
**DEPARTMENT OF FAMILY AND COMMUNITY
SERVICES NSW**

Program Level Agreement

**The Minister for Family and
Community Services, for and on
behalf of the State of New South
Wales, acting through the
Department of Family and
Community Services**

AND

Service Provider
ABN

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Contract Particulars

Program: Permanency Support Program

Program Level Agreement

Item 1: Name: The Minister for Family and Community Services, for and on behalf of the State of New South Wales, acting through the Department of Family and Community Services (**FACS**)

ABN:

Contact:

Telephone:

Name: (Service Provider)

ABN:

Contact:

Telephone:

Item 2: Category of Services	Type of service	Transition Period Start Date	Service Start Date
	Preservation		
	Foster Care		
	Aboriginal Foster Care		
	Therapeutic Sibling Option Placement	Not Applicable	1 July 2018
	Therapeutic Supported Independent Living	Not Applicable	1 July 2018
	Intensive Therapeutic Care Homes	Not Applicable	1 July 2018
	Intensive Therapeutic Transitional Care	Not Applicable	1 July 2018
	Supported Independent Living	Not Applicable	1 July 2018
	Therapeutic Home Based Care	Not Applicable	1 July 2018

Item 3: 30 June 2022

Service End Date

Item 4:

**Meetings to review
Service Provider's
performance** Monthly

**Item 5:
Contract Manager
of the Service
Provider**

**Item 6:
FACS
Representative**

Program Level Agreement - Permanency Support Program

Date: the date on which FACS executes this Agreement as stated on page 25.

Background

- A. FACS has prepared the Permanency Support Program.
- B. The Permanency Support Program requires the provision of the following categories of services:
 - a. Preservation;
 - b. Foster Care;
 - c. Aboriginal Foster Care;
 - d. Intensive Therapeutic Transitional Care;
 - e. Intensive Therapeutic Care Home;
 - f. Therapeutic Sibling Option Placement;
 - g. Therapeutic Supported Independent Living;
 - h. Supported Independent Living; and
 - i. Therapeutic Home Based Care.
- C. FACS wishes to enter into outcome based performance contracts with providers of Services to support the Permanency Support Program.
- D. Following a procurement process the Service Provider has been selected to perform one or more of the categories of Services.
- E. During the Transition Period (if any), the Service Provider will provide the Transition Period Services. Following the Service Start Date, the Service Provider will provide the Services.
- F. FACS will pay the Service Provider for the Services required to support the Permanency Support Program in accordance with the terms and conditions set out in the Funding Deed and this Agreement.
- G. FACS and the Service Provider have agreed to enter into this Agreement in respect of the Services in support of the Permanency Support Program.

Definitions

In this Agreement, unless the context indicates a contrary intention:

Business Day means any day that is not a Saturday, Sunday or public holiday in the State of New South Wales.

Child has the meaning as set out in the *Children and Young Peoples (Care and Protection) Act 1998* (NSW).

Child-Related Work has the meaning given to it in the *Child Protection (Working with Children) Act 2012* (NSW) and *Child Protection (Working with Children) Regulation 2013* (NSW).

Change in Control means, in relation to the Service Provider, any change in the composition of the board of directors and/or members of its senior management which has, or may have the effect (as reasonably determined by FACS), of rendering the Service Provider no longer suitable to perform the Services.

Contracted Volume has the meaning given to it in Schedule 3 of this Agreement.

Contracted Volume Increase has the meaning in clause 9.5 of this Agreement.

Default Event means:

- a. any of the events set out at clause 19.1 of the Funding Deed;
- b. the Service Provider fails to perform any of its obligations under this Agreement to the satisfaction of FACS;
- c. the Service Provider is in material breach of any of its obligations under this Agreement;
- d. the Service Provider fails to notify FACS of a Notification Requirement 3 or more times in any Quarter;
- e. the Service Provider changes the composition of the board of directors and/or members of its senior management which may be a Change in Control and:
 - i. does not notify FACS of the Change in Control within 10 Business Days after becoming aware of the Change in Control; or
 - ii. if such notice is given, FACS reasonably believes that the Change in Control will have a material adverse impact on the ability of the Service Provider to deliver the Services;
- f. the Service Provider, a Subcontractor, an employee or agent of the Service Provider or a Subcontractor engages in fraud, collusion or dishonest conduct in performing their obligations under this Agreement;
- g. a representation or warranty given by the Service Provider is found to be materially incorrect or misleading, or a financial audit report discloses fraudulent, false, misleading or negligent reporting by the Service Provider in respect of any financial statements or invoices or other books or records of the Service Provider;
- h. the Service Provider's OCG accreditation is suspended or cancelled;
- i. FACS records three or more Referral Refusals in respect of the Service Provider in any 12-month period during the Term.
- j. any other event described as a Default Event in this Agreement.

Emergency Contracted Volume Increase has the meaning in clause 9.6 of this Agreement.

Emergency Establishment Payment has the meaning given to it in Schedule 3 of this Agreement.

FACS Representative means the Person specified in Item 6 of the Contract Particulars.

Funding Deed means the deed between FACS and the Service Provider titled "Funding Deed".

GST has the same meaning as described in clause 26.2 of the Funding Deed.

Immediate Placement means:

- a. a Child or Young Person is in need of Placement confirmation within four hours' notice to the Service Provider; and
- b. the Service Provider is requested to place the Child or Young Person within four hours by FACS,

regardless of that Child's or Young Person's need level, Case Plan Goal, age, gender or other characteristics (unless FACS agrees that there is a legitimate reason in accordance with section 4.1 of this Agreement).

Implementation Plan means Schedule 5 of this Agreement.

Intellectual Property Rights has the meaning as described in clause 26.1 of the Funding Deed.

Law means:

- a. the Legislation and FACS Policies set out in Schedule 4 of this Agreement;
- b. any policies of FACS other than those set out in Schedule 4 which apply to the provision of the Services;
- c. all Commonwealth, New South Wales or local government legislation including any regulations, ordinances, instruments, codes, requirements, by-laws, orders, proclamations and other subordinate legislation;
- d. common law; and
- e. authority approvals and the lawful requirements of any Person acting in the exercise of statutory powers enabling them to give directions affecting the Service Provider's obligations under this Agreement.

Milestone Dates means the target dates for the Transition Period Milestones set out in the Implementation Plan.

Minimum Contracted Volume has the meaning given to it in Schedule 3 of this Agreement.

Notification Requirement means:

- a. media commentary which has an adverse impact on the Service Provider in respect of the Permanency Support Program;
- b. the death of a Child or Young Person;
- c. an incident or medical condition and/or serious or life threatening injury, affecting a Child or Young Person.
- d. a threat of serious harm or injury made to the Child or Young Person, the authorised carer or member of the carer's family, including threats to assault or kill;
- e. a report that a Child under 15 is missing from an approved placement;
- f. an allegation that a Child or Young Person may have committed a serious criminal offence, including malicious damage to property (authorised carer's or others) over \$10,000;
- g. a Child or Young Person is involved in proceedings before any court or needs legal assistance such as, for example, in criminal proceedings;
- h. a request to temporarily or permanently allow a Child or Young Person to reside in another jurisdiction;
- i. a Child or Young Person intends or is planning to get married;
- j. a Child or Young Person becomes pregnant and/or requests a termination of pregnancy;
- k. an application is made on behalf of a Child or Young Person for a passport;
- l. a Child or Young Person needs major medical or dental surgery;
- m. a Placement Change occurs;
- n. a breakdown in interagency negotiations;

- o. the occurrence of a Change in Control; or
- p. a Child or Young Person is missing from a placement.

OCG means the NSW Office of the Children's Guardian.

Performance Outcomes and Data Reporting Framework means the document set out at Schedule 2.

Personnel has the meaning in the Funding Deed.

Placement Change has the meaning given to it in Schedule 2.

Program Level Agreement means this Agreement.

Quarter means every three calendar month period commencing on a Quarterly Date, except as follows:

- a. the first Quarter of a Transition Period will be the period from the Transition Period Start Date until the day before the first Quarterly Date during the Transition Period;
- b. the last Quarter of a Transition Period will be the period from the last Quarterly Date during the Transition Period to the day before the Service Start Date;
- c. the first Quarter following the Service Start Date will be the period from the Service Start Date until the day before the first Quarterly Date following the Service Start Date; and
- d. the last Quarter of the Term will be the period from the last Quarterly Date during the Term until the Service End Date.

Quarterly Date means every 1 January, 1 April, 1 July and 1 October of each year during the Term.

RCTI has the meaning given to "recipient created tax invoice" in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Referral Refusal has the meaning given to it in clause 4.1 of this Agreement.

Services or **Service** means one or more of the services to be delivered by the Service Provider under this Agreement as set out in the Contract Particulars and the Schedule 1.

Service Delivery Schedule means the service delivery schedule contained in Schedule 2 corresponding to the category or categories of Services specified in the Contract Particulars.

Service End Date means the date specified in Item 3 of the Contract Particulars.

Service Payment means the payments made by FACS to the Service Provider under this Agreement and has the same meaning as the term Funds as defined in the Funding Deed.

Service Start Date means the date specified in Item 2 of the Contract Particulars.

Subcontractor means a Person or organisation appointed in accordance with clause 4.2 of this Agreement and clause 21 of the Funding Deed.

Term means the period starting from the earlier of the Transition Period Start Date (if applicable) or the Service Start Date and ending with the Service End Date.

Transition Period means the period (if applicable) in respect of the Services specified in Item 2 of the Contract Particulars beginning on the Transition Period Start Date and ending the day before the Service Start Date.

Transition Period Milestones means each of the milestones in respect of the Transition Period which are set out in the Implementation Plan.

Transition Period Services means the Services set out in the Contract Particulars to be delivered by the Services Provider during the Transition Period in accordance with:

- a. the Implementation Plan; and
- b. to the extent it is consistent with the Implementation Plan, Schedule 1.

Transition Period Start Date means the date specified in Item 2 of the Contract Particulars.

Young Person has the meaning as defined in the *Children and Young Peoples (Care and Protection) Act 1998* (NSW).

Operative part

1 Terms

1.1 Commencement and duration

- a. This Agreement commences on the Service Start Date as set out in the Contract Particulars and, unless terminated earlier, continues until the Service End Date.
- b. FACS may, in its absolute discretion, extend the Service End Date by providing written notice to the Service Provider prior to the Service End Date setting out the revised Service End Date.
- c. If FACS does not issue a notice pursuant to clause 1.1b, this Agreement will continue to apply on a Quarter-by-Quarter basis until terminated by FACS.

1.2 Terms of this Agreement

- a. Notwithstanding clause 26.3 of the Funding Deed, in order of precedence, the terms and conditions of this Agreement are set out in:
 - i. Schedule 6;
 - ii. this Agreement;
 - iii. the Funding Deed;
 - iv. the Implementation Plan (Schedule 5); and
 - v. on an equal footing, Schedules 1 to 4.
- b. The parties agree that the Funding Deed includes obligations which must be complied with to obtain payment for the Services.

1.3 Effect of inconsistency or ambiguity

- a. If there is an inconsistency in the terms of the Funding Deed, this Agreement or the Schedules, the terms of the higher document, as described in clause 1.2 above, will prevail.
- b. If the Service Provider believes that any of the Funding Deed, this Agreement or the Schedules contain errors or ambiguities, the Service Provider must write to FACS detailing the errors or ambiguities as soon as possible. FACS will direct the Service Provider as to the correct interpretation.

1.4 Effect of termination of Funding Deed

If:

- a. on or before the Service End Date, the Funding Deed is terminated; and
- b. on such termination, a new Funding Deed commences;

the new Funding Deed will form part of the terms and conditions of this Agreement on the basis set out in that Funding Deed.

2 Services

2.1 Performance of the Transition Period Services

- a. During the Transition Period, the Service Provider must perform the Transition Period Services in accordance with:
 - i. the Implementation Plan (Schedule 5); and
 - ii. Schedules 1 – 4, to the extent that the Transition Period Services are consistent with the Services.
- b. The Service Provider must achieve each Transition Period Milestone by the relevant Milestone Date.

2.2 Performance of the Services

- a. Following the Transition Period (if applicable), the Service Provider must perform the Services as set out in Item 2 of the Contract Particulars:
 - i. on and from the Service Start Date;
 - ii. in accordance with Schedule 1 and Schedule 2 of this Agreement;using resources and Personnel with the accreditation and skills required under this Agreement.

3 Transition Period and Implementation Plan

3.1 Transition Period

- a. The parties agree that the Transition Period (if any) in respect of each of the categories of Services specified in Item 2 of the Contract Particulars commences on the Transition Period Start Date corresponding to that Service set out in Item 2 of the Contract Particulars.

3.2 Implementation Plan

- a. Schedule 5 of this Agreement specifies the Implementation Plan which applies to each of the Services to be performed during the Transition Period.
- b. Schedule 1 and Schedule 2 of this Agreement specify:
 - i. the Services which apply from the Service Start Date;
 - ii. how the Services to be performed during the Transition Period (that is, the Transition Period Services) are to be performed where Schedule 5 does not specify how the Transition Period Services are to be performed.
- c. The Service Provider:
 - i. must promptly provide to FACS any additional information in connection with the Implementation Plan reasonably requested by FACS; and
 - ii. warrants that the Implementation Plan is complete and correct, and not false or misleading in any material respect, at the time it is provided to FACS.

3.3 *Matters not addressed in Implementation Plan*

In the event that:

- a. a component of the Services is referred to in Schedule 1 or any Schedule of this Agreement; and
- b. the Implementation Plan does not address that component of the Services or provides no guidance on how that component of the Services is to be performed during the Transition Period,

then notwithstanding clause 1.3 of this Agreement, the Service Provider must perform that component of the Services during the Transition Period in accordance with the requirements of Schedule 1 or any relevant Schedule of this Agreement.

3.4 *Reporting requirements for Transition Period*

- a. Throughout the Transition Period and in addition to any other reporting requirements contained in this Agreement, the Service Provider must report to FACS for each Quarter on its achievement of the Transition Period Milestones for that Quarter and its forecast progress against the Transition Period Milestones for the following Quarter (**Implementation Plan Report**).
- b. In the event that the Service Provider is delayed in achieving a Transition Period Milestone, the Implementation Plan Report in respect of that milestone must provide details of the delay, including details of the nature, cause and the likely extent of the delay. Following its submission of the Implementation Plan Report to FACS, the Service Provider must immediately collaborate with FACS to develop and agree on a plan to rectify the delay as soon as possible and ensure that it achieves all forthcoming Transition Period Milestones by the relevant Milestone Date.
- c. As part of the plan referred to in clause 3.4b above, FACS may require the Service Provider to update the Implementation Plan within a time period specified by FACS. Once the updated Implementation Plan is approved by FACS it will become the new Implementation Plan for the purposes of Schedule 5. The new Implementation Plan may result in a revised Transition Period and revised Service Start Date as determined by FACS.

3.5 *Service Provider's other obligations not affected*

- a. The Service Provider acknowledges and agrees that, because:
 - i. it is required by other parts of this Agreement to perform certain activities and accept certain responsibilities (including Schedule 1);
 - ii. it may also have obligations to FACS in respect of delivering the Services or under this Agreement or the Funding Deed or any other funding arrangement that it has entered into with FACS; and
 - iii. it may also have obligations in respect of the OCG or under statute,any other performance obligations of the Service Provider under this Agreement remain unaffected and the Implementation Plan does not affect or discharge those obligations

unless specifically agreed to by the FACS Representative in writing as part of developing or updating the Plan.

- b. The Service Provider acknowledges and agrees that, because:
 - i. it is required by other parts of this Agreement to provide certain plans, programs, protocols, policies, procedures, strategies, reports or notifications to FACS (including the quality and performance management framework);
 - ii. it may also have obligations to FACS in respect of performance reporting, performance reviews and audits under this Agreement or the Funding Deed or any other funding arrangement that it has entered into with FACS; and
 - iii. it may also have obligations in respect of the Office of the Children's Guardian or under statute,

the Service Provider's failure to refer to any plan, program, protocol, policy, procedure, strategy, report, review, audit or notification within this Schedule does not affect those obligations unless specifically agreed to by the FACS Representative in writing as part of developing or updating the Implementation Plan.

4 Additional Service Provider obligations

4.1 Referral Refusals

- a. The Service Provider will be required, upon notification by FACS, to accept referrals up to its number of Actual Vacancies. The process for referral and acceptance of cases has a different application of this principle, depending on the Service provided.
- b. Service Providers:
 - i. will at any given point in time, be expected to accept new cases, including Immediate Placements;
 - ii. that have Actual Vacancies and refuse or are unable to take on a new case or Immediate Placement, will have a Referral Refusal recorded (subject to clause 4.1b.iv of the Agreement) and an abatement of the Service Payment may apply;
 - iii. following receipt of a notice referred to in Clause 4.1.a, may reply to FACS providing any justification for the Referral Refusal;
 - iv. a Referral Refusal will not be recorded where FACS agrees that there is a legitimate reason for a Service Provider to refuse to take on a new case or Immediate Placement. Legitimate reasons would include, but not be limited to circumstances where:
 - A. placing the Child or Young Person in the available placement would violate or be inconsistent with legislation, regulations or guidelines applying to OOHC;
 - B. placing the Child or Young Person in the available placement/s would result in inappropriate matching of Children and Young People of the opposite sex within the same household;
 - C. placing the Child or Young Person in the available placement/s would result in inappropriate matching of known past behaviours between

Children or Young People, where there has been a previous shared placement; or

- D. the Child or Young Person to be placed has particularly complex needs (such as requiring specialist disability knowledge and supports).
- E. the Service Provider has 3 or less vacancies available; or
- F. the Service Provider is an Aboriginal provider in circumstances where it was referred an Immediate Placement other than an Aboriginal Child or a sibling of an Aboriginal Child.

4.2 Subcontracting of the Services

- a. Further to clause 21.1(a) and (b) of the Funding Deed, FACS may impose conditions on its consent to the subcontracting of the Services and Transition Period Services by the Service Provider.
- b. In addition to clause 21.1(e) of the Funding Deed the Service Provider will be vicariously liable for all acts, omissions or defaults of its Subcontractors.
- c. In addition to clause 21.1(c) of the Funding Deed, prior to any Subcontractor commencing work the Service Provider must obtain from the Subcontractor a joint written assignment (on terms reasonably satisfactory to FACS) to FACS and the Service Provider of the Intellectual Property Rights (if any) created by the Subcontractor as a result of performing that part of the Services or the Transition Period Services.
- d. FACS will have no contractual relationship with and undertakes no obligations to any Subcontractor.
- e. In addition to clause 21.1(c) of the Funding Deed the Service Provider must ensure that Subcontractors meet the same requirements as are imposed on the Service Provider in this Agreement.

4.3 Accreditation and approvals warranty

- a. The Service Provider warrants to FACS that it has all accreditations and approvals required for it and its Personnel to deliver the Services and the Transition Period Services.
- b. If requested, the Service Provider must submit to FACS its accreditation status and any reports on its ongoing accreditation provided by the OCG as soon as possible.
- c. The Service Provider must ensure that all Subcontractors have all accreditations and approvals required to provide the Services and the Transition Period Services.

4.4 Personnel Working with Children

The Service Provider must ensure that Personnel (including Subcontractor Personnel) obtain a "working with Children check clearance" before commencing any Child-Related Work forming part of the Services.

5 Payments

5.1 *Payment during Transition Period*

During the Transition Period, FACS will pay the Service Provider in accordance with the process described in FACS' Contracting Arrangements and Business Rules and, to the extent it is not inconsistent with the Contracting Arrangements and Business Rules, subparagraph 3.1(c) of Schedule 3 of this Agreement

5.2 *Payment during the Term*

- a. In respect of each type of Service performed by the Service Provider and for each Quarter on and from the commencement of the Term, FACS will pay the Service Provider the Service Payment:
 - i. as set out in this clause 5;
 - ii. calculated in accordance with Schedule 3 of this Agreement;
 - iii. otherwise determined to be payable by FACS; and
 - iv. in advance.

5.3 *Service Payments*

- a. On or before the first Business Day of each Quarter during the Term, FACS will:
 - i. calculate the Service Payment for that Quarter; and
 - ii. by the 5th Business Day of that Quarter, make the Service Payment and issue the RCTI.
- b. FACS and the Service Provider acknowledge that they (or in the case of FACS, an entity on behalf of FACS) are registered for GST when they enter into this Agreement and that each party will notify the other party if it (or the relevant entity) ceases to be registered.
- c. Neither payment of the Service Payments by FACS to the Service Provider nor the issuing of any RCTI is evidence that the Services have been carried out by the Service Provider in accordance with this Agreement and is to be taken as payment on account only.
- d. FACS may, in any RCTI, correct any error in any previous RCTI issued by FACS.

5.4 *Reconciliation of Service Payments*

- a. For each Quarter, FACS will prepare a reconciliation of the Services actually performed by the Service Provider in the previous Quarter against the Services which were paid for by FACS in relation to the previous Quarter in order to determine:
 - i. the actual Services provided, reconciled against the estimated Services to be provided in that Quarter; and
 - ii. the actual cost of each category of Services that the Service Provider performed, reconciled against the estimate of the cost of those Services to be provided in the Quarter showing:
 - A. an itemisation of any applicable GST; and

- B. the total amount that should have been payable in respect of the Services actually performed in the Quarter reconciled against the amount that was actually paid as the estimate for that Quarter.
- b. Where the amount that should have been paid in respect of the Services actually performed in the previous Quarter is:
 - i. greater than the amount which was paid in respect of that Quarter, this additional amount must be added as an itemised amount in the Service Payment for the current Quarter; or
 - ii. less than the amount which was paid in respect of that Quarter, this amount must be deducted as an itemised amount in the Service Payment for the current Quarter.

5.5 *Payment adjustments*

- a. The Service Payment will be adjusted to the extent and in the manner described in Schedule 3 of this Agreement to reflect the agreed principle that FACS will pay for the quantum and quality of the Services or Transition Period Services actually provided.

5.6 *Entitlement to surplus funds*

- a. The Service Provider is entitled to retain or reallocate any surplus or unspent funds received from FACS in order to carry out the Services or Transition Period Services in accordance with this Agreement.
- b. The parties agree that clause 5.6a will prevail to the extent of any inconsistency with clause 8.2(a)(i) of the Funding Deed.
- c. This clause 5.6 should not be construed so as to limit FACS's right to recover moneys from the Service Provider in accordance with any other Law or agreement between FACS and the Service Provider.

5.7 *Set off*

- a. FACS may at any time deduct, from amounts otherwise payable to the Service Provider, any debt or amount due from the Service Provider to FACS or any claim to money which FACS may have against the Service Provider whether for damages or otherwise. FACS may recover any shortfall from the Service Provider as a debt immediately due and payable.

5.8 *Indexation of payments*

- a. The parties acknowledge and agree that FACS will develop an annual indexation mechanism during the first year of the Term which will apply to payments to be made to the Service Provider in the second and subsequent years of the Term. The annual indexation mechanism will be determined by FACS in its absolute discretion, but such mechanism may be consistent with:
 - i. an existing system of indexation utilised by FACS; or

- ii. any other system of indexation provided to FACS by any other department or body of the NSW Government.

which is applied across all FACS funding programs and may change from time to time.

6 Notification requirements

6.1 *General Reporting Requirements of Service Providers*

- a. The Service Provider remains required to fulfil any other disclosure obligations imposed on it by any other Law or contract
- b. The Service Provider must provide written notice to the FACS Representative immediately upon becoming aware of a Notification Requirement.
- c. The notice given by the Service Provider must be in writing and must identify:
 - i. the Notification Requirement with as many details as possible;
 - ii. the parties involved in the Notification Requirement; and
 - iii. include a copy of any information provided to the Ombudsman or the OCG.
- d. As soon as practicable, the Service Provider must notify FACS if it intends to cease operating as an organisation or intends to cease providing services under the Permanency Support Program.

6.2 *Investigations*

- a. The Service Provider agrees to provide all reasonable assistance (including providing all requested information) to FACS for any audit and/or investigation FACS chooses to undertake in respect of any Notification Requirement or other report as required by legislation.

7 Quality and Performance

7.1 *Requirements of the Service Provider*

The Service Provider must collect the types of data and issue the reports as set out in Schedule 2 to this Agreement.

7.2 *Provision of information by the Service Provider*

The Service Provider must, upon FACS' reasonable request, provide to FACS any information required by FACS in relation to any data required to be collected by the Service Provider under Schedule 2 of this Agreement.

7.3 *Performance Meetings*

The Contract Manager and the FACS Representative (as specified in the Contract Particulars) must meet at the frequency specified at Item 4 of the Contract Particulars to monitor and review the Service Provider's performance under this Agreement and Schedule 2. The Service Provider's Contract Manager must contact the FACS Representative to instigate this review.

8 Dispute Resolution

8.1 Notice of Dispute

- a. Clause 8 of this Agreement takes precedence over any inconsistent provisions of the Funding Deed in relation to Disputes arising under this Agreement (**Dispute**). The dispute resolution process in this clause is compulsory, except if a party seeks an urgent injunction or declaration.
- b. If a party considers that a Dispute has arisen, it may give notice to the other party of the Dispute, setting out the matters in dispute (**Dispute Notice**). The Dispute Notice must be given within 7 calendar days of the party becoming aware of these matters.

8.2 Discussions

- a. After issue of a Dispute Notice, the parties must hold good faith discussions attended by the nominated representative of the Service Provider and a nominated representative of FACS with the requisite delegation or authority to attempt to resolve the Dispute (**First Level Discussions**) and must provide all information which is not confidential, and which is appropriate to resolve the Dispute, to the other party.
- b. If the Dispute has not been resolved within 14 calendar days after commencement of First Level Discussions, the parties must hold good faith discussions between a senior executive to be nominated by each Party (**Second Level Discussions**).
- c. Upon receiving a Dispute Notice, either party may refer a Dispute to Mediation as set out in clause 8.3 at any time, regardless of whether First or Second Level Discussions have been commenced or completed, provided that the decision to refer the Dispute to Mediation is made by a person with the requisite delegation or authority.

8.3 Mediation

- a. If the Dispute has not been resolved within 14 Calendar Days after commencement of Second Level Discussions, or such other time as agreed by the parties, then the dispute may be referred to mediation by written Notice from either party to the other (**Mediation Notice**).
- b. For a mediation under this clause:
 - i. the mediator will be chosen from the published list of mediators produced by the NSW Law Society or (by the parties' mutual agreement) from the list published by the Mediator Standards Board; and
 - ii. the seat of the mediation will be Sydney and all mediation sessions must be held in Sydney unless otherwise agreed by the parties.
- c. Nothing in this clause 8.3 prevents a party from seeking urgent injunctive, interlocutory or declaratory relief.

8.4 *Expert Determination*

- a. If the Dispute has not been resolved following a mediation conducted according to clause 8.3, then the dispute may be referred to expert determination by written Notice from either party to the other (**Expert Determination Notice**).
- b. For an expert determination under this clause:
 - i. the expert determination will be conducted in accordance with the current Rules of Expert Determination of the Resolution Institute (the **Rules**);
 - ii. an expert will be appointed by agreement between the parties or, if agreement on the appointment of the expert is not reached within 10 Business Days of the Expert Determination Notice, in accordance with the Rules;
 - iii. the seat of the expert determination will be Sydney and all hearings must be heard in Sydney unless otherwise agreed by the parties; and
 - iv. the determination of the expert will be final and binding on the parties.
- c. Nothing in this clause 8.4 prevents a party from seeking urgent injunctive, interlocutory or declaratory relief.
- d. This clause 8 will survive expiration of the Term or termination of this Agreement.

8.5 *Disputes involving key subcontractors*

If a Dispute has a substantive connection to a Subcontractor, a representative of that Subcontractor must, if requested by FACS, attend any dispute resolution processes referred to above.

9 Variations

9.1 *Sector consultation*

- a. The parties agree that FACS may, for the purpose of flexibility in the delivery of the Services, require an increase, decrease or change in the quantity or types of Services or Transition Period Services to be delivered by the Service Provider.
- b. From time to time, FACS may consult with stakeholders in the Permanency Support Program in relation to the terms of this Agreement or the delivery of the Services.
- c. FACS will consider the outcomes of any consultations carried out under clause 9.1b prior to directing a Variation under this clause 9, but FACS is not required to implement any of the matters raised in those consultations.

9.2 *Proposal*

- a. FACS and the Service Provider may request the other party, in writing, a variation to:
 - i. any provision under this Agreement or the Schedules;
 - ii. the Transition Period Services; or
 - iii. the Services (**Variation**).
- b. Where FACS is the party proposing the Variation it will provide to the Service Provider a notice of intent to direct a Variation (**Variation Notice**).
- c. Where the Service Provider is the party proposing the Variation, FACS will consider the proposed Variation, and it will either:

- i. provide the Service Provider with a Variation Notice; or
 - ii. respond to the Service Provider in writing that the proposed Variation is unacceptable having regard to the impact of achieving the Permanency Support Program objectives.
- d. When FACS issues a Variation Notice it will include the:
- i. date that the Variation will become effective;
 - ii. timing for the implementation of the Variation; and
 - iii. such other matters as are required to give effect to the Variation.
- e. The parties agree to sign any Variation Notice once it becomes effective in accordance with clause 9.2d.

9.3 *Valuation*

- a. If a Variation instructed under clause 9.2 results or may result in changes to the Service Payment, the valuation of that Variation will be determined:
- i. with reference to the applicable rates as set out in Schedule 3 of this Agreement; or
 - ii. where there are no applicable rates set out in Schedule 3, as reasonably determined by FACS.
- b. Any changes required to the Service Payments as a result of a Variation must apply on and from the effective date of the Variation in accordance with clause 9.2d.

9.4 *Omissions*

If a Variation set out in a Variation Notice omits or deletes any part of the Services, FACS may carry out these Services itself or engage another Service Provider to do so.

9.5 *Variation to increase the Contracted Volume*

- a. In addition to the requirements of this clause 9, any Variation Notice which proposes to:
- i. adjust the volume of Services being undertaken under each Category of Services in Item 2 of the Contract Particulars; and/or
 - ii. increase the Service Provider's Foster Care, Intensive Therapeutic Transitional Care and/or Intensive Therapeutic Care Homes Contracted Volume under the Agreement,
- in each case a **Contracted Volume Increase** must be directed in accordance with this clause 9.5.
- b. The Service Provider must determine whether it is capable of implementing the Contracted Volume Increase and give written notice to FACS of such determination no later than 5 Business Days following the date of the issue of the Variation Notice.
- c. If the Service Provider gives notice to FACS that is capable of accepting a Contracted Volume Increase in response to a Variation Notice under clause 9.5a., the Contracted Volume Increase will become effective on the date which is 40 Business Days following the date of the issue of the Variation Notice.

- d. If the Service Provider gives notice to FACS that it is incapable of accepting a Contracted Volume Increase, subject to clause 9.6 of this Agreement, the Contracted Volume will remain unchanged.

9.6 *Emergency Contracted Volume Increase*

- a. Notwithstanding any requirements of notice set out in subclauses 9.5b and 9.5c above, FACS may at any time propose an Emergency Contracted Volume Increase for Foster Care or Intensive Therapeutic Care Homes by way of a Variation Notice, in which case:
 - i. the Service Provider must, as soon as possible, use reasonable endeavours to determine whether it is capable of implementing the proposed Emergency Contracted Volume Increase, having first regard to the interests of the Children and Young People who may be affected by the proposal; and
 - ii. if the Service Provider:
 - A. determines that the Emergency Contracted Volume Increase can be implemented in accordance with clause 9.6a.i., it must immediately notify FACS of that determination, at which point the Emergency Contracted Volume Increase is deemed to have been directed; or
 - B. determines that the Emergency Contracted Volume Increase cannot be implemented, it must immediately notify FACS giving reasons.
- b. Without limiting clause 5 of this Agreement, if the Service Provider accepts an Emergency Contracted Volume Increase for Intensive Therapeutic Care Homes under clause 9.6a.ii.A., FACS must pay to the Service Provider the Emergency Establishment Payment as set out in Schedule 3.

9.7 *Variation to decrease Contracted Volume*

- a. Subject to clause 9.7b, FACS may instruct a Variation to decrease the Service Provider's Contracted Volume for Foster Care, Intensive Therapeutic Transitional Care and/or Intensive Therapeutic Care Homes.
- b. In the event that FACS proposes a Variation to reduce Contracted Volume to less than the Supplier's Minimum Contracted Volume for Foster Care, Intensive Therapeutic Transitional Care and/or Intensive Therapeutic Care Homes, the Service Provider may terminate this Agreement pursuant to the procedure set out in clause 19 of the Funding Deed.

10 Termination

10.1 *Termination of this Agreement*

- a. FACS may generally terminate this Agreement in accordance with the procedure set out in clause 19 of the Funding Deed. In addition, FACS may elect to exercise its rights under this clause 10.
- b. The parties acknowledge and agree that, if a Default Event occurs, FACS must exercise its rights under this Agreement having regard to the best interests of any

Children or Young People who will be affected by the circumstances giving rise to the Default Event.

- c. If the Service Provider commits a Default Event, FACS may direct the Service Provider to prepare and comply with a Performance Improvement Plan.

10.2 Performance Improvement Plan

In circumstances where the Service Provider prepares a Performance Improvement Plan pursuant to clause 10.1c. of this Agreement, the parties agree to observe the following procedure with the intent of remedying the Default Event:

- a. once the Performance Improvement Plan has been prepared, it must be submitted to FACS as soon as practicable;
- b. FACS must, within 2 Business Days of receipt of the Performance Improvement Plan, approve or reject the Performance Improvement Plan. If the Performance Improvement Plan is rejected, FACS must provide reasons for such rejection. The Performance Improvement Plan must then be resubmitted to FACS for re-approval in accordance with this subclause until it is approved;
- c. the Service Provider must immediately implement the Performance Improvement Plan.
- d. in addition to FACS' right of audit under clause 5 of the Funding Deed, FACS may attend any premises owned or operated by the Service Provider, or request any information from the Service Provider, to conduct an audit of the Service Provider's compliance with the Performance Improvement Plan.
- e. following an audit pursuant to clause 10.2d, and in the event that FACS in its sole discretion determines that the Service Provider has failed to comply with the Performance Improvement Plan, FACS may:
 - i. direct the Service Provider to prepare a further Performance Improvement Plan;
 - ii. reduce or cap the Contracted Volume of the Service Provider in respect of any of the Services; or
 - iii. terminate this Agreement in accordance with the procedure set out in clause 19.1 of the Funding Deed.

10.3 Consequences of termination

In addition to the consequences detailed in clauses 16.1 or 19.3 of the Funding Deed, in the event of a termination of this Agreement by either FACS or the Service Provider, and notwithstanding that such termination may have occurred owing to the breach or default of the Service Provider, the parties agree to consult and cooperate with the Service Provider having regard to the best interests of any Children or Young People who will be affected by the termination so as to ensure the fulfilment of the requirements of the Permanency Support Program.

11 No assignment

A party cannot assign or otherwise transfer its rights under this Agreement without the prior written consent of the other party.

12 Counterparts

This Agreement may be executed in any number of counterparts. All counterparts taken together constitute one instrument.

13 Legal expenses and stamp duty

- a. Each party must pay its own legal costs and disbursements in connection with the negotiation, preparation, execution and carrying into effect of this Agreement.
- b. Each party must pay all stamp duty assessed on or in relation to this Agreement and any instrument or transaction required by or necessary to give effect to this Agreement.

14 Invalidity

- a. A word or provision must be read down if:
 - i. this Agreement is void, voidable, or unenforceable if it is not read down;
 - ii. this Agreement will not be void, voidable or unenforceable if it is read down; and
 - iii. the provision is capable of being read down.
- b. A word or provision must be severed if:
 - i. despite the operation of clause 14a, the provision is void, voidable or unenforceable if it is not severed; and
 - ii. this Agreement will be void, voidable or unenforceable if it is not severed.
- c. The remainder of this Agreement has full effect even if clause 14b.i or 14b.ii applies.

15 Waiver

A right or remedy created by this Agreement cannot be waived except in writing signed by the party entitled to that right. Delays by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.

16 Governing law and jurisdiction

- a. The laws applicable in New South Wales govern this Agreement.
- b. The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

Executed as an Agreement

Signed by

.....
Print Full Name of Authorised representative

.....
Position of Authorised Representative

and

.....
Print Full Name of Authorised representative

.....
Position of Authorised Representative

as authorised representatives for
(Service Provider)
ABN:

who warrant that they are duly authorised to execute this document on behalf of
(Service Provider) ABN:

.....
Signature of Authorised Representative

.....
Signature of Authorised Representative

.....
Date

.....
Date

Signed by

.....
Print Full Name of Authorised representative

as authorised representative for the
**Minister for Family and Community Services, for and on behalf of the State of
New South Wales, acting through the
Department of Family and Community
Services**, in the presence of:

.....
Signature of Authorised Representative

.....
Signature of Witness

.....
Position of Authorised Representative

.....
Print Full Name of Witness

.....
Date