations” are a mandatory consideration. Where they are not adhered to, staffing of ACAs or management of children and young people in ACAs should not be renewed for that particular designated agency.

We urge consideration of urgent reforms mandating strict adherence to ss 12A and 13 of the *Care Act* for Aboriginal and Torres Strait Islander children and young people in ACAs, including consideration of priority being given to ACCOs for case management of those placements.

8. Care criminalisation

‘Care criminalisation’ describes the disproportionate involvement of children in OOHC in the NSW criminal justice system and is a well-known phenomenon in the sector²⁵. Children and young people in ACAs often face a ‘perfect storm’ of complex and trauma-based behaviours and restrictions on activities or movement requiring compliance with care providers, in part due to the nature and costs associated with the types of accommodation utilised for ACAs.

²⁴ Sections 12A and 13 *Children and Young Persons (Care and Protection) Act 1998* (NSW)

²⁵ https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBB_OOHC_chapter-Sep2021.pdf, in particular citing the *Independent Review of Aboriginal Children in OOHC in NSW, Family is Culture* (Final Report, October 2019), at p230.

The *Joint protocol to reduce the contact of young people in residential out of home care with the criminal justice system* (Joint Protocol) aims to promote the safety, welfare and wellbeing of young people living in residential and ITC services, reduce the frequency of police involvement in response to behaviour of young people in those placements and promote the principle that criminal charges will not be pursued against a young person if there is an alternative and appropriate means of dealing with the matter.²⁶

The Joint Protocol governance includes Absec and the Association of Child Welfare Agencies, as well as NSW Police and Department of Communities and Justice as signatories. There is a gap in the implementation of the Joint Protocol for children in ACA placements. Given the increasing numbers of children in ACA placements, there is need for the Joint Protocol implementation to be responsive to the cohort of children now experiencing criminalisation in an ACA setting.

Staff in ACAs frequently inappropriately rely on police to manage children's behaviour. This results in increased police scrutiny of the children and young people in ACA placements, leading to greater risk of children being arrested and charged for offences which would not be subject to criminal intervention if they occurred in a private or more permanent home.²⁷ Care-related alleged offending in residential settings (including ACAs) arises out of offending directly relevant to the care environment – including increased charges for damage to property and threats and assaults on staff (often in the context of being restrained or feeling enclosed). Staff are also unsure of their role in supporting a young person subject to bail conditions, which can result in a punitive policing of bail conditions beyond the staff's role. A lack of training of staff in ACAs regarding the Joint Protocol means they are not supported to implement appropriate, non-police responses to behavioural concerns. This further criminalises the most vulnerable children who find themselves in ACA placements.

One consequence of non-adherence to the Joint Protocol is a reliance on ACAs as a form of accommodation following placement breakdowns and on release from youth detention. What is overlooked in the analysis of the children and young people experiencing this form of accommodation and care type is the ACA as the causal factor for their contact with police and the criminal justice system. The connection between ACAs and police involvement leads to children quickly returning to youth detention without meaningful support. Children are not able to stabilise in what is an inherently changeable environment while at risk of police being called and further arrest and disruption.

All ACA staff should receive recurring training and guidance regarding the Joint Protocol and alternatives to using police as a behaviour management tool. Relationships are developed with police local to ACA sites to ensure both parties are aware of and implement the Joint Protocol.

9. Use of ACAs as a Last Resort

In the context of the OOHC system's current operation, there are circumstances where ACAs may be the only available option. One such circumstance may be where young people are granted bail and foster care or kinship care options are not available. In those circumstances, an ACA is used as temporary bail accommodation and as a last resort.

²⁶ For more details on the aims and guiding principles of the Protocol, see https://fac-web.squiz.cloud/_data/assets/pdf_file/0006/585726/NSW-Joint-Protocol-2019.pdf. Please also note that the OCG's Special Report (note 23) includes recommendations about improving the Joint Protocol.

²⁷ The *Family is Culture Final Report* found that 'children and young people in OOHC are arrested for behaviour that would usually result in a disciplinary response from parents and not the criminal justice related response from police officers' (see p236).

Whilst the policy language used by DCJ includes the phrase ‘last resort’, in practice, there is often no evidence provided in Children’s Court proceedings about placement, that other options have first been exhausted, including exploration of provisionally authorising family members or providing supports to persons who might require some assistance to be capable of providing care in order to enable a placement with them.

One ALS solicitor reported a young client had suggested to them that it would be preferable to “put the money into supporting our family, instead of paying people who don’t really care about us”. That solution would necessarily require a complete overhaul of the way that Aboriginal and Torres Strait Islander families are assessed to be kinship carers, including the impacts that WWCC requirements have on Aboriginal households seeking authorisation. This would go some of the way to addressing the shortage of foster carers and kinship carers which is offered as a reason for entry into an ACA and would ultimately ensure compliance with the ATSICPP.

The Government should also consider establishing and funding alternative forms of supported bail accommodation services for Aboriginal and Torres Strait Islander young people. This accommodation must include culturally appropriate supports and case management stable accommodation settings (for example, allowing children to remain in the accommodation during the day and for periods beyond 28 days) and meaningful presence of family and kin. ACCOs should be funded to provide these services for Aboriginal and Torres Strait Islander children to ensure they are culturally appropriate and self-determining. These models are being developed as part of the NSW Closing the Gap Target 11 Working Group. Such work should be prioritised as a meaningful intervention in the care experience of Aboriginal and Torres Strait Islander children and young people requiring accommodation in hotels, motels and caravan parks.

10. Comparative Jurisdictions

In New Zealand, the placement of children in motels is regularly reported upon by media.²⁸ In response, the New Zealand Government has taken steps to approach the issue as part of broader reforms to responses to young people requiring emergency accommodation and better addressing the needs of young people who are leaving care, including addressing systemic issues like poverty and homelessness .

The New Zealand Government’s Child and Youth Wellbeing Strategy has ambitious goals, including to halve the number of New Zealand children living in poverty by 2028 (compared to 2018 levels).²⁹ One of the key drivers of that Strategy is the Oranga Tamariki Action Plan, which is a commitment from six government agencies³⁰ to collaborate and deliver better outcomes for children and young people in Aotearoa. This Action Plan is also community-centred, empowering communities – including Iwi and Māori organisations – to contribute to the work.

²⁸<https://www.stuff.co.nz/pou-tiaki/132835941/teenager-booked-into-christchurch-motel-as-oranga-tamariki-struggle-to-find-a-place-for-her>; <https://www.stuff.co.nz/national/124889260/life-in-a-motel-for-a-teenager-in-state-care--video-games-car-theft-and-nighttime-excursions>; <https://www.stuff.co.nz/pou-tiaki/122450964/judge-slams-oranga-tamariki-over-vulnerable-children-living-in-hotels-for-a-year>

²⁹ <https://www.childyouthwellbeing.govt.nz/sites/default/files/2019-08/child-youth-wellbeing-strategy-2019.pdf>

³⁰ These agencies are NZ Police, Ministry of Education, Ministry of Social Development, Ministry of Health, Ministry of Justice and Oranga Tamariki (Ministry of Children). Contributing agencies include Department of Corrections, Department of Prime Minister and Cabinet, Ministry of Housing and Urban Development, Māori Health Authority, Ministry of Disabled People, Education Review Office, Health NZ, Social Wellbeing Agency, Homes and Communities and the Tertiary Education Commission.

It is imperative for the NSW Government to adopt a renewed and revitalised whole-of-government approach to reducing the number of Aboriginal and Torres Strait Islander children in OOHC, with priority given to returning Aboriginal children and young people living in hotels and motels to their families or communities.

The *Their Futures Matter* reforms introduced by the NSW Government in 2017³¹ recognised that the traditional approach to service provision for vulnerable children and families had not been adequate in responding to children and families with complex needs and promoted a whole-of-government approach to service provision. Regrettably, the audit of the reforms concluded that the governance and cross-agency partnership arrangements used to deliver the reforms were ineffective. The reform concluded in June 2020 without a strategy or plan in place to achieve its intent.³² The NSW Government has an opportunity to learn from previous experiences in transforming the system and service delivery in OOHC.

NSW Health's Strategic Health Plan for Children, Young People and Families 2014-2024³³ has, as part of its Strategic Direction 4 (*Early Intervention*), the objective of engaging with young people at risk of poor health or absence from school. One of the strategies identifies vulnerable children such as those who are in OOHC, homeless and in contact with the justice system.³⁴ This presents just one example of an opportunity for Government agencies operating across portfolios to come together to address the over-representation of Aboriginal and Torres Strait Islander children and young people in HCEAs.

The practice of 'hoteling' children was the subject of a legal settlement in Oregon USA in 2018, after an organisation representing young people brought a class-action lawsuit against the Oregon Department of Human Services (ODHS) to end the practice. As part of the settlement, the ODHS committed to curtail placing children in hotel rooms.³⁵

Despite that Court ruling, the state of Oregon has continued to put foster kids in hotels, with a Federal Judge appointing an independent watchdog in July 2023 to oversee the ODHS and offer recommendations on how to end the practice. According to public reports, in the first half of 2023, 75 kids were placed in hotels, ranging in age from 6-19 years old. The practice of hoteling was identified as financially wasteful, with Oregon state disclosing having spent \$25 million on housing 462 young people in foster care in hotels.

In NSW, Aboriginal peak organisations and communities have indicated unwavering support for the appointment of an independent Aboriginal and Torres Strait Islander Child and Family Commissioner with robust statutory powers. NSW has an opportunity to play a leading role nationally through introducing accountability and independent oversight of the care system. We support the appointment of an independent Aboriginal and Torres Strait Islander Child and Family Commissioner and the implementation of Recommendation 9 of the *Family is Culture Final Report*, by establishing an Independent Child Protection Commission with functions to include the monitoring and oversight of ACAs in addition to those outlined in that recommendation.

³¹ https://www.facs.nsw.gov.au/_data/assets/pdf_file/0009/441495/FACS-Discussion-Paper-Shaping-a-Better-Child-Protection-System.PDF

³² NSW Audit Office of NSW, *Their Futures Matter* Performance Audit (24 July 2020), p2. <https://www.audit.nsw.gov.au/sites/default/files/documents/Their%20Futures%20Matter%20-%20PDF%20Report.pdf>

³³ <https://www.health.nsw.gov.au/kidsfamilies/Publications/healthy-safe-well.pdf>

³⁴ Strategy 4.4.1, p19

³⁵ For more information on the background of the Oregon case and more detail on the settlement, see <https://youthrightsjustice.org/update-dhs-makes-progress-on-ending-placement-of-foster-youth-in-hotels/>

The ALS welcomes the opportunity to discuss this submission further. If you have any questions, please contact the ALS Policy team by emailing [REDACTED]

Sincerely,

[REDACTED]

Nadine Miles
Principal Legal Officer
Aboriginal Legal Service (NSW/ACT) Limited

[REDACTED]
[REDACTED]

Appendix 1.

Recommendation 1

Steps are taken to regularly publish data on the number of Aboriginal and Torres Strait Islander children and young people in ACAs and other HCEA types.

Recommendation 2

Consideration of reforms to the ACA approval process requiring that appropriate local ACCOs are notified of requests made in relation to Aboriginal young people, and provided an opportunity to inform and participate in the decision-making process. For example, the requirement to notify an ACCO could form part of the mandatory criteria for approval as part of the Permanency Support Form A. Requirements could also be introduced for an appropriate ACCO to co-approve a Request to Arrange an ACA and Request for an ACA Extension, and the Permanency Support Forms A & B should be amended to reflect this.

Recommendation 3

The prioritisation of therapeutic supports and resources for children and young people whose complex needs and behaviours may result in placement breakdowns. For Aboriginal and Torres Strait Islander children and young people, this should also include access to healing programs and culturally safe mental health support.

Recommendation 4

Implementation of Recommendation 11 of the *Family is Culture* Final Report, amend the *Children and Young Persons (Care and Protection) Regulation 2012* (NSW) and all other related clauses to ensure that only a charitable or non-profit organisation may apply to the Office of the Children's Guardian for accreditation as a designated agency.

Recommendation 5

Minimum standards of training and knowledge for workers providing care in an ACA environment must be included in contract arrangements, including ensuring that staff are trained in trauma-informed and culturally safe practice.

Recommendation 6

Consideration of urgent reforms to ensure that children and young people in ACAs are referred into wrap-around therapeutic supports within 48 hours of a placement in an ACA, including professional psychological and emotional support.

Recommendation 7

Consideration of urgent reforms mandating strict adherence to ss 12A and 13 of the *Care Act* for Aboriginal and Torres Strait Islander children and young people in ACAs, including consideration of priority being given to ACCOs for case management of those placements.

Recommendation 8

All ACA staff should receive recurring training and guidance regarding the *Joint Protocol* and alternatives to using police as a behaviour management tool.

Recommendation 9

The Government should consider establishing and funding alternative forms of supported bail accommodation services for Aboriginal and Torres Strait Islander young people. This accommodation must include culturally appropriate supports and case management stable accommodation settings (for example, allowing children to remain in the accommodation during the day and for periods beyond 28 days) and meaningful presence of family and kin. ACCOs should be funded to provide these services for Aboriginal and Torres Strait Islander children to ensure they are culturally appropriate and self-determining.

Recommendation 10

We support the appointment of an independent Aboriginal and Torres Strait Islander Child and Family Commissioner and the implementation of Recommendation 9 of the *Family is Culture* Final Report, by establishing an Independent Child Protection Commission with functions to include the monitoring and oversight of ACAs in addition to those outlined in that recommendation.