

MEMORANDUM OF UNDERSTANDING
BETWEEN

LEGAL AID NEW SOUTH WALES

AND

DEPARTMENT OF JUSTICE AND
ATTORNEY GENERAL

AND

DEPARTMENT OF HUMAN SERVICES,
COMMUNITY SERVICES

1 Introduction

- 1.1 This Memorandum of Understanding ("MoU") has been established to facilitate the provision of legal advice to children and young persons:
- under the parental responsibility of the Minister for Community Services or Director-General of the Department of Human Services, and
 - for whom the Minister or Director-General has parental responsibility for consenting to, and having the carriage on behalf of the child or young person, of litigation, and
 - who may have a civil claim against the State of NSW.
- 1.2 This MoU sets out the understanding between the Chief Executive, Department of Human Services Community Services, ("CS"), Legal Aid NSW ("Legal Aid") and the Department of Justice and Attorney General ("DJAG") (collectively, "the Parties") about the role each will play in ensuring that children and young people in out of home care have ready access to independent legal advice about their prospects in relation to making a claim – or seeking any other legal remedy – against the State of NSW and legal representation to bring such a claim or seek such a remedy if it is reasonable to do so.
- 1.3 In this MoU, the terms "child" and "young person" have the same meaning as in the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, namely that a child is a person under the age of 16 years and a young person is a person aged 16 or 17 years.
- 1.4 The Parties recognise that the safety, welfare and well-being of children and young persons is a matter of paramount concern to each agency in fulfilling its role in the process set out in this MoU.

2 Roles and Responsibilities

- 2.1 The Department of Human Services ("DHS") is the lead agency with statutory responsibilities for the provision of child protection and out of home care services to children and young persons living in NSW. These responsibilities are met by CS, an agency within DHS. CS may also have other responsibilities in relation to children and young persons for whom the Director-General has parental responsibility or for whom the Minister has parental responsibility and has delegated the exercise of this responsibility to DHS.
- 2.2 Where the Minister or Director-General has relevant parental responsibility for the child or young person, CS should arrange for the child or young person to have access to independent legal advice and necessary assistance where the child or young person may have a

claim against the State of NSW . This advice and any assistance necessary to pursue a claim or remedy with reasonable prospects should be arranged as soon as it is appropriate and practicable to do so.

- 2.3. There may arise, or be perceived to arise, a potential conflict of interest for CS in providing or obtaining legal advice or pursuing a claim against the State of NSW on behalf of a child or young person for whom it has or exercises parental responsibility . Therefore, a clear and certain process is needed to enable CS to appropriately and effectively discharge its duty to such a child or young person while avoiding any conflict of interest.
- 2.4. Legal Aid is established under the *Legal Aid Commission Act 1979* to improve access to justice by providing a range of legal services to socially and economically disadvantaged people and recognises that children and young people in out of home care are a class of persons who may be disadvantaged and vulnerable.
- 2.5. DJAG administers the courts, tribunals, laws and justice programs of NSW. DJAG plays a key role in promoting access to justice and equity before the law.
- 2.6. DJAG is responsible for the funding and administration of the Guardian Ad Litem Scheme.
- 2.7. The Parties recognise that section 9(e), *Children and Young Persons (Care and Protection) Act 1998 (NSW)* provides that a principle of the Act is that children and young persons who are unable to live with their parents for whatever reason are entitled to special protection and assistance from the State, and that this would include the provision of legal services to such children and young persons.
- 2.8. Therefore, the Parties have agreed to implement the process set out in clauses 3, 4, 5 and 6 below.
- 2.9. The Parties recognise that each agency will fulfil its role in that process in accordance with its policies and procedures. This MoU does not affect the interpretation and/or application of those policies and procedures in any way.

3 Request to DJAG

- 3.1. Where CS becomes aware that a child or young person who is under the parental responsibility of the Minister or the Director-General may have a possible civil action against the State of NSW the Director of Legal Services at CS may forward to the Manager of Legal Services Branch at DJAG a letter requesting that an advice be sought as to whether the possible claim has sufficient merit that it is reasonable in all circumstances to commence legal proceedings.

3.2 Attached to the letter will be:

- evidence to establish the parental responsibility of the Minister or the Director-General, and
- a statement setting out the reasons why CS considers that the child or young person may have a claim against the State, and
- contact details of the child or young person or an appropriate person within the CS office that has case management responsibility of the child or young person, and
- all information held by CS that will assist in assessing the claim or advice as to when the relevant information may be forthcoming.

3.3 CS will seek the consent of the child or young person to provide the information referred to in clauses 3.1 and 3.2 to DJAG where the child or young person has the capacity to provide such consent. The Parties agree that where the child or young person does not have this capacity, CS can provide the information to the DJAG as an exercise of its delegated parental responsibility for the child or young person.

3.4 If further information of the kind described in clause 3.2 becomes available to CS after the referral to DJAG, CS will forward such information to DJAG.

4 Allocation of the request to a Guardian Ad Litem

4.1 Where DJAG receives a request pursuant to clause 3.1, DJAG will allocate that request to a Guardian Ad Litem ("Guardian") from the Guardian Ad Litem Scheme in order for the Guardian to act as tutor for the child or young person.

4.2 DJAG will forward a letter to CS to advise that the request has been allocated to a Guardian.

4.3 DJAG will ensure that policies and mechanisms are in place to ensure that any Guardian allocated a request for advice acts to safeguard and represent the interests of the child or young person.

4.4 DJAG will ensure that policies and mechanisms are in place to check that the costs incurred through the conduct of a Guardian and the soliciting of an advice are reasonable.

4.5 DJAG will provide the necessary administrative support to the Guardian appointed.

5 Referral to Legal Aid

- 5.1 Once a request for advice is allocated to a Guardian pursuant to clause 4.1, the Guardian will become familiar with such material provided by CS and then forward that material under cover of letter to Legal Aid.
- 5.2 Legal Aid will arrange for a merits advice to be prepared by a private practitioner.
- 5.3 Where a practitioner requires further information or instructions in order to prepare the requested advice this is to be provided by the Guardian.
- 5.4. Legal Aid will endeavour to ensure that the advice is completed within 3 months. Upon receiving the advice from the practitioner, Legal Aid will review the advice to ensure that it is of an appropriate standard and that it serves the purpose of the process by advising whether or not the possible claim has sufficient merit that it is reasonable in all circumstances to commence legal proceedings.
- 5.5. Legal Aid will then forward the advice to the Guardian. The Guardian will arrange for the advice to be placed on a file held by DJAG and write to CS to inform CS that an advice has been sent to DJAG.

6 Receipt of Advice

- 6.1 Where the Guardian receives an advice that indicates that the possible claim has sufficient merit that it is reasonable in all circumstances to commence legal proceedings the Guardian may make the necessary arrangements to engage legal assistance for the child or young person.
- 6.2 Where a Guardian determines that an advice indicates that further legal action should be taken, DJAG will encourage the Guardian to seek assistance for the child or young person through an application to Legal Aid or a pro bono scheme and to remain the Guardian of the child or young person throughout the course of any subsequent proceedings.

7 Indemnity

- 7.1 In any legal proceedings commenced by the Guardian on behalf of a child or young person, CS will not seek a costs order.
- 7.2 If, in the course of any legal proceedings commenced by the Guardian on behalf of the child or young person, a court makes an ordinary costs order in favour of CS against the Guardian, CS agrees not to enforce the costs order.
- 7.3 If, in the course of any legal proceedings commenced by the Guardian on behalf of a child or young person, a court makes an ordinary costs

order in favour of any person other than CS, CS agrees to indemnify the Guardian for the amount of the costs order.

- 7.4 However, if in any proceedings commenced by the Guardian on behalf of a child or young person, a court orders the Guardian to pay indemnity costs partly or wholly by reason of the manner in which the Guardian conducted the litigation, CS may enforce any such costs order made in its favour and does not agree to indemnify the Guardian against any such costs orders made in favour of any other person.
- 7.5 CS agrees to indemnify the Guardian from any legal action taken against the Guardian arising in connection with the performance in good faith by the Guardian of his or her duties as Guardian.

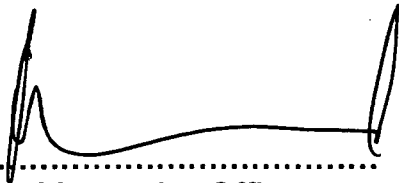
8 Invoicing Arrangements

- 8.1 When Legal Aid receives an advice on merit, Legal Aid will provide an invoice to the Guardian who will request that DJAG pay the invoice. DJAG will then seek reimbursement from CS.
- 8.2 Legal Aid and CS agree that the cost invoiced by Legal Aid for the cost of providing an advice will be in accordance with the fees schedule attached to this MoU and marked 'A'.
- 8.3 DJAG will invoice CS for the costs incurred by the Guardian allocated to a child or young person pursuant to clause 4.1.
- 8.4 DJAG and CS agree that the cost invoiced by DJAG for the cost of the work of a Guardian are to be in accordance with the fees schedule attached to this MoU and marked 'B'.
- 8.5 The Parties recognise that the attached schedules may be amended and fees may be adjusted from time to time throughout the life of this MOU as agreed by the parties to each schedule.

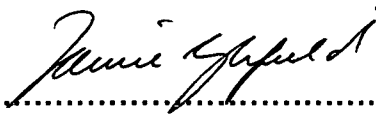
9. Review

- 9.1 This MoU may be reviewed at any time by the agreement of the Parties and in any event within three years of the date of this MoU.
- 9.2 Alterations to this MoU may also be made at any time by the Parties and any such agreed alteration will be considered part of this MoU.

This Memorandum is dated:



.....
Chief Executive Officer
Legal Aid NSW



.....
Director-General
Department of Justice and
Attorney General



.....
Chief Executive
Department of Human Services
Community Services

Attachment A

Fees schedule for legal practitioners providing a merits advice

Legal Aid NSW will pay the costs of obtaining a merits advice referred to in clause 5.2 of this Memorandum of Understanding in accordance with the following schedule.

Item	Amount
Solicitors' fees	\$320 per hour and up to \$360 per hour plus GST
Disbursements	reasonable disbursements as approved by Legal Aid NSW
Counsel's fees	\$350 per hour and up to \$390 per hour plus GST



Fee Schedule

The fees are payable to a Guardian ad Litem on the Guardian ad Litem Panel for services provided in accordance with the Code of Conduct and Handbook.

General Guidelines

Items not specifically included in these guidelines are subject to separate negotiations.

All air travel, overnight accommodation and travel/sustenance expenses exceeding \$50 must have pre-approval of the Director or Manager of the Legal Services Branch.

All fees exceeding the maximum time must be pre-approved by the Director or Manager of the Legal Services Branch.

All hourly rates are to be rounded to the nearest half hour.

All hourly rates are inclusive of GST

No allowance is payable for general office overheads. An allowance may be payable for administration costs (eg faxes to client and photocopying) in certain circumstances with prior approval of the Director or Manager of the Legal Services Branch.

Timeframes for invoicing

Where first applicable a Guardian ad Litem must invoice:

- Within 28 days of the matter being finalised
- Every three months of the proceedings, starting from when the Guardian ad Litem was appointed
- Where the cost of services exceeds \$1,500

Tax invoice

A copy of the tax invoice template is attached. All Guardian ad Litem should use the template when invoicing.

Invoices and tax invoice queries should be e-mailed to guardian_ad_litem_panel_coordinator@agd.nsw.gov.au or posted to GPO Box 6, Sydney 2001

Scale of fees

The scale of fees is as follows:

PREPARATION AND COURT/TRIBUNAL ATTENDANCE			
Item No	Nature of attendance or preparation	Rate/per hour*	Maximum time per appointment**
1a	Preparation for Court (includes perusing the Court/Tribunal file, preparation of Affidavits, Care plans, s65 conferences etc)	\$50 per hour	Up to 3 hours
1b	Preparation for ADR or other conference (includes perusing any relevant files or documents and preparing required documents)	\$50 per hour	Up to 2 hours
2	Conference with client/solicitor/Department of Human Services	\$50 per hour	Up to 4 hours
3	Attendance at Court, Court ordered ADR or other conference	\$50 per hour	For the duration of attendance required
TRAVEL ALLOWANCE, SUSTENANCE AND EXPENSES			
Item No	Travel description	Rate*	Maximum time per appointment**
4	If travel time exceeds half an hour then a Guardian ad Litem can charge for that time.	\$30 per hour	Duration of travel time
5	Travel sustenance/disbursements for transport (includes any public transport costs, tolls and parking)	As per tax receipt	-
6	Travel allowance for use of a private motor vehicle Casual rate Engine capacity- <ul style="list-style-type: none"> • 2601cc and over – 30 cents per kilometre • 1601cc – 2600cc – 29.6.cents per kilometre • 1600cc or less – 25.2 cents per kilometre 	As per engine capacity	-
<p>Note all travel expenses such as airfares and cab charges are to be organised by the Legal Services Branch prior to the event if possible.</p> <p>Receipts are required for all travel sustenance/disbursement claims.</p>			
SUSTENANCE ALLOWANCE (paid in accordance with Circular No:2001-35)			
7	Meal Expenses on one day journeys Capital cities and high cost country centres Breakfast - \$22.30 Dinner - \$43.00 Lunch - \$25.00 Other country centres Breakfast - \$22.30 Dinner - \$43.00 Lunch - \$25.00	As per meal allowance rates	-

	Meal allowances are only payable if the travel: <ul style="list-style-type: none"> • commenced before 6.30am • exceeds 100km (return trip) • extends beyond 6.30pm 		
8	Overnight sustenance Capital cities and high cost country centres As per the rate for the capital city./high cost country centre Other country centres As per the rate for the country centre	As per meal allowance rates	Please contact the Legal Services Branch for the appropriate rate
REPORT WRITING			
9	Where a report is ordered by the court	TBA	TBA

* Hourly rates should be rounded to the nearest half hour

** For complex matters the maximum time limits may be extended if pre-approved by the Director or Manager of the Legal Services Branch.

<GuardianAdLitemName>

<Addressdetails>

<Addressdetails>

<ABN:XX XXX XXX XXX>

<Phone: (02) XXXX XXXX>

<Email:address>

TAX INVOICE

Date: <DD MONTH YYYY>

Tax Invoice No. <XXXXXX>

Department of Justice and Attorney General
Legal Services Branch
GPO Box 6
SYDNEY NSW 2001

Matter Number: <Matter Number>

Name of Client: <Name of Client>

Court/Tribunal: <Court/Tribunal>

PREPARATION AND COURT/TRIBUNAL ATTENDANCE						
Item No.	Date	Description (include nature of work, location, names of people attended with or any other relevant information)	Duration	Fee	GST	Total
1a	12/12/2010	Preparation for Hearing including peruse court file, prepare Affidavit and	1.5 hours	\$75		
2	12/12/2010	Attend Parramatta Children's Court for Hearing	2.5 hours	\$125		
TRAVEL ALLOWANCE, SUSTENANCE AND EXPENSES						
SUSTENANCE ALLOWANCE						
REPORT WRITING						
TOTAL						

Please make payment by to:

<GuardianAdLitemName>

<ABN>

Account details:

<AccountName>

<Bank>

<BSBNumber>

<AccountNumber>

All invoices and queries should be e-mailed to guardian_ad_litem_panel_coordinator@agd.nsw.gov.au or posted to GPO Box 6, Sydney 2001