
**NSW Government
Regional and Rural
Legal Services Panel**

Panel Deed

Between
The Secretary, Transport for NSW
on behalf of the State of New South Wales
(TfNSW)
ABN 18 804 239 602
and
XX Pty Ltd [Variable A]
[Service Provider]
ABN XXX **[Variable B]**

Transport for NSW
18 Lee Street, Chippendale NSW 2008

**The Secretary, Transport for NSW (ABN 18 804 239 602) on behalf of
the State of New South Wales**

of 18 Lee Street, Chippendale NSW 2008

(TfNSW)

and

[Variable A] ABN [Variable B]

of **[Variable C]**

(Service Provider)

Background

- A. The State through TfNSW wishes to coordinate the engagement of external legal services by appointing a panel of suppliers to provide certain legal services to the NSW Government.
- B. The State also wishes to ensure that external legal expenditure be reduced as much as possible over the term of the Panel through engaging and managing good value, high quality legal services. The Panel will be comprised of five Sub-Panels, each of which correlates with an Area of Law.
- C. Notwithstanding the above, TfNSW retains the discretion to obtain legal services outside of the Panel arrangement.
- D. This Agreement sets out the terms on which the State and the Service Provider have agreed that the Service Provider will:
 - (a) be appointed as a member of one or more of the Sub-Panels;
and
 - (b) supply certain legal services as a member of the relevant Sub-Panel,including the terms under which the Service Provider will supply legal services to the Agency in response to a Legal Services Order.

Agreed terms

1. Definitions and Interpretation

1.1 Definitions

In this Agreement, unless the context otherwise requires:

Agreement means this deed and includes the schedules and any annexures to it or documents incorporated by reference.

Agency means any NSW Government agency that orders Services from a Service Provider under a Legal Services Order.

Area of Law means an area of law specified in the Sub-Panels as amended from time to time.

Authorisation means any authorisation, permit, consent, approval,

resolution, licence, exemption, permission, recording, filing, registration, or waiver required by any government authority or by any Law.

Business Day means a day which is not a Saturday, Sunday or public holiday (being a public holiday appointed as such under the *Public Holidays Act 2010* (NSW)) in NSW.

Commencement Date means the date set out in Item 2 of Schedule 1.

Confidential Information means any technical, scientific, commercial, financial or other information of, about, or in any way related to, the State or the Agency, including any information designated by the State or the Agency as confidential, which is disclosed, made available, communicated or delivered to the Service Provider in connection with this Agreement or a Legal Services Contract, and includes:

- (a) the terms of this Agreement and any Legal Services Contract;
- (b) any decisions or determinations made by the Agency in respect of this Agreement or a Legal Services Contract;
- (c) information relating to any Services undertaken pursuant to the Agreement or any Legal Services Contract;
- (d) any report or other Material provided by the Agency to the Service Provider under this Agreement, including the results of any client satisfaction surveys conducted pursuant to this Agreement or in relation to any other service provider under the Panel arrangements; and
- (e) Agency Intellectual Property,

but excludes information:

- (f) which is in or which subsequently enters the public domain other than as a result of a breach of confidentiality or this Agreement or a Legal Services Order;
- (g) which the Service Provider can demonstrate was in its possession prior to the date of this Agreement and in relation to which the Service Provider does not owe any obligation of confidence to the State or the Agency;
- (h) which the Service Provider can demonstrate was independently developed by the Service Provider;
- (i) which is lawfully obtained by the Service Provider from another person entitled to disclose such information; or
- (j) which is disclosed pursuant to legal requirement or order.

Contract Manager means the person nominated by the Agency under clause 18.1.

Contract Material means any Material created by or on behalf of the Service Provider in the course of or as a result of complying with its obligations under this Agreement or providing the Services to the Agency under a Legal Services Contract.

Control means in relation to any Service Provider, the ability of any person directly or indirectly to exercise effective control over the Service Provider (including the ability to determine the outcome of decisions about the financial and operating and other policies of the Service Provider) by virtue of control or influence, or having the capacity to

control or influence the composition of the board, or decision making, directly or indirectly, or by the holding of voting shares, units or other interests in or in respect of the Service Provider or by any other means.

Core Legal Work means legal work which must be referred to the Crown Solicitor in accordance with Premier's Memorandum M2016-04 NSW Government Core Legal Work Guidelines.

Estimate includes an assessment of the scope of the work, the estimated timeframe, the anticipated date of completion, the likely Legal Services Fees (calculated by reference to the Rates), the amount of GST likely to be payable and any other matter required by the Agency.

Expiry Date means the date set out in Item 2 of Schedule 1.

Agency Intellectual Property means any and all Intellectual Property Rights of the Agency in any Material provided or made available by the Agency to the Service Provider for the purposes of any Legal Services Contract.

GST has the meaning given to it in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Incidents means any of the following, to the extent to which the Service Provider, or any Nominated Personnel or any other Personnel or sub-contractor of the Service Provider who is a lawyer, is the subject of those matters, including any partner, consultant, solicitor (however designated) law graduate or trainee:

- (a) commencement of any legal or disciplinary proceedings within Australia or in any other jurisdiction involving:
 - (i) an offence in respect of which the maximum penalty is 12 or more months imprisonment or 100 or more penalty units;
 - (ii) failure to pay any taxes or duties imposed by the Commonwealth, any State or Territory of Australia or by any local authority;
 - (iii) duties, obligations or sanctions under the *Legal Profession Uniform Law Application Act 2014* (NSW) or the *Legal Profession Uniform Law* (NSW), or equivalent duties, obligations or sanctions in any other jurisdiction; or
 - (iv) the appointment of a liquidator or a receiver and manager or mortgagee's or chargee's agent, being subject to any form of insolvency administration or arrangement, or in the case of an individual, bankruptcy or entering into a scheme or arrangement with creditors; and
- (b) going into liquidation or the appointment of a receiver and manager or mortgagee's or chargee's agent is appointed or becoming subject to any form of insolvency, administration or arrangement, or in the case of an individual, becoming bankrupt or entering into a scheme or arrangement with creditors.

Intellectual Property Rights includes all present and future copyright and neighbouring rights, all proprietary rights in relation to inventions

(including patents), registered and unregistered trademarks, confidential information (including trade secrets and know how), registered designs, circuit layouts, and all other proprietary rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Key Performance Indicators are set out in the Service Level Agreement.

Laws means the law in force in the State and the Commonwealth of Australia, including common law and legislation.

Legal Services Contract means the contract which arises between the Agency and the Service Provider as provided by clause 4.

Legal Services Fees means the amounts paid by the Agency to the Service Provider with respect to Services under any Legal Services Contract and includes all expenses and disbursements.

Legal Services Order means an order for Services, submitted by the Agency to the Service Provider in accordance with clause 4.1.

Material includes anything in which Intellectual Property Rights can exist.

Minimum Service Standards are set out in the Service Level Agreement.

Nominated Personnel means the persons specified, from time to time, by the Service Provider (and approved by the Agency) with respect to the relevant Area of Law.

Panel means the panel of suppliers appointed under the terms of this Agreement and which is comprised of five Sub-Panels.

Personal and Health information has the meaning given in clause 15.6.

Personnel means any employee, officer or partner.

Pre-Existing Intellectual Property means any and all Intellectual Property Rights in any works, items or systems created by or the property of or licensed by a third party to the Service Provider, either prior to the commencement of the provision of the Services or after the commencement of the provision of the Services, but not in connection with this Agreement or any Legal Services Contract.

Rates means the rates set out in Schedule 2 (Fee Schedule).

Relationship Manager means the person nominated by the Service Provider under clause 18.1.

Request for Services means a request by the Agency under clause 4.3 in respect of the provision of specified Services.

Request for Tender means the Request for Tender in relation to the provision of legal services under the Panel arrangements released 22 July 2020.

Services means the legal services in the Areas of Law nominated in Schedule 1, as varied from time to time under the terms of this Agreement and, in relation to a Legal Services Contract, includes the Services specified in the relevant Legal Services Order or provided under that Legal Services Contract and also includes services

incidental to or reasonably inferred from those services.

Services Brief means the respective scope of services for each Area of Law set out in Part C of the Request For Tender.

Service Level Agreement means Annexure B as amended from time to time in accordance with Item 3.3 of Annexure B or otherwise in accordance with the terms of this Agreement.

State means the Crown in right of the State of NSW.

Sub-Panel means the five sub-panels comprising the Panel, each of which correlates with a specific Area of Law, namely the Audit and Civil Claims Sub-Panel, the Care Litigation Sub-Panel, the Prosecutions Sub-Panel, the Property Acquisition Sub-Panel, and the Commercial Sub-Panel.

Tender Documentation means the documentation submitted by the Service Provider in response to the Request for Tender including any revisions and clarification submitted on behalf of the Service Provider to TfNSW.

Term means the term of this Agreement determined in accordance with clause 2, including any extension in accordance with that clause.

1.2 Interpretation

Unless expressed to the contrary, in this Agreement:

- (a) headings are for convenience only and do not affect interpretation;
- (b) words in the singular include the plural and vice versa;
- (c) if a word or phrase is defined, its other grammatical forms have corresponding meanings;
- (d) 'includes' in any form is not a word of limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (f) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced;
 - (iii) '\$', 'dollars' or 'AUD' is a reference to the lawful currency of the Commonwealth of Australia;
 - (iv) a clause, schedule or annexure is a reference to a clause, Schedule or annexure of this Agreement, and a reference to this Agreement includes all Schedules and annexures to it; and
 - (v) a financial year is a reference to a consecutive period of 12 months commencing on 1 July and ending on the following 30 June; and

- (g) if the date on or by which any act must be done under this Agreement is not a Business Day, the act must be done on or by the next Business Day.

1.3 Precedence

Where the terms of a Legal Services Order are inconsistent with the terms of this Agreement, the following order of precedence will apply:

- (a) this deed (other than Schedule 1 and Schedule 2);
- (b) the relevant Legal Services Order;
- (c) Schedule 1 and Schedule 2;
- (d) the Request for Tender (other than the Services Briefs); and
- (e) the Services Briefs.

2. Term

2.1 Term

Subject to clause 2.2, this Agreement commences on the Commencement Date and will end on the Expiry Date, unless terminated earlier in accordance with its terms.

2.2 Extension of term

TfNSW may elect by written notice to the Service Provider, not later than two months prior to the expiry of the then current Term, to extend the Term of this Agreement as set out in Item 2 of Schedule 1.

3. Performance of Services

3.1 Scope of Panel

The Panel is limited to the Areas of Law and, in particular, does not include any Core Legal Work.

3.2 No obligation to acquire

The NSW Government is not obliged to issue any Legal Services Orders to the Service Provider or to acquire any particular volume of Services. The Agency may acquire any services from any other person on such terms and conditions as the NSW Government considers appropriate.

3.3 Appointment to provide Services

Upon entering into this Agreement, TfNSW, as the delegate of the State, appoints the Service Provider to provide such Services as are requested under individual Legal Services Orders in accordance with this Agreement.

3.4 Standard of performance

The Service Provider must provide the Services:

- (a) to a standard that reaches or exceeds the Minimum Service Standards and the Key Performance Indicators;

- (b) in a proper, timely and efficient manner using that standard of care, skill, diligence, prudence and foresight that would reasonably be expected from a prudent, expert and experienced provider of services that are similar to the Services;
- (c) in good faith and otherwise in the best interests of the NSW Government;
- (d) transparently and in a manner that keep the NSW Government informed of all matters of which it ought reasonably be made aware; and
- (e) to the reasonable satisfaction of the NSW Government.

3.5 Responsibility for Services

- (a) The Service Provider will remain fully responsible for the Services despite the Agency's comment on or approval of the Services or any deliverables. If the Service Provider is unable to provide the Services (in whole or in part), it must promptly notify the Agency of this in writing.
- (b) Where the Service Provider engages an Agent, the Agency has no obligation to pay the Agent and the arrangement will remain wholly between the Service Provider and the Agent in all circumstances.
- (c) In the event that the Agent is at a lower Level (within the meaning of part 1 of Schedule 2) than the Service Provider, the parties agree that payment will be calculated by reference to lower Level.
- (d) In the event that the Agent is at a higher Level than the Service Provider, the parties agree that payment will be calculated by reference to the level of the Service Provider.

3.6 Limited reliance

The Agency may provide the Service Provider with information relevant to the provision of the Services. The Service Provider must act with reasonable care in its use of such information and may only rely on such information when expressly permitted to do so by the Agency in writing. The Service Provider must promptly notify the Agency in writing if it knows or has reason to suspect that any such information is inaccurate, incomplete or inadequate.

3.7 Compliance with Law and policies

The Service Provider must, in performing its obligations under this Agreement and under any Legal Services Contract, comply with:

- (a) all Laws affecting or applicable to the provision of the Services by the Service Provider; and
- (b) the policies and obligations identified in Schedule 3, along with all other policies notified to it by the NSW Government from time to time.

3.8 Sub-contracting

The Service Provider must not sub-contract to any third person any of its

obligations under this Agreement or a Legal Services Contract without the prior written consent of the Agency, which consent may be given or withheld in the Agency's absolute discretion. The Service Provider will remain liable for all acts or omissions of such sub-contractors as though they were the acts or omissions of the Service Provider.

3.9 Cooperation with other service providers

The Service Provider must co-operate in good faith and without charge with the NSW Crown Solicitor's Office and with any third party service provider appointed by the Agency, including any other providers of legal services under the Panel arrangements.

3.10 Panel refresh

The Agency will monitor the performance of the Panel and its members on an ongoing basis throughout the Term. The NSW Government may, at any time, refresh the Panel arrangement in any manner it thinks fit, including varying the Areas of Law and adding or removing Panel members.

4. Legal Services Contracts

4.1 Legal Services Order

Where the Agency wishes to obtain Services, the Agency will issue a Legal Services Order to the Service Provider. A Legal Services Order must be substantially in the form set out in Annexure A. In certain circumstances (such as in respect of urgent matters), the Agency may also confirm instructions by email, which will be followed subsequently by a Legal Services Order.

4.2 Estimates

If requested to do so, the Service Provider must provide an Estimate to the Agency for the required Services. An Estimate can be requested prior to the Agency issuing a Legal Services Order or as precondition to the Service Provider actually commencing work under a Legal Services Order.

4.3 Request for Services

Prior to issuing a Legal Services Order, the Agency may instead provide the Service Provider with a written or oral Request for Services. A Request for Services must provide sufficient detail to allow the Service Provider to adequately assess the required Services and, where requested, provide an Estimate. The Service Provider must respond to a Request for Services in the required detail and within a reasonable time.

4.4 Formation of Legal Services Contract

Any Legal Services Contract will be formed upon the later of:

- (a) The Agency issuing a Legal Services Order to the Service Provider, and
- (b) The Agency receiving confirmation from the Service Provider that the Service Provider has no conflict of interest in relation to

the provision of the relevant Services.

4.5 Commencement of Legal Services Contract

A Legal Services Contract commences on the earlier of:

- (a) the actual commencement of the relevant work by the Service Provider; and
- (b) the date (if any) specified in the relevant Legal Services Order.

4.6 Content of Legal Services Contract

Other than to the extent expressly set out in a Legal Services Order, a Legal Services Contract will consist of the Legal Services Order and the terms of this Agreement (with such consequential changes as are necessary). In the event of any inconsistency, the provisions of this Agreement will prevail.

4.7 Suspension or Recall of Services

The Agency may, in its absolute discretion, immediately by written notice suspend or recall the provision of any Services under one or more Legal Services Orders. In the event of such a suspension or recall of Services, the Agency will only pay for Services (if any) rendered up until the point of suspension or recall.

Where a matter is suspended or recalled, the Agency may require the file to be transferred to the Agency in its entirety as soon as possible (but in any event, within 24 hours) for allocation to a different Service Provider or the Crown Solicitor as required.

5. Time for provision of Services

5.1 Time requirements

The Service Provider must provide the Services requested under a Legal Services Order diligently, promptly and in accordance with the timeframes specified in the Legal Services Order, required by Law or notified by the Agency.

5.2 Extension of time

The Agency may, in its absolute discretion and whether on its own initiative or as a response to a request by the Service Provider, by written notice grant such extensions of time as the Agency deems appropriate in the circumstances.

6. Price, invoicing and payment

6.1 New or updated Estimates

Regardless of whether the Agency sought an initial Estimate under clause 4.2, the Agency may at any time request a new or updated Estimate which the Service Provider must provide promptly and without charge.

6.2 Status of Estimates

- (a) If the Service Provider becomes aware at any time that the total

legal costs of the Services will or is reasonably likely to exceed an Estimate, the Service Provider must promptly give written notice of this to the Agency. Where relevant, such written notice must be in such form as the Agency may require from time to time during the Term.

- (b) The Agency will not be liable to pay any amount to the Service Provider with respect to the Services which exceeds an Estimate (or a revised Estimate).

6.3 Rates

The Service Provider may only charge the Agency for the Services in accordance with the Rates, which are fully inclusive of all amounts but exclusive of GST and any pre-agreed disbursements. The Rates are fixed for the Term.

6.4 Expenses and other disbursements

The Service Provider may only charge disbursements to the Agency on the basis set out in Schedule 2 or as otherwise approved by the Agency in advance and in writing. Any such disbursements must be charged on a 'pass through' basis only, without allowance for profit or overhead.

6.5 Invoicing

- (a) The Service Provider may submit a tax invoice to the Agency in respect of each Legal Services Contract on the basis set out in the Legal Services Order or, failing that, monthly in arrears. Such invoices must conform with the provisions of Schedule 1 and the Agency's reasonable instructions.
- (b) The Service Provider agrees and acknowledges that in the event that the Agency introduces an electronic invoice payment system during the Term, the Service Provider must comply with that system for the remainder of the Term.

6.6 Payment of invoice

The Agency will pay each properly rendered and undisputed invoice within 30 days of receipt. The Contract Manager will assess whether a particular invoice is properly rendered, acting reasonably.

6.7 Disputed invoices

If the Agency disputes any invoice, in whole or in part, the Agency will pay the undisputed part of such invoice and notify the Service Provider in writing of the basis and quantum of the disputed amount. If the Service Provider does not agree with this assessment, either party may refer the matter for resolution under clause 16.

6.8 Nature of payment

Payment of an invoice is taken to be payment on account only and is not an indication or admission that the Services have been performed adequately or at all.

6.9 Interest

The Agency will, on demand by the Service Provider and in accordance with *Treasury Circular NSW TC11/12* and *Treasury Circular NSW TC11/20* pay simple interest on a daily basis on any overdue and undisputed amount, at the rate determined in accordance with that circular.

7. GST

7.1 Definitions

Terms used in this clause have the same meanings given to them in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

7.2 Consideration is exclusive of GST

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with this Agreement are exclusive of GST.

7.3 Recipient to pay an additional amount

If GST is imposed on any supply made under or in accordance with this Agreement, the recipient of the taxable supply must pay to the supplier an additional amount equal to the GST payable on or for the taxable supply subject to the recipient receiving a valid tax invoice in respect of the supply at or before the time of payment. Payment of the additional amount will be made at the same time as payment for the taxable supply is required to be made in accordance with this Agreement.

7.4 Reimbursement

If this Agreement requires a party to pay for, reimburse or contribute to any expense, loss or outgoing (reimbursable expense) suffered or incurred by another party, the amount required to be paid, reimbursed or contributed by the first party will be the amount of the reimbursable expense net of input tax credits (if any) to which the other party is entitled in respect of the reimbursable expense plus any GST payable by the other party.

8. Insurance

The Service Provider must obtain and maintain the insurances specified in Item 6 of Schedule 1. In respect of professional indemnity insurance, the Service Provider must maintain such insurance for a period of at least six years after the date of the relevant professional services. On request (and otherwise as a condition to payment by Agency), the Service Provider must promptly provide Agency with satisfactory evidence of the currency and scope of the required insurances.

9. Personnel and access

9.1 Nominated Personnel

Where a Legal Services Order so specifies, the Services must be provided by the particular Nominated Personnel identified. If the Nominated Personnel are or become unavailable, the Service Provider

must promptly notify the Agency in writing. The Agency may, at its sole discretion, accept any replacement Personnel suggested by the Service Provider, withdraw the Legal Services Order or terminate the Legal Services Contract without liability to the Service Provider.

9.2 Access to premises

If the Service Provider requires physical access to the premises of the Agency (this does not include a right to access Data or information communication technology located on the premises) in connection with the provision of the Services, the Agency will, subject to its usual security requirements, permit the Service Provider reasonable access (that is, within business hours unless otherwise agreed by the parties) to the premises at such times as may be reasonably necessary. The Service Provider must adhere (and must ensure that its Personnel, agents and contractors adhere) to all reasonable directions of the Agency as well as acting in a safe and lawful manner.

9.3 Removal of Personnel or subcontractors

The Agency may at its sole discretion direct the Service Provider to cease using any Personnel or subcontractor in respect of any activity relating to the Services. The Service Provider must remove that person within the time directed by the Agency.

9.4 Service Provider's Personnel etc

The Service Provider must ensure that its Personnel, agents, sub-contractors and advisers do not do or omit to do anything that, if done or omitted to be done by the Service Provider, would be a breach of the Service Provider's obligations under this Agreement, in particular clause 15.

10. Performance monitoring

10.1 Failure to perform

Without limitation of clauses 4.7 or 14, if the Service Provider fails to adequately provide the Services or otherwise perform this Agreement, the Agency will not be required to pay for those Services unless and until the Services or the relevant obligations are adequately performed. The Agency may, by written notice, require the Service Provider to remedy the relevant default within a reasonable period (including re-performing the relevant Services or obligations), at the Services Provider's sole cost and expense.

10.2 Assessment

The parties must cooperate to monitor, track and report on the Service Provider's delivery of the Services and performance of this Agreement by undertaking client satisfaction surveys and measuring performance against the Minimum Service Standards and Key Performance Indicators.

10.3 Reports and information

The Service Provider must, at the timeframes and in the formats stated

and otherwise on reasonable request, provide to the Agency all required reports, data and information set out in this Agreement or otherwise requested by the Contract Manager.

10.4 Meetings

The Service Provider must, on request by the Contract Manager, ensure that its Relationship Manager attends any meeting in respect of the Panel arrangements reasonably required by the Contract Manager, including discussions around contract management and performance issues raised by either party.

10.5 Annual review

On request by the NSW Government, the parties will meet every 12 months during the Term to conduct a detailed review of the Service Provider's delivery of the Services and performance of this Agreement. Such annual review may consider, among other things, plans and ideas for efficiency savings and continuous improvement.

10.6 Records

- (a) The Service Provider must:
 - (i) keep records for a period of seven years after termination or expiry of this Agreement,
 - (ii) keep true and particular accounts and records of all Services supplied under this Agreement, including records of any expenses or disbursements incurred; and
 - (iii) ensure that any Agent or Sub-contractor employed by the Service Provider also complies with this clause.
- (b) At the expiry of the seven year period, the Service Provider must seek and obtain the written confirmation of the Contract Manager that such records are not required for the purposes of the *State Records Act 1998* (NSW) or State Records disposal authorities (for example Functional Retention and Disposal Authority FA318). The Service Provider acknowledges that the NSW Government may require one copy of the records for the purposes of indefinite storage.

10.7 Audit

At any time during the Term, the NSW Government or its duly authorised representatives, will have the right, after giving reasonable notice, during business hours, to inspect and/or audit the accounts and records of the Service Provider (including the accounts and records of any sub-contractor) referred to in clause 10.6, including taking copies of such records. The Service Provider (must, at its own expense, provide all reasonable access and assistance to the NSW Government or its duly authorised representatives (including procuring access to the account and records of any sub-contractor). Each party will bear their own costs in connection with such inspection or audit.

11. Intellectual Property Rights

11.1 Ownership of Intellectual Property

Nothing in this Agreement or a Legal Services Contract affects:

- (a) ownership of the Contract Material and any Pre-Existing Intellectual Property used by the Service Provider in connection with the provision of Services, which will be owned by the Service Provider; or
- (b) ownership of the Agency Intellectual Property, which will be owned by the Agency.

11.2 Licence of Agency's Intellectual Property

Subject to the terms of any Legal Services Contract, the Agency grants to the Service Provider free of additional charge, a non-exclusive, non-transferable, worldwide licence to use, reproduce, modify and adapt Agency Intellectual Property to the extent necessary for the purposes of carrying out the Service Provider's obligations under the relevant Legal Services Contract. For the avoidance of doubt, this clause does not give the Service Provider the right to use, copy or modify any Agency's insignia, trade mark, letterhead, brand or logo without the Agency's prior written consent.

11.3 Licence by Service Provider

The Service Provider irrevocably and unconditionally grants to the Agency, free of additional charge, a perpetual non-exclusive, transferable, worldwide licence to use, reproduce, adapt, modify, publish, communicate or exploit (including the right to sub-licence) any Contract Materials, including any Pre-Existing Intellectual Property to the extent that such Pre-Existing Intellectual Property is used for or in connection with the provision of the Services (for example by way of incorporation into any Contract Material).

11.4 Moral Rights

Where either the Contract Materials or the Pre-existing Intellectual Property constitute Materials in respect of which moral rights may exist, the Service Provider must, in providing the Services, give due consideration to the obligations imposed by the *Copyright Act 1968* (Cth) and warrants to the Agency that:

- (a) all relevant individuals have validly provided their written consent; and
- (b) that consent allows the Agency (or others) to deal with those works in such manner as the Agency may decide, without being held to have infringed any moral right of the individual.

12. Warranties and indemnity

12.1 Intellectual property

- (a) The Service Provider warrants to the Agency that it is entitled to use and deal with any Intellectual Property Rights (other than any Agency Intellectual Property) which may be used by it in connection with the provision of the Services under this Agreement or any Legal Services Contract, including any

licence of Intellectual Property Rights to the Agency under clause 11.

- (b) The Service Provider indemnifies and will at all times keep the Agency indemnified against any loss, damage, claim, action or expense (including legal expense) arising out of or otherwise in connection with:
 - (i) any breach or alleged breach by the Service Provider of the Intellectual Property Rights of any third person, relating to the provision of the Services under this Agreement or any Legal Services Contract or relating to the exercise by the Agency of its rights under any licence of Intellectual Property Rights granted by clause 11; or
 - (ii) any breach of the warranty in clause 11.4.

12.2 General warranties

The Service Provider warrants to the Agency that:

- (a) the Service Provider has the power and Authorisations to enter into this Agreement and perform its obligations under this Agreement and any Legal Services Contract;
- (b) the Service Provider will maintain such Authorisations for the Term;
- (c) it will provide the Services with all due care and skill and in accordance with all applicable Laws;
- (d) it will provide the Services in accordance with the Agency's relevant policies, including the Department of Communities and Justice's *Policy Directive for the Management of Legal Matters* and the *NSW Model Litigant policy (M2016-03)*;
- (e) the Service Provider and its Personnel are appropriately qualified and have the requisite knowledge, accreditations (including working with children checks), skill and expertise to provide the Services in accordance with the Minimum Service Standards and the Key Performance Indicators; and
- (f) all information and representations made by the Service Provider in or in connection with the Tender Documentation were accurate and will remain accurate during the Term.

In the event of any change of status or accuracy of the above warranties, without prejudice to any other rights or remedies of the NSW Government, the Service Provider must promptly inform the NSW Government in writing.

12.3 General indemnity

The Service Provider will indemnify and hold harmless the NSW Government against all liability arising out of or in connection with:

- (a) the breach of this Agreement and any Legal Services Contract by the Service Provider, its Personnel or its subcontractors; or
- (b) the negligence or default of the Service Provider, its Personnel or its subcontractors in relation to the delivery of the Services.

12.4 Exceptions to indemnity

The indemnity in clause 12.3 will not apply to the extent that such liability is incurred as a result of the negligent act, omission or default of the NSW Government.

12.5 Nature of indemnities

- (a) Each indemnity under this Agreement is a continuing obligation, separate and independent from the other obligations of the party giving the indemnity and survives termination or expiry of this Agreement and any Legal Services Contract. It is not necessary for a party to incur any expense or to make any payment before enforcing a right of indemnity.
- (b) If any indemnity payment is made by the Service Provider under this Agreement or any Legal Services Contract, the Service Provider must also pay to the Agency an additional amount equal to any tax which is payable by the Agency in respect of that indemnity payment.

13. Conflicts of interest and Incidents

13.1 Change in Control

The Service Provider must promptly notify the NSW Government in writing of any proposed or impending change in Control of the Service Provider (or of the ultimate holding company of the Service Provider, if applicable). The notice will include details outlining that the Service provider will have suitable or sufficient measures in place to continue service provision and the NSW Government is satisfied as to those measures.

Where the NSW Government is not satisfied that the Service Provider has or will have suitable or sufficient measures in place to continue service provision, the NSW Government may remove the Service Provide from the Panel.

13.2 Conflicts of interest

The Service Provider warrants that as at the Commencement Date and except as disclosed to the NSW Government in writing, it does not, and will ensure that its Personnel and sub-contractors do not:

- (a) hold any office or possess any property;
- (b) engage in any business, trade or calling (including on a pro bono basis); or
- (c) have any obligations by virtue of any contract,

whereby, directly or indirectly, duties or interests are or might be created in conflict with, or which might appear to be created in conflict with, their duties and interest under this Agreement or a Legal Services Contract.

13.3 Incidents

The Service Provider warrants that to the best of its knowledge, after making diligent inquiry, it has disclosed to the NSW Government all Incidents which have occurred in the five years prior to the

Commencement Date.

13.4 Notification

During the Term, the Service Provider must immediately notify the NSW Government (in writing, with sufficient details) of:

- (a) any event, matter or change in circumstances that would constitute a breach of clause 13.2; or
- (b) the occurrence of any Incident, or any event which might reasonably be considered to be an Incident.

13.5 Response

Without limitation of clause 13.6, on the occurrence of any of the events set out in clause 13.4, the Service Provider must comply with all reasonable correctional and mitigation steps required by the NSW Government.

13.6 Nature of breach

The Service Provider agrees that a failure to comply with this clause 13 will constitute a breach of a fundamental term of this Agreement and the NSW Government may terminate this Agreement and/or any Legal Services Contract with immediate effect by written notice.

14. Termination

14.1 Termination for convenience

The NSW Government may terminate this Agreement and/or each Legal Services Contract (in whole or in part) for convenience by giving written notice to the Service Provider, with effect immediately or at such later date as may be set out in that written notice. The NSW Government will pay the Service Provider for any Services validly and properly provided under a terminated Legal Services Contract prior to the relevant date of termination.

14.2 Termination for breach

The NSW Government may by written notice immediately terminate this Agreement and/or each Legal Services Contract (in whole or in part) where the Service Provider:

- (a) breaches this Agreement and/or a Legal Services Contract and fails to adequately remedy such breach to the reasonable satisfaction of the NSW Government within 14 days of a notice requiring the Service Provider to do so;
- (b) breaches the Agreement and/or a Legal Services Contract and such breach is not, in the reasonable opinion of the NSW Government, capable of remedy;
- (c) consistently fails to provide the Services in accordance with this Agreement, including a failure to meet the Minimum Service Standards or the Key Performance Indicators;
- (d) or any of its Personnel are guilty of fraud, dishonesty or any other serious or wilful misconduct (including where such

Personnel are disqualified under the *Corporations Act 2001* (Cth));

- (e) or any of its Personnel commit any act or do anything that brings the NSW Government into disrepute or is otherwise regarded by the public as unacceptable or otherwise contrary to prevailing community standards;
- (f) experiences a change of Control and the NSW Government has not given its approval under clause 13.1; or
- (g) suffers an insolvency event.

14.3 Suspension

Where the NSW Government would be entitled to terminate this Agreement and/or a Legal Services Contract (whether under clause 14.2 or otherwise), the NSW Government may, as an alternative to termination, elect to suspend this Agreement and/or a Legal Services Contract (in whole or in part) to the extent and for the duration specified in a written notice. In the case of a partial suspension, the Service Provider must continue to perform all unaffected obligations.

14.4 Consequences of termination or expiry

Suspension, termination or expiry of this Agreement and/or a Legal Services Contract is without prejudice to the accrued rights and remedies of either party. Except as expressly provided for in a Legal Services Contract (or in respect of prior Services validly and properly provided), the NSW Government will not be liable to pay any compensation or other money to the Service Provider in connection with the suspension or termination of this Agreement or a Legal Services Contract. The Service Provider must not purport to exercise a lien over any files, documentation, Materials or Confidential Information of the NSW Government and the Agency.

14.5 Transitional assistance

The Service Provider acknowledges and agrees that on termination or expiry of this Agreement and/or a Legal Services Contract the Service Provider must:

- (a) return or destroy (at the Agency's election) all Confidential Information of the Agency;
- (b) provide the Agency with copies of all Contract Materials requested, in such manner and format as the Agency may specify; and
- (c) provide all such transitional assistance as may be reasonably necessary or requested by the Agency to facilitate the smooth transition from the Service Provider to the Agency or to a third party nominated by the Agency.

15. Confidentiality, security and privacy

15.1 Obligations of confidentiality

Except as permitted in clause 15.2, the Service Provider must not, and must make sure that its Personnel, agents, sub-contractors and

advisers do not disclose or use any Confidential Information, except for the purposes of providing the Services and performing this Agreement or as otherwise directed in writing by the NSW Government. The Service Provider acknowledges that the NSW Government will be entitled (in addition to any other remedy it may have) to seek an injunction or other equitable relief with respect to any actual or threatened breach of this clause 15 and without the need to prove any special damage.

15.2 Permitted use and disclosure

The Service Provider may disclose the Confidential Information:

- (a) with the prior written consent of the NSW Government, to its legal advisers, associated firms, auditors and other advisers who require this information for the purposes of this Agreement;
- (b) as required or authorised by Law; or
- (c) with the prior written consent of the NSW Government, to the Service Provider's Personnel or permitted sub-contractors who require this information for the purposes of this Agreement.

15.3 Security

The Service Provider must take all reasonable precautions to prevent any unauthorised use or disclosure of Confidential Information or Personal and Health information, including:

- (a) ensuring that all Confidential Information and Personal and Health information are protected from unauthorised access or use and from misuse, damage and destruction by any person;
- (b) taking protective measures (including administrative, physical and technical safeguards) that are no less rigorous than accepted industry standards;
- (c) not storing any Confidential Information or Personal and Health information outside of Australia without the NSW Government's prior written consent;
- (d) complying with all relevant Laws and best practice; and
- (e) informing and educating its Personnel of the importance of protecting Confidential Information and Personal and Health information.

15.4 Notification

The Service Provider must immediately notify the Contract Manager in writing of any:

- (a) actual, threatened or suspected unauthorised access to or use of any Confidential Information or Personal and Health information; or
- (b) third party request to access any Confidential Information or Personal and Health information.

15.5 GIPA Acknowledgement

- (a) The Service Provider acknowledges that the NSW Government may be required to publish certain information concerning this Agreement or a particular Legal Services Contract in accordance with the *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) and hereby irrevocably consents to such disclosure.

Disclosure log (GIPA Act, section 25)

- (b) Notwithstanding anything else in this Agreement, the Service Provider acknowledges that the Agency may disclose certain information about this Agreement in accordance with the Agency's obligations under the GIPA Act, including by making certain information about this Agreement publicly available in any disclosure log of contracts that the Agency is required to maintain.

Access to information (GIPA Act, section 121)

- (c) The Service Provider must, within 7 Business Days of receiving a written request from the Agency, provide the Agency with immediate access to the following information contained in records held by the Service Provider:
- (i) information that relates directly to the performance of this Agreement by the Service Provider;
 - (ii) information collected by the Service Provider from members of the public to whom the Service Provider provides, or offers to provide, activities pursuant to this Agreement; and
 - (iii) information received by the Service Provider from the Agency to enable it to perform its obligations under this Agreement.
- (d) For the purposes of this clause 15.5, such information does not include information that:
- (i) discloses or would tend to disclose the Service Provider's financing arrangements, financing modelling, cost structure or profit margin;
 - (ii) the Service Provider is prohibited from disclosing to the Agency by provision made by or under any applicable Law; or
 - (iii) if disclosed to the Agency, could reasonably be expected to place the Service Provider at a substantial commercial disadvantage in relation to the Agency, whether at present or in the future.
- (e) The Service Provider must provide copies of any of the information requested by the Agency in accordance with clause 15.5 at the Service Provider's own cost.

Supplier request for information

- (f) The Service Provider may request a copy of any public information or report compiled by the Agency as a result of surveys or any annual report compiled from ongoing data collections.

- (g) The Service Provider must make its request in writing, and the Agency must provide copies of documents validly requested to the Service Provider within 28 days of the Agency receiving a written request from the Service Provider.

15.6 Privacy and personal information

Where the Service Provider has access to personal information (as defined in the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW)) (**Personal and Health information**) in order to fulfil its obligations under this Agreement or a Legal Services Contract, the Service Provider must:

- (a) act in accordance with the *Privacy Act 1988* (Cth);
- (b) act in accordance with the *Privacy and Personal Information Protection Act 1998* (NSW), and the *Health Records and Information Privacy Act 2002* (NSW) in each case as if the Service Provider were bound by that Act; and
- (c) not do or omit to do anything the doing or omitting to do of which would cause the Agency to be in breach of the *Privacy and Personal Information Protection Act 1998* (NSW), the *Health Records and Information Privacy Act 2002* (NSW) or any other Law.

15.7 Indemnity for breach of confidence

The Service Provider will indemnify and hold harmless the Agency against any and all damage, loss, cost, expense or liability incurred or suffered by the Agency at any time as a result of any breach of its obligations under this clause 15 by the Service Provider, the Service Provider's Personnel or agents or sub- contractors.

16. Disputes

16.1 Notice of Disputes

If a party believes a dispute has arisen, that party may provide the other party with written notice of the general nature of the dispute, via the Contract Manager and the Relationship Manager respectively.

16.2 Negotiation

The parties are expected to cooperate in an attempt to resolve disputes in a non-adversarial manner. Where either party has given notice of a dispute, representatives of the parties will meet promptly and will use reasonable endeavours to attempt to resolve the dispute. If the dispute has not been resolved within 30 days of the date of receipt of a notice served under clause 16.1, either party may refer the matter for mediation by the Office of the NSW Small Business Commissioner.

16.3 Continued performance

Despite the existence of a dispute (but without prejudice to any other rights either party may have under this Agreement or at Law), both parties must continue to perform this Agreement and any Legal Services Order unless otherwise validly suspended or terminated.

17. Limitation of liability

17.1 Service Provider's liability cap

Subject to clause 17.3, the total aggregate liability of the Service Provider for all loss or damage sustained by the Agency from events arising out of or related to this Agreement (whether under statute, in contract or in tort, including for negligence, or otherwise), including under an indemnity, is limited to the Liability Cap set out in item 7 of Schedule 1.

17.2 Agency's liability cap

The total aggregate liability of the Agency to the Service Provider for all loss or damage sustained by the Service Provider from events arising out of or related to this Agreement (whether under statute, in contract or in tort, including for negligence or otherwise) is limited to the total amount of Legal Service Fees paid by the Agency to the Service Provider.

17.3 Exceptions to limited liability

Nothing in clause 17.1 excludes or limits the Service Provider's liability:

- (a) in respect of death or personal injury;
- (b) to the extent such liability cannot by Law be limited or excluded;
- (c) to the extent that the Service Provider is entitled to recover that liability from any other third party, or would have been entitled to recover that liability but for any act or omission of the Service Provider; or
- (d) in relation to loss or damage in respect of which the Service Provider is, under this Agreement, required to obtain insurance, provided that any liability of the Service Provider to the Agency for such loss or damage will not exceed the higher of the Liability Cap and the relevant amount of insurance cover.

18. Notices and communication

18.1 Contract Manager and Relationship Manager

The parties respectively appoint as the Contract Manager and Relationship Manager the individuals identified as such in Item 3 of Schedule 1. Day to day communications, complaints and discussions between the parties should occur between the Contract Manager and Relationship Manager in the first instance. Either party may amend their appointment by written notice to the other party.

18.2 Notices

Any notice, demand or other communication may be sent to each party via the respective addresses set out in Item 8 of Schedule 1.

18.3 Time of delivery

A notice or document will be taken to be delivered or served as follows:

- (a) in the case of delivery in person or by courier, when delivered;
- (b) in the case of delivery by post, two Business Days after the date of posting;
- (c) in the case of electronic mail, when acknowledgment of receipt is recorded on the sender's computer; and
- (d) in the case of delivery (in respect of (a), (b) or (c) above) after 5pm or on a non-Business Day, at 9am on the next Business Day.

19. General

19.1 Legal costs

Except as expressly stated otherwise in this Agreement, each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Agreement.

19.2 Amendment

This Agreement and any Legal Services Contract may only be varied or replaced by a document executed by the Agency and the Service Provider.

19.3 Waiver and exercise of rights

A single or partial exercise or waiver by a party of a right relating to this Agreement or a Legal Services Contract does not prevent any other exercise of that right or the exercise of any other right.

19.4 Severability

Any provision of this Agreement or a Legal Services Contract which is invalid or unenforceable is to be read down, if possible, so as to be valid and enforceable, and, if that is not possible, the provision will, to the extent that it is capable, be severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions.

19.5 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a party under this Agreement are cumulative and are in addition to any other rights of that party.

19.6 Set off

The Agency may set off against any sum owing to the Service Provider under this Agreement or any Legal Services Contract any amount then owing by the Service Provider to the Agency.

19.7 Panel refresh

The NSW Government will monitor the performance of the Panel and its members on an ongoing basis throughout the term of the Panel. The NSW Government may, at any time and without notice, refresh the Panel arrangement in any manner it thinks fit, including varying the Areas of Law and adding or removing Panel members in accordance with the Proposed Contract.

19.8 Governing law and jurisdiction

This Agreement is governed by and is to be construed in accordance with the Laws applicable in NSW. Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of NSW and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

19.9 Assignment

- (a) The Service Provider must not assign, novate or transfer or otherwise dispose of any of its rights, title or interest in or under this Agreement or any Legal Services Contract without the prior written consent of the NSW Government which consent may be given or withheld in the NSW Government's sole discretion.
- (b) The NSW Government may assign, novate, transfer or otherwise dispose of any of its rights, title or interest in or under this Agreement and any Legal Services Contract, as applicable, to any other agency where required in the event of any State government restructure or other re-organisation.

19.10 Counterparts

This Agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

19.11 Entire understanding

- (a) This Agreement, including all Schedules and Annexures, together with the Tender Documentation, contains the entire understanding between the parties as to the subject matter of this Agreement.
- (b) Each Legal Services Contract formed pursuant to this Agreement contains the entire understanding between the parties as to the subject matter of that Legal Services Contract.

19.12 Relationship of parties

- (a) Neither this Agreement nor any Legal Services Contract is intended to create a partnership, joint venture, agency or employment relationship between the parties.
- (b) In providing the Services, the Service Provider acts as the Agency's independent contractor and does not have any authority to act as the Agency's agent or on its behalf, unless the Agency expressly authorises the Service Provider to do so in writing.

- (c) In particular, without limitation, the Service Provider has no authority to enter into contracts, make representations or incur liabilities on behalf of the Agency.
- (d) The Service Provider must not purport to make any representation on behalf of the State or the Agency except with the express written instructions of the Agency.
- (e) The Service Provider acknowledges that its engagement to carry out the Services does not entitle it to any employee benefits or entitlements other than as expressly set out in this Agreement.

19.13 Survival

- (a) Without limitation to any other provisions of this Agreement, any indemnity, warranty or representation given or made under this Agreement survives the termination or expiry of this Agreement.
- (b) In addition to any clause that expressly states that it survives, or that any rights or obligations of a party will survive termination or expiry of this Agreement, the following clauses of this Agreement survive the termination or expiry of this Agreement: clauses 1 [Definitions and Interpretation], 8 [Insurance], , 10.6 [Records], 10.7 [Audit], 11 [Intellectual Property Rights], 12 [Warranties], 14.4 [Consequences of termination or expiry], 14.5 [Transitional assistance], 15 [Confidentiality, security and privacy], 17 [Limitation of liability] and 19 [General].

Schedule 1 – Contract details

1. Appointment to the Panel (clause 3.1)

Service Provider: [Variable A]
ACN/ABN: [Variable B]
Address: [Variable C]

The Service Provider is appointed to provide legal services via the following Sub-Panel(s): [insert]

2. Term (clause 2)

Commencement Date: [18 October 2020]

Expiry Date: [17 October 2025]

3. Contract Manager and Relationship Manager (clause 18.1)

NSW Government Contract Manager

Name: [insert]
Title: [insert]
Address: [insert]
Telephone: [insert]
Email: [insert]
[insert]

Service Provider's Relationship Manager

Name: [Variable E]
Title: [insert]
Address: [insert]
Telephone: [insert]
Mobile: [insert]
Email: [insert]

4. Invoicing (clause 6.5)

4.1 Invoice requirements

Invoice requirements include:

- the Service Provider's name and ABN;
- the date of issue of the tax invoice;
- the Agency's name, ABN and Legal Services Order number;
- Legal Services Fees claimed, including details of Rates, hours and expenses including detailed descriptions of the items to which they relate;

- detailed descriptions of all disbursements claimed and, if required, records to substantiate them;
- the total amount payable (including GST);
- the GST amount shown separately;
- the applicable tier or tiers to which the itemised work relates to; and
- such other information as may reasonably be required by the Agency.

4.2 Address for invoice

All invoices must be sent to the person(s) (if any) specified in the relevant Legal Services Order, to the address specified in the Legal Services Order. This may change if an electronic billing system is introduced by the Agency during the Term.

5. Payment (clause 6.6)

Payment for Services is to be made in accordance with the method specified in relevant Legal Services Order.

6. Insurance (clause 8)

| Type of cover | Minimum indemnity limits (AUD) |
|----------------------------------|--|
| Professional indemnity insurance | Approved professional indemnity insurance under the Legal Profession Uniform Law (NSW) of no less than \$2M (AUD) for each and every claim |
| Workers compensation insurance | As required under the workers' compensation legislation. |
| Public liability insurance | \$10 million per claim or any occurrence giving rise to a claim in any 12 month policy period |

7. Limitation of liability (clause 17)

The liability cap is:

- the limit of liability under the Solicitor Scheme under the Professional Standards Act 1994 (NSW) where that scheme applies; or
- otherwise, \$10 million.

8. Notice particulars (clause 18)

Agency

Addressee: [insert]



Address: [insert]
Email: [insert]

Service Provider

Addressee: [Variable C]
Address: [Variable E]
Email: [Variable E]

Schedule 2 – Fee Schedule

1. Introduction

- (a) The Rates set out in the rates matrix will be the maximum rates that may be charged by the Service Provider to the Agency.
- (b) Fees are calculated by reference to the relevant hourly rate. For Care Litigation sub panel matters, Base Rates have been set for certain activities, in which case the Agency will pay up to the relevant Fixed Fee and not for the actual time spent by the Service Provider.
- (c) The Service Provider must not charge for any items listed in paragraph 3 below. The Agency will not pay for any activities not included in this Schedule without the prior written approval of the Agency.

2. Disbursements

- (a) The Agency will reimburse the Service Provider for reasonable third party disbursements at cost, such as courier fees, court fees, agent fees and lodgement fees.
- (b) The following principles apply to reimbursement of other third party disbursements (including airfares and accommodation):
 - (i) prior approval in writing of the category of expenses is required from the Agency (with the exception of reasonable third party disbursements such as courier fees, court fees, and lodgement fees);
 - (ii) for internal audit purposes, the Service Provider must provide appropriate evidence of the expenses claimed and the relationship to the Services provided; and
 - (iii) disbursements may only be charged at cost.

3. Non-chargeable items

Subject to section 4 below, the Agency will not pay for:

- (a) preparation of an Estimate;
- (b) taxi travel, hire car travel, or other ride-sharing services charges;
- (c) internal conferencing between lawyers;
- (d) internal photocopying and printing of documents;
- (e) any performance meetings between the Agency and the Service Provider;
- (f) telephone charges, fax charges and postage;
- (g) any costs associated with a Service Provider complying with the reporting requirements; or
- (h) any additional matter the Service Provider stated in its response to the Request for Tender that it would not charge for or which are designated as non-chargeable in the rates matrix below.

4. Rates matrix

The below are the maximum rates that may be charged per Sub Panel.

4.1 Audit and claims - hourly rate

For the **Audit and Civil Claims Sub-Panel**, the Service Provider may charge an hourly rate of \$150 (excl GST) on the base rate of one hour per volume (or electronic equivalent) unless the volume is extensive and an alternative fee arrangement is agreed with the Agency in writing before work is commenced.

4.2 Care litigation - hourly base rates

For the **Care Litigation Sub-Panel**, the hourly rate is dependent on the experience level of the relevant practitioner, along with the rules on set-fees and capped time.

| TIER LEVEL | Base Rate/ hour (excl GST) |
|------------|----------------------------|
| Level 1 | \$200 |
| Level 2 | \$160 |
| Level 3 | \$125 |

For the purposes of the above, the following definitions apply.

- Level 1:** Solicitors or barristers who are specialists in a relevant Area of Law and/or demonstrate equivalent experience, knowledge and skill in relevant areas, and have at least 7 years or more in providing services required of Panel members;
- Level 2:** Solicitors or barristers who demonstrate sufficient experience, knowledge, skill and capacity to provide the services required of the Panel and who have at least 2 years post qualification experience; and
- Level 3:** Solicitor with minimal relevant experience who is supervised by a Level 1 or Level 2 solicitor or barrister.

4.3 Care litigation - fixed fees

- Fees are calculated on the BASE RATE per hour as determined in accordance with the above matrix except where fixed fees are payable under this schedule.
- Fixed Fee payments have been set for certain aspects of a matter. Where such a Fixed Fee payment has been set, the Agency does not pay for actual time spent by a practitioner on an hourly basis where time spent exceeds the capped fee.
- No fees will be payable or payment made for any work type not included in this schedule without prior approval of the relevant Manager or Director, Child Protection, Legal.
- Court attendance includes waiting time but excludes travel time.

- Invoices must clearly specify the applicable tier or tiers to which the itemised work relates..

| Item | Fixed Fees or actual fees payable (excluding GST) |
|---|--|
| All work associated with an initial mention including but not limited to, review of documentation, provision of advice, obtaining instructions, court attendance, waiting time and reporting back (including preparation and emailing of court outcome sheet to relevant officers) | BASE RATE per hour up to and capped at a maximum of 4 hours. |
| All work associated with subsequent mentions including but not limited to: <ul style="list-style-type: none"> • review of instructions, • provision of advice, • preparation and/or settlement of documentation (including subpoenas), • court attendance, • waiting time, • reporting back (including preparation and emailing of court outcome report to relevant officers) and • settling care and cultural plans | BASE RATE per hour up to and capped at a maximum of 3 hours. Additional BASE RATE per hour per matter where the preparation for the mention involves the settlement of multiple care plans for more than one child / young person up to and capped at a maximum of 3 hours. |
| Drafting terms of reference or letters of instruction for Children’s Court Clinic Assessment Reports or expert reports | BASE RATE per hour capped at 1 hour. |
| Review of Children’s Court Clinic assessment reports and expert reports | BASE RATE per hour capped at 1 hour. |
| Acting as agent for the Secretary for a List Day in Specialist Children’s Courts | Preparation time limited to 30 minutes per matter. Court attendance actual based on BASE RATE per hour up to a maximum of 7 hours. |
| Appearing as an agent for an in-house legal officer at a mention | BASE RATE per hour x1.25 per mention per matter. |
| Guardianship Application | BASE RATE per hour up to a maximum of 2 hours. |
| Preparation for interim hearings including all aspects (an interim hearing is when the matter is formally listed by the court as a hearing) | Actual based on BASE RATE per hour up to a maximum of 5 hours. |

| Item | Fixed Fees or actual fees payable (excluding GST) |
|--|---|
| Preparation for establishment hearings including all aspects | Actual based on BASE RATE per hour up to a maximum of 4 hours ¹ . |
| Preparation for final hearings including all aspects | Actual based on BASE RATE per hour up to a maximum of 8 hours. Where the hearing exceeds 2 days, an additional 2 hours for preparation for each subsequent day. Where the hearing days are separated by more than 5 working days, an additional 2 hours for preparation and accessing and reviewing transcripts. |
| Advocacy at hearings (where counsel not briefed) | Actual based on BASE RATE per hour x 1.25 up to a maximum of 7 hours per day. |
| Hearings (where counsel briefed) | Actual based on BASE RATE per hour up to a maximum of 6 hours per day. |
| Representation at DRCs and other ADR or negotiations including preparation for each conference and preparation of any documentation arising from each conference | BASE RATE per hour up to a maximum of 4 hours per conference BASE RATE per hour x 5 for each ADR conference or successful negotiation which results in final care orders that resolve the care application being approved by the Court without the matter proceeding to a final hearing. ² |
| Travel time | No travel time will be paid for travel to any of the Specialist Children's Courts (currently at Campbelltown, Surry Hills, Parramatta, Port Kembla, Woy Woy, Wyong and Broadmeadow). No travel time will be paid for the first |

¹ Where a practitioner exceeds the cap of 4 hours, the legal practitioner must contact the Manager, Care Litigation for approval prior to continuing to incur costs.

² It is the responsibility of the practitioner making a claim for this fee to provide clear evidence of compliance with the required timeframes

| Item | Fixed Fees or actual fees payable (excluding GST) |
|--|--|
| | hour of travel for any round trips to regional courts. \$75 / hour after the first hour of travel. |
| Mileage | No mileage will be paid for travel. However, the cost of petroleum, diesel or gasoline required for travel to attend any hearing will be reimbursed, as a disbursement, subject to the necessary evidence being provided to substantiate the cost. |
| Subsistence/accommodation | Actual amount incurred to a maximum rate as determined by the Crown Employees Wages Staff (Rates of Pay) Award 2016 (or as subsequently updated). |
| Photocopying & Printing | No charges |
| Faxing & Scanning | No charges |
| Preparation of tax invoices | No charges |
| Preparation of standardised and regular reports that may be required | No charges |
| Preparation of submission seeking approval to exceed the cap of \$10,000 per matter or other request | No charges |

4.4 Prosecutions – base hourly rate

For the **Prosecutions Sub-Panel**, the Service Provider may charge a maximum hourly base rate of \$400 (excl GST), subject to the applicable maximum fee cap.

4.5 Prosecutions – maximum fee caps

Maximum fee caps have been set for certain aspects of a matter. Where a maximum fee cap has been set, the Agency does not pay for actual time spent by a practitioner on an hourly basis where time spent exceeds the capped fee. Arrangements outside of the maximum fee cap may be negotiated as an exception.

| Item | Maximum Fee Caps |
|---|--|
| <p>List -all work associated with appearing on a List day including:</p> <ul style="list-style-type: none"> • review instructions • preparation (including printing and photocopying) • travel to court • court appearance on behalf of TfNSW • any legal research • reporting letter to TfNSW with the court results | <p>Base Rate per hour capped at \$3000 (excl GST)</p> |
| <p>Hearing - all work associated with appearing at a hearing including:</p> <ul style="list-style-type: none"> • review instructions • preparation (including printing and photocopying) • travel to court • court appearance on behalf of TfNSW • any legal research • reporting letter to TfNSW with the court results | <p>BASE RATE per hour capped at \$3500 (excl GST)</p> |

4.6 Property Acquisition – conveyancing

For the **Property Acquisition Sub-Panel**, the Service Provider may charge fixed **conveyancing fees** based on the value of the transaction.

| TIER LEVEL | Fixed Fee (excl GST) |
|----------------------|----------------------|
| <\$250k | \$1300 |
| \$250k - \$1 million | \$1600 |
| >\$1 million | \$2000 |

Property Acquisition – other services

The Agency may engage the Service Provider to provide other services and fees will be negotiated between the the Agency and Service Provider.

4.7 Commercial – base hourly rate

For the **Commercial Sub-Panel**, the Service Provider may charge a maximum hourly base rate of \$400 (excl GST).

Schedule 3 – Compliance with Government Policies

1. Codes of conduct and ethics

- (a) Statement of business ethics – Finance, Services and Innovation:

<https://www.finance.nsw.gov.au/about-us/business-ethics>

- (b) Agency code of conduct and ethics

The Agency's Code of Ethical Conduct and Statement of Business Ethics, as in effect from time to time:

<https://www.rms.nsw.gov.au/about/what-we-do/ethics/index.html>

<https://www.nsw.gov.au/customer-service/who-we-are/business-ethics-statement>

<https://www.facs.nsw.gov.au/download?file=666075>

2. NSW Government Policies

In providing the Services, the Service Provider must, at its own cost, comply with relevant NSW Government policies, procedures and guidelines and be aware of and ensure that consideration is given to the Agency's obligation to comply with Government policies including the following:

- (a) NSW Government Code of Practice for Procurement

<https://www.procurepoint.nsw.gov.au/policies/nsw-government-procurement-information>

- (b) Briefing of Senior Counsel

<http://arp.nsw.gov.au/m2009-17-briefing-senior-counsel>

- (c) Litigation involving Government Agencies

<http://arp.nsw.gov.au/m1997-26-litigation-involving-government-authorities>

- (d) Alternative Dispute Resolution

http://www.courts.justice.nsw.gov.au/Pages/cats/catscorporate_adrdirectorate/catscorporate_adrdirectorate.aspx

- (e) Model Litigant Policy

<http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/model-litigant-policy.aspx>

- (f) Equitable Briefing Policy

<http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/eq-briefing-policy.aspx>

- (g) Premier's Memorandum No 2016-04 'NSW Government Core Legal Work Guidelines



Signing Page

EXECUTED by the parties as a Deed.

SIGNED SEALED AND DELIVERED for and on behalf of the Secretary of Transport for NSW by

[insert],)

)

)

.....

In the presence of

)

)

)

.....

Name of witness

on [DATE]

SIGNED SEALED AND DELIVERED by the SERVICE PROVIDER

on [DATE]

[relevant signature block to be inserted]

LEGAL SERVICES ORDER

Legal Services Order Ref No: [insert]
Service Provider Name: [insert]
Legal Officer: [insert]
Phone: [insert]
Email: [insert]
Date: [insert]

| | |
|----------|---|
| 1 | NATURE OF SERVICES REQUIRED |
| 1.1 | [Matter Name] |
| 1.2 | Scope of engagement - |
| 1.3 | [Attachments - List of attachments to the Legal Services Order] |
| 1.4 | [Matter document references e.g. OP and TRIM numbers] |

| | | |
|-----------|----------------------------------|--|
| 2. | DELIVERY TIMEFRAME | |
| 2.1 | Date Services commence: | [Commencement date; date of Order may be used] |
| 2.2 | Date for completion of Services: | <p>The Services must be completed within [insert] days of receipt of the files.</p> <p>All files must be returned within 10 Business Days of the completion of the Services.</p> |
| 2.3 | Special Circumstances | [Include details of any urgency]. |

| 3. LEGAL SERVICES FEES & INVOICING | |
|---|---|
| 3.1 | Estimate of professional fees |
| 3.2 | Nature and amount of authorised expenses / disbursements (if any): <i>The Agency will accept the cost of off peak courier fees to return files.</i> <i>No other disbursements will be paid.</i> |
| 3.3 | Return of files <i>All files are to be returned to the relevant agency by courier.</i> <i>Files are to be returned to:</i> <i>[insert address]</i> |
| 3.4 | Invoicing requirements: <i>All invoices are to be addressed to:</i> <i>[Provide name, address and contact details]</i> |

| 4. NOMINATED PERSONNEL | |
|-------------------------------|--|
| 4.1 | Nominated Personnel: <i>[Names of Nominated Personnel]</i> <i>[other requirements for the provision of the services]</i> <i>[otherwise, "Not Applicable"]</i> |

Acknowledgement

Except as expressly provided above, this Legal Services Order and any Legal Services Contract between the parties concerning this matter are governed by the terms and conditions of the Panel Deed.

The Service Provider has no actual, potential, perceived or apparent conflict of interest as defined in the Panel Deed, except as disclosed to the Client, in providing the Services requested.

Signed on behalf of the Service Provider by:

Date:

Signature:

Name: *[Set out full name]*

Position: *[Set out position title]*

Please e-mail acknowledgement to the Client's Representative quoting the corresponding Legal Services Order Client Reference Number.

SERVICE LEVEL AGREEMENT

1. Definitions and interpretation

1.1 Definitions

Unless the context otherwise requires:

Existing Matter means any pre-existing agreement for the provision of legal services between the Service Provider and NSW Government agency that was entered into prior to, and remains on foot after, the Commencement Date.

Panel Deed means the agreement between NSW Government and the Service Provider with respect to the provision of Services under the RRLS Panel arrangements.

Service Level Agreement or **SLA** means this service level agreement between NSW Government and the Service Provider.

1.2 Other terms used in this SLA

Capitalised terms that are not defined in item 1.1 of this SLA but that are defined in the Panel Deed, have the meaning given in the Panel Deed.

2. Performance assessment

2.1 Minimum Service Standards

In providing the Services pursuant to the Panel Deed, the Service Provider must satisfy the following minimum service standards.

(a) **Understanding needs**

The Service Provider must be capable of and committed to understanding the circumstances, interests and requirements of the NSW Government agency.

(b) **Meeting needs**

The Service Provider must provide the Services in a manner which is sensitive to the NSW Government agency's circumstances, supports its interests, and meets its requirements.

(c) **Legal advice capability**

The Service Provider must provide legal advice that is accurate, succinct and addresses the questions and issues raised by the NSW Government agency.

(d) **Preparing documents**

The Service Provider must prepare documents that are succinct, comprehensive and in plain language and must seek sufficient instructions from the NSW Government agency to enable documents to be prepared efficiently and in a timely manner.

(e) **Appropriate Dispute Resolution and Litigation activity**

(A) **Civil disputes**

The Service Provider must manage appropriate dispute resolution and

litigation diligently and in accordance with the Model Litigant Policy for Civil Litigation. The Service Provider must advise on and conduct settlement negotiations with a view to the circumstances and requirements of the NSW Government agency, and in accordance with the instructions of the NSW Government agency.

(B) Criminal proceedings

The Service Provider must act with fairness and detachment. The Service Provider must advise on and conduct proceedings consistently in accordance with the Model Litigant Policy for Civil Litigation (set out in Annexure D to the relevant Services Brief).

(f) Managing allocation of work

In providing the Services, the Service Provider must manage the allocation of work with regard to cost effectiveness, as well as to the level of seniority necessary to meet the NSW Government agency's legal service requirements. The Service Provider must comply with all requirements in the Panel Deed in respect of Estimates.

(g) Managing matters

The Service Provider must implement practices to increase efficiency for both itself and the NSW Government agency in the way it provides the Services.

(h) Managing costs

The Service Provider must provide the Services in an efficient manner that meets any agreed costs stipulated.

If it is anticipated that an agreed fee might be exceeded, the Service Provider must immediately notify the NSW Government agency in writing. The NSW Government agency, in its absolute discretion, shall determine whether to grant any cap extension or extension to the fee schedule.

(i) Reporting

The Service Provider must provide compliance and transactional data to the NSW Government agency at such intervals and in such format as set out in item 3.1 of this SLA and in an electronic format as specified by the NSW Government agency.

2.2 Application of this SLA

On and from the date of this SLA, the Minimum Service Standards and the KPIs will apply to the Service Provider's performance of each Legal Service Contract and any Existing Matters.

2.3 Key Performance Indicators

The Service Provider must comply with the following KPIs. In order to meet each KPI, the Service Provider must meet all requirements specified as the monitoring mechanism for that KPI.

| KPI No | KPI | Monitoring mechanism |
|--------|---|---|
| 1 | Managing Budget | |
| | The Service Provider must actively manage and control costs in the provision of the Services. Where required to do so by the Panel Deed, the Service Provider must provide complete and accurate Estimates. | The Service Provider must notify the NSW Government agency in writing as soon as practicable after the Service Provider becomes aware that the Estimate will or might exceed \$10,000, but in any event no later than the time the legal costs accrued or incurred reaches \$8,000. |

| | | |
|----------|---|--|
| 2 | Regular reporting | |
| | The Service Provider must provide regular reports as required by the Panel Deed or this SLA. | The Service Provider must submit the reports set out in item 3.1. Such reports must be provided punctually and in the form and manner required by the NSW Government agency. |
| 3 | Client satisfaction with the Services. | |
| | <p>The Service Provider must provide the Services to the NSW Government agency's reasonable satisfaction, including the following areas:</p> <ul style="list-style-type: none"> • Value for money • legal expertise • Form of expression, e.g. relevant, accurate, succinct, practical • Capability and availability of any Nominated Personnel • Accuracy of documents and deliverables • Clear and timely communications • Understanding of the NSW Government agency's business and needs • Effective management of timelines and budgets • Proactive management of matters | At any time during the Term, the NSW Government agency may require the Service Provider to undertake a client satisfaction exercise, in accordance with item 2.5. |

2.4 Performance assessment

- (a) On request by the NSW Government agency (but no more than once every 12 months), the Service Provider's performance may be assessed against all KPIs. As part of that assessment, a performance report will be prepared and provided to the Service Provider reporting on the outcome of any client satisfaction surveys and the compliance with the terms of the Panel Deed and this SLA (including the reporting requirements).
- (b) Without limitation of the Panel Deed, the NSW Government agency may remove or suspend the Service Provider from the provision of the Services for consistent failure to achieve any of the Minimum Service Standards or the KPIs.

2.5 Client satisfaction surveys

Any client satisfaction surveys will be undertaken by the relevant users of the Service Provider and overseen by the Contract Manager. It will form an integral part of the monitoring mechanism for the performance of the Service Provider.

3. SLA procedures

3.1 Reports

- (a) The table below sets out the reports to be provided by the Service Provider to the NSW Government agency and the time at which they are to be provided. Each report must be provided by the date (and cover the period) set out.
- (b) Where stated, if the table specifies a report must be provided on a certain date, those reports must be provided notwithstanding the termination or expiry of the Panel Deed or the relevant Legal Services Contract.
- (c) Reports required to be submitted on a monthly or quarterly basis must be submitted no later than the 7th day of the immediately following calendar month.

| Reports to be provided by the Service Provider | To |
|---|------------------|
| <p>Invoices – Monthly</p> <p>The Service Provider must provide a report containing transactional data for each Legal Service Contract.</p> | Contract Manager |
| <p>Conflicts – on identification</p> <p>The Service Provider must disclose conflicts of interest and provide a report on conflicts of interest in accordance with the Panel Deed. As soon as a conflict is identified following provision of a Legal Services Order.</p> | Contract Manager |
| <p>Assurance of compliance – Annually</p> <p>On request, the Service Provider must provide a report certifying its compliance with the Panel Deed and this SLA.</p> | Contract Manager |

3.2 Reports from the NSW Government agency

The table below sets out reports which may be provided by the NSW Government agency to the Service Provider.

| Reports to be provided to the Service Provider | By |
|---|------------------|
| <p>A performance review report which may include:</p> <ul style="list-style-type: none"> • Client satisfaction survey results • Assessment against each of the KPIs • Audit findings • Complaints findings • Conflict of interest and Incidents <p>This report may be provided at any performance review meeting.</p> | Contract Manager |

3.3 Variations to the SLA

The following procedures apply to any variations of the SLA.

- The Service Provider may submit a variation request to the Contract Manager.
- The NSW Government agency may accept or reject any variation request at its sole discretion. Agreed variations may not be made to all Services Providers.
- The NSW Government agency may notify the Relationship Manager in writing of the NSW Government agency's desire to vary this SLA.
- All agreed variations must be in writing and signed by both parties. The Contract Manager will keep and maintain a control file of all resolved and outstanding requests for variations to this SLA.

4. Governance

4.1 Roles and Responsibilities

Responsibility for the management of the SLA is detailed in the table below.

| Entity | Responsibilities |
|--------|------------------|
|--------|------------------|

| | |
|---|--|
| Contract Manager (NSW Government agency) | Overall responsibility for the Panel Deed lies with the Contract Manager, including: <ul style="list-style-type: none"> determining variations and changes; exercising statutory and regulatory decision making; removing or adding service providers as Service Providers in accordance with the Panel Deed; extending or varying the services to be provided by the Service Providers; determining whether to suspend or terminate a Service Provider's membership of the Panel; monitoring and managing the Service Providers' performance, including client satisfaction; and assessing and reporting on the Service Providers' performance against the Minimum Service Standards and KPIs. |
| Relationship Manager (Service Provider) | Ensure compliance with provisions of the Panel Deed including the SLA. |

4.2 Governance and Performance Management Meetings

| Meeting | Frequency |
|--|-------------|
| Contract Manager and Relationship Manager –Panel governance <ul style="list-style-type: none"> Discussing contractual management issues, a Service Providers' performance, Panel effectiveness, improvements to Panel administration and develop and review policies and guidelines affecting the Panel arrangements. Reviewing client satisfaction. Considering changes of services that may impact on the SLA. Reviewing the NSW Government's requirements for legal services. Reviewing a Service Providers' remedial action if applicable. Considering and recommending termination or suspension of a Service Provider from the Panel. | As required |
| Contract Manager– assessment of Service Provider's performance <ul style="list-style-type: none"> Undertaking performance assessment reports based on responses to any client satisfaction survey. | As required |
| Contract Manager and Relationship Manager – Review of composition of Panel <ul style="list-style-type: none"> Discussing performance reports against KPIs. Meeting with Service Providers to discuss service needs and requirements. | As required |
| Contract Manager and Relationship Manager <ul style="list-style-type: none"> Undertaking performance reviews Implementing and reporting on any remedial action. Discussing any changes to improve the administration of the Panel arrangements. | As required |

5. Appendices to this Service Level Agreement

- Appendix A – Community Services Care Practice Standards
- Appendix B – Code of Conduct for Legal Representatives in Care and Protection Proceedings
- Appendix C – Representation Principles for Children’s Lawyers
- Appendix D – Model Litigant Policy for Civil Litigation
- Appendix E – FACS Code of Ethical Conduct
- Appendix F – Sample Tax invoice
- Appendix G – DRC Outcome sheet
- Appendix H – Court Outcome sheet

Appendix A Community Services Care Practice Standards – Care Litigation

These practice standards apply to both in-house legal officers and external legal practitioners acting in care matters before the Children’s, District, Family and Supreme Courts on behalf of the Minister or the Secretary of the NSW Department of Family and Community Services (FACS).

(These are standard terms to which the Service Agreement and Position Descriptions, as the case may be, refer and should be read in conjunction with those documents).

1 GENERAL PRINCIPLES

- 1.1 *The Children and Young Persons (Care and Protection) Act 1998* establishes various objects and principles. Amongst these the safety, welfare and well being of the child or young person subject to care proceedings is paramount. Another is that the child or young person should participate in actions pursuant to that Act.
- 1.2 To comply with these, and other, objects and principles it is important that legal practitioners who practice in care litigation are able to communicate effectively and in a way that is understood by the child or young person and their families.
- 1.3 Legal practitioners who practice in care litigation must have an understanding of children and young people who have been abused or neglected, of cross cultural issues and issues facing socially and economically disadvantaged people.

2 GENERAL REPRESENTATION STANDARDS

A legal practitioner abiding by these standards and who appears in care litigation matters will:

- 2.1 Perform the services in a diligent manner and to the standard of skill and care expected of a qualified, competent, ethical and experienced practitioner;
- 2.2 Use all reasonable efforts to acquire an understanding of the vision, the organisation and the nature of the work undertaken by FACS and regularly consult with officers of FACS in the performance of services;
- 2.3 Protect and promote FACS’s credibility, in particular as a ‘model litigant’;
- 2.4 Be familiar, keep up to date and comply with the content and conditions of the current versions of the following documents and any other relevant documents which may come into effect during the period of this agreement, and apply them as appropriate for the Minister and the Secretary
 - Code of Conduct for legal representatives in care and protection proceedings in the Children’s Court of NSW (Appendix B)

- Representation principles for Children’s Lawyers published by the Law Society of NSW (Appendix C)
 - Model Litigant Policy published by the NSW Department of Premier and Cabinet (Appendix D)
 - Code of Ethical Conduct and Ethics published by FACS (Appendix E)
 - Premier’s Memorandum M1997-26 Litigation involving Government Authorities
 - FACS’ Policy Directive on the Management of Legal Matters
- 2.5 Promote timely hearings and reduce case continuances;
 - 2.6 Keep up-to-date and comply with all current legislation, court procedures and timetables;
 - 2.7 Comply with all current Departmental policies, guidelines and procedures relating to child protection;
 - 2.8 Liaise, co-operate and confer with Managers Casework, Caseworkers, in-house legal officers or other delegates (FACS Officers) throughout the conduct of the matter;
 - 2.9 Act in accordance with instructions and within the scope of authority conferred or delegated;
 - 2.10 Prepare for and attend all mentions and hearings;
 - 2.11 Answer telephone inquiries promptly and respond to inquiries within two working days subject to FACS officers providing contact details;
 - 2.12 Provide a meaningful reply to all correspondence within five working days, reply promptly to urgent matters and (where necessary) advise FACS officers that a detailed request for advice may require more time to respond;
 - 2.13 Prepare and file a Notice of Address for Service/Notice of Acting as soon as practicable, disclosing the Director Child Protection as the solicitor on the record but with the details of the practitioner having carriage of the matter, including the practitioner’s address as the address for service;
 - 2.14 Explain the mechanics of court proceedings to FACS staff as required, such as whether the caseworker will be asked to speak and who will be in the court room etc;
 - 2.15 Give the caseworker a realistic assessment of the time the matter will take to be heard and completed;
 - 2.16 Explain to the caseworker that in many list and hearing matters it may not be possible to maintain continuity of representation but that best endeavours will be made to maintain continuity of representation;
 - 2.17 Maintain continuity in representation where possible, and if continuity cannot be maintained explain to the caseworker who will represent the Secretary on the next occasion (change in legal representation requires approval by the Director Child Protection or the relevant Manager);

- 2.18 Speak with the caseworker as soon as reasonably practicable following a court appearance and confirm that the case worker understands the result and any orders made by the court and the reasons why these came about;
- 2.19 Complete and forward by email the Court Outcome sheet (Appendix G or H as applicable) after each court appearance to the relevant caseworker, in-house care litigation legal officer/team leader and administrative officer, within two working days of the court appearance. The final court outcome sheet will need to include an indication whether or not there is a potential civil claim that could be made on behalf of the child or children/young persons subject of the matter;
- 2.20 Notify the Director, Child Protection or the relevant Manager immediately of any circumstances that could give rise to a claim for professional negligence and provide a detailed statement in relation to the matter;
- 2.21 Attend at least one all day seminar on care litigation each year together with other continuing legal education relevant to the care jurisdiction or advocacy;
- 2.22 For external practitioners, submit a tax invoice for each matter (in the form set out in Appendix F) for all costs and disbursements relating to that matter, to the relevant Manager within 7 days of completion of the matter or once every two months during the course of the matter (which ever is the shorter period). Each tax invoice should include a date, a unique invoice number, details of the matter and the terms of payment (30 days from date of invoice);
- 2.23 Tax invoices for all outstanding fees and charges are to be forwarded to the relevant Manager or in-house care litigation legal officer by no later than 15 June each financial year and details of fees incurred but not yet billed to 30 June each year are to be provided by no later than 1 July each year (or other date as may be notified) for accrual accounting purposes, followed by the issue of invoices for such work as soon as possible thereafter;
- 2.24 Notify immediately and keep the Director, Child Protection and the relevant Manager regularly updated about the progress of any matter that is or has the potential to become contentious or of public/media interest;
- 2.25 Take steps to avoid a potential conflict of interest, not act where a conflict exists and notify the Director, Child Protection or the relevant Manager if a conflict arises;
- 2.26 Maintain files in accordance with the *State Records Act 1998* and current recordkeeping practices and in an order that will allow FACS officers or other representatives to quickly and easily understand the factual basis of the matter, the instructions, the stage the matter has reached and further action required;
- 2.27 Ensure all correspondence, memoranda, notes of meetings or instructions, telephone notes, copy accounts are attached to the file and kept in a chronological and orderly manner;
- 2.28 Keep timely and accurate records of work to enable proper costing and/or auditing of the file at any point in time;

- 2.29 Make a note on a file of information given to or received from a FACS officer that is not confirmed in writing;
- 2.30 Review all files on completion of the matter to ensure all necessary steps have been taken before notifying the relevant Manager or in-house care litigation legal officer that the matter is finalised;
- 2.31 Advise the relevant Manager or in-house care litigation legal officer if a potential civil claim by a child or young person in the parental responsibility of the Minister is identified during the course of the matter;
- 2.32 Provide the file in a matter to the relevant Manager or in-house care litigation legal officer within a reasonable time from the completion of the particular matter or where a written authority is received to hand over all records and files prior to that period. The final invoice will not be payable until all records in a satisfactory and orderly condition, are returned to FACS;
- 2.33 Transport all files and confidential documents by courier or hand delivery only;
- 2.34 Assist, co-operate and participate in client surveys, random audits, file reviews and supervision by the relevant Manager on both specific files/matters and generally and comply with any guidelines or instructions relating to audits, review and supervision that may be in place from time to time;
- 2.35 Meet regularly with the relevant Manager or his/her delegate as reasonably required;
- 2.36 Maximise the use of information and communications technology to improve the efficiency of service, including providing all correspondence, documentation, court outcome sheets and invoices electronically;
- 2.37 Send documents where continuity cannot be maintained, to the FACS care litigation legal officer who next has responsibility for the matter, on completion of the current court appearance and specify any relevant follow-up work.

3 SPECIFIC RESPONSIBILITIES FOR CARE LISTS IN SPECIALIST CHILDREN'S COURTS

- 3.1 When appearing in a Care List the legal practitioner will:
 - i. Where necessary, be present at court by 8.30am on the day of this list;
 - ii. Discuss matters in the List with caseworkers (or the Court Liaison Officer) at court prior to the list commencing;
 - iii. Determine, in consultation with caseworkers (or the Court Liaison Officer), matters not able to proceed and negotiate with other legal representatives or parties where applicable.
- 3.2 Following a list day appearance a legal practitioner will:

- i. Complete a Court Outcome Sheet for each matter, place a copy of it on the file and email a copy to the caseworker, in-house care litigation legal officer/team leader and the administrative officer within two working days of the court appearance;
- ii. If an external legal practitioner, confirm with the in-house care litigation legal officer responsible for each matter who will have carriage of the matter at the next court appearance and arrange for the file to be forwarded.

Code of Conduct for Legal Representatives in Care and Protection Proceedings in the Children's Court of New South Wales as prepared by the Children's Court of NSW Advisory Committee

In the application of this Code of Conduct, it is recognised that the provisions contained herein cannot override a legal practitioner's duty at law as contained in the NSW Revised Professional Conduct and Practice Rules 1995 (Solicitor Rules) or the NSW Barrister Rules. In particular, the provisions contained herein cannot override a legal practitioner's duty at law to his or her client and the legal practitioner's duty at law to the Court, nor can it limit a lawyer's obligation of confidentiality to a client.

1. All legal practitioners practicing in the Care and Protection jurisdiction of the Children's Court will:

1.1. Understand and perform duties in a diligent manner and to a standard of skill and care expected of a qualified, competent, ethical and experienced legal practitioner.

1.2. Understand and work in a manner consistent with the overarching objects and principles set out in Chapter 2, *Children and Young Person's (Care and Protection) Act 1998*.

1.3. Encourage clients to promote the best interests of a subject child or young person as the paramount consideration in proceedings before the Court.

1.4. Take all reasonable steps to encourage clients to fully and frankly disclose to the Court and all other parties in a timely manner all information relevant to the case, including information that relates to the safety, welfare and well-being of a subject child or young person, and to take all reasonable steps to assist the client in making that disclosure.

1.5. Promote the right of parents to effectively participate in and be fully informed about court proceedings concerning their child.

1.6. Understand the sensitive nature of records and documents concerning the care and protection of a child or young person and handle them in a way that minimises the impact their use in proceedings may have on the privacy and safety of the individuals connected with those records and documents.

1.7. Assist the parties to reach an appropriate and expeditious resolution of the case, including promoting the use of negotiation and alternate dispute resolution where appropriate.

- 1.8. Promote the conduct of proceedings that are non-adversarial and with as little formality and legal technicality and form as the circumstances of the case permit.
- 1.9. Remain familiar with and comply with all current legislation, court procedures and timetables.
- 1.10. Prepare for and attend, either personally or through a fully appraised agent or counsel, all court events, including mentions, dispute resolution conferences, hearings, as well as other alternate dispute resolution conferences.
- 1.11. Respond to inquiries, correspondence and offers of settlement in a polite and timely manner.
- 1.12. Maximise the use of information and communications technology to improve efficiency of service.
- 1.13. Explain the Court's role to the client, including how proceedings are conducted and what, if anything, the client may be required to do.
- 1.14. After meeting with the party and assessing their capacity to provide instructions, raise any concerns with the Court that the practitioner has in relation to their client's capacity to provide proper instructions.
- 1.15. Maintain continuity of representation where possible, ensuring that where change of legal representation cannot be avoided, the subsequent practitioner receives all information necessary for them to conduct the matter to an appropriate standard and efficiency.
- 1.16. If circumstances require a party to communicate with the Court in the absence of the other parties, promptly inform the other parties of any communications which passed between the practitioner and the Court.
- 1.17. Be aware that there may be common law obligations to provide certain information to the court.
- 1.18. Not to examine or cross-examine witnesses in any proceedings in a way that is oppressive, repetitive or hectoring, unless it is essential in the interests of justice.
- 1.19. Limit evidence, including cross-examination, to that which is relevant and necessary.

2. Legal practitioners representing Community Services will:

- 2.1. Understand the Director-General's duty as a model litigant and current government policy on the duty of a model litigant and represent Community Services consistent with that duty.
- 2.2. Represent Community Services in a way that protects and promotes the credibility of Community Services and is consistent with its role to provide assistance to children, young people and families in the least intrusive way possible.

2.3. Provide court documents to other parties in a timely manner to allow adequate time for other parties to obtain instructions.

2.4. In accordance with the obligation to fully and frankly disclose to the Court and all other parties in a timely manner all information relevant to the case, including information that relates to the safety, welfare and well-being of a subject child or young person, provide to the Court all relevant material known to the legal practitioner in a complete, fair and impartial manner whether that material is supportive of the Director-General's case or otherwise.

2.5. Where material is to be redacted or edited to protect the identity of persons in compliance with legislative requirements, take adequate steps to ensure that any redaction or editing is limited to that which is necessary to protect the identity of such persons. Advise Child Protection Caseworkers of their obligation to ensure that any redaction or editing of material is limited to that which is necessary in order to comply with legislative requirements

3. Legal practitioners representing children or young people will:

3.1. Provide competent representation to all children and young people in compliance with the Law Society of New South Wales' Representation Principles for Children's Lawyers.

3.2. Except in exceptional circumstances, meet with the child as soon as possible once appointed by the Court and maintain contact with the child or young person at an appropriate frequency throughout the proceedings. Unless the child is pre-verbal, this requirement includes meeting with the child or young person as soon as possible after orders are made for the purpose of explaining the effect of those orders and the prospects of appealing any orders made or seeking a variation or rescission of same in the future. In making a determination as to whether exceptional circumstances exist, practitioners may have regard to whether a child has already been the subject of numerous interviews and / or assessments.

3.3. Engage with the child or young person in a manner consistent with that child or young person's age, level of education and cognitive capacity, taking into account cultural and other relevant factors. Preference should be given to face-to-face communication with the child rather than communicating by telephone or in writing.

3.4. Ensure that the views and wishes of the child or young person are placed before the Court, except in circumstances where the child or young person is unable to express their views and wishes by virtue of their age, disability or other special circumstance.

3.5. When acting as a direct legal representative, ensure that the views of the child or young person are placed before the Court, ensure that all relevant evidence is adduced and tested and act on the instructions of the child and young person.

3.6. When appointed as a direct legal representative, act on the instructions of the child or young person and actively advocate the child or young person's position.

3.7. Communicate with a child or young people at a venue which promotes the child or young person's ability to freely express their views and wishes. If the child or young person requests the attendance of a support person, consider the appropriateness of the presence of the particular support person and take steps to ensure that the support person understands the confidential nature of any communications.

3.8. Make independent enquiries and ensure that all relevant evidence is adduced, including expert evidence where appropriate. The legal representative for a child or young person is to test the evidence of the parties and make submissions about the evidence to the Court.

3.9. Provide the child or young person with advice and information, including where appropriate information about evidence presented to the Court by other parties, relevant to the proceedings so as to facilitate their understanding of and participation in the proceedings.

3.10. Make the Court aware of any conflicts of interest that arise through the practitioner being appointed to represent more than one child or young person subject to the same set of proceedings.

3.11. Act independently of any party to the proceedings other than the child or young person the practitioner has been appointed to represent.

4. Legal practitioners representing parents or other interested parties will:

4.1. Provide advice and competent representation to clients, in a manner which promotes and enhances the constructive involvement of the client in decisions about what is in the best interests of the subject children.

4.2. Ensure that they explain proceedings to clients in a manner commensurate with the client's level of understanding. In the event that a client does not speak English, the legal representative should ensure that an interpreter is present at all appropriate times, including when instructions are being taken and affidavits are being prepared. In circumstances where a client is illiterate, the legal practitioner is to ensure that all Court documents, affidavits, correspondence and other documents are read to them.

4.3. Only act for more than one parent or interested party where doing so does not create a conflict of interest.

This document has been saved from <http://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/family-law/code-of-conduct-for-legal-representatives> on 6 March 2017

[1] *Re Georgia and Luke (No 2)*[2008] NSWSC 1387; *Re M (A Minor)(Disclosure of Material)*[1990] 2 FLR 36; *Ramsbotham v Senior* (1869) LR 8 Eq 575; *Re Bell; Ex parte Lees* (1980) 30 ALR 489.



THE LAW SOCIETY
OF NEW SOUTH WALES

REPRESENTATION PRINCIPLES FOR CHILDREN'S LAWYERS

4TH EDITION

UPDATED AUGUST 2014

DISCLAIMER

This document has been produced solely to provide general information. It is not exhaustive of issues which practitioners may encounter, nor does it constitute legal advice. It is a general guide only and practitioners must take care to fully consider the circumstances and laws applicable to their circumstances. While every care has been taken in the production of this document, no legal responsibility or liability is accepted, warranted or implied by the authors or The Law Society of New South Wales and any liability is hereby expressly disclaimed.

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Representation Principles for Children’s Lawyers

ENDORSEMENT

The Representation Principles for Children’s Lawyers are an ongoing project of the Juvenile Justice and Family Issues Committees of the Law Society of NSW. The Council of the Law Society adopted the first edition of these Representation Principles for Children’s Lawyers on behalf of the profession on 19 October 2000. The second edition was adopted by Council on 21 March 2002, and the third edition on 20 September 2007. The fourth edition was adopted by Council on 20 November 2014.

ACKNOWLEDGEMENTS

The first edition of the Representation Principles was produced with the valuable contribution and participation of the members of the 1999 and 2000 Children’s Legal Issues Committees; the Australian Law Reform Commission; Inoka Ho; Meredith Wilkie (Human Rights and Equal Opportunity Commission); Dr Judy Cashmore; NAPCAN Australia; Deborah de Fina; Judith Walker and Frith Way. Appreciation is also due to Robert Fitzgerald, Jenny Barga, Lani Blackman, Peter Champion, Janine Dethlefs, Robert Ludbrook, Janet Loughman, Jane Sanders and Dr Choon-Siew Yong who, initially with members of the Children’s Legal Issues Committee and then the Family Issues Committee, generously volunteered their time and expertise to assist in refining the commentary to the Representation Principles.

The 2001 Children’s Legal Issues Committee (in particular Michael Antrum, Rod Best, Cate Escobar, Alexandra Mackenzie, Nadine Miles, Geoff Monahan, Eija Roti) as well as Dr Judy Cashmore, Kerry Graham, Janet Loughman, Jane Sanders and Alanna Sherry contributed their time to review the Representation Principles generally.

Many of the improvements in the second edition of the Representation Principles were informed by the views of children and young people about legal representation. The support and assistance of UNICEF Australia and the Legal Aid Commission of NSW Children’s Legal Service are gratefully acknowledged. Particular thanks for their commitment to the project go to Alanna Sherry and Kerry Graham, who undertook the consultations and produced the report *This is what I think of you: Feedback on Representation Principles for Children’s Lawyers*. The fourth edition includes the views of some young people in central Sydney who are now aged over 18 who were interviewed as part of a small research project undertaken by a law student at the University of Technology Sydney in late 2013. The views of children and young people about their Independent Legal Representatives in Family Court matters included in the fourth edition are taken from the Australian Institute of Family Studies *Independent Children’s Lawyers Study Final Report* (May 2013).

Members of the 2007 Family Issues Committee, Judith Walker, Associate Professor Geoff Monahan, Rod Best and Alexandra Harland updated the guidelines in 2007 to reflect legislative amendments to that date.

Members of the 2014 Family Issues Committee, the Indigenous Issues Committee and the Juvenile Justice Committee were all invited to contribute to the fourth edition of the Principles. Special thanks are due to Ms Jane Irwin and Ms Jenny Bargaen of the Juvenile Justice Committee for their many contributions to this edition.

Many local, national and international documents have been consulted in updating the fourth edition. These include American Bar Association *Standards of Practice for Lawyers Representing Children in abuse and neglect cases* (1996), American Bar Association Section of Family Law *Standards of Practice for Lawyers Representing Children in Custody Cases* (2003), the Australian Institute of Family Studies *Independent Children's Lawyers Study* (2013), National Legal Aid *Guidelines for Independent Children's Lawyers* (2013), the US National Juvenile Defender Centre *Juvenile Defense Standards* (2012) and *Role of Juvenile Defense Counsel in Delinquency Court* (2009), Legal Aid New South Wales *Children's Criminal Practice Standards* (2008), Legal Aid New South Wales *Care and Protection Practice Standards* (2012), Legal Aid New South Wales *Practice Standards for Independent Children's Lawyers in Family Law Matters* (2007), Dr Nicola Ross PhD thesis, *The Hidden Child: How Lawyers See Children in Child Representation* (2012 – used with permission of the author).

CONSULTATION

A wide range of people and organisations were invited to comment on the Representation Principles and have expressed interest in their development. The Law Society of New South Wales thanks everyone who has been, and continues to be, involved with this project.

COMMENTS

The Law Society encourages readers to make comments and suggestions for further refining and expanding the Representation Principles. Please write to the Policy Lawyer for the Juvenile Justice Committee or the Policy Lawyer for the Family Issues Committee at the Law Society of New South Wales, 170 Phillip Street, Sydney NSW 2000. DX 362 Sydney. Telephone: (02) 9926 0333, Fax: (02) 9231 5809.

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Preface to the Fourth Edition

In 1997 the Human Rights and Equal Opportunity Commission and the Australian Law Reform Commission called on the legal profession to develop guidelines for the legal representation of children and young people. The Law Society of New South Wales was pleased to be able to answer that call. We hope that these principles will help to challenge the dangerous view that the Children's Court is a place for beginners, and that the child client deserves only a basic competency in advocacy and representation. These principles set a high standard, and it is hoped that solicitors will use them as the platform for their professional work with children and young people.

The Law Society is very aware that the principles espouse best practice, and that the practical day-to-day challenges facing the children's lawyer sometimes demand compromises and alternative approaches. Nevertheless, it is our observation that lawyers who represent children are generally a tenacious lot, and we are confident these principles will not be ignored. Indeed, the first and second editions have excited interest around the world, and throughout Australia. Judges, Magistrates, Directors-General and agency managers are referring to these principles in increasing numbers, and the Law Society encourages their adoption by legal professionals wherever possible. It is pleasing that similar representation guidelines have now been developed in the Australian Capital Territory (*Guidelines for Lawyers Representing Children and Young People in Care and Protection Matters in the ACT Children's Court, August 2004*) and South Australia (*Guidelines for Lawyers Acting for Children, July 2007*). Another important and related recent development is the publication of a *Code of Conduct for Legal Representatives in Care and Protection Proceedings in the Children's Court of NSW* (May 2012), prepared by the Children's Court Advisory Committee.

The Law Society welcomes your comments and your ideas for the next edition, particularly if you are a young person with experience of the justice system. In our courts and tribunals, children sometimes tragically have no one to trust. The competent lawyer often represents the final opportunity for a child for the right to be heard. Adherence to these principles will ensure that that last chance is not squandered, and that all children and young people entering our justice system can at least count on their lawyers to do the right thing.

The Law Society thanks everybody who has been involved with the development of the first four editions of these principles, and encourages all lawyers working with children in legal systems to apply them. To the many outstanding children's lawyers working in Australian courts we hope the principles provide some grounding for your practice, and a springboard for promoting the highest principles of legal professionalism.

Juvenile Justice and Family Issues Committees

August 2014

Definitions

‘Child’

These principles use the term ‘child’ to refer to a person under the age of 18. This term is used so as to be consistent with definitions under the United Nations Convention on the Rights of the Child. A number of publications and statutes use the term ‘young person’ to refer to children of teenage years. These principles incorporate a degree of flexibility to ensure that legal practitioners interact with and represent all persons under the age of 18 in a manner appropriate to their age and level of maturity.

‘Direct representative’

A direct representative, regardless of how he or she is appointed, receives and acts on instructions from the child client irrespective of what the representative considers to be the best interests of the child client. A direct representative owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due to an adult client.

‘Best interests representative’

A best interests representative must act impartially and make submissions to the court to further the best interests of the child. The representative must inform the court of the child’s wishes by proper means (*Bennett and Bennett* (1991) FLC 92-191). A best interests representative may be referred to as an independent legal representative as defined in s 99A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), or as an independent children’s lawyer (ICL), formerly child representative, in the *Family Law Act 1975* (Cth). The role of the ICL is set out in s 68LA of the *Family Law Act*. See also *Re K* (1994) 17 Fam LR 537 which sets out the non-exhaustive criteria for appointment of an ICL. For comprehensive research on the role of the ICL in the Family Court of Australia, see Rae Kaspiew, Rachel Carson, Shamee Moore, John De Maio, Julie Deblaquiere and Briony Horsfall, *Independent Children’s Lawyers Study, Final Report*, Australian Institute of Family Studies, Canberra, May 2013, (available at <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/IndependentChildrensLawyersStudyReport-Publication.pdf>)

‘Guardian ad litem’

A guardian ad litem is a person appointed by the court to make decisions on behalf of a child in the legal proceedings. This is generally done where the court considers the child incapable of conducting legal proceedings in their own right. While different jurisdictions have differing requirements of the guardian ad litem, it is generally required that the guardian ad litem not have an interest adverse to the child’s, and expected that the guardian ad litem will act in the best interests of the child. A guardian ad litem may be appointed by the Family Court (s 123, *Family Law Act 1975* (Cth)) and by the Children’s Court in care and protection matters (s 100, *Children and Young Persons (Care and Protection) Act 1998* (NSW)).

‘Case Guardian’

A case guardian is a person appointed by the court to make decisions on behalf of a child in the legal proceedings. The role of the case guardian is the same as that of the guardian ad litem.

A. Who is the Client?

PRINCIPLE A1 - Client of a direct representative

Where a legal practitioner is acting as the direct representative of a child, the child is the client. The direct representative must act upon the instructions of the child client, regardless of who has appointed the practitioner or who is paying legal fees.

Commentary

Direct representatives may be appointed by a court, retained directly by the child or by the parents or guardians of the child. In some cases parents or guardians may fund the legal representation. Such funded legal representatives should proceed on the basis that the child is the client and that the person paying the legal fees has no authority to direct the practitioner in his or her undertaking of the representative role. This is also the case for direct representatives funded by Legal Aid NSW or any other source of funding.

Where third parties are involved in appointing or funding legal representation, or become involved in the direct representative's relationship with the child, the direct representative should clearly state his or her role to the third party, and explain the limitations of the third party's role in the legal representation of the child. The same prohibition against disclosure of confidential information provided by the child applies to third parties that may be funding the legal representation as to any other third person. Direct representatives may need to advise or remind third parties that it is the child who is the client of the representative.

PRINCIPLE A2 - Client of a best interests representative

A best interests representative does not have a client. A best interests representative acts as an officer assisting the court by representing the best interests of the child. Nevertheless, the child must still be given the opportunity to express his/her views and have those views taken into account.

Commentary

A best interests representative may be appointed by a court or retained directly by the parents or guardians of the child. In circumstances where a representative has not been appointed by the court, the representative may appear only with leave. Despite the fact that some children who are provided with a best interests representative may be intellectually, developmentally and emotionally capable of providing instructions, the best interests representative does not act on the instructions of the child.

A best interests representative should seek the child's views and present them to the court. However, the best interests representative does not act on the instructions of the child, parent, guardian or anyone else connected with the child or the legal proceedings. The representative will often request

experts from other fields to provide reports or opinions. Best interests representatives must consider a range of information and opinions in deciding what position to take in any proceedings, and must conduct their role consistently with what they consider to be the best interests of the child. A court may give directions to a best interests representative appointed by the court, as it may with any other practitioner, but it is not to limit the role of the best interests representative.

PRINCIPLE A3 - Client where a guardian ad litem or next friend has been appointed

Where a guardian ad litem or next friend has been appointed to act on behalf of a child in legal proceedings, that person is the client of the legal practitioner. The legal practitioner is to act on the instructions of the guardian ad litem or next friend.

Commentary

Where a court appoints a guardian ad litem or next friend, that person is given authority to conduct proceedings on behalf of the child. Any legal representation is therefore provided to the guardian ad litem or next friend. There is no relationship between the legal representative and the child, although the legal practitioner may be required to communicate with the child in performing his or her duties as instructed by the guardian ad litem or next friend. General principles for communicating with children, determining when children should give evidence and questioning child witnesses remain relevant for legal practitioners acting for a guardian ad litem or next friend.

B. Role of Practitioner

PRINCIPLE B1 - Role of the practitioner

A practitioner is to act as the direct representative of the child except where:

- The law clearly states that the representative shall play a different role in representing the child; or
- The practitioner determines that the child is incapable of giving instructions.

Under no circumstances should the practitioner proceed if he or she is uncertain of the basis of representing the child.

Commentary

There is sometimes confusion for practitioners in determining what their relationship should be with the child they have been appointed, or retained, to represent. Practitioners should represent a child as a direct representative unless there are reasons why this model cannot or should not apply. The primary examples of when a lawyer acts as a 'best interests' representative are in the Family Court, where the court may appoint an Independent Children's Lawyer (ICL) to independently represent the child's interests (ss 68L and 68LA *Family Law Act 1975* (Cth)), and in care matters in the Children's Court where, depending on the child's age and maturity, the court may appoint a lawyer to act either as an independent legal representative (ILR) or a direct legal representative (ss 99-99D *Children and Young Persons (Care and Protection) Act 1998* (NSW)). A direct representation model is the same model used for practitioner-client relationships where the client is an adult, requiring the practitioner to act on the instructions of the client and to maintain confidentiality. The model allows children to participate directly in proceedings if they are able and willing to do so, as required by international law. Solicitors, whether acting as direct or indirect representatives, are also required to comply with the *New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules)*, available on the NSW Law Society website.

There are some circumstances where the law has determined that children should not be directly represented in proceedings, but should have a legal representative acting in their best interests. Where the law clearly indicates that a practitioner should act as a best interests representative, the practitioner should adhere to the law and these guidelines where they apply to the professional conduct of a best interests representative. These guidelines set out instances where the law requires practitioners to act as a best interests representative in specific jurisdictions.

Where the child is not capable of giving instructions, the practitioner cannot act as a direct representative. These guidelines provide assistance to practitioners to determine when a child is incapable of giving instructions (see Principle C1).

"I want my lawyer to say the same as what I say." - male, 16 years

“My lawyer made my mind up for me.” - female, 16 years

“The lawyer should explain the consequences, but if the kid still wants to do it, that is what the lawyer’s got to do.” - male 17 years

PRINCIPLE B2 - Role where child is incapable of giving instructions

Where the practitioner considers that the child is unable to instruct the practitioner in the proceedings as a whole, the practitioner should ensure that the court is aware of the practitioner’s concerns about the child and take appropriate steps to achieve a fair and just outcome for the child.

Commentary

A child who is unable to give instructions should still be represented. It is the duty of a practitioner appointed or retained to directly represent a child to obtain professional advice in the form of a report on whether the child is capable of giving instructions (see Principle C1).

In criminal proceedings, the practitioner should consider making an application for the matter to be dismissed, or for the court to deal with the child under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) if the report writer advises that the child is developmentally disabled, suffering from mental illness or from a mental condition for which treatment is available. If the application is unsuccessful, the practitioner will need to consider raising the issue of fitness with the court in the usual way.¹

In care and protection proceedings, the practitioner should make an application to the court to declare that the child or young person is incapable of giving instructions and to appoint a guardian ad litem for the child. The practitioner will then act on the instructions of the guardian ad litem (see s 100(4), *Children and Young Persons (Care and Protection) Act 1998* (NSW)).

PRINCIPLE B3 - Determination of best interests of the child

The determination of the child’s best interests should be based on objective criteria addressing the child’s specific needs and preferences, and the goal of expeditious resolution of the case.

Commentary

A best interests representative is required to make a judgement as to the best interests of the child. This judgement should be made on an objective basis, based upon consideration of all available material, including the preferences expressed by the child. Nothing about legal training or traditional legal roles necessarily qualifies practitioners to make decisions on behalf of children. Best interests representatives should seek the assistance of behavioural science and child development experts

¹ See the extensive judgment on these points by Marien J in *Police v AR*, Children’s Law News May 2010. See also *Mantel v Molyneux* [2005] NSWSC 955 at 28.

where this would assist the representative to determine the best interests of the child. The role of the best interests representative is further set out in Principle E2.

PRINCIPLE B4 - Should not act as both direct representative and best interests representative

A practitioner should not act simultaneously as both a direct representative and a best interests representative for the same child. If circumstances arise during proceedings that indicate the need to change from one mode of representation to the other, the practitioner should inform the court.

Commentary

A practitioner should never act as both a direct representative and a best interests representative for the same child. In some cases a practitioner may establish a direct relationship with the child, and commence to act on the child's instructions. If the child withdraws instructions, or refuses to continue to give instructions to the practitioner, the practitioner should not seek to become a best interests representative. The direct relationship between the practitioner and child client is established under a different set of circumstances, and may have encouraged the child to be more open with a direct representative than with a best interests representative.

If the child withdraws or refuses to continue to give instructions, the direct representative should inform the court that they do not have instructions from the client on the matter. If the situation is such that the child's case cannot proceed, the direct representative should consider whether they should request the court to appoint a different direct representative, or ask the court to determine the child's capacity to give instructions.

Some young defendants, particularly girls, described circumstances where their lawyer had represented them in both capacities, with extremely negative results. The most pressing example was where "my lawyer ... got me separated from my child." - female, 18 years.

In this case, the young person received a probation order that prohibited her from residing with her mother who had custody of her child. The young person stated that her lawyer requested that such a condition form part of the court order.

"The worst thing about lawyers is that they make decisions for you." - male, 16 years

C. Capacity to give Instructions

PRINCIPLE C1 - Determining whether child has capacity to give instructions

In determining whether the child is capable of giving instructions, the child's willingness to participate and ability to communicate should guide the practitioner rather than any assessment of the 'good judgement' or level of maturity of the child.

Commentary

Child development literature suggests that the skills required to be capable of giving instructions are regularly attained by age six or seven. However, it is the practitioner's responsibility to make an assessment based upon the capacity of the individual child. Socioeconomic factors can affect the learning and verbal skills of children. The practitioner should consider whether a perceived incapacity could be overcome by developmentally appropriate communication, or by adopting a different approach in taking instructions. In instances in which the practitioner concludes that the child may be suffering mental impairment, developmental delay or advancement, or intellectual disability, the practitioner should seek expert advice from a child development or other relevant professional.

PRINCIPLE C2 - Enhancing child's capacity

The practitioner should seek to enhance the child's capacity to provide instructions by structuring all communications to take into account the child's age, level of education, cultural context and degree of language acquisition.

Commentary

Practitioners should be mindful that a child's capacity to give instructions will depend to a significant degree on the practitioner's skills in interviewing children and the child's stage of cognitive development. Adults frequently underestimate the knowledge and understanding of children, and their capacity to work through problems and provide a cogent view as to what is in their interests. If necessary, practitioners should consider seeking the assistance of appropriate behavioural scientists to assist them to ascertain the wishes and directions of younger children. Further discussion of appropriate communication with child clients can be found under Principle D6.

PRINCIPLE C3 - Limited capacity

(a) Limited instructions

Where the client is capable and willing to provide instructions in relation to some, but not all, issues, the practitioner should directly represent the child in relation to those issues in which instructions have been received. In such cases, the practitioner should make procedural decisions with a view to advancing the child's stated position and elicit whatever information and assistance the child is willing and capable to provide.

(b) Disability

An ongoing, pre-existing condition may affect a child’s capacity to give instructions or it may affect a child’s ability to communicate instructions clearly. Practitioners should seek help from appropriate service providers.

Commentary

A child may have the capacity to give instructions in relation to some aspects of the case but not others. If the client is incapable of, or unwilling to, provide instructions on a particular issue or issues, the practitioner should inform the court that instructions are limited to certain issues. This may happen when the entire legal issue before the court is too complex for the child to understand, yet the child is able to instruct on their preferences relevant to the issue. In other circumstances the child may be reluctant to give instructions on a particular issue, but willing to instruct on other relevant issues.

Where a disability makes it difficult for the child to provide or communicate instructions, the practitioner should seek appropriate professional assistance to enhance the child’s ability to give clear instructions or views.

Practitioners should be alert to factors that may temporarily limit a child’s capacity to provide instructions, for example if the child is affected by drugs and/or alcohol, suffering trauma or is in a distressed emotional state. In these circumstances, the practitioner should seek an adjournment and ensure that the short-term needs of the child are addressed.

Where reluctance to instruct results from shyness, nervousness or fear, the practitioner should make further efforts to make the child feel comfortable and safe.

“I like it when my lawyer builds my confidence.” - male, 17 years

“They don’t take disabilities into account.” - female, 17 years

D. Taking Instructions and Preferences

PRINCIPLE D1 - Seeing the child

Other than in exceptional circumstances, his or her legal representative must see every child before going to court. The practitioner should see the child as soon as possible after their appointment, and, where possible, well before the first hearing.

Commentary

It is acknowledged that increasingly, the first meeting between a child and a legal representative in criminal matters may be by way of an Audio Visual Link (AVL).

However, all efforts should be made to meet with the child before each and every court date at which the child must appear to prepare him or her for what is usually a very confusing and sometimes frightening experience. In addition, changes in placement, school suspensions, in-patient hospitalisations, and other changes affecting the child's immediate environment warrant meeting with the child again.

In-person meetings allow the practitioner to explain to the child what is happening, what alternatives might be available, and what will happen next. Problems in communication might also be more easily overcome. This is important in establishing a relationship of trust with the child and is of value even if the child is non-verbal. It also allows the practitioner to get a sense of who they are representing and to assess the child's circumstances, often leading to a greater understanding of the case.

Where funding is limited, practitioners should not use this as a reason not to make every effort to meet with the child as often as is necessary to fully prepare him or her for each appearance.

“Why can't kids see the person who is making these decisions? I think it's wrong that they can decide what should happen in your life without seeing you.”²

“I usually met with my lawyer in person beforehand but when I was coming from custody she was just there at court.” – male, 19 years (2013)

“When I was under 18 I would speak to my lawyer once for about 2 seconds before I went into court and then never again.” – male, 18 years (2013)

“You kind of have to. I hate doing it over the phone.” – female, 18 years (2013)

² Lyon, C. (2000), Children's participation in private law proceedings with particular emphasis on the question of meetings between the judge and the child in family proceedings, in M. Thorpe & E. Clarke (Eds.) No fault or flaw: The future of the Family Law Act 1996, papers presented at the President's Third Inter-disciplinary Conference on Family Law, Dartington Hall, Totnes, 24-26 September, 1999.

“I’d rather meet in person – I like to speak to people face to face.” – male, 20 years, on meeting by way of AVL (2013)

“When I meet the lawyer by AVL I don’t actually know who’s in the room, even if the lawyer has told me. I prefer to meet face to face.” - male, 19 years (2013)

PRINCIPLE D2 - Direct representative relationship with child

Where the practitioner is acting as a direct representative:

- The practitioner should meet with the child client often enough to maintain and develop the lawyer-client relationship; and
- Sufficient time should be devoted to ensure that the child client understands the nature of the proceedings and that the practitioner has understood the child client’s directions.
- The practitioner should identify the options available to the child client and advise about possible consequences.

Commentary

The direct representative should not hurry a child client to give instructions. Sufficient time should be set aside to ensure that the interview can proceed at the child client’s pace.

As with any client, the direct representative may counsel against the pursuit of a particular position sought by the child client. The direct representative should recognise the power dynamics inherent in adult/child relationships, and that the child may be manipulated, intimidated, or overly dependent upon the views of an adult, including the views put forward by the direct representative. Therefore, the direct representative should ensure that the decision the child client ultimately makes reflects his or her actual position. The direct representative must also be prepared to allow the child client to change course or even withdraw instructions.

While the child client is entitled to determine the overall objectives to be pursued, the direct representative, as any adult’s legal representative, may make certain decisions with respect to the manner of achieving those objectives, particularly in relation to procedural matters. Rules relating to the practitioner’s duty to the court apply to all practitioners in all roles (see Rules 17 – 28 *Solicitors’ Rules*).

Where a practitioner is acting as a direct representative in care and protection proceedings, the need to receive instructions should not, by itself, justify the attendance of the child at court for care proceedings (see s 96(2A) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW)).

PRINCIPLE D3 - Best interests representative relationship with child

Where the practitioner is acting as a best interests representative, the practitioner should meet with the child, explain their role, and seek the views of the child as well as other information that may be relevant to the child and their well-being. The practitioner should identify the options available to the child client and advise as to possible consequences.

Commentary

While best interests representatives do not take instructions from the child, the representative should meet with the child, seek the views of the child and present these to the court, as a part of their role. The general principles regarding taking instructions from children are relevant to this part of the best interests representative's role. A major role of the best interests representative is to keep the child informed of progress of the litigation. The best interests representative should also act to minimise the trauma to the child associated with the proceedings.

"I met her once ... We shook hands. She said her name and left" – female, aged 15 -17, on ICL in Family Court³

"It was a bit, um, worrying, but, like, you didn't know what was going to happen, because I know for a long time that she wasn't doing much ... Because it was a long time before I finally met her. When I met her, I remember she, like, explained what she did to, like, help me, but then ... she really didn't do much after that. I didn't really remember her doing anything." - male, aged 12 – 14, on ICL in Family Court⁴

PRINCIPLE D4 - Time and venue of meeting with child

Contact with the child should occur where and when it is comfortable and convenient for the child, not merely where and when it is convenient for the practitioner.

Commentary

The office of a practitioner is not always the best place to take instructions, although it may be the most convenient for a practitioner. Sitting behind a big desk emphasises the gulf between the practitioner's knowledge of law and that of the child client. Other options for seeing a child client should be considered, such as their home, a youth centre, or their cultural centre. Confidentiality issues should especially be considered when determining where the interview will take place. Practitioners should seek instructions as to who can be advised of the visit. The practitioner should also be mindful of their own safety, and the appropriateness of seeing a child at another location.

³ Kaspiew et al (2013), Section 8.5.2 Views on contact with the ICL, Independent Children's Lawyers Study Final Report, p 155

⁴ See Note 3.

The practitioner should concentrate on facilitating openness and putting the child at ease. To that end, it is important for the practitioner to communicate with the child at the child's level. Where it is necessary to conduct the interview in a practitioner's office, consider the office layout and use the least formal room available. Practitioners with a number of child clients might consider decorating their rooms to incorporate child-friendly images and providing age-appropriate activities for siblings who may also be in attendance. Practitioners need to be flexible with seating arrangements and should try to remove obstacles such as desks and computers from between the practitioner and client, although consider that some clients may appreciate having a 'safety' desk in front of them. Practitioners may also need to consider other forms of communication e.g. pencil and paper communication, that will allow the child to express him or herself more comfortably.

Every effort should be made to accommodate the convenience of children. Keeping child clients waiting for a long time will only add to their anxiety. Older children may have to come alone to appointments, but may face difficulties in remembering appointment times, finding an address, or having access to transport. Follow up calls and reminder calls with the child are essential as are clear information about time, date, address and purpose.

"They are always so busy." - male, 17 years

"Lawyers should come talk to you earlier." - female, 14 years

"They put pressure on you to be quick." - female, 15 years

"Never for very long. It's pretty pointless - they don't sit with you long enough to get your side of the story." – male, 19 years (2013)

"They don't really understand my case before they get into court – sometimes they're still reading over the brief when they're talking to the judge. They should just talk to me for longer before they get in there." – male, 19 years (2013)

PRINCIPLE D5 - Support persons

The practitioner should consider whether the child would benefit from the support of a trusted adult during the interview process. It is essential that the practitioner seek the child's view on this issue. The support person should only be invited at the request of, or with the consent of, the child.

Commentary

Many children need or would benefit from having a trusted adult with them during the interview with the practitioner. In many cases, this will be a parent or carer. Where such a relationship does not exist, is dysfunctional, or inappropriate, the practitioner should be careful to make further enquiries. A youth

worker, community elder, a school counsellor, a pastoral care person, or older peer can be substituted where the child is clear about the nature of the meeting with the practitioner, and is completely comfortable with the presence of the support person.

The support person may also be used to enhance the child's ability to give clear instructions or views, e.g. an interpreter, behavioural science worker. In all cases the child should be asked his or her views before a support person is invited to attend.

Children have the right to exclude support persons, including parents, from the room at any time. This issue may become particularly relevant when giving instructions on sensitive issues. It is generally acknowledged that people like family members can exert pressure on a child.

Practitioners should be alert for signs of uneasiness in the relationship between the child and the support person, and tactfully suggest that the support person leave the room if this would benefit the child. Where the child is represented in a best interests capacity, the practitioner should see the child alone, although there may be circumstances where the family member might initially meet the child representative with the child to assist in settling the child and then leave.

In family law and care matters, it will not be appropriate to have family members present during the interviews as family members will often either be parties themselves to the proceedings or potential witnesses.

Where a support person is to be present with the child, the practitioner should ensure that the child understands that the support person may not be subject to the same confidentiality requirements as the practitioner. In particular, where the child is directly represented, the practitioner must consider the fact that the presence of the support person will affect client legal privilege, and ensure the child understands the effect this will have on their legal rights and protection of confidential information they may wish to disclose to the direct representative.

“They should ask you first, ‘Do you want your mum in the room?’” – female, 14 years

“Sometimes my caseworker was with me, but my lawyer always asked if she wanted them to be there. They have to ask that don’t they?” – female, 18 years (2013)

“They sometimes assume you want the support person there, but I don’t actually mind.” – male, 19 years (2013)

“My sister translated what the lawyer was saying into words that I could understand – she simplified what the lawyer was saying because the lawyer didn’t do that. It was alright because my sister was there, but the lawyer used words I didn’t understand.” - female, 20 years (2013)

PRINCIPLE D6 - Communication

The practitioner should use language appropriate to the age, maturity, level of education, cultural context and degree of language proficiency of the child.

Preference should be given to face-to-face communication with the child rather than communication by telephone or in writing.

Commentary

Practitioners representing children should undergo some training in child development and children's language patterns. They should not assume that years of legal experience, having their own children, or success in the courtroom means that they are good communicators with children.

It is important that practitioners are prepared and informed before any meeting with the child. The child must always be treated with respect – this involves listening and giving the child the opportunity to express him or herself without interrupting, addressing the child by his or her name, accepting that the child is entitled to his or her own view etc.

Practitioners should explain the reason why they are asking questions of the child. At the same time, they should be alert to sensitive matters. For example, be careful about asking unnecessary questions or asking questions about matters that are fully covered in file briefing notes or other available material.

In family law matters there are topics about which the ICL should avoid talking to the children. The most obvious example is where there is an allegation that the child has been sexually, physically or emotionally abused. In these cases invariably the child will be interviewed by a court appointed expert and may have already been interviewed by other adults such as police. The ICL could contaminate the child's evidence and multiple interviews could amount to further abuse of the child.

Basic rules for practitioners are:

- Always make time to speak with the child;
- Treat the child with respect;
- Explain the practitioner's role and the process to be followed;
- Provide an overview of the interview/consultation so the child knows what to expect;
- Speak slowly; use short sentences and simple, everyday vocabulary;
- Pause often to allow the child time to process what you are saying, to ask questions, or to interrupt;
- Provide information in short segments, rather than all at once – take breaks when it seems that the child's concentration has faded;
- Invite the child to ask questions regularly and prompt them to indicate his or her understanding;
- Be aware that a child may not recognise that they have not understood what you have said;

- Before asking questions, the practitioner should inform the child that it is acceptable for the child to say “I don’t know” and that a question repeated at any stage does not indicate the child’s answer was wrong or inappropriate;
- Be aware that a child may interpret what you say literally;
- Provide concrete examples when explaining concepts or legal strategies – avoid the use of metaphors and figures of speech;
- Respond constructively to the child’s suggestions or instructions;
- Be aware of cultural or religious sensitivities;
- Be aware of the special communication needs of children with disabilities. Consider non-verbal methods where the child is developmentally disabled, very young or has problems verbalising, e.g. using diagrams, pictures and videos;
- Be aware of and sensitive to relevant factors in the child’s family background or other circumstances that may affect the child’s ability to communicate. This includes any form of abuse or trauma that the child has suffered;
- Seek further assistance from others (being careful to preserve confidentiality) if necessary.

“The best thing about a lawyer is when they talk in a way that you can understand.” - female, 14 years

“The worst thing about my lawyer was that she asked really personal questions.” - female, 15 years

“They talk down to us and don’t speak our language.” - female, 15 years

“The best lawyers understand you and listen to what you have to say.” - female, 17 years

“They can be very businessman like – lawyers should be more friendly. I know I’m going to get treated like that in court, so I want my lawyer to be more personable.” – male, 19 years (2013)

“Sometimes I feel like I couldn’t talk to my lawyer as much as I wanted. When I had [name] I didn’t have their contact number and I could only see them when they wanted to see me. I found it hard to get in touch with them” – male, 19 years (2013)

“My lawyer gave me a lot of respect. She didn’t judge me, she just listened.” – male, 21 years (2013)

“She had this, I think, air about her that she had more important things to do, um, she – she didn’t really – she clearly doesn’t think we have a clue, um, and I’, - I’m very smart ... The worst bit would be her not listening, I suppose, disregarding what we had to say and then

representing the wrong – representing views that weren't actually ours." - male, 15 – 17 years,
on ICL in Family Court⁵

⁵ Kaspiew et al (2013), 8.5 Experiences of young people, Independent Children's Lawyers Study Final Report, p 160.

E. Duties of Representation

PRINCIPLE E1 - Communication

The practitioner communicates the realistic expectations of the proceedings and ensures that the child understands the practitioner's role and capacity to effect change.

Commentary

The practitioner should use language appropriate to the age, maturity, level of education, cultural context and degree of language proficiency of the child. Preference should be given to face-to-face communication with the child rather than communication by telephone or in writing.

Communication in this context is the process of establishing a relationship of trust, of providing an environment that is confidential and supportive, and building in checkpoints along the way to ensure that the child really understands what is going on.

It is also the way in which instructions or preferences are made known to the practitioner. The information a child gives in interviews can be misleading unless practitioners have understood how to ask children developmentally appropriate questions and how to interpret their answers accurately.

The child needs to understand the role of the practitioner (particularly whether the role is that of a direct representative or best interests representative), the nature of the proceedings and have an appreciation of the possible consequences of the court proceedings, both in the short-term and long-term. These should be explained in language appropriate to the child. It is important to ask the child to explain back to you what they think your job is and why they are at court, in their own words, to ensure that true understanding has been attained.

The direct representative has a duty to explain to the child such information as will assist the child in having maximum input in determination of the particular position at issue. The direct representative should inform the child of the relevant facts and applicable laws and the ramifications of taking various positions, which may include the impact of such decisions on other family members or on future legal proceedings.

The direct representative should communicate with the child client to assist the client to understand what is expected to happen before, during and after each hearing. The child client should be shown the courtroom, or at least a diagram of the courtroom, before the hearing and be shown where the participants will be seated. It is helpful for a direct representative to ensure that the child's family and/or support persons are not confused, as this could adversely affect the child client.

“We both decided what should happen in court.” - female, 16 years

“There are so many people in there – who are they?” - female, 15 years

“I’ve never been told who’s who in the court room” - male, 18 years (2013)

“Sometimes they did explain what would happen and sometimes not.” - male, 19 years (2013)

“He tried to explain, but I didn’t really care.” - male, 17 years (2013)

“He listened to me, but he mostly did what he wanted – he was really controlling the process.” - female, 20 years (2013)

PRINCIPLE E2 (Part 1) - General obligations of direct representative

The direct representative should represent the child in a competent and professional way in accordance with the Solicitors’ Rules and general legal requirements.

In particular the direct representative should:

- Actively advocate the child’s position.

- Advise the child concerning:
 - the subject matter of the litigation,
 - their rights and options,
 - the court system,
 - the proceedings,
 - the practitioner’s role,
 - the role of other parties,
 - the relationship of confidentiality,
 - what to expect in the legal process,
 - the possible outcomes and their consequences for the child.

- Obtain copies of all court documents and evidence relevant to the case.

- Participate in all pre-trial hearings or conferences, hearings, negotiations, alternative dispute resolution processes, and discovery that affect the child’s case.

- Inform other parties and their legal representatives that he or she is representing the child and expects reasonable notification prior to any changes in circumstances of the case or the underlying social situation that affect the child and the child’s family.

- **Attempt to reduce case delays.**

- **Identify appropriate family and professional resources for the child.**

- **Ensure the court enters a written judgment or order consistent with the verbal judgment or order of the court.**

- **Consider and discuss with the child client the desirability and possibility of appeals or further applications.**

Commentary

A child client is owed the same duties of competence, loyalty, confidentiality and professional representation as an adult client.

In some jurisdictions the child may choose to attend at court but is not required to do so. The practitioner should discuss their options with the child client and monitor their preferences during the proceedings.

The direct representative's presence at and active participation in all telephone or other conferences and hearings is critical, unless the hearing involves issues completely unrelated to the child. Although the child's position may overlap with the position of one or more other parties (e.g. parents, third-party caretakers or a government agency), the direct representative should be prepared to participate fully in any joint proceedings and not merely defer to other parties.

The direct representative should actively advocate in accordance with the child client's instructions and preferences. Where the child client is in court, the direct representative should help the child client to understand the progress of proceedings and explain the submissions being made. Before closing submissions, the direct representative should quickly consult with the child client to ensure that all aspects of the instructions have been put to the court.

Where the child client's instructions are confusing or inconsistent, then those instructions should be put to the court as is. The direct representative should not impose structure upon the child client's instructions when it is not there. This is not, however, a license to not properly obtain instructions. Any confusion or inconsistency should not be a result of the representative's failure to clarify instructions, or provide professional counsel.

Practitioners should be sensitive to the child client's expectations of progress in a matter and the disruption that may be caused by adjournments. Delays can be harmful, particularly where the child is at risk or their living environment has been adversely affected by the case (including being in custody). Delays can also impact adversely on the child's evidence. However, there may be some circumstances when delay may be beneficial to the child. The direct representative should always consider the effect

that delay will have upon the child client's case and well-being. In cases where the child is giving evidence, the direct representative could request that such cases be given priority in case listings or seek a fixed hearing date for the child to give evidence. The direct representative should consider the use of settlement negotiations and other dispute resolution mechanisms where these would be appropriate.

Part of the direct representative's role is to consider referral to appropriate non-legal services and resources which may assist the child client, including counselling, educational and health services, substance abuse programs, housing and other forms of assistance for which the child client may qualify. Support persons in the form of family members, friends, neighbours, teachers, or services such as educational support or recreational opportunities may also be considered. The desirability of obtaining reports from experts or calling expert witnesses should also be considered. In all cases the direct representative should discuss suggestions with the child client, and should not make referrals without the child client's authorisation.

The direct representative should explain to the child client the legal possibility and merit of an appeal or alternative or further applications, and also the ramifications of filing an appeal or further applications, including the potential for delaying implementation of services or other court orders, and what would happen pending the outcome of the appeal or further application.

“Lawyers should give their legal advice and own opinion on your charges.” - male, 17 years

“When my lawyer talks to the judge I don't understand what they are talking about.” - male, 17 years

“They say stuff in court which I didn't tell them to.” - male, 17 years

“He was good at speaking to me and the judge.” - female, 16 years

“Why do they adjourn all the time?” - lots of participants

“I didn't know what happened in court – the escorts told me.” - male, 17 years

“Some of them do explain it all after court – they turn the big words into little words.” - male, 17 years

“My lawyer didn't listen to what I wanted. Many times I basically got handed my arse for things that happened when I was 12 or 13 when I was 16 because of lawyers not listening to what I wanted to do.” – male, 21 years (2013)

“I spoke up in court because my lawyer wasn’t representing me properly - I felt like only the prosecutor was standing there paying attention and listening to me.” – male, 19 years (2013)

“My lawyer said I could appeal but I didn’t want to because I didn’t get locked up. I should’ve gone ahead with the appeal, I realise now that I’m a bit older.” – male, 21 years (2013)

“I appealed one of my cases and ended up getting another 3 months on my sentence, but my lawyer explained that that might happen. It was a confusing process.” – male, 20 years (2013)

PRINCIPLE E2 (Part 2) - General obligations of best interests representative

The best interests representative should represent the child’s best interests in a competent and professional way in accordance with the Solicitors’ Rules and general legal requirements, even though the child is not the client of the representative and the representative is not acting on the instructions of the child.

In particular the best interests representative should:

- Advise the child concerning:
 - the subject matter of the litigation,
 - their rights and options,
 - the court system,
 - the proceedings,
 - the practitioner’s role,
 - the role of other parties,
 - the relationship of confidentiality,
 - what to expect in the legal process,
 - the possible outcomes and their consequences for the child.

- Obtain copies of all court documents and evidence relevant to the case.

- Participate in all pre-trial hearings or conferences, hearings, negotiations, alternative dispute resolution processes, and discovery that affect the child’s case.

- Inform other parties and their legal representatives that he or she is acting as the best interests representative for the child and expects reasonable notification prior to any changes in circumstances of the case or the underlying social situation that affect the child and the child’s family.

- Attempt to reduce case delays.

- Identify appropriate family and professional resources for the child.
- Ensure the court enters a written judgment or order consistent with the verbal judgment or order of the court.
- Consider and discuss with the child the possibility of appeals or applications.
- In *In the matter of P and P* (1995) FLC 92-615 the court defined the role of the best interests representative in the Family Court. A best interests representative should:
 - Act in an independent and unfettered way in the best interests of the child.
 - Act impartially, but if thought appropriate, make submissions suggesting the adoption by the court of a particular course of action if he or she considers that the adoption of such a course is in the best interests of the child.
 - Inform the court by proper means of the child's wishes in relation to any matter in the proceedings. In this regard, the representative is not bound to make submissions on the child's instructions but is bound to bring the child's express wishes to the court's attention.
 - Arrange for the collation of expert evidence and otherwise ensure that all evidence relevant to the child's welfare is before the court.
 - Test by cross-examination where appropriate the evidence of parties and their witnesses.
 - Ensure that the views and attitudes brought to bear on the issues before the court are drawn from the evidence and not from a personal view or opinion of the case.
 - Minimise the trauma to the child associated with the proceedings.
 - Facilitate an agreed resolution to the proceedings.

Commentary

The overriding duty of the best interests representative is to ensure that the child's long term best interests are served by the decision of the court. The court is only able to reach this decision by having all relevant evidence before it. It is therefore the duty of the best interests representative to ensure that all relevant evidence is presented to court. The duty also entails undertaking investigations to seek all relevant evidence.

In many cases the representative will be unable to interview other parties, particularly where they have individual legal representation. This can only be done with the consent of the party's representative (see *Solicitors' Rule 33*).

The representative is required to make judgements about expert evidence or reports necessary to assist the court, and ensure that this evidence is made available, and to cross-examine all witnesses and question the accuracy of evidence called by other parties where this touches upon the child's welfare.

In all possible circumstances children should have an opportunity to have their views heard in court and administrative proceedings. Where a best interests representative has been appointed, it is an important part of the best interests representative's duty to seek the preferences of the child and ensure that these are placed before the court, even if the representative ultimately submits an alternative option to the court in the best interests of the child.

There is a danger that a child involved in legal proceedings may be subjected to 'systems abuse'. 'Systems abuse' occurs when children are subjected to excessive and potentially harmful investigations, interviews and reports. While most such investigations, interviews and reports are intended to provide information to assist the court in reaching a determination, a child may be traumatised by retelling or reliving facts, or by simply being the subject of repetitive and persistent questioning. The best interests representative should ensure that the relevant and appropriate, but not excessive, interviews and reports are conducted, attempting to balance the need for information and the best interests of the child. In this regard the representative should consider not only those interviews and reports undertaken at the request of him or herself, but also those requested by other parties or the court. Adequate briefing of third parties preparing reports may assist to reduce the details the child is required to provide. The paragraph on delays in Principle E2 (Part 1) also applies here.

While the best interests representative does not directly represent the child, it is the role of the best interests representative to ensure that the child understands the outcomes of proceedings, including interim orders. Wherever possible the best interests representative should explain orders to the child on the same day as the order or judgment is delivered.

"The best thing about my lawyer is that she gave me choices." - female, 15 years

"They don't explain procedures in court." - female, 17 years

"Yes, she ran through things, but it didn't happen like that in court." - female, 16 years

"Um, I probably would have told her that it probably would be better had she just actually represented me ... I still don't know where she got her facts from, but I think it would have been better if she had actually represented me ... [She could have done that by] taking my viewpoints

and not making decisions about what was best for me before actually meeting with me. And stating them and getting a chance to know me ... Like, not meeting me prior to that, I think that was very dodgy, 'cos she already made the viewpoint. I don't know where that came from that she had, and at least doing that to see my point of view." – male, 15–17 years⁶

PRINCIPLE E3 - Consideration of alternative forms of dispute resolution

Legal practitioners representing children should consider whether it would be appropriate to use alternative forms of dispute resolution, including negotiation, to seek expeditious resolution of the case.

Commentary

Legal practitioners representing children should consider the appropriateness of the child participating in conferencing, mediation, negotiation (through legal representatives or otherwise), or other forms of dispute resolution. In some jurisdictions dispute resolution services may be required or provided as part of the proceedings.

While practitioners should seek to minimise delays and promote permanency for the child, the practitioner should consider the potential benefits for, and the possible detrimental effects on, the child participating in alternative forms of dispute resolution. Factors to consider include:

- The legislative requirements for alternative dispute resolution.
- The nature of the power dynamics between the child and other parties.
- The existence or allegations of abuse.
- The long term relationships between the parties.
- The need for an authoritative decision from a court.
- The advantages of early resolution of the issues in question.
- The advantages and disadvantages of involving the child and members of their family, extended family and other carers in decision making.

⁶ Kaspiew et al (2013), 8.5 Experiences of young people, *Independent Children's Lawyers Study Final Report*, p 161.

PRINCIPLE E4 - Whether a child should give evidence

When determining whether to call a child as a witness, or to consent to the child being called as a witness by another party, practitioners should consider the following:

- The child's need or desire to give evidence.
- Any repercussions from giving evidence.
- The necessity of the child's direct evidence.
- The availability of video-conferencing or remote facilities for the giving of evidence.
- The use of written or audio-taped statements as alternatives to the child's direct evidence.
- The availability of other evidence which may substitute for direct evidence from the child.
- The child's developmental ability to provide direct evidence and withstand possible cross-examination.

Commentary

These considerations, subject to relevant statutory provisions, apply equally to a direct representative and a best interests representative. In some jurisdictions, the court must give leave for the child to be called as a witness. A direct representative is ultimately bound by the child client's direction concerning the giving of evidence.

Giving evidence can promote the child's self-respect and dignity, as well as being useful to the court. However, it is often a stressful and horrifying experience for children.

Evidence from children has traditionally been viewed as unreliable. Behavioural science experts now generally discount this view. The practitioner should ensure that, where a child is required to give evidence, the legal processes ensure that the child is able to give reliable and accurate evidence, and that stress placed on the child is minimised.

All child witnesses should be prepared for and understand the purpose and process of the trial. Where the witness is not the client of the practitioner, the practitioner should ensure the child witness understands the practitioner's role and their relationship. This will not only help to minimise the stress on the child, but will assist them to give better evidence.

“I was in the witness stand and it was extremely confronting knowing everyone in the room was judging me.” – male, 19 years (2013)

“I spoke up in court because my lawyer wasn’t representing me properly - I felt like only the prosecutor was standing there paying attention and listening to me.” – male, 20 years (2013)

PRINCIPLE E5 - Questioning a child witness

When examining a child witness, practitioners should ensure that questions put to the child are phrased in a way that they can understand.

Commentary

This principle should apply to all practitioners in any proceedings where a child gives evidence, not merely to those practitioners representing children. The quality of a child witness’s evidence can depend on the communication skills and expertise of the interviewer and/or the questioner in court. Where appropriate the legal practitioner should request that legal processes be modified to ensure that as far as possible child witnesses can give reliable, comprehensive information as required.

PRINCIPLE E6 - Protecting a child witness giving evidence

When a child is being cross-examined by another party, practitioners should be vigilant about monitoring the phrasing of questions and should object to inappropriate questioning where necessary, particularly where such questioning will confuse, intimidate or upset the child.

Commentary

The language and formalities of the courtroom are incomprehensible to most children and can intimidate and confuse child witnesses. Practitioners often use complicated sentence structures deliberately during cross-examination to confuse the witness, and frequently interrupt witnesses to restrict their accounts and to retain tight control over the testimony.

Children are particularly vulnerable to cross-examination intended to intimidate and confuse the witness. Representatives, indeed all practitioners, should be vigilant in monitoring cross-examination of child witnesses, and object to inappropriate questioning when it arises. Principle E5 above encourages practitioners to put questions in language that the child witness can understand. Rule 21.2.3 of the *Solicitors’ Rules* requires that a practitioner not make allegations or suggestions against any person that are principally made in order to harass or embarrass the person. In some instances legislation or court rules outlining procedures for particular courts preclude the use of intimidating, harassing or other inappropriate forms of questioning. Practitioners should bring these requirements and professional principles to the court’s attention where appropriate.

“It was definitely intimidating. A lot of the time the opposition would confuse you and get you to say something you didn’t want to say. It’s a daunting thing to do.” - female, 21 years (2013)

PRINCIPLE E7 - Safety of the child

The practitioner should minimise risk to the safety of the child when the child is required to attend interviews, hearings, or any other proceedings.

Commentary

The practitioner should consider any risk posed to the child by other parties, publication of names and facts as well as access by the general public. In some cases, verbal or visual contact alone could be a risk. When the child is required to attend proceedings, the practitioner should check the physical environment such as the layout of the hearing rooms to minimise the adverse effects on the child's well-being. If such risks cannot be avoided, the practitioner should bring this to the attention of the court and seek appropriate orders.

"They keep away the baddies from us." - female, 10 years

PRINCIPLE E8 - Continuity

The practitioner should be consistently available to represent the child or ensure that incoming practitioners are properly briefed.

Commentary

Continuity of representation is particularly important for children. Practitioners should do whatever they can to promote consistency. While a practitioner should endeavour to ensure continuity of representation, this may not always be possible.

The reality that other practitioners may appear on duty days or for procedural matters should be explained to the child. However, the child should be reassured that the practitioner will be the one who will represent him or her at hearings and whenever important decisions are made.

Where it is necessary that another practitioner represent the child for a period of time or for the remainder of a matter, the reasons for the change in representation should be explained to the child, and, wherever possible, the child should be introduced to the new practitioner. A direct representative should consult with the child client prior to referral of the matter to another practitioner.

Practitioners should ensure that file notes properly record both the legal issues and matters of importance about the child.

"I hate it when you get a different lawyer every time you go to court." - male, 17 years

"Sometimes you get the worst one and then different ones." - female, 15 years

“One time I had 4 different lawyers. It feels like they’re abandoning you and you just end up with a fill in who doesn’t understand the case from the start. It’s good to have one solicitor who you know and like because then you can trust them.” – male, 18 years (2013)

“I hated having different lawyers. That person may not have had time to go through your file, they don’t know you or your circumstances, you have to explain everything again. It’s unprofessional.”
– female, 21 years (2013)

F. Confidentiality

PRINCIPLE F1 - General rule of confidentiality

A practitioner representing a child as a direct representative owes the same duty of confidentiality as would be owed to an adult client. The practitioner must not disclose any confidential information without the authorisation of the child, unless the practitioner is permitted or compelled by law to disclose or in other circumstances required by the Solicitors' Rules.

A practitioner representing the child as a best interests representative also has a duty of confidentiality to the child.

Commentary

Rule 9 of the *Solicitors' Rules* sets out the duty of confidentiality, which a practitioner owes to the client. A child client is entitled to the same protection of these provisions as any other client and has a right to confidentiality in communications between himself/herself and his/her legal representative. Rule 9.2 specifies circumstances in which disclosure of confidential information is permitted. Rule 10, which restricts a practitioner acting against a former client, is also applicable to child clients.

At present, it is unclear whether the law requires a practitioner to reveal confidential information where the welfare of the child is affected. There are clearly specific statutory requirements to disclose and/or legal protection for good faith disclosures of certain information. These are generally set out in child welfare legislation in each State and Territory and also in the *Family Law Act 1975* (Cth). In most cases where the child is at serious risk of harm there will be a legal option for the practitioner to report information, which will remove the risk. Principle F3 should guide practitioners in determining when, how and to whom confidential information should be disclosed.

Some practitioners assert that there is no duty of confidentiality between a child and a best interests representative, because no client-practitioner relationship is said to exist. In the interests of assisting the development of trust between the representative and the child, the child should have the protection of a confidential relationship with the best interests representative. Children in this situation do not, however, have the protection of client legal privilege.

It is particularly important for the best interests representative to explain their role to the child, the nature of their confidential relationship, and the limitations of that relationship. If the child wants to disclose information they have not disclosed to another person, the best interests representative should seek the assistance of a third party, such as a counsellor, to lead the 'disclosure interview' with the child. This is in order that the best interests representative avoids becoming a witness in the proceedings.

They shouldn't speak about my charges in front of my mum. - female, 15 years

They should ask me first if it's OK to tell. - female, 9 years

He should tell the judge everything. [If I don't want my lawyer to tell], well, it's the judge so [my lawyer] should tell him everything. - female, 10 years

PRINCIPLE F2 - Explanation of confidential relationship

Practitioners should explain, in terms appropriate to the child, the confidential nature of the relationship between the practitioner and child client. This includes explanation of the circumstances in which the practitioner may disclose confidential information. This explanation should be undertaken before commencing to interview and/or take instructions from the child, and be repeated as often as is necessary.

Commentary

Practitioners should ensure that children understand the confidential nature of the relationship between practitioner and client, including circumstances in which the practitioner can release confidential information.

PRINCIPLE F3 - Disclosure of confidential information

Where the practitioner is obliged to disclose confidential information in accordance with the law, the practitioner should first seek the child's authority to disclose. The practitioner should explain the reason why the disclosure should or must be made. In all cases, the minimum amount of information necessary to relieve the practitioner's obligations should be disclosed.

Commentary

A situation may arise where a child provides information to the practitioner which indicates that the child has been, or is at risk of being, abused or ill-treated or subjected to behaviour which psychologically harms them. The practitioner should discuss with the child the advantages of bringing the matter to the attention of relevant authorities, and seek permission to disclose the information. If the child refuses to authorise disclosure, the practitioner may only proceed to disclose in situations where the law permits or compels disclosure (see *Solicitors' Rules* 9.2 and specific circumstances set out in these principles). The child should be advised of a practitioner's intention to disclose despite the child's refusal to authorise.

Relevant laws relating to disclosure of confidential information in specific jurisdictions are incorporated into these principles. These laws set out the practitioner's ability or obligation to disclose. Only the minimum information required to fulfil the practitioner's obligation or to relieve the risk to the child should be disclosed without the child's authority.

In situations where the child client of a direct representative is at risk but refuses to authorise disclosure, the practitioner should explore alternatives other than disclosure with the child that may relieve the risk. This is likely to involve appropriate professional or community services, having regard to the extent of the child's consent.

“They should ask me before telling anything about me in court.” - female, 15 years

“They should ask me first if it's OK to tell.” - female, 9 years

“Sometimes they just open their trap and then ask ‘Was I supposed to say that?’” – male, 16 years (2013)

PRINCIPLE F4 - Client legal privilege

The rule of evidence in relation to client legal privilege applies to confidential communications between child clients and their direct legal representatives.

Commentary

As with general rules relating to confidentiality, the direct representative should advise the child client of the existence of client legal privilege, and the fact that disclosure of confidential information to a third party by the child client may result in the loss of client legal privilege. Direct representatives should consider the existence of client professional privilege and refrain from conducting joint interviews with child clients or providing information to third parties. The presence of support persons during an interview with a child client will also affect client legal privilege.

G. Conflict of Interest

PRINCIPLE G1 - General rule of conflict of interest

The Solicitors' Rules in relation to conflict of interest and the duty to avoid conflicts of interest owed by a legal representative to a client apply to all practitioners representing children.

Commentary

Rule 10 of the *Solicitors' Rules* prohibits a practitioner from acting against a former client. Rule 11 of the *Solicitors' Rules* requires a practitioner to consider whether there would be any conflict of interest in acting for more than one party. These rules apply to practitioners representing children.

It is particularly important where children are involved to anticipate conflict, as a change of lawyer can be unsettling for a child. If there are real or apparent risks of a conflict arising, individual representation should be arranged for all of the children capable of providing instructions. Situations where the practitioner represents more than one party should be continuously monitored for conflict of interest situations. For example, a care and protection matter involving two siblings may commence with one legal representative for both siblings, who at the time indicate similar positions, but develop into a conflict of interest situation when the siblings subsequently desire different results. In such cases, the situation and any required actions or options as a result of the conflict should be explained to the children. In some situations the practitioner may need to withdraw completely, particularly where he or she has obtained confidential information from one child that would have a significant effect on the case of the child. In such a situation a conflict of interest will occur if the representative continues to act for any of the children.

Particular care should be taken when considering representing co-accused in a criminal matter, due to the potential for conflict.

A practitioner should not undertake to represent a child in a direct representation capacity and a best interests capacity at the same time.

PRINCIPLE G2 - Specific conflict of interest situations

A practitioner should not under any circumstances undertake the following joint representations, which involve inherent conflicts of interest:

- Child and parent in proceedings for juvenile/criminal justice, care and protection, adoption, medical decision making, civil commitment where the parent is the movant, or residence/access applications.

- Child and government agency in the same matter.

H. Access to Documents and Reports

PRINCIPLE H1 - Access to documents by child client

A child client is entitled to access documents held by the direct representative that have been created or received by the direct representative for the purposes of the child client's matter. Direct representatives should ensure that any legal or court-ordered restrictions in relation to documents are followed, and otherwise consider the impact on the child client who accesses case related documentation.

Commentary

General rules relating to client access to documentation held by practitioners can be found in Rule 14 of the *Solicitors' Rules*. These rules apply equally to child clients. However, direct representatives should consider the capacity of child clients to understand the documentation, and the potential emotional impact the documentation may have upon the child client (particularly reports concerning the child client). The direct representative must follow court-ordered or other legal restrictions placed upon documentation.

The provision of documents to child clients should be consistent with the child client's capacity to comprehend the contents of the document. Direct representatives should ensure the information contained in the documents is presented to the child client in a manner they can understand, taking into consideration the child client's ability to read, the terms contained in documents and reports, and the stress and time limitations placed on the child client.

Many documents and reports may contain information likely to distress the child client. The direct representative should consult with the author of a document or report as to whether any information in the document is unknown to the child client and is likely to cause distress. Wherever possible, this information should be imparted to the child client by the author of the document, who should explain matters that may not have been addressed in the document itself. If the child client does not feel comfortable communicating with the author of the document, another person familiar to the child client with experience in the area should impart the information to the child client.

Where a best interests representative is providing a child with access to documents or reports, the same considerations as to the capacity of the child to comprehend and the potential emotional impact on the child should be applied. In addition, the best interests representative must have regard to court orders and any legislative requirements governing disclosure in these situations.

I. Interaction with Third Parties

PRINCIPLE I1 - Referral to third party services

Where the practitioner considers it necessary to employ the services of another professional or service provider to further the case, the child should be consulted about the involvement of the third party and advised about the nature and purpose of the referral.

Commentary

In a number of circumstances other professionals and service providers will be required, including interpreters, barristers, doctors, counsellors and other social service workers. Third parties should only be consulted or involved where they would benefit the child. In a direct representation situation, third parties should be consulted or involved only with the authority of the child client. In all cases the practitioner should explain the need for the third party and the role that third party will play, e.g. what type of information the third party will provide or what service they will perform for the child. The situation regarding support persons is further discussed under Principle D5.

Where the third party must be provided with confidential information to enable performance of his or her services, the practitioner can only provide this information with the child's authority.

Practitioners should ensure that the third party is properly briefed, to avoid having the child providing details of the case again unless this is absolutely necessary.

“The best thing about my lawyer is that she had a social worker to help her and me.” - female, 14 years

“Sometimes I didn't have a call – the lawyer and the judge had decided between them who I should see.” - male, 19 years (2013)

J. Ending the Relationship

PRINCIPLE J1 - Preparing child for end of relationship with practitioner

The practitioner should prepare the child for the end of the relationship before the end of the case. The practitioner and child should discuss the fact that the practitioner's role will soon be over, and determine what contact, if any, they will continue to have.

Commentary

As a professional, the practitioner should follow standard practice for ending any practitioner-client relationship including debriefing, explanation of orders or outcomes, the potential for appeals or further applications, and an invitation to make further enquiries. This should be done both orally and in writing.

As a child's representative, the practitioner must also consider the personal relationship with the child. In some cases the child may regard his or her lawyer as the last champion, while others may have had a problematic relationship with the practitioner.

Practitioners must exercise caution and a great degree of sensitivity when ending the professional relationship with the child.

Practitioners should inform the child that he or she can be contacted if the child has any problems arising from the case. However, over-dependence on the practitioner should be discouraged. Practitioners may consider appropriate referrals to other non-legal services, and providing information to the child about available services including youth services, clubs, health facilities, counselling services, and telephone help lines.

While a practitioner should endeavour to ensure continuity of representation, this may not always be possible. Where it is necessary that another practitioner represent the child for a period of time or for the remainder of a matter, the reasons for change in representation should be explained and, wherever possible, the child should be introduced to the new practitioner. A direct representative should consult with the child client prior to referral of the matter to another practitioner.

"After court my lawyer comes to see me and explains." - male, 16 years

"I think that your lawyer should stay in contact, especially if you are homeless and you don't know other people who can help you, or if you have more court dates." - male, 16 years

"They should check in on you or if you are in lock up." - male, 17 years

"I don't want any contact – there are enough other people in my life." - male, 18 years

PRINCIPLE J2 - Right to dismiss direct representative

A child client has the right to dismiss their direct representative, regardless of how or by whom the direct representative was appointed.

Commentary

Just as an adult client has the right to dismiss their legal representative, a child client is entitled to express dissatisfaction with the services provided by their direct representative and/or dismiss their direct representative. If a child client expresses dissatisfaction with the legal services provided, the direct representative should provide the child client with contact details for appropriate professional complaints bodies. If the direct representative was appointed by the court and the client wishes to dismiss the representative, the representative should advise the court of the dismissal.

As a best interests representative is not the legal representative for the child and does not act upon the instructions of the child, the child cannot dismiss the best interests representative even if he or she is unhappy with the performance or conclusions reached by the representative. If a best interests representative becomes aware of the child's dissatisfaction and that dissatisfaction cannot be resolved, the representative should bring this to the attention of the Court and seek specific directions.

APPENDIX

Issues for elaboration and consideration

Submissions are invited on issues relevant to representing child clients in the criminal, care and protection, family law, civil and administrative law jurisdictions.

The following issues are important but are not regarded as exhaustive:

Criminal Jurisdiction

- Capacity to give instructions and the *doli incapax* principle.
- Importance of considering *doli incapax* principle.
- Particular importance of effective communication with regard to a decision to plead guilty.
- The issues raised by the use of AVL for interviewing and taking instructions from children
- Representation and police interviews.
- Participation and understanding.
- Competence of representation.
- Legal aid in criminal proceedings.
- Representation of Indigenous and rural children.
- Overlap between criminal matters and other matters, in particular care and protection matters.
- The role of a children's lawyer in youth justice conferences and other alternatives to court.

Care and Protection Jurisdiction

Practitioners representing children in this jurisdiction must be familiar with and appropriately comply with the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Important issues to take note of include:

- Definitions of child and young person under the Act.
- Child's participation.
- Proceedings conducted in non-adversarial manner.
- Child appearing in own right.
- Models of representation.
- Access to information.
- Support persons.
- Duty to explain proceedings.
- Alternative Dispute Resolution.
- Child giving evidence.
- Safety, welfare and wellbeing of the child.
- Appearance of lawyer.

- Dismissal.
- Long term relationships.

Family Law Jurisdiction

- Direct representative relationship.
- Best interests principle.
- Best interests representation.
- Appointment of Independent Children's Lawyer.
- Role of Independent Children's Lawyer.
- Case Guardian.
- Calling a child to give evidence.
- Relationships with third parties.
- Confidentiality.
- Reporting risk to children.
- Support persons.
- Confidentiality (family reports).
- Ending the relationship.

Civil and Administrative Law Jurisdictions

- Guardian ad litem and standing.
- Costs.
- Alternative Dispute Resolution.

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Model Litigant Policy for Civil Litigation

1. Introduction

- 1.1 The Model Litigant Policy has been adopted to assist in maintaining proper standards in litigation and the provision of legal services in NSW. The Model Litigant Policy is a statement of principles. It is intended to reflect the existing law and is not intended to amend the law or impose additional legal or professional obligations upon legal practitioners or other individuals.¹
- 1.2 The Model Litigant Policy applies to civil claims and civil litigation (referred to in this Policy as litigation), involving the State or its agencies including litigation before courts, tribunals, inquiries and in arbitration and other alternative dispute resolution processes.
- 1.3 Compliance with the Model Litigant Policy is primarily the responsibility of the Head of each individual agency in consultation with the agency's principal legal officer. In addition, lawyers, whether government or private, are to be made aware of the Model Litigant Policy and its obligations.
- 1.4 Issues relating to compliance or non-compliance with the Model Litigant Policy should attempt to be resolved between the parties in the first instance, and then are to be referred in writing to the Head of the agency concerned.
- 1.5 The Head of each agency may issue guidelines relating to the interpretation and implementation of the Model Litigant Policy.
- 1.6 The Model Litigant Policy supplements but does not replace existing Premier's Memoranda and policies relating to Government litigation, in particular:
- M1997-26 - Litigation Involving Government Authorities
 - M1995-39 - Arrangements for Seeking Legal Advice from the Crown Solicitor's Office
 - NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Abuse.

2. The obligation

- 2.1 The State and its agencies must act as a model litigant in the conduct of litigation.

¹ It should be noted that clause 2 of Schedule 2 of the *Legal Profession Uniform Law Application Act 2014* provides that a law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

3. Nature of the obligation

3.1 The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the State and its agencies will act as a model litigant has been recognised by the Courts.²

3.2 The obligation requires that the State and its agencies, act honestly and fairly in handling claims and litigation by:

- a) dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation;
- b) paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;
- c) acting consistently in the handling of claims and litigation;
- d) endeavouring to avoid litigation, wherever possible. In particular regard should be had to the *NSW Civil Procedure Act 2005* which provides that the overriding purpose of the Act is to facilitate the just, quick and cheap resolution of the real issues in civil proceedings;
- e) where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
 - I. not requiring the other party to prove a matter which the State or an agency knows to be true; and
 - II. not contesting liability if the State or an agency knows that the dispute is really about quantum;
- f) not taking advantage of a claimant who lacks the resources to litigate a legitimate claim;
- g) not relying on technical defences³ unless the interests of the State or an agency would be prejudiced by the failure to comply with a particular requirement and there has been compliance with Premier 's Memorandum M1997-26 - Litigation Involving Government Authorities;
- h) in accordance with Principle 10 of the *NSW Government Guiding Principles for Government Agencies Responding to Civil Claims for Child Sex Abuse*, State agencies

² See, for example, *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342; *Kenny v South Australia* (1987) 46 SASR 268 at 273; *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 155 and *Australian Securities and Investment s Commission (ASIC) v Helicar* (2012) 247 CLR 345.

³ A 'technical defence' is commonly understood to be a defence that 'lacks all substantive merit and is supportable only on a narrow or literal appreciation or interpretation that is at odds with clear reality': *Liao v New South Wales* (2014) NSWCA 71 at (356). Statutory defences available to government parties, such as defences under Part 5 of the *Civil Liability Act 2002* (NSW) or "good faith" defence provisions are not considered to be technical defences. Where appropriate, such defences should be pleaded.

may not rely on a statutory limitation period as a defence in civil claims for child abuse,⁴

- i) when settling civil claims agencies should consider the use of confidentiality clauses in relation to settlements on a case by case basis;
- j) only undertaking and pursuing appeals where the State or an agency believes it has reasonable prospects for success or the appeal is otherwise justified in the public interest. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interest of the State or an agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable;
- k) apologising where the State or an agency is aware that it has acted wrongfully or improperly; and
- l) providing reasonable assistance to claimants and their legal representatives in identifying the proper defendant to a claim if the proper defendant is not identified or is incorrectly identified.

3.3 The State or an agency is not prevented from acting firmly and properly to protect its interests. The obligation does not prevent all legitimate steps being taken in pursuing litigation, or from testing or defending claims made.

3.4 In particular, the obligation does not prevent the State or an agency from:

- a) enforcing costs orders or seeking to recover costs;
- b) relying on claims of legal professional privilege or other forms of privilege and claims for public interest immunity;
- c) pleading limitation periods (other than in child abuse actions);
- d) seeking security for costs;
- e) opposing unreasonable or oppressive claims or processes;
- f) requiring opposing litigants to comply with procedural obligations; or
- g) moving to strike out or otherwise oppose untenable claims or claims which are an abuse of process.

⁴ See also section 6A of the *Limitation Act 1969* which came into effect on 17 March 2016.



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Code of Ethical Conduct



Document approval

The Code of Ethical Conduct has been endorsed and approved by:

Michael Coutts-Trotter

Secretary

Approved: 19 June 2016

X Signature on file

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A message from the Secretary

The people of New South Wales expect the business of the state to be conducted with efficiency, fairness, impartiality and integrity.

Public sector employment carries with it an obligation to the public interest. It requires of us standards of professional behaviour that promote and maintain public confidence and trust in the work of government agencies.

Every one of us in our department, no matter what we do, makes decisions that require judgement, and affects in some way the welfare of others.

Our Code of Ethical Conduct gives guidance on how we're expected to behave at work, and on the kind of decisions that require particular care.

It explains the principles underpinning appropriate conduct in a variety of contexts and the minimum standard of behaviour we're all expected to demonstrate, while respecting the legal rights of FACS workers.

The Code won't address all the issues that may confront staff, but it does provide general principles to guide our actions, decisions and behaviour.

Overwhelmingly people in our department do the right thing. But a few don't.

Sometimes it's because a person sets out to do the wrong thing, but often people get it wrong because they don't think carefully enough about what they're about to do.

Good decisions require preparation, thought and effort. And decision-making improves with practice and reflection.

Our Code of Ethical Conduct is an important support to help all of us make better decisions, and guard against the risk of bad or wrong decisions.

Every good decision adds to the stock of trust within our department and between us and the community.

But every bad decision risks not just the reputation and career of the person who makes it but, by association, the good standing of their colleagues.

As a result we take this Code very seriously. I endorse the values and principles it contains and expect all staff to follow them.

If you have any questions about the Code of Ethical Conduct, ask your manager, the local HR representative or the Professional Conduct, Ethics and Performance Unit.

Michael Coutts-Trotter
Secretary

NSW public sector principles of conduct

The government sector core values described in this Code clarify the role of FACS workers in preserving the public interest, and adding professional, apolitical value to the commitments of the Government of the day, through integrity, trust, service and accountability.

The core values require public servants to:

- act professionally with honesty, consistency and impartiality
- place the public interest over personal interest
- provide apolitical and non-partisan advice
- provide transparency to enable public scrutiny.

Abiding by the Code is part of the conditions of employment with FACS. A breach of the Code may lead to remedial or formal disciplinary action, ranging from counselling to termination of employment.

The [Government Sector Employment Act 2013](#) sets out the core values for the public sector, and the principles that guide their implementation as follows:

Integrity

- Consider people equally without prejudice or favour
- Act professionally with honesty, consistency and impartiality
- Take responsibility for situations, showing leadership and courage
- Place the public interest over personal interest.

Trust

- Appreciate difference and welcome learning from others
- Build relationships based on mutual respect
- Uphold the law, institutions of government and democratic principles
- Communicate intentions clearly and invite teamwork and collaboration
- Provide apolitical and non-partisan advice.

Service

- Provide services fairly with a focus on client needs
- Be flexible, innovative and reliable in service delivery
- Engage with the not-for-profit and business sectors to develop and implement service solutions
- Focus on quality while maximising service delivery.

Accountability

- Recruit and promote workers on merit
- Take responsibility for decisions and actions
- Provide transparency to enable public scrutiny
- Observe standards for safety
- Be fiscally responsible and focus on efficient, effective and prudent use of resources.

Policy Statement

1 Purpose

The purpose of the Code of Ethical Conduct (the Code) is to identify mandatory and other requirements for the conduct of all FACS' workers, consistent with [Public Service Commissioner Direction No 1 of 2015](#) and the [Government Sector Employment Act 2013](#).

2 Application

The Code applies to all FACS' workers. For the purpose of this Code "worker" includes senior executives, ongoing, temporary or term workers, casual workers, contractors, sub-contractors, labour hire workers, apprentices, trainees, students on work-experience and volunteers.

The Code is to be applied at all times in working relationships with colleagues, clients, stakeholders and the government of the day.

This Code should be read in conjunction with other codes of professional conduct or practice which apply to workers given their professional qualifications or roles within FACS (including, but not limited to, nurses, psychologists, therapists, and legal officers).

Senior executives are also required to comply with the requirements of the Public Service Commission's [Code of Conduct and Ethics for Public Sector Executives](#).

Note: This Code does not apply to Community Services Authorised Carers who are covered by the [Code of Conduct for Authorised Foster, Relative and Kinship Carers](#).

3 Engagement

The aim of the Code is to establish a common understanding of standards of behaviour expected of all FACS workers.

The Code does not attempt to provide a detailed and exhaustive list of what to do in every situation. Instead, it represents a broad framework that will help workers decide on an appropriate course of action when faced with an ethical issue. It is supported by a number of FACS policies and procedures listed in Section 5.

It is also designed to create a culture which supports workers, encourages them to participate in decision making and to feel confident about making decisions in the course of their work that are consistent with FACS' core values.

The Code requires anyone who has responsibility for other workers to engage with them and provide support and training to enable them to not only make the best decisions, but also achieve their personal and professional potential and the best possible outcomes for the organisation and its clients.

FACS senior executive will support all workers to enable them to meet what is expected of them under the Code.

The Code is subject to periodic updates. Updates are communicated with all workers and published on the FACS intranet site. All workers must be familiar with the current version of the Code. An electronic version of the Code is available on the FACS intranet site.

4 Legislation

A principle of the Code is to uphold the law. For FACS workers, the law includes, but is not limited to:

- [*Anti-Discrimination Act 1977*](#) regarding equal employment opportunity *and equal access to services*
- [*Children and Young Persons \(Care and Protection\) Act 1998*](#) regarding obligations relating to the care and protection of, and provision of services to, children and young people
- [*Child Protection \(Working with Children\) Act 2012*](#) regarding obligations to obtain checks and clearances for workers engaged in child-related work
- [*Disability Inclusion Act 2014*](#) provides safeguards for people accessing NSW funded disability supports and services, including employment screening of workers and reporting protocols
- [*Crimes Act 1900*](#) regarding criminal offences
- [*Government Sector Employment Act 2013*](#) particularly sections 25 and 30 regarding the general conduct and management of organisations and section 63 regarding workforce diversity and the integration of workforce diversity into workforce planning
- [*Government Information \(Public Access\) Act 2009*](#) regarding public access arrangements to agency information
- [*Government Advertising Act 2011*](#) regarding requirements to issue advertising compliance certificates
- [*Health Records and Information Privacy Act 2002*](#) regarding the fair and responsible handling of health information
- [*Housing Act 2001*](#) particularly section 70 regarding restrictions on transactions involving FACS or Land and Housing Corporation (LAHC) properties and section 71 regarding the use of information for personal gain in relation to FACS or LAHC properties
- [*Independent Commission Against Corruption Act 1988*](#) regarding reporting of any matter suspected on reasonable grounds to involve corrupt conduct

and to comply with any requirement or direction of the ICAC in relation to a referral of matters by the ICAC

- [Lobbying of Government Officials Act 2011](#) regarding the lobbying of public officers
- [Ombudsman Act 1974](#) regarding obligations to cooperate with investigations by the Ombudsman and obligations relating to reportable conduct concerning child protection matters
- [Privacy and Personal Information Protection Act 1998](#) regarding the protection of personal information, and the protection of the privacy of individuals generally
- [Public Finance and Audit Act 1983](#) particularly sections 11 and 45C regarding the system of internal control over the financial and related operations of agencies
- [Public Interest Disclosures Act 1994](#) regarding receiving, assessing and dealing with public interest disclosures
- [Public Works and Procurement Act 1912](#) regarding the procurement of goods and services by government agencies
- [State Records Act 1998](#) regarding the creation, management and protection of agency records and public access to those records
- [Work Health and Safety Act 2011](#) regarding the health and safety of workers and the maintenance of healthy and safe workplaces.

5 Policy links

This Code should be read in conjunction with the following NSW government policies and guidelines:

- [Code of Conduct and Ethics for Public Sector Executives](#)
- [Code of Practice for Procurement](#)
- [Conduct Guidelines for Members of NSW Government Boards and Committees](#)
- [NSW Lobbyists Code of Conduct](#)

This Code should be read in conjunction with the following FACS policies and procedures:

- [Conflict of Interest Policy](#)
- [Information Security Policy](#)
- [Managing Gifts, Benefits and Bequests Policy and Procedure](#)
- [Procurement Policies](#)
- [Public Interest Disclosures Internal Reporting Policy](#)
- [Senior Executive Probity Management Policy](#)

- [Statement of Business Ethics](#)
- [Respectful Workplace Policy and Procedure](#)
- [Salary Under and Overpayments Policy and Procedures](#)
- [Social Media Policy](#)
- [Workforce Safety and Wellbeing policies and procedures.](#)

6 Support and advice

Workers can get advice and support about anything in this Code from:

- their manager
- their local HR Representative, HR Cluster Lead or by calling Staff Support Centre on (02) 9765 3999 for general inquiries
- Professional Conduct, Ethics and Performance for matters relating to conflicts of interest, gifts, benefits or bequests, misconduct or alleged breaches of this Code via PCEP@facs.nsw.gov.au
- the local Union representative.

Contractors, consultants, students or volunteers should call their FACS contact officer(s).

7 Mandatory conduct – all workers

7.1 General

All workers

- must act in accordance with relevant legislation and FACS policies and procedures, including those listed in Sections 4 and 5
- may make a public interest disclosure under the [Public Interest Disclosures Act 1994](#) about fraud, corrupt conduct, maladministration serious and substantial waste, or government information contravention to a FACS Disclosure Officer (currently the Director, Professional Conduct, Ethics and Performance)
- should report possible breaches of the Code to relevant officers (Section 13)
- should seek assistance when unsure about how to implement the Code (Section 6).

7.2 Acting in the public interest

All workers should treat all people with whom they have contact in the course of their work:

- equally without prejudice or favour
- with honesty, consistency and impartiality.

They should also, in the course of their work:

- place the public interest over their personal interests, as per the FACS [Conflict of Interest Policy](#)
- uphold the law, institutions of government and democratic principles
- provide apolitical and non-partisan advice
- provide transparency to enable public scrutiny
- be fiscally responsible and focus on efficient, effective and prudent use of resources.

Acting in the public interest requires leadership, courage and innovation to develop practical recommendations and actions that are consistent with the core values and will help the Government of the day achieve its objectives. Acting in ways that are expedient or convenient, but which do not promote the integrity, trust, service and accountability of the public sector, is not in the public interest.

7.3 Interacting with clients, colleagues and the community

In all their interactions with colleagues, clients, stakeholders, other agencies, and the Government of the day, all FACS workers are expected to:

- take responsibility for decisions and actions
- appreciate difference and welcome learning from others
- build relationships based on mutual respect
- communicate their intentions clearly and invite teamwork and collaboration
- provide services fairly, with a focus on client needs
- be flexible, innovative and reliable in service delivery
- engage with the not-for-profit and business sectors to develop and implement service solutions
- focus on quality while maximising service delivery
- recruit and promote workers on merit
- take responsibility for decisions and actions
- act transparently to enable public scrutiny
- comply with FACS [Workforce Safety and Wellbeing Policies and Procedures](#).

7.3.1 Interacting with FACS' clients

It is recognised that some workers will have personal relationships with people who are FACS clients. This Code does not prevent workers maintaining these relationships but workers must manage these relationships so they are not in conflict with their professional responsibilities.

Workers must:

- act with impartiality, courtesy, promptness and fairness
- respect the rights and dignity of clients and community members
- not discriminate against, bully or harass any person in their dealings with them
- give information clearly, simply and in the most appropriate form
- maintain confidentiality and privacy
- manage work and personal relationships so that professional boundaries are maintained
- declare to their manager or other appropriate person, any conflicts or potential/perceived conflicts of interest between their professional and personal interests.

Workers must not:

- develop or pursue relationships which extend beyond professional boundaries
- influence clients to provide personal benefit or gain to any worker including themselves
- provide services for which they do not have the appropriate authority, skills or training
- provide advice to clients on financial matters unless it is part of their job, they are authorised to do so, or the advice is consistent with policy, programs or services provided by FACS
- accept an appointment that may lead to a conflict of interest between their personal lives and their professional responsibilities e.g. sole signatory to a bank account, Power of Attorney, or Executor of an estate
- take photos or films of clients or the children of clients unless authorised to do so for approved work purposes.

Where dignity of risk places a work health and safety risk on workers or clients, workers need to balance dignity of risk with their duty of care to ensure the safety and welfare of clients and other workers.

7.3.2 Bullying, discrimination and harassment

As per FACS [Respectful Workplace Policy and Procedure](#), FACS will not tolerate bullying, discrimination or harassment in the workplace.

All workers have a right to work in an environment that is free from all forms of bullying, discrimination and harassment. Workers have a right to be treated with dignity and respect.

All workers must:

- treat colleagues and clients with courtesy, respect and dignity
- not bully, harass or discriminate against other workers, applicants for employment with FACS, clients, contractors, consultants, agency workers, members of the public, volunteers or students on placement. All incidents of bullying, discrimination or harassment will be treated seriously and dealt with quickly, fairly, confidentially, impartially and without victimisation.

7.3.3 Gifts, benefits and bequests

As per FACS [Gifts, Benefits and Bequests Policy](#), workers must not seek personal benefit or reward for the work they undertake or make improper use of their work, status, power or authority to gain personal benefit.

Gifts, benefits and bequests must be carefully dealt with. In general, workers should not accept gifts, benefits or bequests as this can result in perceptions of bias, conflicts of interest, or in some cases corrupt conduct. Workers must not accept gifts, benefits or bequests intended to, or likely to, influence the way they carry out their duties.

Workers must not accept money under any circumstances, and must report any offers of money immediately to the Departmental Fraud Control Officer (i.e. the Executive Director, Corporate Governance and Performance).

7.3.4 Use of social media

As per FACS [Social Media Policy](#), workers must recognise the potential for damage to be caused (either directly or indirectly) to themselves, the department and/or its clients through personal use of social media (such as Facebook, Instagram or Twitter) where they can be identified as a FACS worker.

It is expected that workers would not knowingly form relationships with clients using social media. However, it is recognised that there may be circumstances in which it would be appropriate for workers to communicate with clients using such forums. If there is a need for workers to communicate with a client using social media, they must only do so with the permission of their manager.

Workers are also personally responsible for the content and any comment they publish in a personal capacity on any social media platform. It is important that workers ensure their conduct on their own personal social media accounts does not adversely reflect on their employment with FACS.

When accessing social media via the FACS internet and intranet systems, workers must do so in accordance with internet, IT and email usage policies, which require workers to use these resources 'reasonably', in a manner that does not interfere with work, and is not inappropriate or excessive.

As per the FACS [Social Media Policy](#), workers must report any inappropriate or unlawful activity they become aware of, that relates to the department, or that breaches or is seen to breach this Code, or other employee policies.

Where inappropriate, offensive or unlawful content or significant feedback or criticism of FACS is posted by a FACS client or a member of a client's family, an advocacy service, a funded service provider, another government worker or a member of the general public the matter should be dealt with under FACS complaints policy and reported to the Governance and Audit Unit which will investigate each incident and determine the appropriate action to be taken.

7.3.5 Confidentiality and privacy

FACS workers have access to a wide range of information relating to the operations of the department. It is a requirement of all workers to maintain the confidentiality of all information they come across in their work.

As per FACS [privacy guidelines](#), FACS workers must comply with NSW privacy legislation, particularly the [Privacy and Personal Information Protection Act 1998](#) and the [Health Records and Information Privacy Act 2002](#), when collecting and managing personal and health information.

Workers and clients have a right to seek access to their personal information held by FACS. All workers have a role in assisting this access subject to specific privacy policies.

All workers must:

- respect the confidentiality and privacy of colleagues and clients
- protect client information so that it is not made available to people outside FACS or anyone employed in FACS who does not have a legitimate work related need for the information
- not use FACS information to gain a financial or personal advantage
- handle health information fairly and responsibly by treating personal details of clients and workers (e.g. health records, worker phone numbers or information in client profiles) confidentially and not disclose them without authority
- not disclose the identity of people who report risk of significant harm of children and young people
- not make or retain copies of confidential FACS materials off site e.g. client and personal details of workers
- protect the security of their computer e.g. by keeping passwords private
- comply with the [State Records Act 1998](#) by keeping full and accurate records and ensuring they are kept in safe custody.

In some cases, releasing information without proper authority could be a criminal offence. It is therefore important that workers not release any information without obtaining appropriate authority to do so.

Undermining the decisions of the Government by releasing information without authority is a serious breach of employment responsibilities and a breach of this Code. Such actions could lead to disciplinary action.

Workers who leave the government sector are expected to continue to respect the confidentiality and privacy of information gained during their employment.

7.3.6 Private work and secondary employment

Note – this section does not apply to consultants, contractors, people on work experience, students or volunteers

As per FACS [Secondary Employment and Private Work Policy and Procedure](#), FACS supports workers who choose to undertake secondary employment within FACS or private work outside FACS where such work does not conflict with or compromise their primary FACS employment.

Workers must be able to continue to perform the duties and tasks of their primary role with FACS in a safe and effective way.

FACS, as an employer, has a duty of care under work health and safety laws to ensure the safety of all its' workers.

In addition, workers must declare and manage any conflicts of interest associated with any secondary employment or private work that could compromise FACS.

Therefore, all workers must seek approval to undertake secondary employment or private work.

Voluntary work may also pose a conflict of interest and this should be addressed using FACS [Conflict of Interest Policy](#) and associated documents.

7.3.7 Public comment

Workers have the right to enter into public debate on political and social issues. However, in situations where private comment may appear to be official comment on FACS, workers should preface remarks by noting that what they say is made in a private or union capacity and is not the official view of FACS.

Workers must not:

- make any comment about the government or FACS to the media unless delegated to do so, and must refer any inquiries from the media or Members of Parliament to the Office of the FACS Executive
- publicly criticise FACS or other workers on social media or public forums such as Facebook, Instagram, Twitter or other social networking sites.

Nothing in this section restricts workers from commenting on union matters as a member of the union, in their capacity as a delegate, or as a union office holder.

7.4 Use of government property, equipment and other resources

7.4.1 General

Workers must use public property, equipment and other resources in an efficient, effective and prudent way. Public resources – money, property, equipment or consumables – must never be used for personal benefit, or for an unauthorised purpose.

FACS believes in allowing reasonable personal use of government property, equipment and other resources such as telephones, email, faxes, computers, photocopiers and the internet. However, it should be remembered that these are provided for business purposes.

In addition to the general requirements mentioned above, workers must:

- ensure use of property, equipment and resources for personal reasons is infrequent and brief
- not use a FACS motor vehicle for personal use without prior approval except in an emergency. This must be reported to an appropriate manager as soon as possible
- not use government property, equipment or other resources for unlawful, offensive or time wasting activities, for example sending abusive, harassing, humiliating, intimidating or threatening messages; gambling; transmitting chain emails or inappropriate jokes; accessing or distributing pornographic or violent material or inappropriate or unauthorised images of children or adults; sending unauthorised copyright material or downloading software. Workers must not use client telephones except in an emergency
- not transmit material that may damage the department's reputation
- not transmit material likely to affect the performance of FACS networks
- not make false or disparaging comments about FACS, workers or clients by email or the internet, or by Twitter, Facebook, Instagram, or other social media networking sites.

Workers should note that:

- email messages are official records and personal use of FACS communication devices is not considered private
- FACS may monitor the use of any of its communication devices e.g. reports on the use of FACS mobile phones, laptops, email and the internet by individual workers may be reported to managers
- FACS may also read and retrieve messages and other data from FACS mobile telephones
- explanation may be sought from individuals where abuse of personal use is reasonably suspected and costs may be recovered
- all FACS property and resources must be returned when directed to do so or on termination of employment.

7.4.2 Intellectual property and copyright

Workers may use documents approved by the relevant senior officer for release on FACS websites, subject to the copyright notice on the website. In other cases permission must be obtained from the Executive Director, FACS Strategic Communications.

Workers are able to use work documents to demonstrate skills when applying for roles. However, all documents must have any client, confidential or sensitive information removed.

7.4.3 Procurement and purchasing

Workers who are responsible for receiving, spending or accounting for money, must know, understand and comply with the requirements of the [Public Finance and Audit Act 1983](#), the [Public Works and Procurement Act 1912](#) and the [Government Advertising Act 2011](#).

When purchasing goods and services or funding organisations to deliver services, workers must ensure that:

- expenditure is approved by the relevant delegated officer ([see FACS delegations](#))
- orders are not split to circumvent approval under the required delegations
- procurement decisions are not influenced by private interests
- the tendering or selection process is impartial
- best value for money is achieved and offers are assessed on merit
- the process is transparent and can withstand scrutiny
- they do not endorse suppliers unless authorised to do so.

Workers must also comply with the [NSW Code of Practice for Procurement](#) and FACS [Procurement policies](#).

It is also expected that external partners will act fairly, honestly and in an ethical manner. The FACS Statement of Business Ethics establishes a mutual understanding of public duty obligations between FACS and its business partners.

7.4.4 Salary overpayments

As per FACS [Salary Under and Overpayments Policy and Procedures](#), FACS recognises that from time to time workers may inadvertently be underpaid or overpaid. FACS is committed to ensuring that public funds are appropriately used and will undertake all reasonable attempts to correct pay and recover debts. Salary underpayments and overpayments will be resolved quickly, equitably and consistently for both FACS and its' workers.

Workers must advise their manager as soon as they become aware that a salary under or overpayment has occurred.

Workers must cooperate in the process for the repayment of all monies owed to FACS.

7.4.5 Post separation employment

When workers leave FACS they must:

- not misuse or abuse their position with FACS to obtain future employment
- not allow themselves or their work to be influenced by plans for or offers of outside employment
- be careful in their dealings with former workers and make sure they do not give them, or appear to give them, favourable treatment or access to privileged information.

Former workers of FACS must not use, or take advantage of, information that may lead to gain or profit or personal benefit obtained while they were employed by FACS, until it has become publicly available.

Using confidential information may be a criminal offence. The Independent Commission Against Corruption can investigate corrupt conduct whether or not the person has left the public service.

Additionally, under Section 70 of the [Housing Act 2001](#), it is illegal for workers to use information not generally known for personal gain (or the gain of another person) even after the worker has left the organisation.

8 Mandatory conduct - managers and senior executives

All managers and senior executives are required to demonstrate the above and in addition, have responsibilities to:

- lead and promote implementation of the Code in their workplace
- ensure their workplace culture, practices and systems (including recruitment and promotion) operate consistently with the Code
- recognise and promote conduct that exemplifies the Code
- act promptly and with due process to prevent and address any breaches of the Code
- in the case of a senior executive (including an acting senior executive), declare in writing private interests that have the potential to influence, or could be perceived to influence, decisions made or advice given by the senior executive
- ensure that any real or perceived conflicts of interests are avoided or declared and effectively managed.

They must also follow the [Code of Conduct and Ethics for Public Sector Executives](#).

9 Mandatory conduct - committees, working groups and advisory bodies

This section applies to workers who participate in internal FACS committees and external committees, groups or bodies in which they participate or have a personal interest.

Workers who are members of a committee, working group or advisory body must:

- follow the [Conduct Guidelines for Members of NSW Government Boards and Committees](#)
- declare and address any conflicts or potential conflicts of interest between their role on the committee or working group and that of their employment with FACS, as well as any personal factors which may unduly influence them
- participate constructively and adopt a whole-of-government approach in their involvement
- pursue outcomes aimed at improving client services
- balance the needs of confidentiality with the requirement to ensure FACS operations or interests are not compromised
- manage any conflicts between the interests of the organisation they represent and the efficient discharge of their duties for FACS
- not use any information that they have access to in a way that disadvantages FACS
- ensure they do not misuse their position to gain a financial or non-financial personal benefit for themselves or members of their family.

Housing NSW workers are not permitted to be members of the Boards or Executive or Advisory Committees of Community Housing Organisations.

10 Mandatory conduct – interacting with lobbyists

Workers who interact with lobbyists must abide by the relevant provisions of the [M2014-13- NSW Lobbyists Code of Conduct](#) when dealing with lobbyists. This includes not permitting lobbying by:

- a third-party lobbyist who is not registered in the [Register of Third-Party Lobbyists](#) (the Lobbyists Register)
- an individual engaged to undertake lobbying for a third-party lobbyist who is not registered in the [Register of Third-Party Lobbyists](#)
- any lobbyist who has failed to make disclosures to the Government Official required under the [Lobbying of Government Officials Act 2011](#) or the [M2014-13- NSW Lobbyists Code of Conduct](#)

- a lobbyist whose name has been placed on the [Lobbyists Watch List](#), unless provided for under the [M2014-13- NSW Lobbyists Code of Conduct](#).

Workers contesting State or Federal elections should read [C2013-04 & PSCC 2013-03 Contesting Elections](#).

11 Mandatory conduct - the Secretary

The Secretary has the responsibilities of workers (described in Section 7) and executives (described in Section 8), and in addition has responsibilities to:

- lead and promote implementation of the Code in FACS
- ensure the general conduct and management of the functions and activities of FACS are in accordance with the core values of the Code
- oversee the implementation of the Code and make improvements where necessary.

12 Duties to disclose and report

12.1 Conflict of interest

A conflict of interest occurs when a worker is in a position to be influenced, or appears to be influenced, by private interests when doing their job. A conflict of interest can involve avoiding personal disadvantage as well as gaining personal advantage.

It is recognised that some workers will have personal relationships with people who are FACS clients. Workers must manage these relationships so that they are not, or cannot be seen, to be in conflict with their professional responsibilities. Workers must declare these relationships as soon as possible to allow any conflict of interest to be appropriately managed, whether the conflict is real or perceived.

Where a conflict of interests occurs it should always be resolved in favour of the public interest, rather the interest of the worker.

FACS [Conflict of Interest Policy](#) and associated documents provide guidance and instruction to all workers in regard to actual, potential and perceived s interest.

12.2 Child Protection

Workers who work with, or supervise those who work with children and young people, are mandatory reporters. If in the conduct of their work these workers identify a child they consider to be at risk of significant harm, they are required to immediately report this to the Child Protection Helpline.

Even when a worker is not considered a mandatory reporter, it is expected that any FACS worker who in the conduct of their work identifies a child they consider to be at risk of significant harm, would immediately report this to the Child Protection Helpline.

Any matter involving inappropriate conduct by a worker towards any child or young person under 18, whether in or outside the workplace, or within or outside work time/hours, MUST be immediately reported to NSW Police and the Child Protection Helpline.

The following should be reported to NSW Police and the Helpline:

- physical abuse or non-accidental injury
- sexual abuse including grooming behaviour and exposure to/involvement in pornography, or inappropriate sexual behaviour displayed by a child
- emotional and psychological abuse
- neglect – supervisory neglect, failure to provide for basic physical and psychological needs – food, clothing, shelter, medical and dental care
- domestic and family violence
- alcohol or drug abuse by the child's carer/s
- serious mental health issues for a child's carer/s.

12.3 Criminal charges or convictions

Workers must declare any criminal charge or conviction immediately to PCEP, including those involving drink driving or the use of illegal drugs. It is a formal requirement of the Government Sector Employment Regulations (2014) that workers must notify Professional Conduct, Ethics and Performance Unit, the Secretary or their manager if they have been charged with, or convicted of, any offence that attracts a possible penalty of imprisonment of 12 months or more.

This requirement relates to the period of imprisonment that could have been applied to the charge or conviction, not the period that was received.

Failure to declare charges of offences with a possible imprisonment of 12 months or more may result in disciplinary action.

12.4 Property owned or leased by FACS or the Land and Housing Corporation (LAHC)

Purchasing, leasing and selling activities must be beyond reproach and completely transparent.

A potential conflict of interest may arise when workers or 'related parties' seek to:

- purchase FACS or LAHC properties
- sell properties to FACS or LAHC
- lease a property (other than as a social housing tenant) to or from the LAHC, or a community housing provider, or FACS.

A worker or 'related party' is prohibited from engaging in any of these transactions.

Where a worker becomes aware that a related party will be or has been engaged in a restricted transaction, it is their responsibility to declare the situation to their manager and the Professional Conduct, Ethics and Performance unit.

Workers who are also tenants of the Aboriginal Housing Office or Housing NSW are exempt from these requirements. These workers may make an application to purchase a property they currently rent.

Engaging in or not informing the department of a restricted transaction may be treated as a breach of discipline under the [Government Sector Employment Act 2013](#) and a breach under Section 71 of the [Housing Act 2001](#), which constitutes a criminal offence.

12.5 Senior executives and private interests

Senior executives (including any acting senior executives) must make a written declaration of any financial, business, personal or other interests or relationships that have the potential to influence, or that could be seen to influence their decisions or advice.

The arrangements for FACS' senior executives are described in the [Senior Executive Probity Management Policy](#). In accordance with this Policy, senior executives must complete an Annual Written Declaration of Interests.

13 Behaviour contrary to the Code

13.1 The effect of behaviour that is contrary to the Code

Behaviour contrary to this Code can bring individual workers into disrepute, undermine productive working relationships in the workplace, hinder client service delivery, and damage public trust in FACS and the broader government sector.

If a worker is unsure of what is appropriate conduct under any particular circumstances, they should discuss the matter with their manager and the local HR advisor or HR Cluster Lead.

13.2 When behaviour is contrary to this Code

If a worker sees someone acting in ways that are contrary to this Code, they should discuss that person's behaviour with their manager in the first instance, or report their concerns to any member of FACS's senior executive.

If a worker believes certain conduct is not just unethical, but may also be corrupt, a serious and substantial waste of government resources, maladministration or a breach of government information and privacy rights, then the concern should be reported to a Public Interest Disclosure Officer, the Secretary, Professional Conduct, Ethics and Performance Unit or the relevant investigating authority. For a list of Disclosure Officers see FACS [Procedures for managing Public Interest Disclosures](#).

Workers can make external reports of allegations of:

- corrupt conduct to the Independent Commission Against Corruption (ICAC) on 1800 436 909 or via their [website](#)
- maladministration to the NSW Ombudsman on 1800 451 524 or via their [website](#)
- serious or substantial waste of public moneys to the [NSW Auditor General](#) on 9275 7100
- Government information contravention to the Information Commissioner on 1800 472 679 or via their [website](#)
- Discrimination, as covered by the [Anti-Discrimination Act 1977](#), to the Anti-Discrimination Board on 1800 670 812 or via complaintsadb@agd.nsw.gov.au
- harm to children and young people to the Child Protection Helpline on 132 111 and NSW Police
- crime to the NSW Police.

Under the [Public Interest Disclosures Act 1994](#), it is illegal to victimise or harass any person who makes a public interest disclosure.

13.3 Actions to be taken when allegations are made

If it is alleged that a worker has acted in a way that is contrary to this Code, they will have an opportunity to provide their version of events. How this will happen will be proportionate to the seriousness of the matter.

In those cases where the allegation is minor, the manager will usually discuss this matter directly with the worker. If the allegations are more serious, an allegation report must be forwarded to the Professional Conduct, Ethics and Performance Unit, and a formal disciplinary process may be required.

If an allegation of a behaviour that is contrary to this Code is being investigated, the investigator must ensure their decision-making is fair and reasonable by acting consistently with four principles:

1. procedural fairness for both the complainant and the worker
2. investigations should be handled expeditiously. This will minimise the potential for breaches of confidentiality and lack of procedural fairness
3. confidentiality for all parties, where practicable and appropriate, until such time as the investigation process is completed
4. meticulous recordkeeping, including recording of reasons for all significant decisions.

For workers of Public Service agencies, the [Government Sector Employment Act 2013](#) and the [Government Sector Employment Rules 2014](#) describe how allegations of misconduct are to be dealt with.

Attachment 1 – Good practice guides

Ethical decision making

To make the best-available decision:

- scope the problem: clarify the scope of the problem, and consider carefully how the problem affects (or may affect in the future) work colleagues, clients, stakeholders, and the government of the day. Wherever possible, consult affected people and communities
- develop options: develop a mix of options that address these questions:
 - duties: what are your responsibilities as defined by the law, Government policies, FACS' policies and procedures, and your role description? Is it legal? Is it consistent with the principles and policies of FACS and the NSW government?
 - results: which options will yield the greatest benefit (or least harm) to the most people, and minimise the number of people who might be disadvantaged – in the short and longer term? What will the consequences be for your colleagues, FACS and yourself? What will the consequences be for other parties?
 - justice: which options support due process, transparency, fair compensation for any loss, and fair treatment of those affected by any decision?
 - rights: which options support the legal rights of clients and citizens?
 - public interest: which options best advance the public interest, without regard to your own reputation, career, personal views or potential for personal gain or loss?
 - resources: what is the likely impact on government finances, workforce, infrastructure and other assets?
 - innovation: can the issue be addressed in new ways (such as the redesign of services, reengineering of work practices, or a new model of service delivery)?
- evaluate and decide: choose the option that best addresses the above issues and is in the public interest, supports integrity, builds trust, delivers better services and ensures accountability. To establish if your actions are consistent with the Code consider your answers to the following questions:
 - integrity: would your colleagues say you had considered the views of all interested parties and acted in the right way, even if it was at your personal cost?
 - trust: would your action, if it became public, build confidence in the public sector?

- service: would your clients and customers say your actions improved the quality of the services they receive?
- accountability: would the head of your agency say your actions are consistent with the Code and the law?
- implement: implement the decision in ways that are consistent with the objectives, values and principles of the Code
- review and identify opportunities for continuous improvement.

Encouraging ethical behaviour by other workers

There are a number of ways FACS workers can support the ethical behaviour of other workers, these include:

- personal: encourage colleagues to act ethically by making ethical decisions and acting ethically yourself
- interpersonal: encourage all workers to openly discuss ways to better implement the Code in their individual actions, their team's practices and in services to clients and customers
- organisational: ensure the leadership, culture, governance, management and work practices, the behaviour of individual workers and the delivery of client services are consistent.

Attachment 2 - Code of Ethical Conduct Statement of Agreement

Code of Ethical Conduct Statement of Agreement – FACS workers

Instructions for completion of the Statement of Agreement

Step 1: Managers are required to meet with their workers as a group or individually to discuss the Code its content, intentions and obligations.

Step 2: Managers sign their agreement to certify they have explained the Code, its content, intentions and obligations to their workers. This form should be completed for each worker including the 'Comment' section if required.

Step 3: Managers should request and encourage their workers to sign the agreement.

Code of Ethical Conduct Statement of Agreement – Manager

I certify that I have explained the content, intentions and obligations of the FACS Code of Ethical Conduct to the worker named below.

Worker's name: _____

Manager's name: _____

Role title of manager: _____

District/Directorate: _____

Business Stream/Unit: _____

Signature: _____ Date: _____

Comment (if required*) _____

* If a worker chooses not to sign this Agreement, the manager must complete the form and include details of the worker's decision in the "Comment" section

Code of Ethical Conduct Statement of Agreement - Worker

I have received and read my copy of the Code of Ethical Conduct, discussed the Code with my manager and had the opportunity to clarify any issues.

I agree to abide by this Code of Ethical Conduct.

Worker's name: _____

Worker's number (optional – refer payslip): _____

Role title of worker: _____

District /Directorate: _____

Business Stream/Unit: _____

Manager's name: _____

Signature: _____ Date: _____

Code of Ethical Conduct Statement of Agreement – Others

This form is for consultants, contractors, persons on work experience, students and volunteers

I have received and read my copy of FACS Code of Ethical Conduct, discussed the Code with my manager or FACS contact officer and had the opportunity to clarify any issues.

I agree to abide by this Code of Ethical Conduct.

Name: _____

Status (i.e. consultant, contractor, person on work experience, student or volunteer): _____

District /Directorate: _____

Business Stream/Unit: _____

Manager/Contact Officer's name:

Signature: _____ Date: _____

Managers/Contact Officers are not required to sign a *Code of Ethical Conduct Statement of Agreement-Other* for consultants, contractors, persons on work experience, students or volunteers.

A signed copy of this form must be placed on a local file for governance purposes. In addition, the district, directorate or business stream will need to maintain a spreadsheet with details of all *Code of Ethical Conduct Statement of Agreement-Others*.

Attachment 3 - Definitions

| Term | Definition |
|-----------------|--|
| Bullying | <p>Generally, workplace bullying is any behaviour or series of behaviours that intimidate, denigrate, humiliate or undermine a person or group of people.</p> <p>Bullying is:</p> <ul style="list-style-type: none"> ▪ usually repeated behaviour ▪ the less favourable treatment of a person – either directly or indirectly - by one or more people in the workplace which may be considered unreasonable and inappropriate ▪ behaviour that intimidates, offends, degrades or humiliates a person ▪ not based on any grounds of discrimination ▪ behaviour that causes a risk of injury or an actual injury to the person targeted. |
| Benefit | <p>An item of value in addition to normal entitlements obtained by a worker through their employment with FACS, e.g. a new role or promotion, preferential treatment, meals, seats or access to corporate boxes at entertainment or sporting events, upgrades on flights or access to confidential information that one person or organisation confers on another.</p> <p>A benefit can include an opportunity provided to a worker by a person or organisation which the worker received because of their employment with FACS, such as an offer to attend a function or conference. A benefit may influence, or be perceived to have influenced, the relationship between the worker and the person providing the benefit.</p> |
| Bequest | <p>Something left to a person in a will (for the purposes of this policy, the term bequest relates to those which occur due to the working relationship between the worker receiving the bequest and those giving it such as a client, supported person or their families).</p> |

| Term | Definition |
|------------------------|---|
| Confidentiality | <p>Confidentiality means not using or disclosing any information about clients, workers or FACS business unless it is a requirement of a worker's role to do so, or they are given authority or official permission to disclose the information.</p> <p>Privacy and Personal Information Protection Act 1998 sets privacy standards for dealing with personal information and the Health Records and Information Privacy Act 2002 sets privacy standards for dealing with health information. Both apply to NSW state and local government agencies.</p> <p>The improper use of confidential information can constitute corrupt conduct as defined by the Independent Commission Against Corruption Act 1988.</p> |
| Copyright | <p>According to the New South Wales Premier's Department's Intellectual Property Management Framework for the NSW Public Sector, 'copyright' protection gives owners exclusive rights to license others to copy, perform in public, communicate, publish, or make an adaptation of their work. Exclusive rights apply also to sound recordings, cinematograph films, broadcasts and published editions of works. In Australia, copyright law is set out in the Copyright Act 1968 (Cth).</p> |
| Corrupt conduct | <p>The dishonest exercise of official functions, or breach of public trust, or misuse of information or material acquired in the course of official duties. Corrupt conduct can involve a substantial breach of a Code of Conduct. Corrupt conduct is fully defined in section 8 of the Independent Commission Against Corruption Act 1988.</p> |
| Dignity of risk | <p>Dignity of risk recognises that clients have a right to make their own decisions and are entitled to take reasonable risks in their lives. Clients have a right to learn from life situations even if, with support, this involves some risk.</p> |
| Discrimination | <p>Discrimination is where a person is treated unfairly compared to someone else, because of their sex, religion, pregnancy, race, ethno-religious origin, age, marital status, homosexuality, disability, transgender status, or carers' responsibilities. Discrimination is against the law.</p> <p>Discrimination may be deliberate. It may also be the result of inadvertent practices that appear to be fair to everyone but in fact have an unfair or unequal impact on certain groups.</p> |

| Term | Definition |
|------------------------------|--|
| Duty of care | <p>Duty of care means that all FACS workers have a duty of care to maintain and ensure a safe work environment.</p> <p>All workers have a duty of care to clients and colleagues. Duty of care can be physical, emotional or financial; it is the obligation to take reasonable care to make sure that nobody in the workplace is harmed. 'Reasonable' means the degree of care that could be expected from a competent and skilled person in the particular role.</p> |
| Gift | <p>An item given to a worker, group of workers or the department or any part of it which is provided due to the working relationship the person providing the gift has with those receiving it. Gifts can have different meanings and purposes. They can be gifts of gratitude, token gifts, ceremonial gifts or gifts of influence such as a gift voucher, entertainment, hospitality or travel.</p> |
| Harassment | <p>Harassment is any form of behaviour that is not wanted and offends, humiliates or intimidates the person, and targets a person because of sex, pregnancy, race, age, marital or domestic status, homosexuality, disability, transgender (transsexual) status or carers' responsibilities.</p> |
| Intellectual property | <p>According to the New South Wales Premier's Department's Intellectual Property Management Framework, "intellectual property" is "a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort." Of particular relevance to FACS, it includes manuals, publications, educational resources, digitised material (including CD ROM products), and software that have been developed by or for FACS.</p> |
| Manager | <p>A person who has managerial or day to day supervisory responsibilities for one or more workers</p> |
| Misconduct | <p>Misconduct involves improper, wrong or potentially unlawful conduct that is outside of policy, directions or the law. Examples include assault, theft, blatant disregard for policies, or other serious actions that may require investigation. Misconduct is dealt with in section 69 of the Government Sector Employment Act 2013.</p> |
| Privacy | <p>Privacy relates to the rules around the collection, storage use and disclosure of people's personal and health information, and respecting people's right to autonomy and personal space.</p> |

| Term | Definition |
|-----------------------------------|--|
| Private work | Private work is paid work undertaken outside employment in FACS, including work for another employer, self-employment, and owning, operating or being a director of a private business. |
| Procedural fairness | <p>Procedural fairness refers to the processes by which an outcome is reached and not the outcome itself. Decision-makers must:</p> <ul style="list-style-type: none"> ▪ act in a transparent and objectively fair manner at all times ▪ not pre-judge or appear to pre-judge the outcome ▪ take into account and consider all relevant information ▪ deal with the issues in a timely manner. |
| Public comment | Public comment is comment for any media including social media, journals, books, other publications, the internet, chat rooms or at public speaking events. |
| Public interest disclosure | A disclosure made by a public official relating to corrupt conduct, maladministration, serious and substantial waste, or government information contraventions. |
| Public official | <p>A 'public official' is:</p> <ul style="list-style-type: none"> • a person employed under the Government Sector Employment Act 2013 - this includes all FACS workers. • an individual in the service of the Crown - this includes volunteers whose conduct is capable of being investigated by an investigative body (for example ICAC) and those appointed directly by a Minister (for example the Registrar of Community Housing). • any other individual having public official functions or acting in a public official capacity whose conduct and activities may be investigated by an investigating authority – this includes anyone who's conduct could be investigated by an investigating authority (for example the Ombudsman, ICAC, the Auditor General or the Information Commissioner). • an individual who is engaged by a public authority under a contract to provide services to or on behalf of the public authority - this includes individual independent contractors who work for FACS. |

| Term | Definition |
|--------------------------------|---|
| Reasonable personal use | When using FACS' resources, workers must do so in accordance with FACS' policies and procedures, which require workers to use these resources 'reasonably', that is, in a manner that does not interfere with work, and is not inappropriate or excessively accessed. |
| Related party | <p>A 'related party' is someone with whom staff have a:</p> <ul style="list-style-type: none"> • family relationship (specifically spouse, siblings, parents, grandparents, children and grandchildren) • business relationship other than a casual business relationship • fiduciary relationship (that is, a person who is entrusted to hold, control or manage property for another) • relationship in which one person is accustomed, or obliged, to act in accordance with the |
| Secondary employment | Secondary employment is paid work undertaken in a secondary position within FACS. |
| Senior executive | Senior Executive refers to FACS Public Service Senior Executives (PSSE) and Transitional Former Senior Executives (TFSE). |
| Sexual harassment | Under Section 22A of the Anti-Discrimination Act 1977 (NSW) , sexual harassment is any form of sexually related behaviour that a person does not want and, in the circumstances, a reasonable person would have expected that person to be offended, humiliated or intimidated. |

*Panel solicitor letterhead (including ABN)***TAX INVOICEⁱ**

| NSW Department of Family & Community Services (ABN 80 597 369 676) C/-Director, Child Protection Address: Locked Bag 4028 Ashfield NSW 1800 | | Invoice No: ⁱⁱ 12345 Invoice Date: 8/06/13 OP/TRIM Ref: 201212345 LGF17/XXXX Date of initial allocation: | | |
|---|---|---|-------|--------------|
| DATE | ITEM/SERVICE | RATE PER HR or LUMP SUM FEE \$ | UNITS | AMOUNT \$ |
| | Child's SURNAME, First name, dob; or List Day at <location> Children's Court ⁱⁱⁱ | | | |
| DETAILS OF SERVICES | | | | |
| XX/XX/17 | Initial mention | \$XXX | | \$XXX |
| XX/XX/17 | Preparation for Interim Hearing | \$XXX | hours | \$XXX |
| | SUBTOTAL | | | \$XXX |
| | GST | | | \$XXX |
| | TOTAL | | | \$XXX |

NOTES

ⁱ **Tax Invoice** means an invoice issued in compliance with relevant legislation and the Director General's current requirements. Tax invoices must include:

For supplies of less than \$1000:

- ABN of supplier
- the GST inclusive price of the taxable supply
- the words 'Tax Invoice' stated prominently
- the date of the issue of the tax invoice
- the name of the supplier
- a brief description of each service supplied
- when GST payable is exactly 1/11th of the total price, either a statement along the lines of 'the total price includes GST', or the GST amount

For supplies of \$1000 and over:

- ABN of supplier
- the GST inclusive price of the taxable supply
- the words 'Tax Invoice' stated prominently
- the date of the issue of the tax invoice
- the name of the supplier
- the name of the recipient
- the address or the ABN of the recipient
- a brief description of each service supplied
- the extent of services supplied
- when GST payable is exactly 1/11th of the total price, either a statement along the lines of 'the total price includes GST', or the GST amount.

ⁱⁱ Mandatory **unique invoice number** for each invoice issued, not a name or other reference.

- The reference number must be a unique identifier and is to be no greater than 12 characters
- The invoice number should not contain: Spaces, semi-colons or colons for example LS12345;1:3 or Leading zeros, for example 0000012345

ⁱⁱⁱ The heading should include either:

- The child/ren's SURNAME/S and First name/s and date/s of birth OR
- Where charges are for representation at a list day, include the location of the Children's Court **and** individual matter names and costs against each matter mentioned during the list day.

Appendix G - Dispute Resolution Conference Outcome

| | | | | |
|------------------------------|-------------|--------------------------|-------------------|----------------|
| Date: | Time Start: | Time End: | Court: Parramatta | Registrar: |
| CSC Caseworker Manager | | | CYP Name(s) | |
| FACS Lawyer | | | Ph: 9354 1500 | Fax: 9354 1583 |
| Attendees: | Mother | <input type="checkbox"/> | Lawyer | |
| | Father | <input type="checkbox"/> | | |
| | Child | <input type="checkbox"/> | | |
| | Other | <input type="checkbox"/> | | |
| | Other | <input type="checkbox"/> | | |
| | Other | <input type="checkbox"/> | | |

Area of Agreement

Area of Disagreement

CASEWORKER PLEASE NOTE: This document is subject to a claim of Legal Professional Privilege and should be tabbed when placed on file. In the event the file is required to be produced either in response to a subpoena or otherwise, this document should not be produced. If production is sought, please contact Legal Services for advice.



Directions:

Note to Caseworker

Next Court date:

Signed:

Date:

CASEWORKER PLEASE NOTE: This document is subject to a claim of Legal Professional Privilege and should be tabbed when placed on file. In the event the file is required to be produced either in response to a subpoena or otherwise, this document should not be produced. If production is sought, please contact Legal Services for advice.

Appendix H - Court Outcome - Care Litigation

| | | | | | |
|--|--|---------------|-------------------------------|---------------------|----------------|
| Court Date: | | Court: | | Magistrate: | |
| Name of CYP: | | | | | |
| CSC/ Caseworker: Manager: | | | | ATSI Issues: | |
| FACS Lawyer: | | | Ph: | | |
| Lawyer for Child/YP: | | | | Legal Rep | Sep Rep |
| Lawyer for Mother: | | | Lawyer for Father: | | |
| Others: | | | | | |

Orders/Directions made:

Next Court date:

Information/Required action:

Signed:

Date:

CASEWORKER PLEASE NOTE: This document is subject to a claim of Legal Professional Privilege and should be tabbed when placed on file. In the event the file is required to be produced either in response to a subpoena or otherwise, this document should not be produced. If production is sought, please contact Legal Services for advice.

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