

Care and Protection Practice Standards

This document sets out practice standards for lawyers representing children and adults under a grant of legal aid in proceedings brought under the *Children and Young Persons (Care and Protection) Act 1998*.

Satisfactory compliance with these practice standards also includes adherence to the Representation Principles for Children’s Lawyers published by the Law Society of NSW¹.

These practice standards apply to in-house Legal Aid NSW solicitors and private lawyers acting in legally aided care and protection matters.

Lawyers who are appointed to the Care and Protection Panel (the panel) to act for adults only or for both adults and children are eligible to receive grants of aid and assigned work from the Grants Division, including case matters and duty work.

Legal Aid NSW may audit panel lawyers for compliance with practice standards. Continued inclusion on the panel is conditional on compliance with these practice standards.

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¹ <http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026517.pdf>

1. Statement of Principles

- 1.1 Lawyers are to recognise that children who are the subject of care and protection proceedings have often been the subject of abuse, maltreatment and/or neglect. Most come from families who are socially and economically disadvantaged, and many children themselves suffer from emotional, cognitive and behavioural issues.
- 1.2 Lawyers representing children in care and protection must be able to communicate effectively with children. Lawyers must also have an understanding of issues facing children who are the subject of care proceedings.
- 1.3 Lawyers appearing for children must observe and comply with the current version of the Representation Principles for Children’s Lawyers published by the Law Society of NSW.
- 1.4 Lawyers are to recognise that many adults who appear in care and protection matters are socially and economically disadvantaged. Many suffer from disabilities including mental health issues and intellectual disability as well as drug and alcohol dependence. Many are from culturally and linguistically diverse backgrounds.
- 1.5 Lawyers who represent adults in care and protection must be able to effectively communicate with their clients. Lawyers must also have an understanding of issues facing socially and economically disadvantaged people coming within the care and protection jurisdiction.
- 1.6 Lawyers should ensure that costs are not incurred unreasonably
- 1.7 Lawyers should use their best endeavours to at all times seek ways to resolve matters in a timely fashion.

2. Responsibilities to Clients

2.1 Children and Young People²

A lawyer representing a child in a care and protection matter will:

- 2.1.1 Comply with Practice Notes and court directions.
- 2.1.2 Not act as both a direct legal representative and an independent legal representative in the same matter.
- 2.1.3 Appear for the sibling group in the capacity of either a direct legal representative or an independent legal representative unless exceptional circumstances exist. If children are to be separately represented, lawyers must make submissions via Grants Online outlining the reasons why an additional representative is required to be appointed (unless an order has been made to that effect by the Court).
- 2.1.4 Attend all court events in a timely manner; allowing adequate time to prepare.

² A reference to a child is taken to also include a reference to a young person as applicable.

2.1.5 Ensure that the client is represented at all court events and that any agents engaged are members of the panel.

2.2 Children in Direct Representation Matters

A lawyer appearing as a direct legal representative in a care and protection matter will:

2.2.1 Immediately apply for a grant of legal aid on behalf of the child.

2.2.2 Maintain a lawyer-client relationship with the child throughout the proceedings. In doing so, the lawyer must:

- (i) Meet with the child as soon as possible after the lawyer has been appointed and maintain appropriate contact with the child or young person throughout the course of proceedings.
- (ii) Provide the child with sufficient details to allow them to contact the lawyer between court appearances.
- (iii) Answer all telephone inquiries from the child or young person promptly and respond to inquiries by the next working day.
- (iv) Provide a meaningful reply to all correspondence within five working days, reply promptly to urgent matters and, where necessary, advise the child that a detailed request for advice may require more time to respond.
- (v) Maintain continuity of representation; where possible, and if continuity cannot be maintained:
 - advise the Grants Division of Legal Aid NSW so that the matter may be re-assigned. Lawyers must not re-allocate the matter to another lawyer directly; and
 - at the first available opportunity explain to the child who will represent the child on the next occasion and the contact details for that person.

2.2.3 Communicate with the child and seek his or her instructions on all relevant issues in the matter. In doing so, the lawyer must:

- (i) Use communication methods and language appropriate to the age, maturity, education, cultural background, possible disability (physical or intellectual) and language proficiency of the child.
- (ii) Use a qualified interpreter whenever necessary.
- (iii) Encourage the child to ask questions and answer those questions appropriately.
- (iv) Interview the child in private. However, in some situations the child might wish to have, or benefit from, having a support person present for part of the interview. If so, ask the child to choose an appropriate support person who is independent from the proceedings.
- (v) At the first available opportunity, explain to the child the application(s) before the court, the possible outcomes of the court proceedings, the processes and procedures that will be used in court (i.e., who will speak for

the child and who will be in the court room) and the likely time in which their matter will be heard and finalised.

- (vi) At the first available opportunity, explain to the child the solicitor-client relationship, including that the lawyer owes the child the same duty of confidentiality as would be owed to an adult client.
- (vii) At the first available opportunity, write to the child using plain English to confirm the lawyer's advice as to the lawyer-client relationship and as to the pending care proceedings.
- (viii) Read all documents, including evidence from the Department of Family and Community Services, other parties and Children's Court Clinic reports, out loud to the child unless: (1) the child is clearly competent to read and understand the relevant document or (2) taking into consideration the potential emotional impact the relevant document may have upon the child, it is in the opinion of the lawyer more appropriate for the author of the document to explain its contents to the child. In reading any document to the child, the lawyer must modify or explain obscure or inappropriate language in such documents. Should the lawyer feel that it is more appropriate for the author of the document to explain its contents to the child; the lawyer must advise the child and make arrangements for this to occur.
- (ix) Communicate with the child immediately following all relevant court appearances to explain the result and any orders made by the court.

2.2.4 Participate in any court proceedings, including alternate dispute resolution, as instructed or, where instructions have been provided only as to the desired outcomes, in such a way as to advocate for the outcomes instructed by the child.

2.3 Children in Independent Legal Representative Matters

A lawyer appearing as an independent legal representative in a care and protection matter will:

2.3.1 Immediately apply for a grant of legal aid on behalf of the child.

2.3.2 Maintain a relationship with the child throughout the proceedings. In doing so, the lawyer must:

- (i) Meet with the child, except in circumstances where the child is not as yet of school age.
- (ii) Provide the child and/or his or her carers with sufficient details to allow them to contact the lawyer between court appearances.
- (iii) Answer all telephone inquiries promptly and respond to inquiries by the next working day.
- (iv) Provide a meaningful reply to all correspondence within five working days, reply promptly to urgent matters and, where necessary, advise that a detailed request for advice may require more time to respond.
- (v) Maintain continuity of representation; where possible, and if continuity cannot be maintained:

- advise the Grants Division of Legal Aid NSW so that the matter may be re-assigned. Lawyers must not re-allocate the matter to another lawyer directly; and
- at the first available opportunity explain to the child who will represent the child on the next occasion and the contact details for that person.

2.3.3 Communicate with the child at relevant points in the matter, taking into consideration the child's age, maturity, education, cultural background, possible disability (physical or intellectual) and language proficiency. When communicating with the child, the lawyer must:

- (i) At the first available opportunity, explain the role of the independent legal representative.
- (ii) Use communication methods and language appropriate to the age, maturity, education, cultural background and language proficiency of the child.
- (iii) Use a qualified interpreter whenever necessary.
- (iv) Encourage the child to ask questions and answer those questions appropriately.
- (v) Interview the child in private. However, in some situations the child might wish to have, or benefit from, having a support person present for part of the interview. If so, ask the child to choose an appropriate support person who is independent from the proceedings.
- (vi) At the first available opportunity, explain to the child in a way which is age appropriate the care application(s) before the court, the possible outcomes of the court proceedings, the processes and procedures that will be used in court (i.e., who will speak for the child, and who will be in the court room) and the likely time in which their matter will be heard and finalised.
- (vii) Explore with the child his or her wishes in relation to all major decisions concerning the matter, and respect any decision of the child not to express a wish in relation to any issue.
- (viii) Explore with the child the extent to which the child can participate in framing appropriate proposals which can be used in the conduct of the proceedings, but which will avoid involving the child in an adversarial way in the proceedings.
- (ix) Ensure that any correspondence to the child is age appropriate.
- (x) Ensure that the child is kept advised of decisions made by the Court in a way which is age appropriate.
- (xi) Communicate with the child before agreeing to proposals which are substantially different to those discussed with a child.
- (xii) Meet with the child, as appropriate, to explain any orders made.

2.3.4 Participate in any court proceedings in such a way as to advocate for the best interests of the child. In doing so the lawyer must:

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- (i) Act in an independent and unfettered way in the best interests of the child.
- (ii) Obtain all relevant material in relation to the matter including, where appropriate, the Department of Family and Community Services file on the child and any siblings, the applications and evidence filed by all other parties, and other documents as required.
- (iii) Present direct evidence in an admissible format about the child, his or her wishes and matters relevant to his or her safety, welfare and wellbeing.
- (iv) Test by cross examination where appropriate the evidence presented by the other parties.
- (v) Make applications and submissions for orders that the Independent Legal Representative considers appropriate and in the best interests of the child.
- (vi) Ensure that any position taken by the lawyer as to the best interests of the child is based on the evidence and not upon the lawyer's personal view or opinion of the case.
- (vii) Ensure that the child is listened to and is involved in the decision making in a way that takes into account the age and maturity of the child.

2.4 Adults

When representing adults in care and protection matters the lawyer will:

2.4.1 Assist the client to apply for a grant of legal aid. In doing so, the lawyer must:

- (i) Explain to the client the nature and extent of any grant of legal aid which is applicable in the circumstances.
- (ii) Accept ongoing representation under a grant of legal aid of any client who requires such representation after being represented by the lawyer on a duty basis, (i.e. maintain continuity of representation) unless the lawyer discovers a conflict of interest, unless the client wishes to instruct a different lawyer or unless maintaining such continuity of representation is otherwise impracticable.

2.4.2 Maintain a lawyer-client relationship with the client, including:

- (i) Provide the client with sufficient details to allow him or her to contact the lawyer between court appearances.
- (ii) Answer all telephone inquiries promptly and respond to inquiries by the next working day.
- (iii) Provide a meaningful reply to all correspondence within five working days, reply promptly to urgent matters and advise clients that a detailed request for advice may require more time to respond.
- (iv) Maintain continuity in representation, and if continuity cannot be maintained explain to the client the steps they need to take to ensure ongoing representation.

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2.4.3 Communicate with the client and seek his or her instructions at all relevant points in the matter. In doing so, the lawyer must:

- (i) Ensure that all language used is appropriate for the client's education, cultural background, possible disability (physical or intellectual) and language proficiency of the client.
- (ii) Use a qualified interpreter whenever necessary, including when a client is swearing or affirming affidavits.
- (iii) Provide advice as to realistic prospects of success and settlement.
- (iv) Respond promptly to communication from other lawyers, including offers of settlement.
- (v) Ensure that the client is provided with copies of all evidence and other documents related to the proceedings if required, including copies of the Stage 1 and 2 bundles and any Children's Court Clinic or expert report, promptly upon such evidence or documentation being made available.
- (vi) Explain to the client the nature of the care application(s) before the court, the possible outcomes of the court proceedings, the processes and procedures that will be used in court and the likely time in which their matter will be heard.
- (vii) Ensure that the client understands the issues that the court will consider in the course of the matter and the options available to the client and advise the client as to the ramifications of any instructions provided by the client.
- (viii) At the first available opportunity, write to the client using plain English to confirm the lawyer's advice as to the pending care proceedings, the options available and any grant of legal aid.
- (ix) Ensure that the client understands the content of all evidence filed in the proceedings, including that of the Department of Family and Community Services and Children's Court Clinic reports.
- (x) Not have matters listed for final hearing which are otherwise capable of being resolved.
- (xi) Communicate with the client immediately following all relevant court appearances to explain the result and any orders made by the court.

2.4.4 Participate in any court proceedings, including alternate dispute resolution, as instructed consistent with Solicitors and Barristers Rules.

2.4.5 Attend all court events in a timely manner; allowing adequate time to prepare.

2.4.6 Ensure that the client is represented at all court events and that any agents engaged are members of the panel.

3. Responsibilities to Legal Aid NSW

A lawyer acting in a care and protection matter subject to a grant of legal aid will:

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- 3.1 Comply with these practice standards.
- 3.2 Comply with the provisions of the [Legal Aid Commission Act 1979 \(NSW\)](#) and the [policies and guidelines](#) of Legal Aid NSW (as amended).
- 3.3 Comply with the [Terms and Conditions of use of Grants Online](#) (as amended).
- 3.4 Comply with the terms and conditions of the grant of legal aid.
- 3.5 Ensure that any applications for legal aid, extensions of the grant of aid and requests for reconsideration and review are lodged promptly with all relevant information and supporting material to enable a decision to be made without delay.
- 3.6 Seek approval of the Grants Division for any disbursements prior to expenditure on the file by obtaining the appropriate grant or extension via Grants Online.
- 3.7 Review all files on completion of the matter to ensure all necessary steps have been taken before notifying the Grants Division that the matter is finalised. When submitting the final claim to the Grants Division the lawyer must complete the file outcome form setting out the steps involved in completion of the matter and the result in the matter.
- 3.8 Ensure prompt payment to barristers, experts, witnesses and other third parties who have undertaken work pursuant to a grant of aid for that work.
- 3.9 Provide the file in a matter to Legal Aid NSW where a written authority is received from a client to hand over the file.
- 3.10 Seek orders for costs where appropriate.
- 3.11 Notify Legal Aid NSW immediately of any circumstances that could give rise to a claim for professional negligence and provide a detailed statement in relation to the matter.
- 3.12 Complete at least five CLE points each year specifically relevant to the practice of representing children.

4. Duty Work

Duty work encompasses taking instructions and appearing for an adult or child at their first appearance at the Children's Court in a care and protection matter.

A lawyer rostered to appear as duty solicitor on a list day in the Children's Court will:

- 4.1 Comply with the Duty Guidelines for Lawyers in Specialist Children's Courts (as amended).
- 4.2 Act for any party requiring representation irrespective of whether that is rostered on for children or adults, subject to 4.3 below.
- 4.3 Not appear as duty solicitor for children if they are not appointed to the panel to act for children.

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- 4.4 Apply for a case grant of legal aid for each child or adult represented on a duty basis who requires further assistance, and maintain continuity of representation for that client unless the lawyer discovers a conflict of interest or unless the client wishes to instruct a different lawyer or unless maintaining such continuity of representation is otherwise impracticable.
- 4.5 Only arrange for a lawyer who is a member of the panel to act for children if a lawyer who is a member of the panel to act for children needs to arrange another lawyer to cover their duty day.

Following a duty day appearance a lawyer will:

- 4.6 Compile and retain the child / adult's documents incorporating:
 - (i) the signed duty application;
 - (ii) a copy of the care and protection application and accompanying material;
 - (iii) notes of the client's instructions, if available; and
 - (iv) any other documents obtained from the child/adult and/or from the Department of Family and Community Services.
- 4.7 Write to the client to confirm the outcome of the proceedings including any future court dates.

5. File Management

A lawyer acting in a care and protection matter subject to a grant of legal aid must ensure that:

- 5.1 Files must be maintained in an orderly manner so that Legal Aid NSW may effectively audit the file if required, and to ensure that another lawyer assuming conduct of the matter may quickly and easily understand its factual basis, the client's instructions, the stage the matter has reached and all further action required to run the matter in line with the practice standards.
- 5.2 All documents including:
 - (i) correspondence from the Grants Division in relation to the grant of legal aid; and
 - (ii) correspondence received and sent in relation to the matter
 must be kept on the file in date order.
- 5.3 Court documents filed, served or issued in the proceedings must be kept in a separate bundle on the file in date order.
- 5.4 Clear and legible file notes are kept of all telephone conversations, conferences, interviews, meetings with clients or witnesses and experts include:
 - (i) date;
 - (ii) name of person spoken to; and
 - (iii) relevant details of the conversation.
- 5.5 Clear and legible file notes are kept of information and advice given to a client that is not confirmed in writing.

- 5.6 All court attendances are noted on the file in date order with:
- (i) Coram;
 - (ii) date and venue of court appearance;
 - (iii) the name of the solicitor attending on behalf of the legally assisted person;
 - (iv) other parties' representative/s;
 - (v) summary of any negotiations and orders or directions made;
 - (vi) start and finish time/s of the court attendance; and
 - (vii) the date proceedings have been adjourned to or the outcome of the matter.
- 5.7 Receipts or other verifying evidence for all disbursements claimed for payment from Legal Aid NSW are retained in a separate section of the file.