

REPORT ON CHILD AND YOUTH PROTECTION SERVICES (PART 2)

STANDING COMMITTEE ON HEALTH, AGEING AND COMMUNITY
SERVICES

JULY 2020

REPORT 11

THE COMMITTEE

COMMITTEE MEMBERSHIP

Ms Bec Cody MLA	Chair from 26 September 2018
Mrs Vicki Dunne MLA	Deputy Chair from 14 December 2016
	Member from 13 December 2016
Ms Caroline Le Couteur MLA	Member from 13 December 2016

Former Members

Mr Chris Steel MLA	Chair from 14 December 2016 to 23 August 2018
Mrs Elizabeth Kikkert MLA	Deputy Chair from 14 December 2016 to 20 September 2018
Mr Michael Pettersson MLA	Chair from 4 to 20 September 2018
	Member from 13 December 2016 to 3 September 2018

SECRETARIAT

Dr Andréa Cullen <small>FGIA FCIS</small>	Secretary (from 21 August 2019)
Mr Andrew Snedden	Acting Secretary (from 10 July 2019 to 20 August 2019)
Mrs Josephine Moa	Secretary (to 9 July 2019)
Ms Lydia Chung	Administrative assistance

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RESOLUTION OF APPOINTMENT

The ACT Legislative Assembly appointed the Standing Committee on Health, Ageing and Community Services on 13 December 2016.

Specifically, the resolution of 13 December 2016 establishing the Standing Committees of the 9th Assembly as it relates to the Standing Committee on Health, Ageing and Community Services states:

That:

- (1) The following general purpose standing committees be established and each committee inquire into and report on matters referred to it by the Assembly or matters that are considered by the committee to be of concern to the community:

...

(b) a Standing Committee on Health, Ageing and Community Services to examine matters related to hospitals, community and public health, mental health, health promotion and disease prevention, disability matters, drug and substance misuse, targeted health programs and community services, including services for older persons and women, families, housing, poverty, and multicultural and indigenous affairs;...¹

TERMS OF REFERENCE

That this Assembly:

(1) notes that:

(a) the 2004 Vardon report raised concerns from community members that the ACT's care and protection system lacked "effective external scrutiny" to remedy "unlawful or incorrect administrative actions or decisions", and also mentioned the need for "transparency and accountability in decision making";

(b) the 2016 Glanfield inquiry recommended, as one of four key outcomes, the "improved quality of, and transparency in ... decision making and practices" in the ACT's care and protection system;

(c) in its 2016 *Response to Family Violence*, the ACT Government stated that:

(i) "increased transparency and the building of trust is particularly necessary in child protection cases";

¹ ACT Legislative Assembly, Minutes of Proceedings No. 2, 13 December 2016, p. 13.

(ii) the Territory's care and protection system "must adopt a culture of transparency"; and

(iii) "the ACT Government accepts that proper accountability enhances community confidence in public administration, especially in complex areas such as statutory child protection services"; and

(d) the ACT Government recently released a discussion paper on options for the review of child protection decisions in the ACT for public consultation;

(2) also notes that:

(a) a 2018 Court of Appeal decision, reported in *The Canberra Times* on 17 February 2019, set aside previous Children's Court and Supreme Court decisions in relation to the children's need for care and protection; and

(b) a number of prominent Canberrans, including legal practitioners, Aboriginal and Torres Strait Islander community leaders, and a former ACT Chief Minister, have publicly called for an inquiry into this matter;

(3) refers the following matters to the Standing Committee on Health, Ageing and Community Services:

(a) analysis of the case referred to in (2)(a) to identify potential systemic issues that may need to be addressed, and report to the Assembly no later than March 2020; and

(b) inquiry into the ability to share information in the care and protection system in accordance with the *Children and Young People Act 2008*, with a view to providing the maximum transparency and accountability so as to maintain community confidence in the ACT's care and protection system, and report to the Assembly on a date to be determined by the Committee, but no later than July 2020; and

(4) requests the Committee to observe the following in relation to the inquiries established at (3):

(a) that the Committee take evidence and hold documents in ways that will not allow for individual people to be identified without their express consent; and

(b) to the extent that people providing or hearing evidence related to the inquiries are traumatised, that appropriate supports are referred or provided.²

² ACT Legislative Assembly, Minutes of Proceedings, No. 98, 16 May 2019, pp. 1466–1467; 1470.

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EXECUTIVE SUMMARY

[People seeking to obtain information about a care and protection matter in the ACT—as it relates to themselves] should go to the front door:

...but the fact is that the front door does not exist. There is some kind of window, but you cannot open it. The information can be given to you or it cannot be; the right to get the information is not there. That is the right to the kind of information a person wants to know about themselves: “What did I do? I’m the person who had care of the child. The child’s been moved out of my care and given to someone else. What have I done wrong?” They cannot get the information.³

Mr Chris Donohue, President, ACT Law Society

A care and protection system that is impenetrable, confusing and opaque compounds this trauma. It reinforces the inherent power imbalance between a government system and a highly vulnerable individual. Many women come to our service distressed and confused. They do not know the care and protection system and they are unable to get information from care and protection to clarify the situation.⁴

Ms Claudia Maclean—Principal Solicitor, Women’s Legal Centre (ACT and Region)

...in our request for the Assembly to make laws that give the person, the carer, some degree of confidence and feeling that there is justice in the rule of law. You can have a law, and we all comply with the rule of law, but if there is no justice in it you cannot feel comfortable with the rule of law. It is most important that people who are using this system feel that there is justice—not just there somewhere but there as a first step.⁵

Mr Chris Donohue, President, ACT Law Society

In our experience, sharing relevant information that would be in the best interest of the child, the mother or the family is based on what CYPS determines is in the best interests of the child, with no or little consultation with the family or the support service who may be supporting that family.⁶

Ms Robyn Martin, Manager, Beryl Women Incorporated

The ACT Legislative Assembly asked the Standing Committee on Health, Ageing and Community Services to inquire into the ability to share information in the care and protection system in accordance with the *Children and Young People Act 2008*, with a view to providing the maximum transparency and accountability so as to maintain community confidence in the ACT’s care and protection system.

³ Mr Chris Donohue, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 132.

⁴ Ms Claudia MacLean, Women’s Legal Centre—ACT and Region, *Transcript of evidence*, 29 January 2020, p. 54.

⁵ Mr Chris Donohue, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 133.

⁶ Ms Robyn Martin, Beryl Women Incorporated, *Transcript of evidence*, 28 January 2020, p. 17.

If the Committee was to scale back this inquiry to first principles, it would be about trust. Trust in the ACT care and protection system has been in decline for many years. Despite numerous reviews and inquiries into various aspects of the system stretching back over a decade or more—trust in the system by the people to whom the system seeks to serve and the community of which the system is a part continues to remain at low levels.

Trust is essential for any kind of relationship and gives legitimacy to decision-making and the actions that follow. Trust is built, maintained (or eroded) in the array of interactions an individual has with representatives of a system or service and/or with the service or system itself.

The integrity or quality of these interactions is premised on some form of information sharing. The effectiveness of information sharing in each of these interactions coupled with appropriate accountability for these exchanges can either build, maintain or erode trust. Trust in a system and/or service has benefits for those who work within the system to provide services, the recipients of services provided by the system, and the community of which the system is a part.

The Committee acknowledges the efforts to date by the Government in conjunction with other stakeholders to bring about change to the ACT care and protection system—a system in need of change. Notwithstanding these efforts—evidence to the inquiry made clear more needs to be done but also that any improvements need to be underpinned by legislative change.

Evidence emphasised a risk-averse approach to the sharing of information and urged that this be reframed to one of a risk management approach. Contributors noted that decision-making in care and protection matters was a difficult mandate and complex—and at times there were legitimate reasons for not sharing information—however, the default prohibition on the sharing of sensitive information and the lack of appeal and review rights established a culture of information sharing that was counterproductive to transparent and accountable decision-making. Ultimately, such a culture is not in the best interests of a child or young person—the people to whom the system seeks to serve.

The Committee recognises that decision-making under the *Children and Youth Protection Act 2008* affects the rights of individuals in profound and life-changing ways. It is imperative that people using the care and protection system ‘feel that there is justice—not just there somewhere but there as a first step’.⁷

In seeking to respond to the many issues raised in evidence to this inquiry—the Committee has been forward-looking in setting out its views and recommendations using an overarching ethos that a care and protection system and its services should at all times be needs-led and not service-led.

In doing so the Committee has sought to install an unlocked front door to the ACT care and protection system that can be opened to access information needed by the clients of care and protection services and the stakeholders working in and across the care and protection continuum to assist these clients. The Committee has also endeavoured to establish an equitable power balance between the care and protection system and those highly vulnerable individuals who are caught up in the system that is supposed to be acting in their best interests.

⁷ Mr Chris Donohue, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 133.

The Committee accepts that questions about, and decision-making surrounding, the care and protection of children and young people in the Canberra community are often controversial, complex and require a balancing of rights. In that context, those working in the care and protection space work in a challenging, tough and complex environment. Equally important, is that keeping children and young people safe in their families and communities is not just the responsibility of child protection services—it is a whole-of-community responsibility.

The Committee wishes to thank all of those who have contributed to its inquiry, by making submissions and/or appearing before it to give evidence.

The Committee also particularly thanks the statutory organisations, peak bodies, advocacy and support groups, professional associations and other community sector organisations that participated in this inquiry. Many of these groups also contributed to the ACT Government review of child protection decisions in the ACT. The Committee acknowledges that these groups have all been strong advocates in child protection over many years and genuinely thanks them all for sharing their wisdom, expertise and experience with this inquiry. The wide-ranging experience of these organisations, and their commitment to serving children, parents and families, was reflected both in the breadth and in the quality of their contributions.

The Committee also acknowledges and thanks all individuals who made written submissions. The Committee recognises that many participants to its inquiry shared deeply personal experiences and that contemplating and preparing their submissions would not have been easy. The Committee sincerely thanks all inquiry participants for taking the time and personal energy to contribute to an inquiry of this nature.

The Committee is grateful that it was able to draw on a broad range of expertise and experience in its deliberations. In its report, the Committee has based many of its recommendations on suggestions by inquiry participants.

ACT Standing Committee on Health, Ageing and Community Services

RECOMMENDATIONS

RECOMMENDATION 1

- 5.13 The Committee recommends that the ACT Government review and amend the *Children and Young People Act 2008* to ensure its compatibility with the *Human Rights Act 2004* and overriding international conventions that enshrine human rights to which Australia is a signatory. This should include: section 11—the rights of the child and the family; section 21—the right to a fair trial; section 27(2)—cultural rights; and section 8—equality and non-discrimination.

RECOMMENDATION 2

- 5.26 The Committee recommends that the ACT Government review and amend section 349(1) of the *Children and Young People Act 2008* to ensure that the ‘best interests test’ reflects the seven provisions set out in Article 3 of the *United Nations Convention on the Rights of the Child*.

RECOMMENDATION 3

- 5.28 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to specify an express requirement for the court to be satisfied that all reasonable steps have been taken to provide the services necessary to support family unity prior to making an actual care and protection order [as per section 276(1)(b) of the Victorian *Children, Youth and Families Act 2005*].

RECOMMENDATION 4

- 5.32 The Committee recommends that the ACT Government reframe the underlying principles in the *Children and Young People Act 2008* to embed the construct of the ‘best interests test’ to be defined in terms of the relationships a child and young person has and needs for healthy development.

RECOMMENDATION 5

- 5.33 The Committee recommends that the ACT Government strengthen and support the development and maintenance of skills (including reflection and supervision) of care and protection case workers—with regard to an amended ‘best interests test’.

RECOMMENDATION 6

- 5.38 The Committee recommends that the ACT Government in the planning, design and delivery of care and protection services in the ACT adopt the *Charter of rights and responsibilities for parents and family members with children in the care of child protection services in Australia*.

RECOMMENDATION 7

- 5.56 The Committee recommends that the ACT Government explore the feasibility of codifying in the *Children and Young People Act 2008* that all families have a legal entitlement to family group conferencing before Child and Youth Protection Services can intervene and before a matter is referred to the ACT Childrens Court in care and protection matters.

RECOMMENDATION 8

- 5.60 The Committee recommends that the ACT Government—in the context of the ACT as a human rights jurisdiction and Canberra becoming a restorative city—bring together under a cohesive and integrated program the significant restorative work that is already taking place in Canberra to not only strengthen the presence and value of this work but also for it to be a resource to inform and support similar work in the care and protection space and other policy and service delivery areas.

RECOMMENDATION 9

- 6.18 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to allow the sharing of sensitive information that would be in the best interests of the child or young person—from a child concern report, a care and protection report, a pre-natal report, provided interstate care and protection information, a contravention report or family group conference information—where respective notifiers consent to the information being shared.

RECOMMENDATION 10

- 6.19 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to specify when certain parties, such as parents or lawyers, must be provided with particular information.

RECOMMENDATION 11

- 6.20 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to enable a person who has left out-of-home care to access their own records.

RECOMMENDATION 12

- 6.21 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to expressly provide for review rights of a decision to refuse the provision of sensitive information on the basis of it not being in the best interests of the child or young person.

RECOMMENDATION 13

- 6.23 The Committee recommends the ACT Government develop and publish guidelines on when and how the Director-General's discretion to share sensitive information under section 851 of the *Children and Young People Act 2008* will be exercised.

RECOMMENDATION 14

- 6.27 The Committee recommends that until such time as improvements for individuals to access information about themselves relating to matters under the *Children and Young People Act 2008* (the CYP Act) are available under the CYP Act, the ACT Government should restore the pathway for access under section 17 of the *Freedom of Information Act 2016*.

RECOMMENDATION 15

- 6.28 The Committee recommends that the ACT Attorney-General should remind all ACT Government Directorates that any amendment(s) to legislation that removes a fundamental right should not be brought forward to the ACT Legislative Assembly in the form of an omnibus bill.

RECOMMENDATION 16

- 6.42 The Committee recommends the ACT Government, as a priority, implement an internal review mechanism for review of decisions under the *Child and Young People Act 2008*. The mechanism should reflect the general underlying principles for an internal review process as outlined by the ACT Law Society's Family Violence and Children Committee.

RECOMMENDATION 17

- 6.43 The Committee recommends that the ACT Government codify the internal review mechanism for decision-making under the *Child and Young People Act 2008*.

RECOMMENDATION 18

- 6.44 The Committee recommends that the ACT Government revise the Community Services Directorate's *Guide 4—Feedback and raising concerns: How can I let others know what I think?* to address satisfactorily the issues raised by the ACT Law Society's Family Violence and Children Committee regarding its wording, structure and drafting.

RECOMMENDATION 19

- 6.71 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to provide for an external review mechanism.

RECOMMENDATION 20

- 6.72 The Committee recommends that the ACT Government ensure that the external review mechanism for review of decisions made under the *Children and Young People Act 2008* comply with the right to a fair hearing (pursuant to section 21 of the *Human Rights Act 2004*) and be empowered to examine both the merits and any alleged procedural irregularities of the following categories of decision-making: (i) decisions that significantly alter the relationship between parents and their children or between the children and siblings or other people significant in the children's lives; and (ii) decisions (including the imposition of conditions) that amount to limitations on a person's human rights.

RECOMMENDATION 21

- 6.73 The Committee recommends that the ACT Government model the amendments to the *Children and Young People Act 2008* on the external review provisions in the comparable Victorian *Children, Youth and Families Act 2005*.

RECOMMENDATION 22

- 7.14 The Committee recommends that the ACT Government: (a) review the processes by which ACT health professionals are required to make a pre-natal report to ACT child protection authorities to ensure parents are provided with referrals, advocacy, support and information appropriate to their circumstances; and (b) fund targeted early intervention programs for pre-natal women whose are identified as at risk of abuse or neglect after birth.

RECOMMENDATION 23

- 7.30 The Committee recommends that the ACT Government ensure that all ACT Child and Youth Protection Services' staff working with children, parents and families should be required to undertake regular training to ensure that practice is kept up to date. This should include ongoing training on culture and unconscious bias.

RECOMMENDATION 24

- 7.31** The Committee recommends that the ACT Government ensure that appropriate quality control and assurance processes are implemented to reduce unintended bias in decision-making under the *Children and Young People Act 2008*.

RECOMMENDATION 25

- 7.33** The Committee recommends that the ACT Government should acknowledge the importance of child protection and support work for children, parents and families and value, appraise and develop staff that do this important work.

RECOMMENDATION 26

- 7.35** The Committee recommends that the ACT Government should provide funding in the 2020–21 Budget and across the budget out-years for the ACT Disability Aged and Carer Advocacy Service and Advocacy for Inclusion to deliver their specific Disability awareness-type training to all ACT Child and Youth Protection Services' staff working with children, parents and families.

RECOMMENDATION 27

- 7.41** The Committee recommends that the ACT Government revise ACT Child and Youth Protection Services (CYPS) policy and practices to ensure that the Aboriginal and Torres Strait Islander Child Placement Principle is explicit in the policy and the practice of child protection in the ACT.

RECOMMENDATION 28

- 7.48** The Committee recommends that the ACT Government develop child and youth protection service specific litigation guidelines that build on existing obligations (as per the model litigant guidelines and alternative dispute resolution requirements). The Guidelines should recognise the Territory's obligations, parents' responsibilities and rights, and the need to always consider the child's best interests.

RECOMMENDATION 29

- 7.54** The Committee recommends that the ACT Government—in conjunction with the ACT Childrens Court, legal representatives and other interested stakeholders in the care and protection space—review and, if necessary, revise statutory time frames for taking matters to the Childrens Court, in particular following emergency action, to ensure that these timeframes do not adversely impact on the ability to share information with parents, their lawyers and children's lawyers in a sufficiently timely way.

RECOMMENDATION 30

- 7.72** The Committee recommends that the ACT Government amend the *Child and Youth Protection Act 2008* (CYP Act) to provide for disclosure of any information obtained in connection with the administration or execution of the CYP Act for the purposes of any legal proceedings arising out of the CYP Act.

RECOMMENDATION 31

- 7.79** The Committee recommends that the ACT Government review and revise the Director-General's emergency action notification form provided to Children's representatives to ensure that it discloses as much information about the family and their circumstances from the first point of contact. This should include: (a) the child's date of birth; (b) age of parents; (c) Aboriginal or Torres Strait Islander background or other cultural background; (e) disability background; (f) if there has been previous involvement with Child and Youth Protection Services; and (g) requiring the Director-General to provide any previous final orders that have been made and the current care plan.

RECOMMENDATION 32

- 7.88** The Committee recommends that the ACT Government review the relevant sections of the *Court Procedures Act 2004* (the CP Act) to examine how the CP Act may better facilitate the participation of children and young people in proceedings—in particular, to ensure that their instructions, views and wishes are properly taken into account.

RECOMMENDATION 33

- 7.93** The Committee recommends that the ACT Attorney-General update the ACT Legislative Assembly by the last sitting day in August 2020 on the identification of specified proposals as to how a therapeutic justice approach in the care and protection jurisdiction would work in the Australian Capital Territory.

RECOMMENDATION 34

- 7.96** The Committee recommends that the ACT Government—in conjunction with the ACT Childrens Court and key stakeholders in the care and protection and domestic violence space—explore the feasibility of the merits, or otherwise, of measures to safeguard personal information required in court documents from being disclosed that may place parents and children at risk.

RECOMMENDATION 35

7.106 The Committee recommends that the ACT Government ensure that Child Youth and Protection Services facilitate the engagement of advocacy and support services working with children, parents and families in the care and protection system.

RECOMMENDATION 36

7.109 The Committee recommends that the ACT Government, in partnership with the ACT Disability, Aged and Carer Advocacy Service (ADACAS), conduct a targeted advocacy 12-month pilot program providing specialised dedicated support to individuals with disability and mental ill-health who might come to the attention of Child and Youth Protection Services. The pilot program should be accompanied by a process, impact and outcome evaluation.

RECOMMENDATION 37

7.117 The Committee recommends that the ACT Government report to the ACT Legislative Assembly by the last sitting day in August 2020 on the progress of its implementation of the recommendations of the *Report of the Inquiry: Review into the system level responses to family violence in the ACT*. This should include: (i) a summary of action to date, either completed or in progress (including milestones completed); and (ii) the proposed action (including timetable) for implementing recommendations (or parts thereof), where action has not yet commenced.

RECOMMENDATION 38

7.128 The Committee recommends that the ACT Government prioritise addressing the concerns raised by carers about information sharing arrangements between agencies regarding medical information in general and hospital discharge summaries in particular for children and young people in care.

RECOMMENDATION 39

7.145 The Committee recommends that—where the case management of a child or young person in short-term foster care is held by ACT Together—the ACT Government ensure, as a formal practice, that the outcomes of kinship findings are appropriately shared with service providers within ACT Together.

RECOMMENDATION 40

7.146 The Committee recommends that—where the Director-General of the Community Services Directorate has declined to approve a family member as a kinship carer for a child or young person—the ACT Government ensure that either the Kinship Assessment Report (de-identified as required) or a statement of reasons is provided to the potential kinship carer.

RECOMMENDATION 41

7.152 The Committee recommends that—where a child or young person is referred for an out-of-home care placement—the ACT Government ensure that ACT Together is provided with information that will assist with the identification of suitable placement matches. This should include information as to: (a) the reason for removal; (b) details of the involvement of the family and child with Child and Youth Protection Services prior to removal; and (c) the child's emotional and behavioural presentation and their specific needs.

RECOMMENDATION 42

7.153 The Committee recommends that—where the case management of a child or young person is held by ACT Together and a Child Protection Assessment Report (CPAR) has been prepared—the ACT Government ensure, as a formal practice, that a copy of the CPAR (de-identified as required) be provided to ACT Together as soon as practicable.

RECOMMENDATION 43

7.154 The Committee recommends that—where the case management of a child or young person is held by ACT Together—the ACT Government should ensure that all Child Concern Reports Report (de-identified as required) relating to the child or young person are routinely shared with ACT Together.

RECOMMENDATION 44

7.156 The Committee recommends that the Minister with portfolio responsibility for child, youth and protection services in the 10th ACT Legislative Assembly appoint by the end of 2020 a Children and Youth Services Council in accordance with Part 2.2 of the Children and Young People Act 2008. The Council to be tasked with overseeing the implementation of the recommendations of the 9th Assembly Standing Committee on Health, Ageing and Community Services' reports into Part 1 and Part 2 of its inquiry into child and youth protection services.

1 INTRODUCTION AND CONDUCT OF INQUIRY

INQUIRY REFERRAL AND TERMS OF REFERENCE

- 1.1 On Thursday, 16 May 2019 the Australian Capital Territory's (ACT) Legislative Assembly (the Assembly) asked the Standing Committee on Health, Ageing and Community Services (the Committee) to inquire into Child and Youth Protection Services.
- 1.2 The Committee's terms of reference (T of R) are to inquire into and report on two matters. As the matters have different reporting dates and coverage, the inquiry and report have been divided into two separate parts—Part 1 and Part 2. An interim report for Part 1 was released on 31 March 2020.⁸ The present report is for Part 2 and is concerned with the inquiry into the second matter—specifically:
 - to inquire into the ability to share information in the care and protection system in accordance with the *Children and Young People Act 2008* (the CYP Act), with a view to providing the maximum transparency and accountability so as to maintain community confidence in the ACT's care and protection system, and report to the Assembly on a date to be determined by the Committee, but no later than July 2020.
- 1.3 The Assembly asked the Committee to report on the second matter by no later than July 2020.

CONDUCT OF THE INQUIRY

SUBMISSIONS

- 1.4 The Committee invited written submissions from the public for its inquiry in July 2019. The Committee widely advertised its call for submissions using a range of communication channels—including, via a media invite and release; an announcement in the Assembly; advertising in the *Canberra Times*; via the Assembly website; and via social media communication channels. The Committee also directly invited key stakeholders, interest groups and organisations with an interest in the inquiry to make written submissions.

⁸ ACT Legislative Assembly, Minutes of Proceedings, No. 129, 2 April 2020, p. 1916. Standing Committee on Health, Ageing and Community Services—Report 9—*Interim Report on Child and Youth Protection Services (Part 1)*—released 31 March 2020 and tabled 2 April 2020. Available at: <https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/standing-committees-current-assembly/standing-committee-on-health,-ageing-and-community-services/inquiry-into-child-and-youth-protection-services#tab1367930-5id>

- 1.5 The original deadline for receipt of submissions was 30 August 2019, however the Committee extended the deadline by a month to 30 September 2019 to allow late submissions. Also, in response to direct contact from interested individuals and organisations, the Committee also considered requests for, and accepted, late submissions to the inquiry.
- 1.6 The individuals and organisations from who written submissions were received are listed at **Appendix A**. Copies of authorised submissions can be downloaded from the Committee inquiry homepage.⁹ Further detail on submissions received is set out in Chapter 3.

SUPPORT SERVICES FOR WITNESSES

- 1.7 Given the sensitive nature of many of the submissions received and evidence heard, support services were offered to inquiry participants. This extended to those preparing, providing or hearing evidence. The availability of these services was also in accordance with the Assembly resolution referring the inquiry to the Committee—in that ‘to the extent that people providing or hearing evidence related to the inquiries are traumatised, that appropriate supports are referred or provided’.¹⁰

PUBLIC HEARINGS

- 1.8 The Committee held public hearings on 28 and 29 January 2020; and 4, 5, and 25 February 2020.
- 1.9 A list of witnesses who appeared at the public hearings is at **Appendix B**. Full transcripts of the public hearings are available on the Assembly website.¹¹

INVITED BRIEFINGS

- 1.10 As part of its inquiry, the Committee scheduled a series of private briefings to hear from subject matter experts who provided background information on aspects of the inquiry coverage. The Committee met with the following subject matter experts:
- Mr Paul Nixon—Former New Zealand (NZ) Chief Social Worker—28 April 2020;
 - Ms Jenny Saywood—Chair, Restorative City Whanganui Trust (Incorporating Restorative Justice and Restorative Practices)—19 May 2020;

⁹ Refer: <https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/standing-committees-current-assembly/standing-committee-on-health,-ageing-and-community-services/inquiry-into-child-and-youth-protection-services2#tab1435366-2id>

¹⁰ ACT Legislative Assembly, Minutes of Proceedings, No. 98, 16 May 2019, pp. 1466–1467.

¹¹ Refer: <http://www.hansard.act.gov.au/hansard/2017/comms/default.htm#health>

- Mr David Alexander—Member, Restorative City Whanganui Trust (Incorporating Restorative Justice and Restorative Practices)—19 May 2020;
- Mr Grant Bennett—NZ Chief Social Worker/Deputy Chief Executive Professional Practice, NZ Ministry for Children—26 May 2020; and
- Ms Erin Judge—Chief Legal Advisory, NZ Ministry for Children—26 May 2020.

1.11 The Committee also met with the Chair—Ms Barbara Causon and other members of the *Our Booris, Our Way* Steering Committee on 15 October 2019.

1.12 The Committee thanks these subject matter experts for making time to meet with it. The briefings assisted the Committee in its understanding of the many issues it considered during the inquiry.

QUESTIONS

1.13 A number of witnesses at the public hearings undertook to provide further information or took questions on notice. The Committee acknowledges that taking questions on notice means that a considered and accurate answer can be provided.

1.14 Responses to these questions can be accessed from the inquiry homepage.¹²

1.15 The Committee thanks all witnesses for their assistance with the provision of responses and additional information. This information also assisted the Committee in its understanding of the many issues it considered during the inquiry.

REPORT ADOPTION

1.16 The Committee met on 21, 28 and 29 July 2020 to consider the Chair’s draft report and the report, as amended, was adopted by the Committee on 29 July 2020.

¹² Refer: <https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/standing-committees-current-assembly/standing-committee-on-health,-ageing-and-community-services/inquiry-into-child-and-youth-protection-services2#tab1435366-4id>

STRUCTURE OF THE COMMITTEE'S REPORT

- 1.17 The Committee's report on the second matter is divided into three sections, comprising a total of eight chapters, covering the following main topics:

Section 1—Context to the Inquiry

- Chapter 1—Introduction and conduct of the Inquiry
- Chapter 2—Inquiry context [subject matter and local context]

Section 2—Views from submitters and witnesses

- Chapter 3—Views of submitters and witnesses

Section 3—Views of the Committee

- Chapter 4—Guiding principles informing the inquiry
- Chapter 5—Ethos of the Statutory framework—information sharing
- Chapter 6—Legislative framework—information sharing
- Chapter 7—Practice matters—information sharing
- Chapter 8—Conclusion

- 1.18 At Chapter 1, information on the context for the inquiry—including referral and T of R are summarised.
- 1.19 At Chapter 2, information is provided on the national and local context for the funding and provision of child care and protection services in Australia; the statutory framework for the handling and sharing of care and protection information in the ACT; and a statistical snapshot of selected care and protection service data in the ACT.
- 1.20 At Chapter 3, evidence analytics together with a summary of views (individuals and organisations/groups) on the inquiry T of R—as expressed in written submissions and by witnesses at public hearings—are considered and summarised.
- 1.21 At Chapter 4, the Committee sets out the guiding principles informing the inquiry. These principles are informed by views of contributors to the inquiry and the body of theory and practice as it concerns information sharing underpinning the delivery of care and protection services. Many of the contributors, either in full or in part, referred to the concepts underpinning the guiding principles. The Committee also sets out in this chapter how it has determined to organise and consider the many issues raised in evidence across its inquiry T of R.
- 1.22 At Chapters 5 through to 7, the Committee sets out its consideration of the many issues raised in evidence across its inquiry T of R organised according to the following parameters: (i) information sharing matters relating to the ethos of the CYP Act; (ii) the legislative

framework as it relates to information sharing; and (iii) practice matters arising as it concerns information sharing.

ACKNOWLEDGEMENTS

- 1.23 The Committee thanks the Minister for Children, Youth and Families and their directorate and agency officials who assisted the Committee in the course of its inquiry by appearing before it and/or providing additional information.
- 1.24 The Committee appreciates and thanks key interest and stakeholder groups and organisations who made written submissions and those who appeared as witnesses and provided information at its public hearings.
- 1.25 The Committee also particularly thanks the statutory organisations, peak bodies, advocacy and support groups, professional associations and other community sector organisations that participated in this inquiry. Many of these groups also contributed to the ACT Government review of child protection decisions in the ACT. The Committee acknowledges that these groups have all been strong advocates in child protection over many years and genuinely thanks them all for sharing their wisdom, expertise and experience with this inquiry. The wide-ranging experience of these organisations, and their commitment to serving children, parents and families, was reflected both in the breadth and in the quality of their contributions.
- 1.26 The Committee also acknowledges and thanks all individuals who made written submissions. The Committee recognises that many participants to its inquiry shared deeply personal experiences and that contemplating and preparing their submissions would not have been easy. The Committee sincerely thanks all inquiry participants for taking the time and personal energy to contribute to an inquiry of this nature.
- 1.27 The Committee is grateful that it was able to draw on a broad range of expertise and experience in its deliberations. The Committee has based many of its recommendations on suggestions by inquiry participants.

2 INQUIRY CONTEXT

- 2.1 The Assembly has asked the Committee to inquire into the ability to share information in the care and protection system in accordance with the CYP Act, with a view to providing the maximum transparency and accountability so as to maintain community confidence in the ACT's care and protection system.
- 2.2 Child care and protection systems in Australia comprise a range of components and services that encompass multiple agencies working together to promote child and family well-being. Components include: notifications; intensive family support services; investigations; substantiations; care and protection orders; and out-of-home care.¹³ Key services include: protective intervention services; out-of-home care; family support services; and intensive family support services.¹⁴
- 2.3 The overarching goal of child care and protection services in Australia is to provide:
- ...supports and interventions to promote child and family wellbeing, and to protect children and young people aged 0–17 years who are at risk of abuse and neglect within their families, or whose families do not have the capacity to provide care and protection.¹⁵

PROVISION OF CHILD CARE AND PROTECTION SERVICES

NATIONAL OBJECTIVES

- 2.4 National objectives have been established for child care and protection services in Australia, with these services aiming to 'promote child and family wellbeing' by:
- enabling families to care for, and protect, children and young people;
 - protecting children and young people who are at risk of abuse and neglect within their families or whose families do not have the capacity to provide care and protection; and
 - supporting children and young people in the child protection system to reach their potential.¹⁶

¹³ Productivity Commission (2020) *Report on Government Services—Community Services—Part F, Section 16—Child Protection Services*, pp. 16.9–16.10—viewed 6 July 2020, <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/child-protection/rogs-2020-partf-section16.pdf>>.

¹⁴ *Ibid.*, p. 16.4.

¹⁵ *Ibid.*, p. 16.6.

¹⁶ *Ibid.*

- 2.5 To work towards the achievement of these aims, governments across Australia seek to provide child care and protection services that:
- are responsive, ensuring that notifications are responded to, and investigations are completed, in a timely and appropriate manner;
 - are targeted to children and young people who are at greatest risk;
 - support and strengthen families so that children and young people can live in a safe and stable family environment;
 - provide quality care for children and young people aged 0–17 years who cannot live with their parents for reasons of safety or family crisis, with an emphasis on safety, stability and permanency in children's living arrangements; and
 - meet the needs of individual children and young people in the child protection system.¹⁷

STATE AND TERRITORY ROLES AND RESPONSIBILITIES

- 2.6 State and territory governments have responsibility for funding and/or providing child care and protection services in Australia. While each jurisdiction has its own legislation that determines the policies and practices of its child care and protection system—the intent of respective legislative frameworks are all focused on achieving the national objectives for child care and protection services in Australia—that is—to ‘promote child and family wellbeing’.
- 2.7 Importantly, other government service systems may also have a role in child care and protection—including:
- mandatory reporting responsibilities for particular occupations in some jurisdictions;
 - education and child care services, which in some jurisdictions includes education on protective behaviours;
 - health services and mental health services, which support the assessment of child protection matters and deliver general medical and dental services as well as therapeutic, counselling and other services;
 - police services, which investigate serious allegations of child abuse and neglect, particularly criminal matters, and may also work on child protection assessments; and
 - courts, which decide whether a child will be placed on an order.¹⁸

¹⁷ Productivity Commission (2020) *Report on Government Services—Community Services—Part F, Section 16—Child Protection Services*, p. 16.6—viewed 6 July 2020, <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/child-protection/rogs-2020-partf-section16.pdf>>.

¹⁸ *Ibid.*, p. 16.4.

- 2.8 Critical to the delivery of child care and protection services focused on achieving the national objectives to ‘promote child and family wellbeing’ in an equitable, effective and efficient manner is the sharing of information.
- 2.9 As noted previously, each jurisdiction has its own legislation that determines the policies and practices of its child care and protection system. While the intent of this legislation is similar across jurisdictions, it varies in detail, in particular regarding rights to access and obtaining information and rights to appeal and review.
- 2.10 As it concerns rights to access information and rights to appeal and review available in ACT legislation, the President of the ACT Human Rights Commission (the ACT HRC) observed:

Despite being a human rights jurisdiction for 16 years, administrative law, very basic safeguards, such as external review and accessibility to information, that are a matter of course in other jurisdictions, are simply unobtainable presently in the ACT. These deficiencies need to be addressed as a priority.¹⁹

STATUTORY FRAMEWORK FOR THE HANDLING AND SHARING OF INFORMATION IN THE ACT

- 2.11 The CYP Act sets out a framework for the handling and sharing of care and protection information held by ‘information holders’ under the CYP Act. All Child and Youth Protection Services (CYPS) officers are information holders for the purposes of the CYP Act.
- 2.12 Any information received by a person as an information holder is considered to be ‘protected information’ under the CYP Act.²⁰ However, some ‘protected information’ is considered to be ‘sensitive information’, which is subject to more restrictive rules. ‘Sensitive information’ includes a wide range of information such as: care and protection reports and appraisals; contravention report information; interstate care and protection information; family group conference information; and prenatal reports.²¹
- 2.13 CYPS officers can share protected information, with the consent of the person the information is about, provided that the information *is not sensitive information*.²² Outside of court proceedings²³, however, CYPS (on behalf of the Director-General) can only share sensitive information, even with the person’s consent, if it considers that doing so is in the

¹⁹ Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 86.

²⁰ Section 844, *Children and Young People Act 2008*.

²¹ Section 845, *Children and Young People Act 2008*.

²² Section 849, *Children and Young People Act 2008*.

²³ Section 866, *Children and Young People Act 2008*.

best interests of a child or young person.²⁴ This delineation between protected and sensitive information came into force in 2010²⁵, and was inserted ‘to require consideration of the best interest, safety and wellbeing of the child or young person’ and so allow ‘for the release of sensitive information in limited circumstances’.²⁶

- 2.14 Furthermore, other than in relation to court proceedings, the CYP Act imposes a complete ban on CYPS from sharing sensitive information, even if it would be in the best interests of the child or young person to do so, if the information identifies a person who made a child concern report, a care and protection report, a pre-natal report, provided interstate care and protection information, a contravention report or family group conference information.²⁷ This includes any information that would allow someone to identify the reporter.²⁸ This restriction applies irrespective of whether the notifier consents to the information being shared.
- 2.15 The responsible Minister may give an ‘information sharing entity’²⁹ for a child or young person ‘safety and wellbeing information’ in relation to a child or young person, but only after receiving advice that it is appropriate.³⁰
- 2.16 In its Interim Report on Child and Youth Protection Services (Part 1), the Committee noted that the current information sharing provisions have presented challenges to undertaking parts of this inquiry—in particular the matter related to Part 1.

STATISTICAL SNAPSHOT OF SELECTED CARE AND PROTECTION SERVICE DATA IN THE ACT

- 2.17 The Productivity Commission’s annual Report on Government Services (RoGS) provides information on the equity, effectiveness and efficiency of government services in Australia. Concerning ACT child care and protection services, the 2020 annual RoGS on community services³¹, reported that, as of 30 June 2019, there were:

- 9.4 children on care and protection orders for every 1,000 children in the ACT (compared to 10.6 per 1,000 nationally);

²⁴ Section 851, *Children and Young People Act 2008*.

²⁵ Section 10, *Children and Young People Amendment Act 2010*.

²⁶ ACT Legislative Assembly, *Hansard*, 10 December 2009, p. 5657 (Ms Joy Burch MLA, Minister for Children and Young People).

²⁷ Section 857, *Children and Young People Act 2008*.

²⁸ Section 857(b), *Children and Young People Act 2008*.

²⁹ Section 859, *Children and Young People Act 2008*.

³⁰ Section 860, *Children and Young People Act 2008*.

³¹ The report, which was released on 23 January 2020, provides detailed information on the equity, effectiveness and efficiency of service provision and the achievement of outcomes for the aged care, disability, child protection and youth justice service areas in service-specific chapters.

- 91.9 Aboriginal and/or Torres Strait Islander children on care and protection orders for every 1,000 children in the ACT (compared with 66.1 per 1,000 nationally); and
- 53.6 per cent of children in the ACT in out-of-home care or on other supported placements were with relatives or kin, meaning that almost half of all these children were separated from their families (compared with percentages ranging from 27.9 to 51.1 per cent for other Australian jurisdictions³² for which data³³ were presented).³⁴

2.18 In considering the RoGS data for 2018–19 in the context of performance against previous reporting periods and associated trends, the Director-General of the Community Services Directorate (CSD) told the Committee:

The snapshot reports highlight that there has been a slowdown in new entries into care. Service demand continues to increase but at a lower rate in 2018-19 than in 2017-18 and 2016-17. From July 2018 to June 2019, 122 children entered the out of home care system, compared to 155 in 2017-18 and 196 in 2016-17. This reduction is also reflected in the lower number of Aboriginal and Torres Strait Islander children entering care, with 20 per cent of children entering care in 2018-19 being Aboriginal or Torres Strait Islander. This compares with 32 per cent of entries in 2017-18 and 30 per cent in 2016-17.

This is clearly still too high; however, progress is tracking in the right direction and the directorate continues to focus efforts on reducing these numbers.³⁵

³² Qld—44.5 per cent; WA—51.1 per cent; SA—46.6 per cent; Tas—41.1 per cent; NT—27.9 per cent.

³³ Data were not presented for NSW, Victoria or nationally.

³⁴ Productivity Commission (2020) *Report on Government Services—Community Services—Part F, Section 16—Child Protection Services*, Table 16A.1; Table 16A.20; viewed 6 July 2020 <<https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/child-protection/rogs-2020-partf-section16.pdf>>.

³⁵ Ms Rebecca Cross, ACT Government—CSD, *Transcript of evidence*, 5 February 2020, pp. 105–106.

3 VIEWS OF SUBMITTERS AND WITNESSES

- 3.1 This chapter considers views arising on the inquiry T of R—as expressed in written submissions and by witnesses at public hearings—and identifies a number of themes. These are expanded on in Section 3 of the report. It also presents a summary of the evidence analytics across written submissions and public hearings.

SUMMARY OF EVIDENCE ANALYTICS

WRITTEN SUBMISSIONS

- 3.1 The Committee received 17 submissions to its inquiry—12 of these submissions were published and the other five submissions were received in-confidence (refer **Appendix A**).
- 3.2 As to the submission analytics—the submissions that were published³⁶ were from five key stakeholder groups: individuals³⁷; advocacy and support groups and non-government organisations (NGOs); professional associations; academics/policy and research institutes; and government and civic based stakeholders. A summary of the 12 public submissions³⁸ received across these stakeholder groups is detailed in Table 3.1.

Table 3.1—Summary of published public submissions across stakeholder groups

Stakeholder group(s)	Number of submissions
Individuals	2
Government/Civic	3
Professional associations	1
Academics/policy and research institutes	1
Advocacy and support groups and NGOs	5

³⁶ Copies of authorised submissions can be downloaded from the Committee inquiry homepage—refer: <https://www.parliament.act.gov.au/in-committees/standing-committees-current-assembly/standing-committee-on-health,-ageing-and-community-services/Inquiry-into-the-Maternity-Services-in-the-ACT#tab-1251198-2>

³⁷ These submissions were published in part.

³⁸ Submissions authorised for publication.

PUBLIC HEARINGS

- 3.3 The Committee held five public hearings—including 27 witnesses representing several of the key stakeholder groups.³⁹ A summary of witnesses appearing across stakeholder groups is detailed in Table 3.2.

Table 3.2—Summary of witnesses appearing across stakeholder groups

Stakeholder group(s)	Number of witnesses
Government/Civic	10
Professional associations	3
Academics/policy and research institutes	3 ⁴⁰
Advocacy and support groups and NGOs	11

SUMMARY OF VIEWS OF SUBMITTERS AND WITNESSES

- 3.4 The views and themes arising on the inquiry T of R from individuals⁴¹ and organisations and groups⁴², as expressed in written submissions and evidence given at public hearings, are summarised under the headings established in Section 3⁴³ of the Committee's report.
- 3.5 The Committee notes that the summaries following are not an exhaustive list.

ETHOS OF THE CYP ACT—INFORMATION SHARING

- 3.6 Views and themes arising from written submissions and evidence given at public hearings relating to the ethos of the CYP Act and information sharing is as follows:
- a) the delivery of equitable, effective and efficient child care and protection services focused on promoting child and family safety and well-being critically requires information sharing;
 - b) the prevailing culture of sharing information is not in the best interests of a child or young person;
 - c) a consensus about the need to improve transparency and accountability in the child protection system;

³⁹ A list of witnesses who appeared at public hearings is at **Appendix B**. Full transcripts of public hearings are available on the Legislative Assembly website—refer: <http://www.hansard.act.gov.au/hansard/2017/comms/default.htm#health>.

⁴⁰ One witness appearing in this capacity also made a submission as an individual to the inquiry.

⁴¹ As expressed in written submissions and by witnesses at public hearings—drawn from seven written submissions and evidence given by one witness at public hearings.

⁴² As expressed in written submissions and by witnesses at public hearings—drawn from 10 written submissions and evidence given by 26 witnesses at public hearings.

⁴³ In Section 3—Views of the Committee: Chapter 4—the Committee sets out how it determined to organise its consideration of the evidence, and associated recommendations (where applicable) within a forward-looking framework.

- d) incompatibility of the underlying principles of the CYP Act with human rights principles enshrined in international conventions to which Australia is a signatory and with the *ACT Human Rights Act 2004*;
- e) the combination of the opacity of the system and the power imbalance in the system creates a situation where many families cannot advocate for themselves;
- f) the importance of adopting restorative approaches and practice in the delivery of care and protection services—in particular, its value in bringing sustainable change to a system in need of change;
- g) dismay with the proliferation of reviews into care and protection in the ACT—with seemingly limited sustainable change; and
- h) provision of best practice examples of the use of restorative approaches and practices, in particular as they relate to the care and protection space but also in other community settings of which children and their families are a part. While noting some restorative approaches have been trialled and implemented in the ACT—an urging for the Government to adopt some modifications to existing restorative practices together with trialling other proven approaches in the ACT.

LEGISLATIVE FRAMEWORK—INFORMATION SHARING

- 3.7 Views and themes arising from written submissions and evidence given at public hearings relating to the legislative framework and information sharing is as follows:
- a) the power imbalance, in the context of access to information, appeal and review rights and involvement of advocacy, support and legal services, that exists in the CYP Act with regard to information sharing;
 - b) the scope for external review of decisions in the ACT was limited and suggested that a greater range of CYPS' decisions should be subject to external review (whether internal review is a prerequisite for external review or not);
 - c) the subjecting of decisions to scrutiny—and sometimes simply the possibility of scrutiny—can lead to improved decision-making within an agency and greater accountability;
 - d) as to giving form to an external review mechanism—where contributors made recommendations—it ranged between the Victorian and Queensland provisions;
 - e) the importance of designing or making 'good law' in particular where it concerns decisions that affect individuals such as in the care and protection space;
 - f) the difficulty around defining the 'best interests test' in the CYP Act; its incompatibility with human rights principles; and its limitations in scope, viewing a child or young person as an individual alone rather than as an individual and a dependent person;
 - g) limitations under the legislative framework with regard to right to information—access, appeal and review rights. This situation needs to be addressed as a priority;

- h) that best practice administrative law principles and safeguards such as accessibility to information about oneself, which are a matter of course in other jurisdictions, are unobtainable in the ACT—despite the ACT being a human rights jurisdiction;
- i) a range of recommendations to enable greater and timelier information sharing;
- j) concern that the removal of a fundamental right to information relating to child protection was done by placing it in an omnibus bill—traditionally reserved for uncontroversial and technical amendments;
- k) improved internal review is needed. Contributors were also of the view that to change culture in terms of accountability—improved internal review alone would not be sufficient and that it needed to be accompanied by external review; and
- l) views as to the general underlying principles for internal and external review processes. In particular, that internal and external review processes should be codified in the CYP Act.

PRACTICE MATTERS CONCERNING INFORMATION SHARING IN THE CARE AND PROTECTION SYSTEM

3.8 Views and themes arising from written submissions and evidence given at public hearings relating to assumptions and unconscious bias and information sharing is as follows:

- a) assumptions of care at birth—evidence highlighted instances of assumptions of a mother’s ability to care for their newborn baby at birth—where numbers of babies each year are removed from their mothers in hospital;
- b) assumptions at other interactions with the care and protection system—several population groups in the ACT are at greater risk of adverse experiences with CYPs—due to assumptions about their ability to parent and/or the circumstances they are trying to navigate; and
- c) the importance of training and recruitment practices in addressing ongoing issues of cultural bias in CYPs.

3.9 Views and themes arising from written submissions and evidence given at public hearings relating to court related events and processes and information sharing is as follows:

- a) the need for model litigant guidelines to be developed. The guidelines would assist with addressing the current power imbalance that appears to prevail in court-related care and protection matters and be consistent with the right to a fair hearing;
- b) statutory time frames for taking matters to the ACT Childrens Court can impact on the ability to share information with parents, their lawyers and children’s lawyers in a sufficiently timely way;
- c) calls for improved jurisprudence in the care and protection field of work—enabling greater scope for the publication of court decisions would be beneficial;
- d) improvements to disclosure when emergency action is taken and during court proceedings;

- e) adopting a best practice model for the representation of children and young people in care and protection matters;
 - f) potential benefits of a therapeutic jurisprudence model for care and protection matters in the ACT Childrens Court; and
 - g) interaction between care and protection and domestic violence, complications that may arise regarding information sharing in court documents.
- 3.10 Views and themes arising from written submissions and evidence given at public hearings relating to advocacy and support services and information sharing is as follows:
- a) advocacy and support services—the importance for anyone involved in the care and protection system to have access to advocates;
 - b) the distinctive nature of advocacy work in the care and protection space, including its complexity and requirement for a level of specialist skills;
 - c) the value of advocacy and support services in improved outcomes for clients when these services are engaged early; and
 - d) the power imbalances that exist in the care and protection system and limitations highlighted regarding information sharing and engagement between CYPS and advocacy and support services.
- 3.11 The 2016 Glanfield Report recommendations—*Review into the System Level Responses to Family Violence in the ACT*⁴⁴—should be implemented as a priority.
- 3.12 Views and themes arising from written submissions and evidence given at public hearings relating to communication with parents, carers, children and young people and information sharing is as follows:
- a) communication with parents, carers, children and young people and improving systems communication with young people;
 - b) improving health information shared with carers;
 - c) a desire for change so that others will not have to endure what some kinship carers, foster carers and interested family members have experienced when engaging with and navigating within the ACT care and protection system; and
 - d) assessments of carers and kinship carers, difficulties in accessing information about these decisions in particular, if you are the person seeking to be appointed as a kinship carer and you are knocked back, accessing information about why is almost impossible.

⁴⁴ Glanfield, L. (2016) *Report of the Inquiry: Review into the system level responses to family violence in the ACT*, April, viewed 19 May 2020, <https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0010/864712/Glanfield-Inquiryreport.pdf>.

3.13 Views and themes arising from written submissions and evidence given at public hearings relating to out-of-home care placements and information sharing is as follows:

- a) disclosure during kinship care applications;
- b) the sharing of information around kinship findings when children are in short-term care;
- c) accessing information about decision-making as part of assessments of kinship carers, in particular, if a known relative or friend is deemed unsuitable as a kinship carer;
- d) importance of access to information about decision-making as part of assessments of kinship carers for legal representatives; and
- e) information sharing with potential carers, carers, legal representatives and non-government organisations that make up the consortium of agencies that constitute ACT Together.

4 GUIDING PRINCIPLES INFORMING THE INQUIRY

- 4.1 This Chapter sets out the guiding principles informing the inquiry—informed by views of contributors to the inquiry and the body of theory and best practice on the subject of child care and protection services. Many of the contributors, either in full or in part, referred to the concepts underpinning the guiding principles.
- 4.2 The guiding principles informing the inquiry include:

UN CONVENTION ON THE RIGHTS OF THE CHILD

- 4.3 The United Nations (UN) Convention on the Rights of the Child was adopted and opened for signature, ratification and accession by the UN General Assembly on 20 November 1989. It came into force from 2 September 1990.
- 4.4 The Convention:
- sets out the rights that must be realised for children to develop to their full potential;
 - offers a vision of the child as an individual and as a member of a family and community, with rights and responsibilities appropriate to his or her age and stage of development. In recognising children's rights in this way, the Convention firmly sets the focus on the whole child; and
 - recognises the fundamental human dignity of all children and the urgency of ensuring their well-being and development. It makes clear the idea that a basic quality of life should be the right of all children, rather than a privilege enjoyed by a few.⁴⁵
- 4.5 According to the United Nations Children's Fund (UNICEF)⁴⁶, the premises on which children's rights are singled out in a separate human rights Convention are as follows:
- a) **Children are individuals**—children are neither the possessions of parents nor of the State, nor are they mere people-in-the-making; they have equal status as members of the human family.
 - b) **Children start life as totally dependent beings**—children must rely on adults for the nurture and guidance they need to grow towards independence. Such nurture is ideally found from adults in children's families, but when primary adult caregivers

⁴⁵ UN General Assembly Resolution 44/25 of 20 November 1989, *Convention on the Rights of the Child*, viewed 4 July 2020, <<https://www.unicef.org/child-rights-convention/convention-text>>.

⁴⁶ The United Nations Children's Fund (UNICEF), originally known as the United Nations International Children's Emergency Fund (1946–1953), was created by the United Nations General Assembly on 11 December 1946, to provide emergency food and healthcare to children and mothers in countries that had been devastated by World War II.

cannot meet children's needs, it is up to the State as the primary duty bearer to find an alternative in the best interests of the child.

- c) **The actions, or inactions, of government impact children more strongly than any other group in society**—practically every area of government policy, from education to public health, affects children to some degree. Short-sighted policymaking that fails to take children into account has a negative impact on the future of all members of society.
- d) **Children's views should be heard and considered in the political process**—children generally do not vote and do not traditionally take part in political processes. Without special attention to the opinions of children—as expressed at home and in schools, in local communities and even in governments—children's views go unheard on the many important issues that affect them now or will affect them in the future.
- e) **Many changes in society are having a disproportionate, and often negative, impact on children**—transformation of the family structure, globalisation, climate change, digitalisation, mass migration, shifting employment patterns and a shrinking social welfare net in many countries all have strong impacts on children. The impact of these changes can be particularly devastating in situations of armed conflict and other emergencies.
- f) **The healthy development of children is crucial to the future well-being of any society**—because children are still developing, they are especially vulnerable, more so than adults, to poor living conditions such as poverty, inadequate health care, malnutrition, unsafe water, inadequate housing and environmental pollution. The effects of disease, malnutrition and poverty threaten the future of children and therefore the future of the societies in which they live.
- g) **The costs to society of failing its children are huge**—social research findings show that children's earliest experiences significantly influence their future development. The course of their development determines their contribution, or cost, to society over the course of their lives.⁴⁷

HUMAN RIGHTS CONSIDERATIONS

- 4.6 Human rights considerations are of even more importance given the ACT is a human rights jurisdiction. A number of contributors to the inquiry raised the incompatibility of the CYP Act with the *Human Rights Act 2004* (the HR Act) in respect to rights to information and rights to appeal and review.

⁴⁷ UNICEF., Child rights and why they matter—Every right, for every child, viewed 4 July 2020, <Child rights and why they matter—Every right, for every child>.

4.7 The President of the ACT HRC told the Committee:

As a human rights jurisdiction, the starting point should be, naturally, the Human Rights Act. However, the underlying legislative framework, the Children and Young People Act 2008, falls well short of compatibility with the Human Rights Act by lacking safeguards.⁴⁸

4.8 The Committee notes that a number of key processes seeking reform in the care and protection space have failed to adequately acknowledge the fundamental incompatibility of the CYP Act with the HR Act as it concerns rights to information and rights to appeal and review. These include: the Glanfield Report in making its recommendation that a review should be undertaken of what CYPS decisions should be subject to either internal or external merits review—'did not consider whether the absence of external merits review for particular decisions would be consistent with the requirements of the HR Act'⁴⁹; and the 2019 discussion paper prepared by the Government for public consultation—released three years after the Government had accepted the Glanfield recommendation that a review be conducted, 'made only passing reference to human rights principles, and omitted to directly address the human rights requirements (including public authority obligations) pursuant to the HR Act that must necessarily underpin a review of this nature'.⁵⁰

JUSTICE IN THE RULE OF LAW

4.9 Several contributors to the inquiry highlighted in a variety of ways the importance of designing or making 'good law'—in particular where it concerns decisions that affect individuals such as in the care and protection space. The ACT Law Society described 'good law' as:

...something that is fair and just, comprehensible, does not contradict itself, does not contradict other legislation and generally is not retrospective.⁵¹

4.10 The Law Society called on the Assembly:

...to make laws that give the person, the carer, some degree of confidence and feeling that there is justice in the rule of law. You can have a law, and we all comply with the rule of law, but if there is no justice in it you cannot feel comfortable with the rule of law. It is most important that people who are using this system feel that there is justice—not just there somewhere but there as a first step.⁵²

⁴⁸ Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 86.

⁴⁹ ACT Human Rights Commission—Response to QToN—PH 4 February 2020, p. 5.

⁵⁰ ACT Human Rights Commission—Response to QToN—PH 4 February 2020, p. 5.

⁵¹ Mr Chris Donohue, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 131.

⁵² Mr Chris Donohue, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 133.

- 4.11 Designing or making ‘good law’ and achieving justice in the rule of law are fundamental components of best practice in administrative law and decision-making.

BEST PRACTICE ADMINISTRATIVE LAW AND DECISION-MAKING

- 4.12 Administrative law ‘is concerned with upholding the standards of executive government decision-making. Grounded in the principle that public authorities and officials must act within the law, the administrative law framework seeks to balance the interests of individuals and the collective interests represented by governments’.⁵³
- 4.13 The principal objective of administrative law is ‘good government according to law, including ideals of openness, fairness, participation, accountability, consistency, rationality, accessibility of judicial and non-judicial grievance procedures, legality and impartiality’.⁵⁴
- 4.14 Administrative law provides five key avenues for challenging administrative decisions:
- judicial review—in which the court evaluates the legality of a decision;
 - merits review (external review)—typically before a tribunal, by which all aspects of a decision are independently and impartially reconsidered;
 - independent investigation and reporting on complaints made to ombudsman—about incorrect or unjust executive actions by public officials;
 - internal review—involves an affected person applying to have a decision reviewed by a more senior officer in the same agency; this officer is often called a ‘review officer’; and
 - access to government documents through Freedom of Information legislation—which requires agencies to disclose certain categories of information.⁵⁵
- 4.15 Importantly—not all administrative decisions that affect the rights and interests of individuals are subject to merits review (external review)—in that a right to apply for an external review of a decision must be specifically assigned by legislation.⁵⁶

⁵³ Stokes, P., Xavier, M. and Fas, H. (2018) ‘Good government—keep up with your admin (law)’, *The Bench Press*, 10 July, viewed 7 July 2020, <<https://www.mccullough.com.au/2018/07/10/good-government-keep-up-with-your-admin-law/>>; Creyke, R., McMillan, J. and Smyth, M. (2015) *Control of Government Action* (4th edn.), LexisNexis Butterworths, 36.

⁵⁴ Stokes, P., Xavier, M. and Fas, H. (2018) ‘Good government—keep up with your admin (law)’, *The Bench Press*, 10 July, viewed 7 July 2020, <<https://www.mccullough.com.au/2018/07/10/good-government-keep-up-with-your-admin-law/>>; Aronson, M. and Groves, M. (2013) *Judicial Review of Administrative Action* (5th edn.), Thomson Reuters, 1.

⁵⁵ Administrative Review Council. (2007) *Best Practice Guide 5—Decision Making: accountability*; Stokes, P., Xavier, M. and Fas, H. (2018) ‘Good government—keep up with your admin (law)’, *The Bench Press*, 10 July, viewed 7 July 2020, <<https://www.mccullough.com.au/2018/07/10/good-government-keep-up-with-your-admin-law/>>.

⁵⁶ Administrative Review Council. (2007) *Best Practice Guide 5—Decision Making: accountability*, p. 4.

PARENTS AND FAMILY MEMBERS MATTER: A CHARTER OF RIGHTS AND RESPONSIBILITIES

- 4.16 Charters of rights and responsibilities exist within many other areas where the livelihoods of citizens are regulated by public administration, including health, tax, and transport.
- 4.17 In response to research of how child protection interventions are carried out in Australia, Sharynne Hamilton and Valerie Braithwaite (2014) authored a charter⁵⁷ for parents and family members with children in the care of child protection services in Australia.⁵⁸
- 4.18 Hamilton and Braithwaite's research found that in:
- ...some situations, parents are exposed to unfair, non-transparent and unsupported processes where they are given inadequate information, not treated respectfully, not empowered but marginalised and stigmatised. This creates harm in communities and erodes trust in the child protection system.⁵⁹
- 4.19 The Charter sets out:
- ...the rights of parents and family members going through the child protection process, but also their responsibilities. It is premised on developing relationships of mutual respect, open and honest communication, and making sure that there is clear information being transferred at all stages of the process. Parents and family members need to know their rights, and what support is available to them.⁶⁰
- 4.20 The overarching focus of the Charter: 'in the best interest of the family' is underscored by six guiding principles of rights and responsibilities for parents and family members involved with child protection services in Australia—(i) respect; (ii) diversity; (iii) consultation and dialogue; (iv) transparency and accountability; (v) strengths and weaknesses; and (vi) privacy.⁶¹ A copy of the Charter is at **Appendix C**.

⁵⁷ A Charter of Rights and Responsibilities for Parents and Family Members with Children in the Care of Child Protection Services in Australia (the Charter).

⁵⁸ Hamilton, S. and V. Braithwaite. (2014) 'Parents and Family Members Matter: A Charter of Rights and Responsibilities for Parents and Family Members with Children in the Care of Child Protection Services in Australia'. Canberra: Regulatory Institutions Network, Occasional Paper 22, Australian National University.

⁵⁹ Community Capacity Building in Child Protection. (2019) 'Parents and Family Members Matter: A Charter of Rights and Responsibilities', 25 January, viewed 7 July 2020, < <http://www.protectingchildren.org.au/blog-1/2019/1/25/parents-and-family-members-matter-a-charter-of-rights-and-responsibilities>>.

⁶⁰ Ibid.

⁶¹ Hamilton, S. and V. Braithwaite. (2014) 'Parents and Family Members Matter: A Charter of Rights and Responsibilities for Parents and Family Members with Children in the Care of Child Protection Services in Australia'. Canberra: Regulatory Institutions Network, Occasional Paper 22, Australian National University.

RESTORATIVE APPROACHES AND PRACTICE

- 4.21 Restorative philosophy has relevance in all aspects of community life. Underpinning the philosophy is the concept of relational theory⁶² that:
- ...holds at its heart the idea that the human self is fundamentally constituted in terms of its relation to others.⁶³
- 4.22 Restorative practices and philosophy have been used over many years to address conflict. (within a criminal justice setting) in the form of restorative justice. For example, restorative justice has a well-recognised place in the criminal justice system. However, restorative approaches have wider use beyond the criminal justice system in addressing conflict or promoting healthy relationships within the wider context of everyday settings (communities, workplaces, schools, organisations etc.).
- 4.23 Several contributors⁶⁴ to the inquiry emphasised the importance of adopting restorative approaches and practices in the delivery of care and protection services, in particular, its value in bringing sustainable change to a system in need of change.
- 4.24 In evidence the Committee heard about best practice examples of the use of restorative approaches and practices—in particular in the care and protection space but also in other community settings of which children and their families are a part. These examples included: Hull Centre of Restorative Practice, UK; Leeds City Council—Child Friendly Leeds Plan, UK; Restorative City Whanganui Trust (Incorporating Restorative Justice and Restorative Practices), NZ; and restorative work in NZ child protection services focused on improving the relationship of these services with the community, and working closely with Maori Iwi to develop culturally appropriate child protection practice including a strong focus on family-led decision-making and action, through improving the quality of mandated Family Group Conferencing (using a different model to that which has been developed and implemented in the ACT).⁶⁵

⁶² Downie, J. and Llewellyn, J.J. (eds.) (2012). *Being relational: Reflections on relational theory and health law*. Vancouver: UBC Press.

⁶³ Saywood, J. (2019) 'Whanganui: Respectful relationships at the heart of our city—a story from New Zealand', *International Journal of Restorative Justice*, pp. 321; 320–324.

⁶⁴ Including: Submission No. 3—ACT Council of Social Service Inc. (ACTCOSS); Submission No. 9—Canberra Restorative Community Network; Submission No. 13—F. Tito Wheatland; and *Transcript of evidence*—4 February 2020.

⁶⁵ Including: Submission No. 3—ACT Council of Social Service Inc. (ACTCOSS); Submission No. 9—Canberra Restorative Community Network; Submission No. 13—F. Tito Wheatland; and *Transcript of evidence*—4 February 2020; private briefing 28 April 2020—Mr Paul Nixon—Former New Zealand (NZ) Chief Social Worker; and private briefing—19 May 2020—Ms Jenny Saywood—Chair and Mr David Alexander—Member, Restorative City Whanganui Trust (Incorporating Restorative Justice and Restorative Practices).

RESPONDING TO THE INQUIRY TERMS OF REFERENCE

- 4.25 The Assembly has asked the Committee to inquire into the ability to share information in the care and protection system in accordance with the CYP Act, with a view to providing the maximum transparency and accountability so as to maintain community confidence in the ACT's care and protection system.
- 4.26 The Committee has determined to organise its consideration of the evidence, and associated recommendations (where applicable) within a forward-looking framework. Accordingly, the Committee has set out its consideration of the many issues raised in evidence covering its inquiry T of R across the following parameters:
- Overarching ethos of the CYP Act. The ethos of the CYP Act sets the culture or tone for the sharing of information in the care and protection system. The culture or tone in turn shapes the values underpinning information sharing in the system. Considers evidence relating to the current ethos underpinning the sharing of information.
 - Legislative framework for care and protection services in the ACT. The legislative framework operationalises the culture for the sharing of information in the form of provisions relating to information sharing and the scope of decision-making under CYP Act. Considers evidence relating to information sharing and decision-making in the interests of the child, family and community; and accountability for that decision-making.
 - Practice is the expression of the culture and values of information sharing and decision-making in action. It is generally accepted that values drive behaviours, which in turn, drive outcomes. Considers evidence relating to practice matters concerning information sharing.
- 4.27 This approach provides for an integrated perspective and supports a robust consideration of issues raised (and solutions where required) within a cohesive context.

5 ETHOS OF THE CYP ACT—INFORMATION SHARING

- 5.1 This chapter considers evidence (and where applicable, makes recommendations) relating to the current ethos underpinning the sharing of information in the ACT care and protection system. The overarching ethos of the CYP Act sets the culture or tone for the sharing of information in the care and protection system. The culture or tone in turn shapes the values underpinning information sharing in the system.

CULTURE OF INFORMATION SHARING

- 5.2 Overwhelmingly contributors⁶⁶ to the inquiry highlighted the power imbalance—in the context of access to information, appeal and review rights and involvement of advocacy, support and legal services—that exists in the CYP Act with regard to information sharing. While observing instances where information sharing worked well and where there were limitations a representative of Barnardos Australia observed:

I suppose I would comment that sometimes my professional view, having worked in this jurisdiction and not in New South Wales, is that often the legislation is framed so that it contains information sharing more to protect adults than children, I would observe.⁶⁷

- 5.3 Evidence emphasised a risk-averse approach to the sharing of information and urged that this be reframed to one of a risk management approach. Contributors noted that decision-making in care and protection matters is a difficult mandate and complex—and at times there were legitimate reasons for not sharing information—however, the default prohibition on the sharing of sensitive information and the lack of appeal and review rights established a culture of information sharing that was counterproductive to transparent and accountable decision-making.
- 5.4 The Principal Solicitor at the Women’s Legal Centre (ACT and Region) told the Committee:
- A care and protection system that is impenetrable, confusing and opaque compounds this trauma. It reinforces the inherent power imbalance between a government system

⁶⁶ Including: Submission No. 1—Legal Aid ACT; Submission No. 2—ACT Council of Social Service Inc. (ACTCOSS); Submission No. 4—ACT Human Rights Commission; Submission No. 5—Advocacy for Inclusion; Submission No. 9—Canberra Restorative Community Network; Submission No. 11—ACT Law Society; Submission No. 13—F. Tito Wheatland; Submission No. 15—ACT Disability Aged and Carer Advocacy Service (ADACAS); and Submission No. 16—Women’s Legal Centre—ACT and Region.

⁶⁷ Ms Melissa Bell, Barnardos Australia, *Transcript of evidence*, 28 January 2020, p. 4.

and a highly vulnerable individual. Many women come to our service distressed and confused. They do not know the care and protection system and they are unable to get information from care and protection to clarify the situation. Very rarely are women given anything in writing, which makes our job very difficult. When you cannot articulate what is going on and you are in the middle of a process that puts up significant roadblocks, it is very difficult to seek help.

As noted in our submission, it is very difficult to obtain information and much of the centre's time is spent chasing the client's caseworker for it. Sometimes we have been told that caseworker do not speak to lawyers. Whilst this may be the case if you are in the middle of Childrens Court proceedings, it is not the case for a matter that is not in court. However, the provision relating to when information can be shared is discretionary, limited and not subject to external review unless in court. Indeed, the information may become available only once there are proceedings in the Childrens Court on foot.⁶⁸

- 5.5 As the ACT has been a human rights jurisdiction for 16 years, the ACT HRC was of the view that the starting point for informing the underlying principles of a statute in the ACT should be the HR Act and the overriding international conventions that enshrine human rights. The ACT HRC explained:

As a human rights jurisdiction, the starting point should be, naturally, the Human Rights Act. However, the underlying legislative framework, the Children and Young People Act 2008, falls well short of compatibility with the Human Rights Act by lacking safeguards.⁶⁹

- 5.6 The ACT HRC observed that the broad discretionary framework under the CYP Act to make decisions, combined with the lack of external mechanisms, is, in its view incompatible with the HR Act, specifically section 11, the rights of the child and the family; section 21, the right to a fair trial; section 27(2), cultural rights; and section 8, equality and non-discrimination.⁷⁰
- 5.7 The ACT Disability, Aged and Carer Advocacy Service (ADACAS) was also of the view that human rights should be placed:

...at the centre of the principles which need to underpin any future decision process in the CYPs. We believe these rights-based principles should inform practice when

⁶⁸ Ms Claudia MacLean, Women's Legal Centre—ACT and Region, *Transcript of evidence*, 29 January 2020, p. 54; Submission No. 16—Women's Legal Centre—ACT and Region.

⁶⁹ Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 86.

⁷⁰ Submission No. 4—ACT Human Rights Commission; Submission No. 4a—ACT Human Rights Commission; ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, pp. 86–87.

considering the current and potential parents who may have disability or have experienced mental ill health.⁷¹

5.8 ADACAS explained that its position was driven by its:

...commitment to human rights and directly informed by those rights enshrined within the United Nations Convention on the Rights of Persons with Disabilities, the CRPD, as well as the framework provided under the ACT Human Rights Act 2004.⁷²

5.9 Advocacy for Inclusion (AFI) was of the view that the current system is reflective of substitute decision-making rather than supported decision-making. The Senior Policy Adviser for AFI explained:

We strongly believe that all people with disability should have the opportunity for supported decision-making capacity. Currently our system is very much reliant on substitute decision-making, what is best for the person in regard to their decision. And we see elements of that quite a fair bit in the child protection system where the parent with disability is not often involved in their decision-making or involved in the conversation regarding their family matters or their children. It is not a matter of perhaps amending but perhaps making it recognise that parents with disability also need to be involved in their own process.⁷³

COMMITTEE COMMENT

5.10 The Committee recognises that the current overarching legislative framework provides for a culture of sharing information that could be regarded as not in the best interests of a child and young person and their respective families.

5.11 The Committee acknowledges that decision-making in care and protection matters is a difficult mandate and complex—and at times there are legitimate reasons for not sharing information—however, the default prohibition on the sharing of sensitive information and the lack of appeal and review rights has established a culture of information sharing that is counterproductive to transparent and accountable decision-making and contrary to the ACT's designation as a human rights jurisdiction.

5.12 The Committee is firmly of the view that the underlying principles in the CYP Act need to be reframed to ensure compatibility with human rights principles—namely the HR Act and overriding international conventions that enshrine human rights and to which Australia is a signatory. This includes the: *Universal Declaration on Human Rights, United Nations*

⁷¹ Mr Michael Bleasdale, ADACAS, *Transcript of evidence*, 29 January 2020, p. 27.

⁷² Mr Michael Bleasdale, ADACAS, *Transcript of evidence*, 29 January 2020, p. 27.

⁷³ Ms Bonnie Millen, Advocacy for Inclusion, *Transcript of evidence*, 28 January 2020, p. 10.

Convention on the Rights of the Child and United Nations Convention on the Rights of Persons with Disabilities.

Recommendation 1

- 5.13** The Committee recommends that the ACT Government review and amend the *Children and Young People Act 2008* to ensure its compatibility with the *Human Rights Act 2004* and overriding international conventions that enshrine human rights to which Australia is a signatory. This should include: section 11—the rights of the child and the family; section 21—the right to a fair trial; section 27(2)—cultural rights; and section 8—equality and non-discrimination.

THE BEST INTERESTS TEST

- 5.14** A key underlying principle in the CYP Act is the ‘best interests test’. In the course of the inquiry, the Committee discussed with witnesses the difficulty around defining the ‘best interests test’; its incompatibility with human rights principles; and its limitations in scope—viewing a child or young person as an individual rather than a dependent person.
- 5.15** As to the sorts of principles that should underpin the best interests of the child or young person, the ACT Law Society suggested that:
- ...the Family Law Act actually sets it out fairly well, being a relationship with both parents, so long as that relationship can be done safely. It does go on to deal with a number of considerations that can go into making that determination, but I do not know that it needs to be any more complex than that on the face of it.⁷⁴
- 5.16** Sections 7, 8, 9, 349 and 350 of the CYP Act set out principles and provisions to guide decision-making as it concerns the ‘best interests’ of a child or young person.
- 5.17** The ACT HRC was of the view that the ‘best interests test’ in the CYP Act does not accord with the *UN Convention on the Rights of the Child*. The Commission noted that section 349(1) of the CYP Act has 12 provisions as compared with seven provisions in Article 3 of the *Convention on the Rights of the Child*. The Commission further noted that care and protection legislation in Victoria reflects the seven provisions in article 3 of the *Convention on the Rights of the Child* and was of the view:
- ...that the ACT should pick that up. We are both human rights jurisdictions, and theirs has been updated. Firstly, section 10(3)(a) of the Victorian act explicitly recognises that

⁷⁴ Mr Adrian Curtis, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 140.

prioritising support to preserve family unity is an inherent part of the best interest principles. That is not the case under the 12 principles in the ACT.⁷⁵

- 5.18 With regard to information sharing that considers the ‘best interests’ of the child or young person in the context of the family unit, a Domestic Violence Specialist and Support Worker from Beryl Women Incorporated explained:

The bit that I would say around the sharing of information is that I think that it would be prudent for child protection to consider who the family’s main supports are and actually to engage them in the process.⁷⁶

- 5.19 Further, an individual submission highlighted:

CYPS **MUST** do more at an early stage to identify the biological family, even if the suspected parents provide no assistance.⁷⁷

- 5.20 With regard to limitations in scope of the ‘best interests test’, Dr Tito Wheatland observed:

...the approach generally in the Act seems to be that a child is an individual, rather than a dependent person, requiring the love and support of a family and others for healthy development. There are some special principles that appear to recognise relationships more for Aboriginal and Torres Strait Islander children, but they are still framed in a manner which sees them as being free-standing individuals.⁷⁸

- 5.21 An example of a jurisdictional approach where a child or young person is viewed as dependent person comes from NZ. The NZ equivalent of the CYP Act is the *Oranga Tamariki Act 1989* or *Children’s and Young People’s Well-being Act 1989*.

Dr Tito Wheatland told the Committee that the NZ legislation:

...strongly embeds constructs of the child’s best interests in their nested relationships, one inside the other. A non-Indigenous Australian translation might be that a child’s best interests would be best served by strengthening the relationships of love and protection in their family, their extended family, friends and community to enable them to flourish. The New Zealand Act applies the Maori relational concepts to all New Zealand children. Clearly, all children are embedded in a web of relationships and these need to be recognised and reflected in our local legislation.⁷⁹

- 5.22 The final report of the *Our Booris, Our Way* review observed that there is a provision in the CYP Act that recognises that ‘the maintenance of an Aboriginal and/or Torres Strait Islander

⁷⁵ Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 88; Submission No. 4—ACT Human Rights Commission.

⁷⁶ Ms Linda Hayden, Beryl Women Incorporated, *Transcript of evidence*, 28 January 2020, p. 20.

⁷⁷ Submission No. 2—Name withheld, p. 3.

⁷⁸ Submission No. 13—F. Tito-Wheatland, p. 21.

⁷⁹ Submission No. 13—F. Tito-Wheatland, p. 21.

child with their family and culture is always in the child's best interest'⁸⁰—specifically section 349 (1)(g) which states:

...for an Aboriginal or Torres Strait Islander child or young person—that it is a high priority to protect and promote the child's or young person's cultural and spiritual identity and development by, wherever possible, maintaining and building the child's or young person's connections to family, community and culture.

- 5.23 Notwithstanding the aforementioned legislative provision—the *Our Booris, Our Way* review found that it was 'rarely mentioned in decision-making documents that have been viewed throughout this review'. Further contrary to the intent of section 349(1)(g), the *Our Booris, Our Way* review found:

...incidents of Aboriginal and Torres Strait Islander children being denied restoration to their kin as they are deemed to be in a stable placement and potential restoration would be upsetting and it is therefore in the child's best interests to stay in the, usually, non-Aboriginal placement. This is not an appropriate application of the best interests test when family, or another culturally appropriate placement, exists.⁸¹

- 5.24 With regard to informing decision-making when court proceedings are considering care orders, the Committee also heard that Victorian care and protection legislation expressly requires that the Court 'be satisfied that all reasonable steps have been taken to provide the services necessary to support family unity prior to making an actual care and protection order'.⁸²

COMMITTEE COMMENT

- 5.25 The Committee is firmly of the view that the provisions in the CYP Act should be compatible with human rights principles, and this extends to the 'best interests test'. The Committee agrees that the 'best interests test' at a minimum should adequately reflect Article 3 of the *UN Convention on the Rights of the Child*.

⁸⁰ *Our Booris, Our Way* review, Final Report, December 2019, p. 19, viewed 7 July 2020, <https://www.strongfamilies.act.gov.au/__data/assets/pdf_file/0011/1457813/Our-Booris-Report-FINAL-REPORT.pdf>.

⁸¹ *Our Booris, Our Way* review, Final Report, December 2019, p. 19, viewed 7 July 2020, <https://www.strongfamilies.act.gov.au/__data/assets/pdf_file/0011/1457813/Our-Booris-Report-FINAL-REPORT.pdf>.

⁸² Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 88; Submission No. 4—ACT Human Rights Commission.

Recommendation 2

- 5.26 The Committee recommends that the ACT Government review and amend section 349(1) of the *Children and Young People Act 2008* to ensure that the ‘best interests test’ reflects the seven provisions set out in Article 3 of the *United Nations Convention on the Rights of the Child*.**
- 5.27 Further, the Committee is of the view that the CYP Act should also include an express requirement for the court to be satisfied that all reasonable steps have been taken to provide the services necessary to support family unity prior to making an actual care and protection order. Such a requirement is included in section 276(1)(b) of the Victorian *Children, Youth and Families Act 2005*.

Recommendation 3

- 5.28 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to specify an express requirement for the court to be satisfied that all reasonable steps have been taken to provide the services necessary to support family unity prior to making an actual care and protection order [as per section 276(1)(b) of the Victorian *Children, Youth and Families Act 2005*].**
- 5.29 With regard to scope of the meaning of ‘best interests’, the Committee strongly considers that the underlying principles in the CYP Act need to be reframed to embed the construct of the ‘best interests test’ being defined in terms of the relationships a child and young person has and needs for healthy development—a relational approach, as well as individual needs. From this—the focus for sharing information is established—in that, people the child or young person has relationships with should be involved in the decision-making that affects them. In this way, information sharing and decision-making under the CYP Act transitions from a service-led approach to a needs-led approach.
- 5.30 The Committee acknowledges that while the wider relational aspects needed for a child or young person’s healthy development may at times be considered in practice, the Committee heard its application was *ad hoc* and largely reliant on individual case workers. The Committee is therefore of the view that it should be codified in the CYP Act but notes that while regulation has its place it is not a substitute for reflection and judgement.
- 5.31 The Committee also acknowledges that the CYP Act⁸³ recognises the importance of wider relational aspects in the ‘best interests test’ for Aboriginal and Torres Strait Islander

⁸³ Section 349 (1) (g)—‘for an Aboriginal or Torres Strait Islander child or young person—that it is a high priority to protect and promote the child’s or young person’s cultural and spiritual identity and development by, wherever possible, maintaining and building the child’s or young person’s connections to family, community and culture’.

children—in that ‘the maintenance of an Aboriginal and/or Torres Strait Islander child with their family and culture is always in the child’s best interest’. Notwithstanding, evidence suggested that this provision is ‘still framed in a manner which sees [*Aboriginal and Torres Strait Islander children*] as being free-standing individuals’.⁸⁴ Further, the *Our Booris, Our Way* review found that this provision of the CYP Act ‘is rarely mentioned in decision-making documents that [*had*] been viewed throughout’ its review.⁸⁵

Recommendation 4

- 5.32 The Committee recommends that the ACT Government reframe the underlying principles in the *Children and Young People Act 2008* to embed the construct of the ‘best interests test’ to be defined in terms of the relationships a child and young person has and needs for healthy development.**

Recommendation 5

- 5.33 The Committee recommends that the ACT Government strengthen and support the development and maintenance of skills (including reflection and supervision) of care and protection case workers—with regard to an amended ‘best interests test’.**
- 5.34 The Committee understands an outcome of research examining how child protection interventions are carried out in Australia by Sharynne Hamilton and Valerie Braithwaite (2014) from the ANU—was the development of a charter⁸⁶ for parents and family members with children in the care of child protection services in Australia.⁸⁷
- 5.35 The Charter of rights and responsibilities for parents and family members with children in the care of child protection services in Australia sets out:
- ...the rights of parents and family members going through the child protection process, but also their responsibilities. It is premised on developing relationships of mutual respect, open and honest communication, and making sure that there is clear

⁸⁴ Submission No. 13—F. Tito-Wheatland, p. 21.

⁸⁵ *Our Booris, Our Way* review, Final Report, December 2019, p. 19, viewed 7 July 2020, <https://www.strongfamilies.act.gov.au/__data/assets/pdf_file/0011/1457813/Our-Booris-Report-FINAL-REPORT.pdf>.

⁸⁶ A Charter of Rights and Responsibilities for Parents and Family Members with Children in the Care of Child Protection Services in Australia (the Charter).

⁸⁷ Hamilton, S. and V. Braithwaite. (2014) ‘Parents and Family Members Matter: A Charter of Rights and Responsibilities for Parents and Family Members with Children in the Care of Child Protection Services in Australia’. Canberra: Regulatory Institutions Network, Occasional Paper 22, Australian National University.

information being transferred at all stages of the process. Parents and family members need to know their rights, and what support is available to them.⁸⁸

- 5.36 The overarching focus of the Charter: ‘in the best interest of the family’ is underscored by six guiding principles of rights and responsibilities for parents and family members involved with child protection services in Australia—(i) respect; (ii) diversity; (iii) consultation and dialogue; (iv) transparency and accountability; (v) strength and weaknesses; and (vi) privacy.⁸⁹
- 5.37 The Charter reflects learnings from evidenced based research arising from care and protection interventions in Australia and also reflects restorative principles. In that regard, it becomes a useful platform for informing improvements and reform to the planning, design and delivery of care and protection services.

Recommendation 6

- 5.38 The Committee recommends that the ACT Government in the planning, design and delivery of care and protection services in the ACT adopt the *Charter of rights and responsibilities for parents and family members with children in the care of child protection services in Australia*.**

RESTORATIVE PRACTICES AND APPROACHES

- 5.39 A key systemic issue raised by many stakeholders has been the dismay with the proliferation of reviews into care and protection in the ACT. The Canberra Restorative Community Network:

...views this current series of ongoing A.C.T. inquiries as a symptom of continued failure in the practices, processes and policies in A.C.T. statutory child protection. Many outcomes of previous reviews have not been enacted and it appears that top down initiatives have had limited impact. We continue to have the second highest rate of removals in the nation, in a community which prides itself with lower levels of socio-economic deprivation. Since the Prime Minister apologised for the actions of governments in relation to the Stolen Generations over a decade ago, our removal rates of Aboriginal children have increased threefold. Our failure of vision and action

⁸⁸ Community Capacity Building in Child Protection. (2019) ‘Parents and Family Members Matter: A Charter of Rights and Responsibilities’, 25 January, viewed 7 July 2020, < <http://www.protectingchildren.org.au/blog-1/2019/1/25/parents-and-family-members-matter-a-charter-of-rights-and-responsibilities>>.

⁸⁹ Hamilton, S. and V. Braithwaite. (2014) ‘Parents and Family Members Matter: A Charter of Rights and Responsibilities for Parents and Family Members with Children in the Care of Child Protection Services in Australia’. Canberra: Regulatory Institutions Network, Occasional Paper 22, Australian National University.

has led to around 1 in 10 of our Aboriginal children and young people being in care in the ACT.⁹⁰

- 5.40 The ACT has been a human rights jurisdiction for 16 years and has also embarked on Canberra becoming a restorative city. Restorative values and principles are inextricably linked to human rights principles. Some of the elements of the characteristics of a restorative city are already reflected in the values and obligations in the HR Act. As to the relationship between restorative and human rights values and principles the ACT HRC has emphasised:

...implementing a best practice human rights jurisdiction in the ACT...is the most important step to be taken in efforts to make Canberra a restorative city. It would also allow the ACT to ground restorative practices and values in an established and substantial framework.⁹¹

- 5.41 In 2016, the Assembly called on the ACT Government:

...to work towards the declaration of Canberra as a restorative city, which will confirm its commitment to exploring and implementing creative solutions to shared problems using restorative process and continue the ACT's vision for safer, more connected communities.⁹²

- 5.42 In accordance with the Assembly's resolution, the Attorney-General asked the ACT Law Reform Advisory Council to inquire into and report on: (i) what it would mean for Canberra to be a restorative city, with a focus on the legal and justice dimensions; (ii) how the ACT should prioritise its efforts to make Canberra a restorative city; and (iii) how the ACT Government can appropriately affirm the community working to establish Canberra as a restorative city through the Canberra Restorative Practices Network.

- 5.43 The ACT Law Reform Advisory Council provided its final report—Canberra—becoming a restorative city—to Government in October 2018. The Government released the Council's report in 2019. Amongst other things, the Council identified a number of options for achieving a more relationally-focussed child protection system—a key restorative process recommended was the use of some form of Family Group Conferencing (FGC). The Council made four recommendations relating to FGC.⁹³

⁹⁰ Submission No. 9—Canberra Restorative Community Network, p. 4.

⁹¹ ACT Law Reform Advisory Council. (2018) Final report: *Canberra—becoming a restorative city*, p. 16.

⁹² ACT Legislative Assembly Debates. (2016). Restorative Justice motion moved by Ms Mary Porter MLA, 10 February, pp. 122–136; ACT Legislative Assembly, Minutes of Proceedings, No. 125, 10 February 2016, pp. 1430–1431.

⁹³ ACT Law Reform Advisory Council. (2018) Final report: *Canberra—becoming a restorative city*.

5.44 Several contributors⁹⁴ to the inquiry emphasised the importance of adopting restorative approaches and practice in the delivery of care and protection services in particular, its value in bringing sustainable change to a system in need of change.

5.45 The ACT Council of Social Service Inc. (ACTCOSS) emphasised that ‘there must be a concerted effort to moving towards a restorative child protection system, in line with the goal of Canberra becoming a Restorative City’.⁹⁵

5.46 As to the implementation of a restorative focused child protection system and the associated dimensions of change that may be required, the Public Advocate and Children and Young People Commissioner explained:

Yes, cultural change is part of that but if we do not provide direction, whether that be through legislative framework or policy direction, then I do not think we are ever going to get there.

You are absolutely right that cultural change is needed, but we also need to tell people what the expectations are in terms of those processes of engagement and set that scene really clearly. If there is training that is needed to achieve that, then provide that training. ...⁹⁶

I would say potentially structural change as well. While you were talking, I was thinking about the fact that that front line within CYPS is called an intake team. That in and of itself suggests that you are bringing people into the system. It does not suggest that you are actually setting people up to facilitate supports to actually hold people outside the system. So thinking about it, from some of those structural perspectives, what are those inherent messages that we are sending through the way that we are setting up the systems within the directorate itself?⁹⁷

5.47 The Victims of Crime Commissioner added:

Hearing from our colleagues in Leeds and Hull in the UK who have gone about this cultural process change over time with significant reductions in the removal of children, there would be lessons to learn about how you bring about, in a practical sense, that change. I think it is about a change in the processes that case workers at the lowest level of CYPS are required to undertake in order to make a decision and to record that.

Fundamentally, though, it is about this sharing of power, which is the most confronting thing, I think, for government agencies who are used to, in a conversation, holding all

⁹⁴ Including: Submission No. 3—ACT Council of Social Service Inc. (ACTCOSS); Submission No. 9—Canberra Restorative Community Network; Submission No. 13—F. Tito Wheatland; and *Transcript of evidence*—4 February 2020.

⁹⁵ Submission No. 3—ACT Council of Social Service Inc. (ACTCOSS), p. 14.

⁹⁶ Ms Jodie Griffiths-Cook, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 90.

⁹⁷ Ms Jodie Griffiths-Cook, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 91.

of that power. Restorative practice offers us a model of different engagement, which is about not assuming you have all the relevant information when you walk in the door. That is something that cultural change alone will shift, really.⁹⁸

How do we deliver that? Play it by using a whole lot of tools in the toolbox, whether it is training or whether it is about a change in documented processes and how you undertake it and how you record things. I think accountability and knowing that your decision can be queried formally by the person you are engaging with is a very important tool in that regard.⁹⁹

- 5.48 In other evidence the Committee also heard about best practice examples of the use of restorative approaches and practices, in particular in the care and protection space but also in other community settings of which children and their families are a part. These examples included: Hull Centre of Restorative Practice, UK; Leeds City Council—Child Friendly Leeds Plan, UK; Restorative City Whanganui Trust (Incorporating Restorative Justice and Restorative Practices), NZ; and restorative work in NZ child protection services focused on improving the relationship of these services with the community, and working closely with Maori Iwi to develop culturally appropriate child protection practice—including a strong focus on family-led decision-making and action, through improving the quality of mandated Family Group Conferencing (using a different model to that which has been developed and implemented in the ACT).¹⁰⁰

COMMITTEE COMMENT

- 5.49 The Committee is of the view that the safety and well-being of children and young people is the responsibility of Canberra as a community. The Committee notes with concern the numerous reviews into care and protection matters over many years in the ACT.
- 5.50 The Committee considers that, within the ACT's broad human rights and obligations framework, pursuing a restorative and relational focus at a city level could seek to prioritise restorative practices, policies and procedures across many facets of government decision-making—including care and protection matters. The Committee believes that this may bring lasting change to a system in need of change.
- 5.51 The Committee notes the recommendations of the ACT Law Reform Advisory Council has made with regard to achieving a more relationally-focused child protection system—in particular, the use of some form of FGC. The Committee notes that it made

⁹⁸ Ms Heidi Yates, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 90.

⁹⁹ Ms Heidi Yates, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 91.

¹⁰⁰ Including: Submission No. 3—ACT Council of Social Service Inc. (ACTCOSS); Submission No. 9—Canberra Restorative Community Network; Submission No. 13—F. Tito Wheatland; and *Transcript of evidence*—4 February 2020; private briefing 28 April 2020—Mr Paul Nixon—Former New Zealand (NZ) Chief Social Worker; and private briefing—19 May 2020—Ms Jenny Saywood—Chair and Mr David Alexander—Member, NZ Restorative City Whanganui Trust (Incorporating Restorative Justice and Restorative Practices).

recommendations with regard to FGC and the provision of a government response to the ACT Law Reform Council's Final Report in its Interim Report inquiring into CYPS (Part 1). At the time of tabling this report—the Government was still to respond to the Committee's interim report inquiring into CYPS (Part 1).

- 5.52 The Committee also understands that the NZ FGC model, which includes a strong focus on family-led decision-making and action, through improving the quality of mandated FGC, is different to the model developed in the ACT.¹⁰¹
- 5.53 The Committee notes that several contributors to the inquiry emphasised the importance of adopting restorative approaches and practice in the delivery of care and protection services—in particular, its value in bringing sustainable change to a system in need of change. The Committee also heard how improvements could be made to some restorative approaches that have been implemented in the ACT and best practice examples of the use of restorative approaches and practices, in particular as it relates to the care and protection space but also in other community settings of which children and their families are a part.
- 5.54 The Committee is of the view that to support and embed a relational approach to the planning, design and delivery of care and protection services as specified in its earlier recommendations—that modifications or adjustments need to be made to strengthen some current restorative practices but also other proven restorative approaches and practice to care and protection services should be trialled. These should be informed by evidence based practice—such as the *International Review¹⁰² of Parent and Family Engagement in Child Protection of what works in child protection*.
- 5.55 In its interim report on Part 1 of its inquiry into CYPS, the Committee recommended that there was merit in exploring the feasibility of codifying in statute that all families have a legal entitlement to FGC before the Territory can intervene and before a matter is referred to court in care and protection matters.

Recommendation 7

- 5.56 The Committee recommends that the ACT Government explore the feasibility of codifying in the *Children and Young People Act 2008* that all families have a legal entitlement to family group conferencing before Child and Youth Protection Services can intervene and before a matter is referred to the ACT Childrens Court in care and protection matters.**

¹⁰¹ Submission No. 13—F. Tito Wheatland, p. 17.

¹⁰² Ivec, M. (2013) *A Necessary Engagement: An International Review of Parent and Family Engagement in Child Protection*, Social Action and Research Centre, Anglicare Tasmania, viewed 20 January 2020, <<https://www.anglicare-tas.org.au/research-library/report/necessary-engagement>>.

- 5.57 The Committee recognises while it is ideal that FGC should occur before any formal intervention, from time to time emergency action may be required. The Committee also recognises that the implementation of FGC will require timely resourcing of facilitators, counselling and programs to support families to remain together and implement decisions made. The Committee is of the view that the Government should work in partnership with the Canberra Restorative Community Network to source expertise, facilitators and other resources.
- 5.58 The Committee is also firmly of the view that there is merit in bringing together in a cohesive way a significant amount of restorative work that is already taking place in Canberra to not only strengthen the presence and value of this work but also for it to be a resource that can be drawn on to support similar work in the care and protection space and other policy and service delivery space.
- 5.59 The Committee notes that the foundation building blocks for such an approach are already in place—specifically designation as a human rights jurisdiction and work underway on Canberra becoming a restorative city. The Committee further notes that several restorative initiatives and programs are already happening including—various restorative justice initiatives; the sentencing circle work; the drug and alcohol court; the health justice partnership; the disability justice partnership; and the respectful relationships program in schools. In the current COVID-19 climate—Canberra’s recovery plan could benefit from restorative approaches but also wider linkages with similar work if brought in under a cohesive and integrated program such as Canberra becoming a restorative city.

Recommendation 8

- 5.60 The Committee recommends that the ACT Government—in the context of the ACT as a human rights jurisdiction and Canberra becoming a restorative city—bring together under a cohesive and integrated program the significant restorative work that is already taking place in Canberra to not only strengthen the presence and value of this work but also for it to be a resource to inform and support similar work in the care and protection space and other policy and service delivery areas.**

6 LEGISLATIVE FRAMEWORK—INFORMATION SHARING

- 6.1 This chapter considers evidence (and where applicable, makes recommendations) relating to the Legislative framework for care and protection services in the ACT as it concerns information sharing and decision-making in the interests of the child or young person, family and community; and accountability for that decision-making. The legislative framework operationalises the culture for the sharing of information and the scope of decision-making under the CYP Act.

RIGHT TO INFORMATION—ACCESS, APPEAL AND REVIEW RIGHTS

- 6.2 Several contributors¹⁰³ to the inquiry highlighted limitations under the legislative framework with regard to right to information—access, appeal and review rights.¹⁰⁴ The ACT HRC observed that these rights to information were best practice administrative law principles that the ACT, despite:

...being a human rights jurisdiction for 16 years, administrative law, very basic safeguards, such as external review and accessibility to information, that are a matter of course in other jurisdictions, are simply unobtainable presently in the ACT. These deficiencies need to be addressed as a priority.¹⁰⁵

- 6.3 Rights to information are critical where decisions are made that affect individuals. They are paramount in a system such as care and protection that:

...revolves around making determinations about risk and predictions about a child's future safety, both of which are fallible and subject to the proposition that low probability events do happen.

We therefore cannot expect that the right decision will be made all the time and in all cases. But this does not mean that wrong decisions should be left unexamined, that appropriate measures should not be in place to reduce the instances of error or that responsibility for wrong decisions can be minimised on the basis of the inherent

¹⁰³ Including: Submission No. 1—Legal Aid ACT; Submission No. 3—ACTCOSS; Submission No. 4—ACT Human Rights Commission; Submission No. 11—ACT Law Society; Submission No. 13—F. Tito Wheatland; Submission No. 16—Women's Legal Centre—ACT and Region.

¹⁰⁴ ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 132.

¹⁰⁵ Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 87.

difficulties in the work or human. Rather, it invites close scrutiny of systems, processes, procedures and policies that may have led to the (human) error in decision making.¹⁰⁶

6.4 The Minister for Children, Youth and Families told the Committee:

In the government's submission to this part of the inquiry, we acknowledge that the current information sharing and privacy provisions of the Children and Young People Act, the CYP Act, are somewhat convoluted and confusing. A lot of work has been done through practice guidance to make sure CYPS—child and youth protection services—staff know how these rules work. But there is certainly a legitimate argument that the act itself could do with updating.¹⁰⁷ ...

The committee would also be aware that the ACT government is currently examining its approach to the internal and external merit review of child protection decision making. ...

The long story short is that, while everyone agrees that more review mechanisms should be available—and that includes me—there is no consensus on what they should be, just as there is no consistency between other jurisdictions on either which decisions are reviewable or the most appropriate review process.¹⁰⁸

COMMITTEE COMMENT

6.5 The Committee notes the consensus among contributors to the inquiry that rights to information under the CYP Act are limited and that the situation needs to be addressed as a priority.

6.6 The Committee is of the view that appropriate rights to information provide transparency and reviewability lead to better decision-making—and are important accountability measures. Notwithstanding—in the current ACT care and protection system—there are only a very limited number of decisions made by CYPS that are subject to review (either internal or external) as compared to other Australian jurisdictions.

6.7 The Committee also notes that the current limitations on rights to information present in the CYP Act are contrary to the principles of administrative law.

¹⁰⁶ Dr John Boersig (Legal Aid ACT), *'Improving the care and protection system in the ACT'*, ACT Bar Association Bulletin, August 2019 Edition, viewed 11 September 2019
<<https://mailchi.mp/actbar/httpsus8adminmailchimpcomcampaignseditid2865121-2940489>>.

¹⁰⁷ Ms Rachel Stephen-Smith MLA, *Transcript of evidence*, 5 February 2020, p. 103.

¹⁰⁸ Ms Rachel Stephen-Smith MLA, *Transcript of evidence*, 5 February 2020, pp. 104–105.

RIGHT TO INFORMATION—ACCESS

- 6.8 The ACT Law Society observed that people seeking to access information about a care and protection matter—as it relates to themselves—should be able to ‘go to the front door’ to get such information:

...but the fact is that the front door does not exist. There is some kind of window, but you cannot open it. The information can be given to you or it cannot be; the right to get the information is not there. That is the right to the kind of information a person wants to know about themselves: “What did I do? I’m the person who had care of the child. The child’s been moved out of my care and given to someone else. What have I done wrong?” They cannot get the information. If there is an external review right, how can it be used if the person does not have the information that was taken into account to remove the child? That is a very important point.¹⁰⁹

- 6.9 Further, the Society emphasised that it had a major concern with ‘the lack of rights to information’ in the CYP Act. It observed that there was:

...a big difference between available information, which is the government’s submission, information which may be made available and information that must be made available. We are looking for “must”. This kind of information must be made available. We are looking for rights to appeal, to review decisions, not just channelling it back through the CYPS system. But in the event that it is still unsatisfactory for whatever reason, we want to see rights to appeal, whether it is back to the Magistrates Court or to the ACAT or to some other body set up externally to the CYPS system.¹¹⁰

- 6.10 The ACT HRC was of the view that the blanket prohibition on sensitive information that cannot be shared—covering broad things like reports and appraisals, contraventions, interstate orders, family group conferences and prenatal reports—needed to change. The Commission suggested that the Director-General should develop and publish guidelines on when and how the discretion to share this sensitive data under section 851 of the CYP Act will be exercised. Further, the CYP Act should also allow identifiable information about a report to be shared with the consent of that person who is the reporter.¹¹¹

- 6.11 Legal Aid ACT observed:

There is no legislative guidance or policy guidance that we are aware of that sets out when and why the Director-General may or may not disclose such information.

¹⁰⁹ Mr Chris Donohue, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 132.

¹¹⁰ Mr Chris Donohue, ACT Law Society, *Transcript of evidence*, 25 February 2020, pp. 131–132.

¹¹¹ *Transcript of evidence*, 4 February 2020, p. 86; Submission No.4—ACT Human Rights Commission; Submission No. 4a—ACT Human Rights Commission.

Moreover, there is no legislative mechanism to compel disclosure in appropriate cases (apart from issuing a subpoena, which results in additional time and costs).¹¹²

6.12 Several contributors to the inquiry made recommendations to enable greater and timelier information sharing. This included: specifying when certain parties, such as parents or lawyers, must be provided with particular information; enabling a person who has left out-of-home care to access their own records; and expressly providing for review rights of a decision to refuse the provision of sensitive information on the basis of it not being in the best interests of the child or young person.¹¹³ Further discussion on providing legal representatives with information is set in Chapter 7 under Court related events and processes.

6.13 A significant change to one of the few existing rights for a person to obtain information about themselves held by officials under the CYP Act—including care and protection reports and appraisals, family group conferencing information, and contravention reports—was presented to the Assembly in March 2019 and became effective from 21 June 2019. This occurred through an amendment to section 17 the *Freedom of Information Act 2016* (the FOI Act)¹¹⁴ that removed the right of a person to use the FOI Act to ‘obtain sensitive information about themselves’ and only about themselves—‘held by officials under the *Children and Young People Act 2008*’.¹¹⁵ Further, this amendment was put through in an omnibus bill. Omnibus bills are used for uncontroversial and technical amendments, however the Law Society was of the view that amending section 17 of the FOI Act in this way was ‘anything but’.¹¹⁶

6.14 The Committee noted that at the time the Assembly passed the amendment to the FOI Act in the context of omnibus legislation—it was portrayed to members that it was a technical issue and closing a loophole that should not have been there in the first place. Further, it was put to members of the Assembly that it would also protect disclosers under the CYP Act.¹¹⁷

6.15 The Committee inquired as to the Law Society’s interpretation of the rationale given to the Assembly that it was about protecting disclosers, and whether there were provisions in the FOI Act that would have protected disclosers. Discussion ensued as follows:

¹¹² Submission No. 1—Legal Aid ACT, p. 2.

¹¹³ Submission No. 4—ACT Human Rights Commission; Submission No. 11—ACT Law Society; Submission No. 1—Legal Aid ACT; Submission No. 16—Women’s Legal Centre—ACT and Region.

¹¹⁴ Justice and Community Safety Legislation Amendment Bill 2019—to amend the *Freedom of Information Act 2016* (the FOI Act).

¹¹⁵ ACT Law Society. (2019) Media release: ‘Concerns about omnibus bill stripping FOI rights’, 19 May; Justice and Community Safety Legislation Amendment Bill 2019—to amend the *Freedom of Information Act 2016* (the FOI Act); ACT Law Society, *Transcript of evidence*, 25 February 2020, pp. 133–134.

¹¹⁶ ACT Law Society. (2019) Media release: ‘Concerns about omnibus bill stripping FOI rights’, 19 May.

¹¹⁷ ACT Law Society, *Transcript of evidence*, 25 February 2020, pp. 133–134.

Mr Donohue: Indeed. The right under the FOI Act was to obtain what is defined in the Children and Young People Act as “sensitive information”. Now they are only entitled to obtain sensitive information about themselves. In the example I gave to the court, Aunty May—she was named after my own aunt—or “Aunty” for short, has a child in her care removed. She is a kinship carer. She wants to know all that is alleged against her and have a proper opportunity to correct errors. If she cannot get that information, she is not in a position to take any further steps. It has been there in the FOI Act for—

THE ACTING CHAIR: Forever?

Mr Donohue: Unfortunately, the ACT has not been here forever.

THE ACTING CHAIR: Well, so long as there has been an FOI Act.

Mr Donohue: For long enough. That fundamental right to be able to get information about yourself—not about other people—and which has had a severe impact on your life, is hardly a technical or minor amendment. It is fundamental. It was wrong, in my view, to put it in an omnibus bill.

MS LE COUTEUR: In the briefings that I had—you may or may not have had the same—basically we were told, and possibly foolishly believed, that the accesses through the real act, not the FOI Act, gave people access to reasonable information about themselves. That is what was said to us—that it was, at best, a doubling up.¹¹⁸

COMMITTEE COMMENT

- 6.16 Administrative powers that affect the rights and interests of individuals and organisations are usually created by legislation. The legislation might create a scheme whereby decisions made in the exercise of those powers can be reviewed or appealed against.¹¹⁹
- 6.17 The Committee finds it incomprehensible that best practice administrative law principles and safeguards such as accessibility to information about oneself, which are a matter of course in other jurisdictions, are simply unobtainable presently in the ACT—despite the ACT being a human rights jurisdiction for the last 16 years. Several contributors to the inquiry made recommendations to enable greater and timelier information sharing. Accordingly, the Committee makes the following recommendations:

¹¹⁸ ACT Law Society, *Transcript of evidence*, 25 February 2020, pp. 133–134.

¹¹⁹ Administrative Review Council. (2007) *Best Practice Guide 5—Decision Making: accountability*, p. 1.

Recommendation 9

- 6.18 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to allow the sharing of sensitive information that would be in the best interests of the child or young person—from a child concern report, a care and protection report, a pre-natal report, provided interstate care and protection information, a contravention report or family group conference information—where respective notifiers consent to the information being shared.

Recommendation 10

- 6.19 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to specify when certain parties, such as parents or lawyers, must be provided with particular information.

Recommendation 11

- 6.20 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to enable a person who has left out-of-home care to access their own records.

Recommendation 12

- 6.21 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to expressly provide for review rights of a decision to refuse the provision of sensitive information on the basis of it not being in the best interests of the child or young person.
- 6.22 The Committee considers that it is unacceptable that there appears to be no legislative guidance or policy guidance that sets out when and why the Director-General may or may not disclose sensitive information under section 851 of the CYP Act. This is further compounded by there being no legislative mechanism to compel disclosure in appropriate cases (apart from issuing a subpoena, which results in additional time and costs).

Recommendation 13

- 6.23 The Committee recommends the ACT Government develop and publish guidelines on when and how the Director-General's discretion to share sensitive information under section 851 of the *Children and Young People Act 2008* will be exercised.

- 6.24 The Committee is deeply disturbed that one of the very few opportunities that was available for a person to obtain information about themselves as it relates to matters under the CYP Act was removed via amendment to the FOI Act—presented to the Assembly in March 2019¹²⁰ as part the Justice and Community Safety Legislation Amendment Bill 2019.
- 6.25 The Committee notes that at the time the Assembly passed the amendment to the FOI Act the proposed change was put forward in the context of omnibus legislation and was portrayed to members as a technical issue—the closing of a loophole, that should not have been there in the first place. The Committee expresses its grave concern that the removal of a fundamental right to information relating to child protection was done by placing it in an omnibus bill—traditionally reserved for uncontroversial and technical amendments.
- 6.26 The Committee also notes at the time the bill was presented, the Attorney-General told the Assembly:
- The introduction of this bill demonstrates the government's continuing commitment to improving the operation of the territory's laws. The bill makes a range of minor and non-controversial changes which improve our statute book and which have positive social and regulatory impacts. ...
- ...
- The bill being introduced today is a human rights compatible bill that improves the operation of our laws and increases the availability of services in our community. These improvements are a result of the government listening to and working with the community to deliver legislation that is accessible, transparent and timely.¹²¹

Recommendation 14

- 6.27 The Committee recommends that until such time as improvements for individuals to access information about themselves relating to matters under the *Children and Young People Act 2008* (the CYP Act) are available under the CYP Act, the ACT Government should restore the pathway for access under section 17 of the *Freedom of Information Act 2016*.**

¹²⁰ 21 March 2019.

¹²¹ Mr Gordon Ramsay MLA, ACT Legislative Assembly, *Hansard*, 21 March 2019, pp. 1000–1001.

Recommendation 15

- 6.28 The Committee recommends that the ACT Attorney-General should remind all ACT Government Directorates that any amendment(s) to legislation that removes a fundamental right should not be brought forward to the ACT Legislative Assembly in the form of an omnibus bill.**

RIGHT TO INFORMATION—INTERNAL REVIEW

- 6.29 Internal review is the most common type of review for administrative powers that affect the rights and interests of individuals and organisations. It involves an affected person applying to have a decision reviewed by a more senior officer in the same agency.
- 6.30 The ACT Law Society, Legal Aid ACT and the ACT HRC were all of the view that improved internal review was needed. They were also of the view that to change culture in terms of accountability, improved internal review alone would not be sufficient and that it needed to be accompanied by external review.¹²²
- 6.31 The Committee heard that the CYP Act has very limited or no provisions for internal review. Discussion ensued as follows:

Mr Curtis: In preparing our submission Ms Donoghue and I certainly struggled to locate any internal review mechanisms that were enshrined in the act.

THE ACTING CHAIR: So, if there is an internal review mechanism, it is purely administrative—implemented through procedures and guidelines?

Mr Curtis: That was our understanding. Chris, am I allowed to raise this?

Mr Donohue: Yes, sure.

Mr Curtis: On further inquiries through JACS we found out that those internal policies are not consistent and there certainly is not a cohesive document that represents those policies.

THE ACTING CHAIR: So you were advised by the Justice and Community Safety Directorate that the internal guidelines which you referred to before, Mr Curtis, as guide 4, are inconsistent with the legislation?

Mr Curtis: Inconsistent with the legislation, but also that the policies that are alleged to exist within guide 4 do not actually exist.¹²³

¹²² Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 87; Submission No. 4—ACT Human Rights Commission; Submission No. 1—Legal Aid ACT; Submission No. 11—ACT Law Society; *Transcript of evidence*, 29 January 2020; *Transcript of evidence*, 25 February 2020.

¹²³ ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 139.

THE ACTING CHAIR: Okay. So the take-out message is that there is no formal mechanism for internal review?

Mr Curtis: That is our understanding, following the communications with JACS.¹²⁴

6.32 The ACT Law Society Family Violence and Children’s Committee (the ACT Law Society—FVCC) was of the view that the general underlying principles for an internal review process should include:

- Strict time limits for the conduct of reviews. This may include certain timeframes for each stage within the review process, including applications to be made within a set time frame after a decision has been made.

Consideration might also be given to shorter time limits for certain decisions, such as decisions about arrangements for contact or placement of a child or young person.
- An independent review process to ensure that no conflict of interest or perceived bias arises. Any internal review should be conducted by a person in another organisational team or directorate to ensure the decision maker is not in a position where they may be influenced by the primary decision maker.
- Ensuring that the decision maker has a certain level of expertise in reviewing or making decisions that relate to the best interests of the child.
- Information about any review process should be provided to all relevant parties, mandated in legislation, and should be presented in a simple manner. Information regarding review rights must be provided to individuals notified of a decision and be made publicly available on the Directorate's website.
- Processes that are transparent and fair, including a requirement that all parties be provided with written reasons for any decision made.¹²⁵

6.33 With regard to whether the existing internal merits review mechanisms should be codified in the CYP Act, the ACT Law Society—FVCC stated:

The simple answer to this is yes but twofold. Internal review mechanisms should be easily identified, easily accessible and able to be applied to a decision that meets a certain criteria. Furthermore, internal review mechanisms should be codified and integrated in the Act so that there are legislated ramifications for such processes not being adhered to.¹²⁶

6.34 Notwithstanding the ACT Law Society—FVCC commented:

...it has come to the attention of the committee...the fact that there does not appear to be an existing internal merit review mechanism in place by CYPS. The committee

¹²⁴ ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 140.

¹²⁵ Submission No. 11—ACT Law Society, Attachment 2—ACT Law Society—Family Violence and Children’s Committee, p. 1.

¹²⁶ Submission No. 11—ACT Law Society, Attachment 2—ACT Law Society—Family Violence and Children’s Committee, p. 4.

undertook research into the guides that they were directed to. Although it is acknowledged that these guides, which are available online, are useful and provide general information, they do not sufficiently establish what the internal review process is for CYPS.¹²⁷

6.35 In seeking to clarify what information was publicly available in respect of CYPS internal merits review policies, the ACT Law Society—FVCC was directed to 'Guide 4', a publicly available guide to complaints and the review process. In its submission to the Government review of child protection decisions in the ACT, the FVCC raised concerns with 'Guide 4', in particular its structure, wording and drafting. The FVCC was of the view that:

- the 'structure and wording' of the Guide 'is designed to discourage parents and the public from making complaints and seeking review of decisions';
- the Guide 'contains several statements which could be said to be misleading or inconsistent with policy, legislation and/or practice';
- there was 'difficulty establishing how one could go about accessing the internal review process';
- the Guide 'is focused on diverting people to the complaints handling system. The wording of 'Guide 4' makes clear that this process has an altogether different purpose'; and
- the 'system appears set up to explain decisions, rather than to seek review of possibly incorrect decisions'.¹²⁸

6.36 The FVCC also raised drafting concerns with regard to 'Guide 4'—highlighting inconsistencies between the Guide and the CYP Act. The FVCC stated that:

...the Guide attempts to steer individuals away from possible complaints or applications for review.

'Guide 4' suggests that the process of seeking a revocation or amendment of any final Care and Protection Order must be made in conjunction with an annual review of their case by CYPS.

...

This statement is inconsistent with section 466 and 467 of the Act. The Act states that a party may apply to the Children's Court for an amendment or revocation of a care and protection order. However, leave is required to bring such application in the event an application is made more than once within a 12-month period. It is noted that section 466 and 467 of the Act also set out specific requirements that must be considered before filing such an application, including whether the application is in the best interests of the child. It is the Committee's view that parents should be encouraged to

¹²⁷ Submission No. 11—ACT Law Society, Attachment 2—ACT Law Society—Family Violence and Children's Committee, p. 4.

¹²⁸ Submission No. 11—ACT Law Society, Attachment 2—ACT Law Society—Family Violence and Children's Committee, p. 2.

seek to amend or revoke final care and protection orders in circumstances where it would be of benefit to the child or children involved.¹²⁹

6.37 With regard to reviewable decisions, the FVCC observed that 'Guide 4' establishes several decisions:

...which are not open to review, and in some cases are not open to complaint either. The only decision open for review appear to relate to approvals for a role as carer. Unfortunately, Tribunal decisions have made such review considerations irrelevant. CYPs has clearly indicated that placement decisions are viewed as non-reviewable parenting decisions. The Tribunal¹³⁰ reluctantly agreed.¹³¹

COMMITTEE COMMENT

6.38 The Committee is concerned about the unavailability of an adequate internal merit review mechanism—the most common type of review that should be available for administrative powers that affect the rights and interests of individuals and organisations.

6.39 The Committee is further concerned that the ACT Government discussion paper that accompanied its review of care and protection decisions referred to the existence of an internal merit review mechanism that appears to not exist.

6.40 The Committee notes that the Minister for Children, Youth and Families reported back to the Assembly on 2 April 2020 on the next stages of the Government's review of children protection decisions. The Minister advised that the CYPs was: (i) undertaking work to improve internal decision-making processes; and (ii) working to provide a more transparent and consistent internal merits review process. The Minister further advised that 'this work would be completed by July 2020, but clearly this may be delayed as a result of the current COVID-19 emergency'.¹³²

6.41 The Committee is firmly of the view that an internal review mechanism needs to be implemented as a priority; that it reflect the general underlying principles for an internal review process as outlined by the ACT Law Society's FVCC at paragraph 6.32; it be codified in the CYP Act; and the issues raised regarding wording, structure and drafting in *Guide 4—Feedback and raising concerns: How can I let others know what I think?*¹³³ need to be addressed.

¹²⁹ Submission No. 11—ACT Law Society, Attachment 2—ACT Law Society—Family Violence and Children's Committee, p. 3.

¹³⁰ *W v Director-General Community Services* [2015] ACAT 14.

¹³¹ Submission No. 11—ACT Law Society, Attachment 2—ACT Law Society—Family Violence and Children's Committee, p. 3.

¹³² Minister for Children, Youth and Families, Statement, Children and Young People—Out of home Care: Response to Motion of 18 September 2019, presented 2 April 2020, pp. 4–5.

¹³³ ACT Government—CSD, *Guide 4—Feedback and raising concerns: How can I let others know what I think?*, viewed 11 July 2020, <<https://www.communityservices.act.gov.au/ocyfs/children/child-and-youth-protection-services/working-together-for-kids/guide-4-feedback-and-raising-concerns>>.

Recommendation 16

- 6.42** The Committee recommends the ACT Government, as a priority, implement an internal review mechanism for review of decisions under the *Child and Young People Act 2008*. The mechanism should reflect the general underlying principles for an internal review process as outlined by the ACT Law Society's Family Violence and Children Committee.

Recommendation 17

- 6.43** The Committee recommends that the ACT Government codify the internal review mechanism for decision-making under the *Child and Young People Act 2008*.

Recommendation 18

- 6.44** The Committee recommends that the ACT Government revise the Community Services Directorate's *Guide 4—Feedback and raising concerns: How can I let others know what I think?* to address satisfactorily the issues raised by the ACT Law Society's Family Violence and Children Committee regarding its wording, structure and drafting.
- 6.45** The Committee is also of the view that improved internal review alone is not sufficient and that an external review process is also required. This is on the basis that internal review on its own will not meet the standards of independence required for compliance with the right to a fair hearing under section 21 of the HR Act.¹³⁴
- 6.46** The Committee notes the position of the ACT HRC that the right to a fair hearing pursuant to section 21 of the HR Act:
- ...guarantees the right to have rights and obligations recognised by law decided by a competent, independent and impartial court or tribunal. In broad terms, this means that access to a mechanism for external (or independent) merits review will generally be necessary for administrative decisions that impact upon human rights.¹³⁵
- 6.47** The Committee further notes that not all administrative decisions that affect the rights and interests of individuals and organisations are subject to merits review (external review). A right to apply for an external review of a decision must be specifically assigned by legislation.¹³⁶ The following section sets out views of inquiry contributors regarding external review of decisions made under the CYP Act together with the Committee's views.

¹³⁴ ACT Human Rights Commission—Response to QToN—PH of 4 February 2020, p. 1.

¹³⁵ ACT Human Rights Commission—Response to QToN—PH of 4 February 2020, p. 1.

¹³⁶ Administrative Review Council. (2007) *Best Practice Guide 5—Decision Making: accountability*, p. 4.

RIGHT TO INFORMATION—EXTERNAL REVIEW

- 6.48 There is a lack of an independent merits review for many CYPS decisions. Further changes are required to give greater certainty that these decisions are made correctly, taking account of all relevant legal obligations.
- 6.49 Merits review is a common form of appeal—where a ‘tribunal assesses the merits of the decision under appeal; this involves consideration of the evidence, disputed facts, discretionary factors, and the application of law and policy to the facts of the case’.¹³⁷
- 6.50 A merits review tribunal ‘usually has all the powers and discretions of the primary decision maker—that is, the person who initially made the decision under review’. Further, an appeal of a decision by way of merits review ‘usually involves a fresh hearing in which the tribunal hears evidence and submissions, whether or not they were available to the primary decision maker’.¹³⁸
- 6.51 Importantly, the objective of merits review is:
- ...to reach the ‘correct’ or ‘preferable’ decision. This often entails two steps. First, the tribunal must reach a decision that is correct—in the sense that it is free from errors of law and fact. Second, if more than one decision is correct the tribunal selects the preferable decision.¹³⁹
- 6.52 According to the ACT HRC the lack of independent merits review for many CYPS decisions could be incompatible with the right to a fair hearing under the HR Act.¹⁴⁰ The Commission advised that:
- Decisions made by the Director-General pursuant to a care and protection order made by the Childrens Court are not reviewable under the *Administrative Decisions and Judicial Review Act 1989* because they are not technically ‘decisions’ made under the CYP Act. In any case, judicial review would not be a sufficient remedy for human rights purposes as it focuses the lawfulness of a decision and does not consider its merit (that is, whether the decision was the correct or preferable decision).¹⁴¹
- 6.53 The 2016 *Review into the System Level Responses to Family Violence in the ACT* (the Glanfield Report)¹⁴² by Laurie Glanfield recommended that the Justice and Community

¹³⁷ Administrative Review Council. (2007) *Best Practice Guide 5—Decision Making: accountability*, p. 3.

¹³⁸ Administrative Review Council. (2007) *Best Practice Guide 5—Decision Making: accountability*, p. 3.

¹³⁹ Administrative Review Council. (2007) *Best Practice Guide 5—Decision Making: accountability*, p. 3.

¹⁴⁰ Watchirs, H., Griffiths-Cook, J., Toohey, K. and Yates, H. (2019) Opinion piece: ‘Transparency needed about care and protection of Aboriginal and Torres Strait Islander children’, *Canberra Times*, 9 May.

¹⁴¹ ACT Human Rights Commission—Response to QToN—PH of 4 February 2020, p. 5.

¹⁴² Glanfield, L. (2016) *Report of the Inquiry: Review into the system level responses to family violence in the ACT*, April, viewed 19 May 2020, <https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0010/864712/Glanfield-Inquiryreport.pdf>.

Safety Directorate and CSD work together to review what CYPS decisions should be subject to either internal or external merits review.¹⁴³ The Glanfield Report noted that important decisions—such as decisions to amend care plans, and decisions to withhold information from parents about care arrangements—are not subject to external review in the ACT but are reviewable in other jurisdictions.¹⁴⁴ In light of this recommendation, in a media release on 9 May 2019, Minister Stephen-Smith noted the newly released *Review of Children Protection Decisions in the ACT* discussion paper, which sought feedback on the current decision-making framework.¹⁴⁵

- 6.54 ACTCOSS¹⁴⁶ advised that it agreed with the ACT Law Society’s recommendation that the ACT institute an external review model comparable to the mechanism in Queensland.¹⁴⁷ ACTCOSS considered that the ACT Civil and Administrative Tribunal (ACAT) would offer appropriate external review, given its existing powers and that this option would also be timelier than establishing a new review panel.
- 6.55 As to the suitability of the Queensland mechanism, ACTCOSS highlighted that it has a fundamental principle that caring for children is a shared responsibility across government agencies, service providers, communities, businesses and industry.¹⁴⁸ In ACTCOSS’ view, this principle ‘adds an important layer of accountability and expresses that child protection is everyone’s responsibility’.¹⁴⁹
- 6.56 ACTCOSS also noted that ‘the current process of going before ACAT can be difficult for some complainants’ and made a number of recommendations that would strengthen its suitability to act as a robust external review mechanism for families and children.¹⁵⁰ This included: (i) people going before ACAT need more appropriate supports to navigate the process; (ii) proper training must be given to potential ACAT members who could oversee CYPS cases; and (iii) the CREATE Foundation has indicated that ACAT requires amendments

¹⁴³ Recommendation 12 of the Glanfield Report stated: ‘A review should be undertaken of what decisions made by CYPS should be subject to internal or external merits review. The review should have regard to the position of other jurisdictions and be chaired by the Justice and Community Safety Directorate.’

¹⁴⁴ Glanfield, L. (2016) *Report of the Inquiry: Review into the system level responses to family violence in the ACT*, April, viewed 19 May 2020, <https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0010/864712/Glanfield-Inquiryreport.pdf>.

¹⁴⁵ Minister Stephen-Smith MLA—Media release: ‘Feedback sought on review of child protection decisions in the ACT’, 9 May 2019, viewed 17 July 2020, <<https://www.rachelstephensmith.com.au/news/media-releases/feedback-sought-on-review-of-child-protection-decisions-in-the-act/>>.

¹⁴⁶ Submission No. 3—ACTCOSS, p. 11.

¹⁴⁷ ACT Law Society Family Violence and Children’s Committee, *Submissions prepared by the ACT Family Violence and Children’s Committee on the Discussion Paper prepared by the Justice and Community Safety Directorate (in consultation with the Community Services Directorate) dated April 2019 regarding Review of Child Protection Decisions in the ACT*, ACT Law Society, 2019, p. 5.

¹⁴⁸ Department of Child Safety, Youth and Women, *Sharing responsibility for children’s safety and wellbeing*, Queensland Government, viewed 26 August 2019, <<https://www.csyw.qld.gov.au/childfamily/child-family-reform/sharing-responsibility-childrens-safety-wellbeing>>.

¹⁴⁹ Submission No. 3—ACTCOSS, p. 11.

¹⁵⁰ Submission No. 3—ACTCOSS, p. 11.

to some of its practices to ensure proper communication with children and young people to permit their full and informed participation in its processes.¹⁵¹

6.57 ACTCOSS observed that the current lack of transparency around life-changing decisions in the care and protection space:

...is unacceptable, particularly considering the ongoing concerns that current internal review mechanisms are insufficient.¹⁵² As noted by the *Our Booris, Our Way* Steering Committee, “there are many decisions that cannot be appealed that have significant impact on our families”.¹⁵³ Indeed, the ACT Human Rights Commission note that an external review mechanism is important to address community concerns about bias or systemic discrimination.¹⁵⁴ An external review mechanism would ensure accountability for many decisions that are not currently available for review.¹⁵⁵

6.58 The *Our Booris, Our Way* Steering Committee (the Steering Committee) strongly supports external review mechanisms for certain CYPS decisions. In accordance with the Aboriginal and Torres Strait Islander Child Placement Principle, the Steering Committee considers, at a minimum, that external review mechanisms should be in place for:

- Decisions made in relation to care and protection orders including placement decisions—a decision to place children with a foster or kinship carer is critical to the life-long outcomes for that child and among the most contentious decisions made by child protection workers. It is critical that this decision is able to be reviewed to enable transparency of decision-making to bring trust and confidence in fairness and recognition of cultural rights.
- Care and case plans—both in their original or amended state, care plans need to be able to be challenged when information pertinent to the child are not evident in the decision-making.¹⁵⁶
- Providing information to parents—ensuring provision of information in multiple ways and throughout their engagement with the child protection system including checking for understanding of the information, next steps and consequences.

¹⁵¹ CREATE Foundation, *Submission on the Review of Child Protection Decisions in the ACT*, CREATE Foundation, June 2019, p. 7.

¹⁵² See: CREATE Foundation, *Submission on the Review of Child Protection Decisions in the ACT*, CREATE Foundation, June 2019, pp.4-5; ACT Law Society Family Violence and Children’s Committee, *Submissions prepared by the ACT Family Violence and Children’s Committee on the Discussion Paper prepared by the Justice and Community Safety Directorate (in consultation with the Community Services Directorate) dated April 2019 regarding Review of Child Protection Decisions in the ACT*, ACT Law Society, 2019, p.2.

¹⁵³ *Our Booris, Our Way* Steering Committee, *Communique #14, Our Booris, Our Way* review, May 2019, viewed 25 August 2019, <https://www.strongfamilies.act.gov.au/__data/assets/pdf_file/0007/1364677/Communique-Our-Booris-Our-Way-4.pdf>.

¹⁵⁴ ACT Human Rights Commission. (2019) *Response to the Discussion Paper – ‘Review of child protection decisions in the ACT’*, ACT Human Rights Commission, p. 8.

¹⁵⁵ Submission No. 3—ACTCOSS, p. 10.

¹⁵⁶ ACT Law Society Family Violence and Children’s Committee, *Submissions prepared by the ACT Family Violence and Children’s Committee on the Discussion Paper prepared by the Justice and Community Safety Directorate (in consultation with the Community Services Directorate) dated April 2019 regarding Review of Child Protection Decisions in the ACT*, ACT Law Society, 2019, p.4.

- Contact—contact options for birth family and relatives appear to be arbitrary and not based on evidence to support continued relationships with family, nor support ongoing cultural engagement and growth.¹⁵⁷

6.59 The ACT Law Society—FVCC was of the view that an external review process should be legislated and based on the following underlying principles:

- Strict time limits for the conduct of reviews. This may include certain timeframes for each stage within the review process. Consideration might also be given to shorter time limits for certain decisions, such as decisions about arrangements for contact with a child or young person or placement of a child or young person.
- An external review process must be conducted by an independent body, such as a tribunal. The external review body must have a certain level of expertise in making decisions that relate to the best interests of the child. The FVCC endorses the example of the constitution of the Queensland Civil and Administrative Tribunal set out at pages 14 and 15 of the ACT Government Discussion Paper. The FVCC notes that the constitution of the tribunal in Queensland is set out within the relevant legislation, an approach which is supported by the Committee. Legislative requirements regarding the expertise and experience required of tribunal members will ensure a solid underpinning to the external review process.
- The conduct of proceedings using both inquisitorial and adversarial procedures to arrive at the best possible decision.
- Information about any review process should be provided to all relevant parties, mandated in legislation, and should be presented in a simple manner. Information regarding review rights must be provided to individuals notified of a decision and be made publicly available on the Directorate's website.
- That processes are transparent and fair, including a requirement that all parties be provided with written reasons for any decision made.¹⁵⁸

6.60 Dr Tito Wheatland advised strong support for a child protection system external review and decision-making system focused on restorative processes which:

- comply with natural justice;
- allow early speedy independent mediation before any formal process is required to commence;
- address power imbalances, requiring effective communication of concerns before any action occurs;

¹⁵⁷ *Our Booris, Our Way* Steering Committee. (2019) *Submission to Review of Child Protection Decisions in the ACT Discussion Paper*, viewed 16 January 2020, <http://cdn.justice.act.gov.au/resources/uploads/JACS/Submission_-_Review_of_child_protection_decisions_in_the_ACT_-_Our_Booris_Our_Way_-_13062019.PDF>.

¹⁵⁸ Submission No. 11—ACT Law Society, Attachment 2—ACT Law Society—Family Violence and Children's Committee, p. 2.

- ensure quality of representation provided by the State, where it chooses to involve lawyers;
- are transparent, so that families and carers and children know what is alleged to have happened, the evidence relied upon in forming a decision and written reasons for all decisions; and
- make changes of practice in CPS [*care and protection services*] compellable where there is evidence of frequent and continued abuses of power and failures of process.¹⁵⁹

6.61 With regard to external review rights, the ACT HRC commented that the ACT was:

...completely out of step with other jurisdictions. Other jurisdictions have tribunal review of placement and contact arrangements: VCAT, NCAT, QCAT, SACAT and WASAT, but not ACAT. There is already jurisdiction for refusing approved carers and foster carers and revoking approved carers. ACAT does have minimal jurisdiction presently and it does have jurisdiction for mental health and guardianship, so it is used to dealing with people experiencing vulnerability.¹⁶⁰

6.62 The Committee asked the ACT HRC¹⁶¹ whether there were particular child protection decisions made under the CYP Act that should not be reviewable and was told:

Administrative decisions made by the Director-General (or their delegates) relating to a child or young person's care may therefore only be safely exempted from external merits review if they do not engage human rights or are unlikely to adversely affect the human rights of children and families.

In the Commission's experience, decisions made under a care plan or pursuant to a care and protection order are rarely, if ever, likely to fall within these categories, and, as such, we consider that these decisions must be made subject to external merits review to comply with the right to a fair hearing under the HR Act.

Sensitive matters are not in themselves a legitimate basis for excluding particular classes of decision making from being subject to external merits review. Independent review processes are important in determining significant interests because of the message it sends to the community about process as well as outcome. Moreover, external mechanisms such as ACAT review processes, for example, are equipped to handle confidential information and have provisions in place to ensure their non-disclosure where appropriate.¹⁶²

¹⁵⁹ Submission No. 13—F. Tito Wheatland, p. 34.

¹⁶⁰ Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 87.

¹⁶¹ ACT Human Rights Commission—Response to QToN—PH of 4 February 2020, pp. 2–3.

¹⁶² Refer, for example, *ACT Civil and Administrative Tribunal Act 2008*, s 39 (Hearings in private or partly in private), s 40 (Secrecy for private hearings), etc.

- 6.63 Where contributors recommended the adoption of external review provisions from other jurisdictions—the jurisdictions of Victoria and Queensland were recommended. Useful guidance regarding the categories of child protection decisions that should be subject to external merits review was provided by Legal Aid ACT in its response to the Government’s ‘Review of Child Protection Decisions in the ACT’ discussion paper. A table setting out the key comparative provisions from Victoria and Queensland is given in **Appendix D**.
- 6.64 The ACT HRC considers that modelling the ACT amendments on the external review provisions in the comparable Victorian *Children, Youth and Families Act 2005* would best achieve the outcomes of determining matters when parties are unable to reach agreement, while taking into account the ‘significance of the rights interests at stake in child protection matters and the requirements necessitated by the right to a fair hearing’.¹⁶³

COMMITTEE COMMENT

- 6.65 The Committee notes the considerable delay between the Glanfield recommendations on the review of CYPS decisions and the 2019 release of the ACT Government discussion paper. The Committee is of the view that this delay is disturbing.
- 6.66 As noted previously, the Minister for Children, Youth and Families reported back to the Assembly on 2 April 2020 on the next stages of the Government’s review of children protection decisions. The Minister advised that the:
- ...the ACT Government supports the development of an external review mechanism for child protection decisions in the ACT and is committed to working with stakeholders and capturing the voice of children and youth as this important piece of work progresses.¹⁶⁴
- 6.67 The Minister further advised that:
- ...establishing an external review mechanism as proposed in the Communique would require amendments to the Children and Young People Act 2008, which is a complex piece of work. In the interim, as noted previously, work is progressing on models that reflect the intent of stakeholder feedback but don’t require legislative changes. I have also offered to discuss that work with the HRC and to jointly host a forum or workshop on these matters when the current restrictions on face-to-face gatherings are sufficiently eased.¹⁶⁵

¹⁶³ ACT Human Rights Commission—Response to QToN—PH of 4 February 2020, p. 3.

¹⁶⁴ Minister for Children, Youth and Families, Statement, Children and Young People—Out of home Care: Response to Motion of 18 September 2019, presented 2 April 2020, p. 9.

¹⁶⁵ Minister for Children, Youth and Families, Statement, Children and Young People—Out of home Care: Response to Motion of 18 September 2019, presented 2 April 2020, p. 9.

- 6.68 The Committee also notes that several contributors to the inquiry were of the view that the scope for external review of decisions in the ACT was limited and suggested that a greater range of CYPs' decisions should be subject to external review (whether internal review is a prerequisite for external review or not). Contributors felt that subjecting decisions to scrutiny—and sometimes simply the possibility of scrutiny—can lead to improved decision-making within an agency, greater accountability and, 'through the provision of reasons, increased public understanding of how and why CYPs makes particular decisions'.¹⁶⁶ In terms of giving form to an external review mechanism—where contributors made recommendations—Victorian and Queensland provisions were the preferred models.
- 6.69 The Committee is strongly of the view that an external review mechanism for decisions made under the CYP Act must be introduced. The Committee supports the views put forward by the ACT HRC, that the review mechanism should be framed so as to comply with the right to a fair hearing (pursuant to section 21 of the HR Act) and be empowered to examine both the merits and any alleged procedural irregularities of the following categories of decision-making: (i) decisions that significantly alter the relationship between parents and their children or between the children and siblings or other people significant in the children's lives; and (ii) decisions (including the imposition of conditions) that amount to limitations on a person's human rights.¹⁶⁷
- 6.70 The Committee notes the ACT HRC's view that modelling the ACT amendments on the external review provisions in the comparable Victorian *Children, Youth and Families Act 2005* would best achieve the outcomes of determining matters when parties are unable to reach agreement while taking into account the 'significance of the rights interests at stake in child protection matters and the requirements necessitated by the right to a fair hearing'.¹⁶⁸

Recommendation 19

- 6.71 The Committee recommends that the ACT Government amend the *Children and Young People Act 2008* to provide for an external review mechanism.**

¹⁶⁶ Including: Dr John Boersig (Legal Aid ACT), '*Improving the care and protection system in the ACT*', ACT Bar Association Bulletin, August 2019 Edition, viewed 11 September 2019, <<https://mailchi.mp/actbar/httpsus8adminmailchimpcomcampaignseditid2865121-2940489>>; Submission No. 4—ACT Human Rights Commission; Submission No. 16—Women's Legal Centre—ACT and Region; Submission No. 1—Legal Aid ACT; Submission No. 13—F. Tito Wheatland; Submission No. 11—ACT Law Society; Submission No. 3—ACTCOSS.

¹⁶⁷ ACT Human Rights Commission—Response to QToN—PH of 4 February 2020.

¹⁶⁸ ACT Human Rights Commission—Response to QToN—PH of 4 February 2020, p. 7.

Recommendation 20

- 6.72** The Committee recommends that the ACT Government ensure that the external review mechanism for review of decisions made under the *Children and Young People Act 2008* comply with the right to a fair hearing (pursuant to section 21 of the *Human Rights Act 2004*) and be empowered to examine both the merits and any alleged procedural irregularities of the following categories of decision-making: (i) decisions that significantly alter the relationship between parents and their children or between the children and siblings or other people significant in the children's lives; and (ii) decisions (including the imposition of conditions) that amount to limitations on a person's human rights.

Recommendation 21

- 6.73** The Committee recommends that the ACT Government model the amendments to the *Children and Young People Act 2008* on the external review provisions in the comparable Victorian *Children, Youth and Families Act 2005*.
- 6.74** The Committee further notes the ACT HRC comment that the Glanfield Report in making its recommendation that a review should be undertaken of what CYPs decisions should be subject to either internal or external merits review 'did not consider whether the absence of external merits review for particular decisions would be consistent with the requirements of the HR Act'.¹⁶⁹
- 6.75** Furthermore, the ACT HRC noted that the 2019 discussion paper prepared by the Government for public consultation, which was released three years after the Government had accepted the Glanfield recommendation that a review be conducted, 'made only passing reference to human rights principles, and omitted to directly address the human rights requirements (including public authority obligations) pursuant to the HR Act that must necessarily underpin a review of this nature'.¹⁷⁰
- 6.76** The Committee understands that stronger external review processes for decisions made by care and protection agencies are available in other Australian jurisdictions, including in equivalent Childrens Courts and Administrative Tribunals. The Committee is firmly of the view that decisions about the care of children and young people in the ACT must not only be opened to greater scrutiny and transparency but also be compatible with provisions under the HR Act.

¹⁶⁹ ACT Human Rights Commission—Response to QToN—PH 4 February 2020, p. 5.

¹⁷⁰ ACT Human Rights Commission—Response to QToN—PH 4 February 2020, p. 5.

- 6.77 The Committee has made comment and recommendations to address the compatibility of the CYP Act with the HR Act in Chapter 5. In its Interim Report inquiring into CYPS (Part 1), the Committee also made comment with regard to this matter.

7 PRACTICE MATTERS—INFORMATION SHARING

- 7.1 This chapter considers evidence and where applicable, makes recommendations relating to practice matters concerning information sharing in the care and protection system. Practice is the expression of the culture and values of information sharing and decision-making in action. It is generally accepted that values drive behaviours, which in turn, drive outcomes.

ASSUMPTIONS/UNCONSCIOUS BIAS

ASSUMPTIONS OF CARE AT BIRTH

- 7.2 Evidence¹⁷¹ to the inquiry highlighted instances of assumptions of a mother's ability to care for their newborn baby at birth and numbers of babies each year are removed from their mothers in hospital. This occurs often 'where the Director General forms a view prior to the birth that the child will be at risk once born. Aboriginal mothers, young mothers, mothers who have disabilities, and mothers who have health issues like drug and alcohol dependence or experiencing mental illness are said to be more affected by removal practices'.¹⁷²
- 7.3 A number of contributors to the inquiry emphasised that these 'practices cause harm to the relationships between carers and the mothers and families, as well as trauma to all'.¹⁷³
- 7.4 The Health Services Commissioner told the Committee:
- ...the issue has been raised with respect to that notion of what the role of a midwife is in assisting a mother to deliver a child and then being put in a circumstance where they may not have the expertise to determine whether a report should be made but they tend to, I guess, err on the risk-averse side. That can put them in a position of both supporting the parent to deliver the child and then making a report at the same time. It is certainly an issue that has been raised with me. We have seen matters as well where reports have been made, particularly around parents who have a disability and there are assumptions about their ability to care for a child simply based on an

¹⁷¹ Including: Submission No. 9—Canberra Restorative Community Network; Submission No. 13—F. Tito Wheatland; ACT Human Rights Commission—*Transcript of evidence*, 4 February 2020, p. 99; Submission No. 3—ACTCOSS.

¹⁷² Submission No. 13—F. Tito-Wheatland, p. 25.

¹⁷³ Submission No. 13—F. Tito-Wheatland, p. 25.

observation of the level of disability that the parent exhibits. There is absolutely no evidence, apart from that, that the parent has any difficulty caring for a child.¹⁷⁴

- 7.5 As to the detrimental effect this practice can have during the important period of bonding between mothers and their newborn child, the Health Services Commissioner added:

The first experience that that parent has is of child protection coming to talk to them, and that whole initial bonding period has actually been completely overshadowed by the experience, for some reason, of suddenly being on the CYPS radar and being summoned to a meeting to discuss their parenting skills when, in fact, what they have done is spent the previous months putting in place all the supports and services that they need to ensure that that child is well supported. It can be a very disturbing and heartbreaking experience for people. I think, particularly in that environment, as I have said, midwives have certainly fed back to us that their professional intent is around supporting that mother through a healthy, active, safe birth to bond with the child and then being responsible in some ways for an intervention in that relationship directly afterward.¹⁷⁵

- 7.6 In its report inquiring into maternity services in the ACT¹⁷⁶, the Committee made comment and a series of recommendations regarding circumstances where child protection notifications are made during pregnancy; mandatory reporting requirements by midwives; and the removal of children from mothers by child protection agencies.
- 7.7 Evidence to the Committee's maternity inquiry noted the lack of structural supports—early intervention and support; and coordinated culturally competent, health and social care for women subject to a child protection notification during pregnancy—and that more needed to be done to address these structural circumstances that were beyond the control of women and their families.¹⁷⁷
- 7.8 As part of evidence to the inquiry into maternity services, as it concerned maternity services and child protection, the ACT Health Care Commissioner suggested that:

¹⁷⁴ Ms Karen Toohey, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 99.

¹⁷⁵ Ms Karen Toohey, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 99.

¹⁷⁶ HACS *Report on Inquiry into Maternity into Services in the ACT* (tabled 4 June 2020), pp. 73–78—available at: <https://www.parliament.act.gov.au/parliamentary-business/in-committees/committees/standing-committees-current-assembly/standing-committee-on-health,-ageing-and-community-services/Inquiry-into-the-Maternity-Services-in-the-ACT#tab1251198-5id>.

¹⁷⁷ Including: Submission No. 34—Health Care Consumers' Association of the ACT—HACS Inquiry into Maternity Services in the ACT, pp. 17–18 (); Submission No. 36—ACT Human Rights Commission (ACT Health Services Commissioner)—HACS Inquiry into Maternity Services in the ACT, p. 5; and Canberra Restorative Community Network, *Transcript of evidence*, 29 January 2020, pp. 72–77.

...a review of the processes by which these reports occur be undertaken to ensure public confidence in these processes and to ensure parents are provided with referrals, advocacy, support and information appropriate to their circumstances.¹⁷⁸

COMMITTEE COMMENT

- 7.9 The Committee is of the view that women and their families should have access to individualised safe and responsive maternity care that seeks to address barriers that may arise for women and their families due to marginalisation, disadvantage, disability and vulnerability.
- 7.10 The Committee agrees with the view of the Health Care Consumers' Association of the ACT as submitted to its inquiry into maternity services in the ACT that 'the removal of children by child protection agencies should occur as a last resort'.¹⁷⁹ Further, the Committee notes evidence to its inquiry into maternity services that 'there is a lack of early intervention and support for families who have come to the attention of child protection agencies' coupled with 'a specific lack of coordinated, culturally competent, health and social care for women who are the subject of child protection notification during pregnancy'.¹⁸⁰ The Committee is firmly of the view that more needs to be done and can be done in this regard to support women and families in these situations.
- 7.11 As noted previously—in its report inquiring into maternity services in the ACT—the Committee made comment and a series of recommendations regarding improving opportunities for the Government and maternity services to provide better care for women and families who are the subject of child protection notification in pregnancy and who are at risk of having their child removed from their care.
- 7.12 The Health Care Consumers' Association of the ACT advanced that the work undertaken as part of the *Our Booris, Our Way* review has suggested a number of ways to improve care in this regard.¹⁸¹ This includes—for example: (a) enhancing pre and postnatal family and decision-making support; and (b) removing child protection and health care practices that reflect the assumption that removal is inevitable.¹⁸²

¹⁷⁸ Submission No. 36—ACT Human Rights Commission (ACT Health Services Commissioner)—HACS Inquiry into Maternity Services in the ACT, p. 5.

¹⁷⁹ Submission No. 34—Health Care Consumers' Association of the ACT—HACS Inquiry into Maternity Services in the ACT, p. 18.

¹⁸⁰ Submission No. 34—Health Care Consumers' Association of the ACT—HACS Inquiry into Maternity Services in the ACT, p. 18.

¹⁸¹ Submission No. 34—Health Care Consumers' Association of the ACT—HACS Inquiry into Maternity Services in the ACT, p. 18; *Our Booris, Our Way* review, viewed 21 May 2020, <<https://www.strongfamilies.act.gov.au/our-booris,-our-way>>.

¹⁸² Submission No. 34—Health Care Consumers' Association of the ACT—HACS Inquiry into Maternity Services in the ACT, p. 18.

- 7.13 The Committee agrees with the ACT Health Care Commissioner's suggestion that a review of the processes by which ACT health professionals are required to make a pre-natal report to ACT child protection authorities if they are concerned that an unborn child is at risk of abuse or neglect after birth, may contribute to public confidence but importantly assist with the provision of appropriate early intervention support.

Recommendation 22

- 7.14 The Committee recommends that the ACT Government: (a) review the processes by which ACT health professionals are required to make a pre-natal report to ACT child protection authorities to ensure parents are provided with referrals, advocacy, support and information appropriate to their circumstances; and (b) fund targeted early intervention programs for pre-natal women whose are identified as at risk of abuse or neglect after birth.**

OTHER INTERACTIONS WITH THE CARE AND PROTECTION SYSTEM AND ASSUMPTIONS

- 7.15 Evidence to the inquiry highlighted that there are several population groups in the ACT that are at greater risk of adverse experiences with CYPS—due to assumptions about their ability to parent and/or the circumstances in which they are trying to navigate. These population groups include:
- Aboriginal and/or Torres Strait Islander parents;
 - teenage parents;
 - parents with history of drug and alcohol abuse
 - parents who have experience of incarceration;
 - women experiencing domestic violence;
 - parents experiencing mental illness; and
 - parents with a disability.¹⁸³
- 7.16 ACTCOSS observed due to 'risks of stigma and discrimination, lack of trust in the service system, and a lack of support, there are certain families, children and young people who will experience greater harm from an opaque child protection system without appropriate accountability mechanisms'.¹⁸⁴

¹⁸³ Submission No. 5—Advocacy for Inclusion; Submission No. 9—Canberra Restorative Community Network; Submission No. 3—ACTCOSS; Submission No. 15—ACT Disability Aged and Carer Advocacy Service (ADACAS); Beryl Women Incorporated—*Transcript of evidence*, 28 January 2020.

¹⁸⁴ Submission No. 3—ACTCOSS, p. 12.

7.17 In its written submission ACTCOSS¹⁸⁵ noted it had heard of ‘concerning accounts of families at risk of unnecessary removal of children and young people due to discrimination and lack of support within the child protection system’.¹⁸⁶ According to ACTCOSS this was ‘affirmed by Tito Wheatland and Ivec, who note that in some cases, families with support needs come to the attention of CYPS and are met with an adversarial system, rather than a restorative approach that seeks to address these needs’.¹⁸⁷ As an alternative to this process, Tito Wheatland and Ivec identify the following tri-level restorative practice process: (i) participation and inclusion—this requires child protection to work together with families, children and young people, and carers; (ii) effective communication, listening, respecting rights, shared decision-making for solutions—this requires child protection to commit to involving all parties in the last-resort decision to remove a child; and (iii) sustained support and time to change.¹⁸⁸

7.18 The Committee heard that assumptions are in-built in the care and protection system regarding parents from some population groups being presumed to be unable to parent (even with support); and the presumptions that certain parents cannot parent.¹⁸⁹

7.19 As to the relationship between assumptions underpinning unconscious bias towards removing children at risk and the cultural change needed to reform such practice—ACTCOSS’ CEO observed:

I guess the driving force behind unconscious bias is often misunderstanding and assumptions about other people because of cultural background, age, whatever it may be, and a lack of communication between those who make the decisions and those involved in or at the receiving end of those decisions, which means that those misunderstandings and those presumptions continue whether they are right or wrong.

We have talked about the lack of transparency and the lack of communication and we see that case conferencing is a good way to improve that. By improving communication and understanding you take away some of those presumptions and, therefore, you help remove the impact of unconscious bias by decision-makers.¹⁹⁰

7.20 In terms of how to address assumptions with regard to parents with disability and their parenting ability, the CEO of ADACAS commented:

¹⁸⁵ Submission No. 3—ACTCOSS, p. 15.

¹⁸⁶ ACTCOSS. (2019) *Submission: Consultation on Adoption Reform: dispensing with parental consent*, ACTCOSS, April, pp.8-11.

¹⁸⁷ Ivec, M. and Tito Wheatland, F. (2014) *Moving to a restorative and relationally based child protection system in the ACT*, Australian National University, June, p. 1.

¹⁸⁸ Ivec, M. and Tito Wheatland, F. (2014) *Moving to a restorative and relationally based child protection system in the ACT*, Australian National University, June, p. 2.

¹⁸⁹ *Transcript of evidence*, 28 January 2020, pp. 10–11; Submission No. 5—Advocacy for Inclusion.

¹⁹⁰ Dr Emma Campbell, ACTCOSS, *Transcript of evidence*, 4 February 2020, p. 85.

...there needs to be a lot more awareness of disability, the capabilities of people with disability to live in the community and the ability for the community and families to provide parenting and other kinds of support that might be available and not to necessarily leap to the assumption that people who are so categorised are incapable of doing it.¹⁹¹

- 7.21 Beryl Women Incorporated told the Committee that Aboriginal and Torres Strait Islander children are over-represented across the child protection system and its own experiences also supports that. Beryl Women was of the view that systemic unconscious bias seems to play a part when CYPS are working with Aboriginal and Torres Strait Islander families¹⁹²

COMMITTEE COMMENT

- 7.22 It is clear to the Committee that assumptions about the parenting ability of certain population groups exist in the care and protection system—that result in care and protection workers acting in a way that presumably they see as being in the best interests of the child, providing stable parenting for a child, but in that process breaking down the relationship between the child and their parent.¹⁹³
- 7.23 The Committee is firmly of the view that these in-built assumptions in the system need to be addressed as a priority. The Committee believes that its earlier recommendation(s)—that the underlying principles in the CYP Act need to be reframed to ensure compatibility with human rights principles and to support a more relationally-focused care and protection system will assist with reorientating the overarching culture needed to support such a change in practice.
- 7.24 The Committee also considers that improvements to the system will need to be supported by ongoing training to CYPS staff on culture and unconscious bias.

TRAINING

- 7.25 The 2016 Glanfield Report highlighted the ongoing issue of cultural bias in CYPS, stating that CSD ‘should continue to review its recruitment practices and cultural awareness training programs and ensure appropriate quality control in decision making to reduce unintended bias’.¹⁹⁴

¹⁹¹ Mr Michael Bleasdale, ADACAS, *Transcript of evidence*, 29 January 2020, p. 32.

¹⁹² Ms Robyn Martin, Beryl Women Incorporated, *Transcript of evidence*, 28 January 2020, p. 17.

¹⁹³ *Transcript of evidence*, 28 January 2020, pp. 10–11; Submission No. 5—Advocacy for Inclusion.

¹⁹⁴ Glanfield, L. (2016) *Report of the Inquiry: Review into the system level responses to family violence in the ACT*, April, p. 78, viewed 19 May 2020, <https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0010/864712/Glanfield-Inquiryreport.pdf>.

- 7.26 As noted in the Committee's interim report on its inquiry into CYPs (Part 1)—the Government has detailed work being undertaken to provide: (i) ongoing training to CYPs staff on culture and unconscious bias; (ii) more funding to Aboriginal community-controlled organisations to provide early support to families; and (iii) clearer requirements for CSD to consult with Aboriginal and Torres Strait Islander people who have an interest in the well-being of a child or young person through kinship, family and cultural ties.¹⁹⁵
- 7.27 ADACAS's submission identifies the need for quality control and assurance training and ongoing mentoring of CYPs workers on disability, human rights and the principles of making reasonable adjustments to procedure and infrastructure to ensure that people with disability are accommodated when dealing with the CYPs system.¹⁹⁶
- 7.28 Regarding specific disability awareness type training ADACAS advised that it was:
- ...currently engaged with our colleagues at AFI in developing some training on behalf of the Office for Disability. I just wanted to state that the importance of that is not to do it one off. Disability awareness-type training is sometimes done one off and then the next generation of workers comes through. I think, with that kind of training, we are very aware of the problem of the situation. We would be very hopeful that that training could actually assist those good caseworkers. It will empower them to be more effective in the workplace and effect some kind of culture change from within the workforce.
- But that will take some time to embed and it needs to be continued. It needs to be rolled out as soon as workers come through. Part of their induction really needs to be part of it.¹⁹⁷

COMMITTEE COMMENT

- 7.29 Too often throughout the inquiry the Committee heard instances that the sharing of information and level of engagement was reliant on individual caseworkers. The Committee is of the view that training is critical to improving performance. Further, training should not be confined to the beginning of professional life, but must be a life-long process with training opportunities available throughout the career of staff.

¹⁹⁵ ACT Standing Committee on Health, Ageing and Community Services. (2020) Interim Report on Child and Youth Protection Services (Part 1), 31 March, pp. 36–37; Watchirs, H., Griffiths-Cook, J., Toohey, K. and Yates, H. (2019) 'Transparency needed about care and protection of Aboriginal and Torres Strait Islander children', *Canberra Times*, May, viewed 25 August 2019, <<https://www.canberratimes.com.au/story/6113090/transparency-needed-about-care-and-protection-ofaboriginal-and-torres-strait-islander-children/>>.

¹⁹⁶ Mr Michael Bleasdale, ADACAS, *Transcript of evidence*, 29 January 2020, p. 28; Submission No. 15—ACT Disability Aged and Carer Advocacy Service (ADACAS).

¹⁹⁷ Mr Michael Bleasdale, ADACAS, *Transcript of evidence*, 29 January 2020, p. 35.

Recommendation 23

- 7.30** The Committee recommends that the ACT Government ensure that all ACT Child and Youth Protection Services' staff working with children, parents and families should be required to undertake regular training to ensure that practice is kept up to date. This should include ongoing training on culture and unconscious bias.

Recommendation 24

- 7.31** The Committee recommends that the ACT Government ensure that appropriate quality control and assurance processes are implemented to reduce unintended bias in decision-making under the *Children and Young People Act 2008*.
- 7.32** An important matter linked to training is the recruitment and retention of quality staff, which is a prerequisite to improving performance. The Committee is firmly of the view that ways need to be found to acknowledge the importance of child protection and support work for children, parents and families—and to value, appraise and develop staff who do this work.

Recommendation 25

- 7.33** The Committee recommends that the ACT Government should acknowledge the importance of child protection and support work for children, parents and families and value, appraise and develop staff that do this important work.
- 7.34** The Committee acknowledges that advocacy and support services working in the care and protection space make valuable contributions helping children, parents and families to overcome their reluctance to either seek or accept help. These organisations can be both innovative and flexible in bringing their unique expertise and experience to respond to the needs of children, parents and families. The value of the services these organisations provide should be acknowledged and ways found to enable them to contribute their expertise.

Recommendation 26

- 7.35** The Committee recommends that the ACT Government should provide funding in the 2020–21 Budget and across the budget out-years for the ACT Disability Aged and Carer Advocacy Service and Advocacy for Inclusion to deliver their specific Disability awareness-type training to all ACT Child and Youth Protection Services' staff working with children, parents and families.

INCORPORATION OF ATSI CHILD PLACEMENT PRINCIPLE

- 7.36 The *Our Booris, Our Way* review final report released in December 2019 made findings about bias and systemic discrimination resulting in different outcomes for Aboriginal and Torres Strait Islander families.¹⁹⁸
- 7.37 The *Our Booris, Our Way* review interim report recommended that CYPS immediately:
- ...commence revision of policy and practices to ensure that the Aboriginal and Torres Strait Islander Child Placement Principle are explicitly designed into policy and practice. Children must be valued in a process that holds cultural rights as central to their identity and safety.
- We believe that this will hold children as central and valued within the child protection process and demonstrate closer alignment to our cultural rights as described in the ACT Human Rights Act 2004 [Section 27 (2)].¹⁹⁹
- 7.38 The Committee notes that the Minister for Children, Youth and Families signed up to the Family Matters commitment in September 2017 which includes the application and implementation of the Aboriginal and Torres Strait Islander Child Placement Principle.²⁰⁰
- 7.39 In evidence—ACTCOSS called for the following action—‘urgently’:
- ...CYPS policy and practices must be revised to ensure that Aboriginal and/or Torres Strait Islander child placement principles are explicit in the policy and the practice of child protection in the ACT, and CYPS staff must receive ongoing training on unconscious bias.²⁰¹

COMMITTEE COMMENT

- 7.40 To respond to and address bias and systemic discrimination that results in different outcomes for Aboriginal and Torres Strait Islander families the Committee agrees that CYPS policy and practices should be revised to ensure that the Aboriginal and Torres Strait Islander Child Placement Principle²⁰² is explicit in CYPS policy and practice.

¹⁹⁸ *Our Booris, Our Way* Steering Committee, *Final Report*, December 2019, Canberra.

¹⁹⁹ *Our Booris, Our Way* Steering Committee, *Interim Report*, August 2018, Canberra, p. 3.

²⁰⁰ *Our Booris, Our Way* Steering Committee, *Interim Report*, August 2018, Canberra, p. 3.

²⁰¹ ACTCOSS, *Transcript of evidence*, 4 February 2020, p. 82; Submission No. 3—ACTCOSS.

²⁰² The Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP) is the cornerstone of Australian law and policy acknowledging the importance of family, cultural and community connections to the identity and wellbeing of Aboriginal and Torres Strait Islander children who come into contact with the statutory child protection system. Refer: SNAICC (national non-governmental peak body for Aboriginal and Torres Strait Islander children)—viewed 17 July 2020, <<https://www.snaicc.org.au/aboriginal-and-torres-strait-islander-child-placement-principle/>>.

Recommendation 27

- 7.41 The Committee recommends that the ACT Government revise ACT Child and Youth Protection Services (CYPS) policy and practices to ensure that that the Aboriginal and Torres Strait Islander Child Placement Principle is explicit in the policy and the practice of child protection in the ACT.**

COURT RELATED EVENTS AND PROCESSES

MODEL LITIGANT OBLIGATIONS—CARE AND PROTECTION JURISDICTION

- 7.42 Model litigant obligations and guidelines acknowledge:

...the nature of public bodies and ‘the resource and power advantages they enjoy over individual citizens’.²⁰³ They provide guidance to ensure that public agencies do not use their position to exploit litigants who are not as well resourced or as powerful.²⁰⁴

- 7.43 The ACT HRC advised that feedback from practitioners indicated that there is not model litigant behaviour by CYPS in the care and protection space.²⁰⁵ In evidence, the ACT Law Society provided the Committee with a number of court related examples that could be considered as contrary to model litigant behaviour.²⁰⁶ Legal Aid ACT also provided examples that could also be considered as contrary to model litigant behaviour.²⁰⁷

- 7.44 The ACT HRC told the Committee that it was ‘concerned about the adversarial nature of proceedings’.²⁰⁸ The ACT HRC recommended that CYPS specific litigation guidelines that build on existing obligations (as per the model litigant guidelines and alternative dispute resolution requirements) should be developed to act as a model for CYPS. The guidelines should recognise the Territory’s obligations, parents’ responsibilities and rights, and the need to always consider the child’s best interests.²⁰⁹

²⁰³ Camille, C. and Taylor-Sands, M. (2007) “Corporate Governments” as Model Litigants’, *Legal Ethics*, 10(2), p. 154.

²⁰⁴ Victorian Law Commission. (2010) *Protection Applications in the Children’s Court: Final Report*, Chapter 10, p. 395; Camille, C. and Taylor-Sands, M. (2007) “Corporate Governments” as Model Litigants’, *Legal Ethics*, 10(2), p. 154.

²⁰⁵ Submission No. 4—ACT Human Rights Commission; Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 88.

²⁰⁶ ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 144.

²⁰⁷ Submission No. 1—Legal Aid ACT; *Transcript of evidence*, 29 January 2020.

²⁰⁸ Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 88; Submission No. 4—ACT Human Rights Commission.

²⁰⁹ Submission No. 4—ACT Human Rights Commission, p. 8.

COMMITTEE COMMENT

7.45 The Committee is of the view that the development of specific model litigant guidelines for use in the care and protection jurisdiction would assist with addressing the current power imbalance that appears to prevail in court related care and protection matters and be consistent with the right to a fair hearing. The Committee notes that the Victorian Law Reform Commission made a similar recommendation in 2010 for the development of these guidelines in Victoria.²¹⁰

7.46 As the Committee understands the basis for the Victorian Law Reform Commission's recommendation was that:

A shortcoming of the model litigant guidelines is their commercial focus. Given the unique nature of child protection proceedings, it appears highly desirable to develop specific guidelines for use in this jurisdiction that recognise the state's obligations, parents' responsibilities and rights, and the need to always consider the child's best interests.²¹¹

7.47 The Committee further notes that the Victorian Law Reform Commission emphasised that it was not:

...helpful to continue to view [*child*] protection proceedings through a criminal law lens, or to adapt criminal law processes for use in this jurisdiction. We need to re-cast the way in which protection proceedings are characterised and devise processes that are specifically designed for use in that new model.²¹²

Recommendation 28

7.48 The Committee recommends that the ACT Government develop child and youth protection service specific litigation guidelines that build on existing obligations (as per the model litigant guidelines and alternative dispute resolution requirements). The Guidelines should recognise the Territory's obligations, parents' responsibilities and rights, and the need to always consider the child's best interests.

STATUTORY TIMEFRAMES FOR TAKING MATTERS TO COURT

7.49 The Committee heard that statutory time frames for taking matters to the Childrens Court—in particular, following emergency action—can 'impact on the ability to share

²¹⁰ Victorian Law Commission. (2010) *Protection Applications in the Children's Court: Final Report*, Chapter 10, pp. 395–397, viewed 17 July 2020, < https://www.lawreform.vic.gov.au/sites/default/files/PACC_Chapter_10.pdf >.

²¹¹ Ibid., p. 397.

²¹² Ibid., p. 397.

information with parents, their lawyers and children's lawyers in a way that they might consider to be sufficiently timely'.²¹³

7.50 This coupled with the context in which decisions in child protection are often made—that is, when children are at considerable risk, when families are in crisis and are most vulnerable—can present additional challenges for the sharing of information with parents, their lawyers and children's lawyers in a timely way.

7.51 The Minister for Children, Youth and Families stated that:

This, in my view, is an important line of inquiry for the committee. It is not something over which CYPS or its staff have much control at present.²¹⁴

COMMITTEE COMMENT

7.52 The Committee agrees that statutory time frames for taking matters to the Childrens Court, particularly following emergency action, can impact on the ability to share information with parents, their lawyers and children's lawyers in a sufficiently timely way.

7.53 Given the momentousness of decisions such as taking a child away from its parents and its family, the Committee is of the view that statutory timeframes should be of a reasonable duration to permit all relevant information to be shared with parents, their lawyers and children's lawyers in a timely way. At a minimum, the Committee considers the two working-day statutory timeframe for emergency action to be worthy of consideration.

Recommendation 29

7.54 The Committee recommends that the ACT Government—in conjunction with the ACT Childrens Court, legal representatives and other interested stakeholders in the care and protection space—review and, if necessary, revise statutory time frames for taking matters to the Childrens Court, in particular following emergency action, to ensure that these timeframes do not adversely impact on the ability to share information with parents, their lawyers and children's lawyers in a sufficiently timely way.

JURISPRUDENCE IN THE CARE AND PROTECTION FIELD SPACE

7.55 There is almost no ACT jurisprudence in the care and protection field of work because decisions in the ACT Childrens Court are not published decisions and are therefore not publicly available. This circumstance makes it difficult to make decisions based on

²¹³ Ms Rachel Stephen-Smith MLA, *Transcript of evidence*, 5 February 2020, p. 104.

²¹⁴ Ms Rachel Stephen-Smith MLA, *Transcript of evidence*, 5 February 2020, p. 104.

precedent when no precedent is published. This leaves only the CYP Act to fall back on because there is no common law in the care and protection space.

7.56 Where there is a practice of publishing decisions—it means there is a clear body of case law which guides not only the decision-makers but also²¹⁵ the people giving advice in the care and protection space. The current situation in the care and protection space results in ‘many unknowns...having published decisions would aid in addressing that confusion...’.²¹⁶

7.57 The ACT HRC was of the view that ‘enabling greater scope for the publication of court decisions’ would be beneficial and noted:

Remarkably, CP was published. I am not aware of other cases. We think that the Family Court system at the federal level has a very accessible and commonsense methodology for enabling the system to be understood and for the public to have confidence by publishing certain information, whether it is de-identified or in other forms.²¹⁷

7.58 The Committee sought clarification that Childrens Court decisions only get published if they go to the Supreme Court or the Court of Appeal (CoA) and was told:

If they go to appeal, that is right. As I see it, it would probably be quite helpful to have some way of the court demonstrating its interpretation of the law, its application to certain fact scenarios and the outcomes of those matters. The concern that I see is that this is unlike the Family Court, in that these children who are involved have fairly significant abuse and neglect in their past. They may not want that on the record anywhere, and they may be able to work out that it is them sometime down the track. That is one concern I have. The other primary one I have is the resourcing for the court.

If a magistrate is required to write a decision on every single matter that he or she hears, it is going to take a substantial amount of time. We are already in a situation where we have got one Childrens Court magistrate. When we go to a listing hearing, which is when all the parties come together and say in front of the magistrate, “We are ready to go; all the evidence is filed,” we are at a point now where we are already waiting four, five, six months to have a hearing listed. If that magistrate is then required to sit down and perhaps spend a week writing a judgement, that is going to push out the resourcing in the Childrens Court significantly. Whilst I think it could be a very helpful resource, it will have a big knock-on effect.²¹⁸

²¹⁵ *Transcript of evidence*, 29 January 2020, pp. 60–61.

²¹⁶ Ms Claudia Maclean, Women’s Legal Centre—ACT and Region, *Transcript of evidence*, 29 January 2020, p. 61.

²¹⁷ Dr Helen Watchirs, ACT Human Rights Commission, *Transcript of evidence*, 4 February 2020, p. 88.

²¹⁸ Ms Anne Martens, *Transcript of evidence*, 5 February 2020, p. 127.

7.59 The Supreme Court and CoA decisions relating to the matter subject to Part 1 of this inquiry, together with a small number of other appeals, are the only published decisions in the care and protection field of work in the ACT.

7.60 As to the value of the published decisions relating to the matter subject to this inquiry in the care and protection field of work, the Committee was told:

The Women's Legal Centre were part of the initial Childrens Court case and part of bringing the appeal as well for the decision that is at the centre of this inquiry. Part of that, particularly amongst legal practitioners, is that finally we got a Supreme Court decision which lays out what you can and cannot rely upon in Childrens Court proceedings. Part of that, and relating to this particular inquiry about information sharing, was that you cannot rely upon child concern reports if you do nothing to follow up on those. There is this idea that "We're going to take emergency action because there are 12 reports." But if they did nothing to investigate those reports or they investigated and nothing came of it, that cannot be used as evidence of you being an unfit parent. That was really useful, because that gets taken back to all legal practitioners, both those for the department and those assisting clients within the system. So I 100 per cent support decisions being published.²¹⁹

7.61 The Committee discussed the desirability of written decisions in care and protection with the ACT Law Society. Discussion ensued as follows:

Mr Donohue: Yes, we certainly do. We are, of course, constrained by—and properly so—the privacy concerns, the confidentiality of things, but finding a way where the principles of a case can be made available to practitioners would assist immensely in the consistency of decisions, decision-making and submissions. We always look at previous cases to find out where this path goes.

Mr Curtis: And it should be noted that the Supreme Court decisions often are reported, so there does not seem to be any real reason why a Magistrates Court decision could not be. Arguably, in Supreme Court decisions it would be even easier to figure out who was involved, given the rare frequency with which they take place. The Family Law Act and the national disability insurance scheme review process all have systems in place for protecting parties involved and anonymising judgements. There is no reason that similar provisions could not be put in place for magistrates' decisions in the care and protection jurisdiction.

Mr Donohue: Or, indeed, if we ever get there, to the external review process that we are hopefully going to achieve.

THE ACTING CHAIR: But it would be advantageous to everybody involved that there was a clear process of reporting decisions—

²¹⁹ *Transcript of evidence*, 29 January 2020, p. 61.

Mr Donohue: Yes, definitely.

THE ACTING CHAIR: so as to underline the principles by which decisions are being made?

Mr Donohue: Yes.²²⁰

- 7.62 Further, the Committee heard that finding a way where the principles of a case can be made available to practitioners would assist in the consistency of decisions, decision-making and submissions—in particular in the context of defining what ‘best interests’ means. A representative of the ACT Law Society explained:

And if I could go back to the “best interests” question, the jurisprudence is around the really big, sticky questions. It does not deal with the basic stuff, and that is what we need more of—the basic little bits and pieces.²²¹

COMMITTEE COMMENT

- 7.63 The Committee notes the limitations concerning jurisprudence in care and protection cases because decisions of the ACT Childrens Court are not routinely published. The Committee further notes the value of published court decisions as providing a clear body of case law—in that the court demonstrates its interpretation of the law, its application to certain fact scenarios and the outcomes of those matters—which guides not only decision makers but also parties giving advice in the care and protection space.
- 7.64 The Committee also notes the work being carried out in other jurisdictions to publish children court reports—for example, the New South Wales (NSW) Children’s Court regular online publication to alert legal practitioners and other interested persons of important cases and papers considered to be relevant to the Children’s Court jurisdiction—Children’s Law News (NSW CLN).²²²
- 7.65 The Committee acknowledges the issues raised concerning privacy of parties to which court matters relate and the resourcing implications for the Childrens Court were magistrates required to write a decision on every matter that comes before them. The Committee further notes that any decisions published by the NSW Children’s Court are:
- ...anonymised to protect the identity of the children and young people involved in the case. This means that the names used in judgments published by the Children’s Court are not the real names of the children involved in the case.

²²⁰ ACT Law Society, *Transcript of evidence*, 25 February 2020, pp. 145–146.

²²¹ Mr Adrian Curtis, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 146.

²²² Refer: <http://www.childrenscourt.justice.nsw.gov.au/Pages/publications/lawnews/lawnews.aspx>

The identity of adults may also be anonymised if the publication of their real name is likely to identify the children involved. Other details such as locations may also have been changed to protect the identity of the children involved.²²³

- 7.66 Given the value of published court decisions in providing a clear body of case law, the Committee believes the feasibility of the merits of publication of ACT Childrens Court decisions—that balances privacy and the resourcing implications—should be explored further.
- 7.67 In its Interim Report inquiring into CYPs (Part 1)—the Committee recommended the ACT Government in conjunction with the ACT Childrens Court and key stakeholders in the care and protection space—explore the feasibility of the merits, or otherwise, of the publication of Childrens Court decisions and report back to the Assembly. At the time of tabling this report—the Government was still to respond.

DISCLOSURE DURING COURT PROCEEDINGS

- 7.68 In the course of litigated care matters, Legal Aid ACT and the Law Society advised that at times there can be difficulties getting relevant information from the CYPs. This can extend to obtaining kinship assessments or foster care assessments from the Director-General.²²⁴

- 7.69 Legal Aid ACT told the Committee that:

These assessments are particularly relevant where the Director-General has declined to approve a family member as a kinship carer for a child and we want to seek a review of that decision in ACAT: without the kinship assessment report, it is very difficult to ascertain the basis for the Director-General's decision.²²⁵

- 7.70 The Committee understands that in NSW, disclosure of 'any information obtained in connection with the administration or execution' of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) is permitted 'for the purposes of any legal proceedings arising out of the Act or the regulations' [section 254(1)(c)]. The Committee further understands that there is no equivalent provision in the CYP Act and contributors to the inquiry suggested that such a provision may assist those involved in care proceedings in obtaining relevant information from the Director-General.²²⁶

²²³ NSW Children's Court—Children's Law News, viewed 17 July 2020, <<http://www.childrenscourt.justice.nsw.gov.au/Pages/publications/lawnews/lawnews.aspx>>.

²²⁴ Submission No. 1—Legal Aid ACT; *Transcript of evidence*, 29 January 2020; ACT Law Society *Transcript of evidence*, 25 February 2020.

²²⁵ Submission No. 1—Legal Aid ACT, p. 2.

²²⁶ Submission No. 1—Legal Aid ACT, pp. 2–3.

COMMITTEE COMMENT

- 7.71 The Committee acknowledges that legal representatives and others involved in care proceedings should have access to all relevant information from the CYPS so that these representatives can assist the court and the mother or father in the best possible way.

Recommendation 30

- 7.72 The Committee recommends that the ACT Government amend the *Child and Youth Protection Act 2008* (CYP Act) to provide for disclosure of any information obtained in connection with the administration or execution of the CYP Act for the purposes of any legal proceedings arising out of the CYP Act.**

DISCLOSURE WHEN EMERGENCY ACTION IS TAKEN

- 7.73 When emergency action is taken, the Director-General has two working days to make an application to the Childrens Court for interim orders formalising the care arrangements.
- 7.74 Legal Aid ACT, almost without exception, appears as the children's representative the first time the matter is in court. Legal Aid ACT advised that when the Director-General gives notification that emergency action has been taken, Legal Aid receives 'some very basic information about the matter'. Legal Aid ACT explained that provision of further information about the family and their circumstances would greatly improve its 'ability to assist the court and the mother or father'.²²⁷
- 7.75 The Committee inquired further about the types of information that would assist Legal Aid ACT in its ability to assist the court and the mother and father when emergency action is taken. Discussion ensued as follows:

THE CHAIR: In your submission at point 9 you talk about disclosure when emergency action is taken and the fact that you are not often told whether the parents or the child are from an Aboriginal or Torres Strait Islander background. Would that also be true from a disability background, from a—

MS LE COUTEUR: A multicultural background?

THE CHAIR: Yes, a multicultural background?

Ms Hiles: I will speak to that in terms of how we get notified about the case. It is an imperative that a child representative be appointed in all care and protection cases. That is the first step. What happens when a child is taken into care is that an

²²⁷ Submission No. 1—Legal Aid ACT, p. 3.

emergency action is taken and the director-general is obliged to let Legal Aid client services, who are our funding body, know that basically we need a child representative in this new matter. That is just, simply, a form. It is a piece of paper that has certain boxes that can be ticked or usually it is one or two sentences as to what happened, why emergency action was taken.

It probably depends on who the caseworker is or who the lawyer is who has actually drafted this piece of paper. This piece of paper, this document, has no box for disability, for example. But sometimes, with the one or two sentences at the bottom where it talks about what the case is, they may mention that this child has complex medical needs or something—

THE CHAIR: But what about the parent, for example?

Ms Hiles: Or the parents, no. And one thing I will have a gripe about, a personal gripe—and I have been asking for this since day dot—is having the parents' date of birth provided. You would think that is a very basic requirement. But what that does is help me shape the way that I am going to approach the case. For example, if it has got the child's date of birth, which is good, that is something. But it does not have the parents' date of birth.

It is perhaps a nuanced thing but it may be why that we approach it differently. For example, if we are talking about very young parents, or teenage parents, it probably would be different than the way we would look at a parent aged 40 with five other children. Other information could be whether or not this child is the first child of these parents; if it is very young parents, what supports could be put in place for those people. Often I do not even know these things.

...

If this is a multicultural family we have a great—...the liaison team?

Ms Campbell: The community liaison team.

Ms Hiles: Community liaison unit, yes. We have varying cultural backgrounds but also support services available in house. For example, if I know this person is of a particular background, we may actually have someone of that background on staff whom I can ask, "Would you mind coming with me?" Often, particularly, parent clients are much happier speaking to someone in their own language or someone that they know and feel more comfortable with than me. That is very helpful for me to be able to do my job and for the client to feel supported.²²⁸

²²⁸ *Transcript of evidence*, 29 January 2020, pp. 49–50.

7.76 Legal Aid ACT added that:

...if there has been previous involvement with CYPS, requiring the Director-General to provide any previous final orders that have been made and the current care plan would be of great assistance because the likely issues in the proceedings would be immediately apparent from these documents. The time involved in providing previous orders and the care plan would be minimal since they would already be on file. Moreover, if orders are not made by consent after emergency action is taken and we have to run an interim hearing, we would have more contextual material and a fuller understanding of the issues and the family's circumstances.²²⁹

7.77 Barnardos Australia also noted limitations in the sharing of information at the initial interface—where a child is referred to ACT Together for placement. The General Manager Operations, ACT Together, Barnardos Australia explained:

We certainly do experience some concern at the initial interface where a child is referred for placement on occasions where there is a lack of information made available to us. That means it is more difficult for us to be able to make the most appropriate placement decision match—what we call a match in our language—between a carer and a child. That is because in order to make the right match you need to know what the child's needs are so you can find a carer who will be able to manage those needs. That includes managing risk where that presents itself with a child's or young person's behaviour or where it might affect other children who live in the carer home.²³⁰

COMMITTEE COMMENT

7.78 The Committee is of the view that when emergency action is taken, that legal representatives tasked with assisting the court and the mother or father at such a time should be provided with as much information about the family and their circumstances from the first point of contact. This should include: the child's date of birth; age of parents; Aboriginal or Torres Strait Islander background or other cultural background; disability background; if there has been previous involvement with CYPS; and requiring the Director-General to provide any previous final orders that have been made and the current care plan.

²²⁹ Submission No. 1—Legal Aid ACT, p. 3.

²³⁰ Ms Melissa Bell, Barnardos Australia, *Transcript of evidence*, 28 January 2020, p. 3.

Recommendation 31

- 7.79 The Committee recommends that the ACT Government review and revise the Director-General’s emergency action notification form provided to Children’s representatives to ensure that it discloses as much information about the family and their circumstances from the first point of contact. This should include: (a) the child’s date of birth; (b) age of parents; (c) Aboriginal or Torres Strait Islander background or other cultural background; (e) disability background; (f) if there has been previous involvement with Child and Youth Protection Services; and (g) requiring the Director-General to provide any previous final orders that have been made and the current care plan.**

MODEL FOR REPRESENTATION OF CHILDREN AND YOUNG PEOPLE IN CARE AND PROTECTION MATTERS IN THE ACT CHILDRENS COURT

- 7.80 Prior to the introduction of the 2008 CYP Act—the provisions dealing with the legal representation of children and young people were specified in the now repealed *Children and Young People Act 1999*. The ACT Law Society developed and published in August 2004 ‘Guidelines for Lawyers Representing Children and Young People in Care and Protection Matters’ in the ACT Childrens Court setting out practice standards for the legal representation of children and young people in care and protection proceedings.
- 7.81 The provisions dealing with the legal representation of children and young people are now found in Part 7A of the *Court Procedures Act 2004*.
- 7.82 The ACT HRC noted that, by contrast to the repealed *Children and Young People Act 1999*,²³¹ the current provisions in the Court Procedures Act ‘do not expressly stipulate that a lawyer must act and make representations to the Childrens Court in accordance with the instructions given by a child or young person who has the capacity to give the lawyer those instructions’.²³²
- 7.83 In the ACT HRC’s view, the ‘current ACT legislative framework for the representation of children and young people in care and protection proceedings appears to provide a less rigorous model than those used by other jurisdictions when it comes to ensuring that children and young people have access to direct representation’.²³³
- 7.84 The ACT HRC cited the Victorian model, as an example—where lawyers are expressly obliged to act in accordance with a child’s instructions, having regard to the maturity of the

²³¹ Refer: s 24(4) of the *Children and Young People Act 1999* (repealed).

²³² Submission No. 4a—ACT Human Rights Commission.

²³³ Submission No. 4a—ACT Human Rights Commission.

child.²³⁴ Further, the ACT HRC understands that Victorian courts appear to be given a more direct role in determining whether a child or a young person has capacity to instruct their lawyer.²³⁵ The ACT HRC also noted the recently published guidance by Victoria Legal Aid,²³⁶ which contains more current advice on said matters—in particular, regarding ensuring consistency with the requirements of article 12 of the *UN Convention on the Rights of the Child*.

- 7.85 The ACT HRC suggested that it would be worthwhile for ‘the relevant sections of the Court Procedures Act be reviewed to examine how that Act may better facilitate the participation of children and young people in proceedings to ensure that their instructions, views and wishes are properly taken into account’. As to foundation principles—the Commission considers that the model for representation of children and young people:

...must start from a presumption that a child or young person has capacity and a right to direct legal representation. In the absence of such capacity, the child or young person must be entitled to all supports necessary to ensure their views and wishes can be communicated to the court to their fullest extent.²³⁷

COMMITTEE COMMENT

- 7.86 The Committee notes that, in contrast to the repealed *Children and Young People Act 1999*, the current provisions in the *Court Procedures Act 2004* ‘do not expressly stipulate that a lawyer must act and make representations to the Childrens Court in accordance with the instructions given by a child or young person who has the capacity to give the lawyer those instructions’.²³⁸
- 7.87 The Committee is of the view that there is merit in adopting a best practice model for the representation of children and young people in care and protection matters and a starting point would be to review the relevant sections of the *Court Procedures Act 2004* to examine how that Act may better facilitate the participation of children and young people in proceedings—in particular, to ensure that their instructions, views and wishes are properly taken into account.

²³⁴ Refer: s 524(10) of the *Children, Youth and Families Act 2005* (Vic).

²³⁵ Refer: s 524(1B) of the *Children, Youth and Families Act 2005* (Vic).

²³⁶ Refer: Victoria Legal Aid, ‘Representing children in child protection proceedings’, April 2019, viewed 4 July 2020, <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-representing-children-in-child-protectionproceedings-guide.pdf>>.

²³⁷ Submission No. 4a—ACT Human Rights Commission, p. 10.

²³⁸ Submission No. 4a—ACT Human Rights Commission, p. 9.

Recommendation 32

- 7.88 The Committee recommends that the ACT Government review the relevant sections of the *Court Procedures Act 2004* (the CP Act) to examine how the CP Act may better facilitate the participation of children and young people in proceedings—in particular, to ensure that their instructions, views and wishes are properly taken into account.**

THERAPEUTIC JURISPRUDENCE MODEL FOR CARE AND PROTECTION MATTERS IN THE ACT CHILDRENS COURT

- 7.89 The Committee understands that a report was prepared by academics from the University of Canberra and the Australian Catholic University in relation to impacts and potential benefits of a therapeutic jurisprudence model for care and protection matters in the Childrens Court.²³⁹
- 7.90 The Committee further understands that the report was the outcome of work being led by the Chief Magistrate involving key stakeholders from government and non-government sectors. At the time the availability of the academic report was advised—the Standing Committee on Justice and Community Safety (JACS) was told that the Chief Magistrate had circulated the report to a range of stakeholders as part of the next stage of the review process. The JACS Committee further heard that the outcome of the review process would involve identification of specified proposals to put to the Government as to how a therapeutic justice approach in the care and protection jurisdiction would work in the ACT.²⁴⁰

COMMITTEE COMMENT

- 7.91 The Committee welcomes the work being undertaken in relation to the impacts and potential benefits of a therapeutic jurisprudence model for care and protection matters in the Childrens Court.
- 7.92 The Committee notes that the academic report considering the matter and the related discussion as noted related to the 2016–17 reporting period. Given the focus of this inquiry—the Committee is of the view that the Attorney-General should inform the Assembly as to progress on the identification of specified proposals as to how a therapeutic justice approach in the care and protection jurisdiction would work in the ACT.

²³⁹ ACT Standing Committee on Justice and Community Safety, Inquiry into 2016–17 Annual and Financial Reports, *Transcript of evidence*, 8 November 2017, pp. 115–116.

²⁴⁰ ACT Standing Committee on Justice and Community Safety, Inquiry into 2016–17 Annual and Financial Reports, *Transcript of evidence*, 8 November 2017, p. 116.

Recommendation 33

- 7.93 The Committee recommends that the ACT Attorney-General update the ACT Legislative Assembly by the last sitting day in August 2020 on the identification of specified proposals as to how a therapeutic justice approach in the care and protection jurisdiction would work in the Australian Capital Territory.**

INTERACTION BETWEEN CARE AND PROTECTION AND DOMESTIC VIOLENCE—INFORMATION SHARING IN THE ACT CHILDRENS COURT

- 7.94** The Committee heard about complications that may arise regarding information sharing in court documents such as affidavits that may place women and children at risk where domestic violence is also a consideration in care and protection matters. Discussion with representatives from Beryl Women Incorporated ensued as follows:

Ms Hayden: Yes. The bit that I would say around the sharing of information is that I think that it would be prudent for child protection to consider who the family's main supports are and actually to engage them in the process.

But there is also another thing for me which is concerning, and that is that they do not really understand domestic violence. As soon as you get into the Childrens Court potentially the perpetrator of the violence against the woman that we are supporting is brought into that process. That information sharing can be really complicated because it then also can put the woman at risk again. There is a level of information sharing that can happen in court documents that is not always protecting the woman's safety, which may also be the child's safety, depending on where they are.

MRS DUNNE: What sorts of things would you be talking about here? Is that about providing, inadvertently, information about where they might be residing or—

Ms Hayden: Yes, potentially that. We have had to get addresses out of court documents because they have been in affidavits, because affidavits do not like you not having an address. There is that. But there is also information because you are responding to an affidavit. And if there is an affidavit from child protection that might have vexatious allegations in it or things that are not proven yet, but they are written, and that is going to the other party, that also has the potential to escalate the violence for our client.²⁴¹

²⁴¹ *Transcript of evidence*, 28 January 2020, p. 20.

COMMITTEE COMMENT

- 7.95 The Committee is concerned about the potential risk for parents and children that may arise from the level of personal information that is shared in court documents. The Committee acknowledges that the official nature of court documents such as affidavits require personal information for validity purposes but considers that court procedures could require that personal information that may place parents and children at risk be redacted prior to disclosure to a potential perpetrator.

Recommendation 34

- 7.96 The Committee recommends that the ACT Government—in conjunction with the ACT Childrens Court and key stakeholders in the care and protection and domestic violence space—explore the feasibility of the merits, or otherwise, of measures to safeguard personal information required in court documents from being disclosed that may place parents and children at risk.**

ADVOCACY AND SUPPORT SERVICES

- 7.97 A number of contributors to the inquiry highlighted the importance for anyone involved in the care and protection system to have access to advocates. The Chief Executive of ACTCOSS commented:

It is really important to make sure that, in particular, young people, but anyone who is involved in the system who is vulnerable, have access to advocates. It is one thing to simply read something that is on a paper and agree with it; it is another thing to really understand the long-term consequences for you and your family of agreeing with that statement when it is presented to you. It is advocacy and funding. Good quality advocacy for those involved in child protection services is something that will help with many of the issues that are addressed in our submission.²⁴²

- 7.98 ACTCOSS also highlighted the important difference between legal advocacy and personal advocacy—explaining:

I think there is also a difference between legal advocacy and personal advocacy, and even navigating or dealing with legal systems, lawyers. Knowing that you have the right to access lawyers, which lawyers you can access freely and so on is complex, and you need an advocate to help navigate that. There is a difference. Many of our members

²⁴² Dr Emma Campbell, ACTCOSS, *Transcript of evidence*, 4 February 2020, p. 81.

would be active in that non-legal advocacy space, and they need support in order to support all members, all those involved in this system.²⁴³

7.99 The Committee heard evidence from organisations providing important disability, aged, carer, indigenous and women's advocacy and support services to people involved in the care and protection system. These organisations provided examples of failures in the system to formally engage with them and mutually share information to assist clients in their respective services. The Committee notes that the CYP Act allows for the interaction of an advocate but evidence indicated that its facilitation was reliant on the care and protection worker.²⁴⁴

7.100 Beryl Women Incorporated explained:

Our experience has been that information sharing between CYPS and our service is limited. What we also know and have seen from our experience is that the information that they are providing to clients in the service is limited as well. Decisions are being made in the background. Women are not being consulted around what is best for their child or children. We are trying to advocate and be a go-between between the client and CYPS but we are not being able to access that information either, or the supports. That is my experience.²⁴⁵ ...

I think it is vital that the information that they hold absolutely needs to be shared, not just with the families that they are involved with but also with the services that are supporting those families. There are things that have happened. Our experiences have been that in the past they have taken emergency action. They have removed a child. We have had clients where mum has not had a clue about what is going on and we have been involved with families for sometimes up to 12 months because they have been in our service for that long.

We know a lot about them. We are providing support to them, advocating with various services on their behalf. If we were a point of contact at some point in the system, some of those decisions could have been different and more holistic support given to the family.²⁴⁶

7.101 Discussion with the ACT Disability, Aged and Carer Advocacy Service (ADACAS) regarding the essential need for information and the information not forthcoming ensued as follows:

MRS DUNNE: You made some strong points about the essential need for information and the information not being forthcoming and you have spoken a little about increasing the understanding of disability by people in the CYPS system. In a sense, are

²⁴³ Dr Emma Campbell, ACTCOSS, *Transcript of evidence*, 4 February 2020, p. 82.

²⁴⁴ *Transcript of evidence*, 28 January 2020, p. 12.

²⁴⁵ Ms Robyn Martin, Beryl Women Incorporated, *Transcript of evidence*, 28 January 2020, p. 17.

²⁴⁶ Ms Robyn Martin, Beryl Women Incorporated, *Transcript of evidence*, 28 January 2020, p. 19.

you seeing that CYPS has a slightly old-fashioned, perhaps mid-20th century, view about the capacity of people with disabilities?

Ms Bulenda: Yes. I think CYPS staff have varying levels of knowledge and experience but there is definitely a general assumption that there is less capacity if a person has especially an intellectual disability and if you add psychosocial on top of that there is just this underlying presumption that they cannot parent.

THE CHAIR: We heard evidence yesterday that it can also depend on what caseworker you might get; some caseworkers are great. Would you agree?

Ms Bulenda: Yes, I agree. I really believe that CYPS workers should be doing compulsory training in disability and NDIS as part of their induction and perhaps regular updates to keep them up to date because the NDIS changes so frequently and they would have a greater knowledge, greater understanding. They would be able to adjust how they engage with clients who have a disability or mental health issue; those regular adjustments and what these people need to understand. So many times when I interact with these people they are just not being clear. The client does not understand what they are doing wrong.²⁴⁷

7.102 Advocacy at the beginning makes a big difference however, Advocacy for Inclusion (AFI) told the Committee that its services were usually brought in after 18-year orders had been made. A Senior Advocate with AFI explained:

I suppose we have noted that advocacy at the beginning does make a big difference to the whole process and parents' understanding of what the issues are, what the concerns might be, to be able to get a better relationship there with care and protection as well if we are in at the beginning, which I think makes a really big difference to the whole process. It probably gives care and protection a bit of an understanding of the parent's disability and capabilities, the understanding of what might be the issues associated with their disability, rather than coming in with the attitude that they are willing and not able to parent.

We are often brought in after the 18-year-olds' orders have been made. Then a lot of work is done in trying to maintain that parent-child relationship. Especially when contact is down to four times a year it is really hard for the parents to sustain that relationship.²⁴⁸

7.103 The Committee also heard that advocacy in the care and protection space is distinct from other forms of advocacy and for these reasons is complex, challenging and requires a level of specialist skills. The CEO of ADACAS elaborated:

²⁴⁷ *Transcript of evidence*, 29 January 2020, p. 34.

²⁴⁸ Ms Jamelle Boettcher, Advocacy for Inclusion, *Transcript of evidence*, 28 January 2020, p. 11.

With this type of advocacy, it is a range of different challenges within the single issue that can go on for a significant level of time. It challenges us resource wise to be able to allocate that. It is quite challenging also for the advocates who do it because it can be very stressful. It also involves, unfortunately, too often at the end, us going to court supporting somebody through that rather traumatic process as well, which requires a certain level of skill. We had made this representation, even prior to the submission, directly to a minister around the need for this kind of specialised, dedicated support to individuals with disability and mental ill health who might come to the attention of CYPS. It might be possible to nip some of this in the bud early. When we are involved early we have had significant amounts of success.²⁴⁹

7.104 In its written submission, ADACAS suggested that an area where it believed improvement was needed was in the areas of increased support available to parents with disability or mental ill-health during assessment and legal processes related to child protection matters, in particular advocacy support. The CEO of ADACAS elaborated:

I am identifying, I suppose, a new stream of funding, a special program if you like, that really targets this because this is an entrenched and systemic issue and we are able to deal with it through our generic advocacy at the moment. But unless we actually see wholesale change then that is going to persist and I think it would benefit from a targeted advocacy which is then able to be monitored and impact and outcomes also assessed.²⁵⁰

COMMITTEE COMMENT

7.105 The Committee acknowledges the power imbalances that exist in the care and protection system and the limitations highlighted regarding information sharing and engagement between CYPS and advocacy and support services. The Committee also acknowledges that the CYP Act allows for the interaction of an advocate, but evidence indicated that its facilitation was reliant on the care and protection worker.²⁵¹

Recommendation 35

7.106 The Committee recommends that the ACT Government ensure that Child Youth and Protection Services facilitate the engagement of advocacy and support services working with children, parents and families in the care and protection system.

²⁴⁹ Mr Michael Bleasdale, ADACAS, *Transcript of evidence*, 29 January 2020, p. 33.

²⁵⁰ *Transcript of evidence*, 29 January 2020, p. 33.

²⁵¹ *Transcript of evidence*, 28 January 2020, p. 12.

7.107 The Committee commends the value of the advocacy and support services provide by many organisations working in the care and protection space. The Committee also recognises the improved outcomes for clients when advocacy services are involved early.

7.108 The Committee also understands the distinctive nature of advocacy work in the care and protection space, including its complexity and requirement for a level of specialist skills. The Committee believes there is merit in a targeted advocacy 12-month pilot program providing specialised dedicated support to individuals with disability and mental ill-health who might come to the attention of CYPS. The pilot program should be accompanied by a process, impact and outcome evaluation.

Recommendation 36

7.109 The Committee recommends that the ACT Government, in partnership with the ACT Disability, Aged and Carer Advocacy Service (ADACAS), conduct a targeted advocacy 12-month pilot program providing specialised dedicated support to individuals with disability and mental ill-health who might come to the attention of Child and Youth Protection Services. The pilot program should be accompanied by a process, impact and outcome evaluation.

IMPLEMENTATION OF THE 2016 GLANFIELD REPORT RECOMMENDATIONS

7.110 Several written submissions to the inquiry noted the Glanfield inquiry, its subsequent report and recommendations relating to reform and improvements in the care and protection space.²⁵²

7.111 ACTCOSS—the peak body for people experiencing disadvantage in the ACT and the community organisations who represent and service these people—called for, at the very least, the recommendations of the 2016 Glanfield Report to be implemented as soon as possible.²⁵³

7.112 Given the broad level support in the community sector for the report and its recommendations—the Committee discussed with ACTCOSS representatives the reasons they perceived were responsible for the delay. Discussion ensued as follows:

²⁵² Including: Submission No. 3—ACT Council of Social Service Inc. (ACTCOSS); Submission No. 9—Canberra Restorative Community Network; Submission No. 13—F. Tito Wheatland.

²⁵³ *Transcript of evidence*, 4 February 2020, pp. 82–83; Submission No. 3—ACT Council of Social Service Inc. (ACTCOSS).

MS LE COUTEUR: You mentioned in your opening remarks that the Glanfield inquiry recommendations should have been implemented. This is probably a question for Ms Moloney rather than you, Dr Campbell, given that she has been in Canberra a bit longer. Why do you think, when we did have this inquiry—

MRS DUNNE: It was nearly four years ago.

MS LE COUTEUR: Do you have any ideas as to why it was not implemented?

Dr Campbell: What are the barriers from the community sector?

MS LE COUTEUR: There was an inquiry; there were a lot of recommendations. Basically everyone that has talked to us has been positive about them, some people more than less. But everyone has indicated that this suggested a step forward that has not been properly taken. Given that you have been talking to so many different groups, I am wondering if you have an idea of why that step was only a bit taken.

Ms Moloney: As far as I can tell from the discussions I have had in the community, that is something that the community sector wonders as well. There has been a lot of support for this by the community sector. We, too, have been left wondering why it has been almost four years. Child protection issues have certainly emerged in a bigger way, politically and in advocacy spaces, in the past two years. Maybe now we are finally getting to that groundswell, paying enough attention, and sufficiently recognising the importance of it, that, hopefully, we can get them implemented.

Dr Campbell: This inquiry is a great opportunity to demonstrate—for the committee to recommend and for the ACT government to see—that the vast majority of the community sector and those involved in this area do broadly support the recommendations in the report. I think that that will help the momentum behind moving forward with some of these ideas.²⁵⁴

COMMITTEE COMMENT

7.113 The Committee notes that 2016 *Report of the Inquiry: Review into the system level responses to family violence in the ACT* made 31 recommendations about the service system, in particular child protection and family violence services. The ACT Government accepted the recommendations and the need for changes to legislation, policy, practice and culture as identified in the recommendations.²⁵⁵

7.114 The Committee emphasises that it is the action taken by applicable agencies to implement recommendations that is all important in achieving the outcomes and change they seek to address not the recommendations *per se*.

²⁵⁴ *Transcript of evidence*, 4 February 2020, pp. 82–83.

²⁵⁵ Refer: Government response—http://www.cmd.act.gov.au/__data/assets/pdf_file/0008/883484/ACT-Government-Response_family_violence.pdf

7.115 The Committee further notes the close to three-year delay in actioning²⁵⁶ recommendation 12 regarding undertaking a review of what decisions made by CYPS should be subject to internal or external merits review. The Minister for Children, Youth and Families told the Committee ‘it has taken longer to get to that point than we would have liked. There has been a lot of work’.²⁵⁷

7.116 Given the present 9th Assembly will be concluding in October 2020, the Committee believes there is merit in the Government reporting to the Assembly on the progress of its implementation of the recommendations of the *Report of the Inquiry: Review into the system level responses to family violence in the ACT* before this time.

Recommendation 37

7.117 The Committee recommends that the ACT Government report to the ACT Legislative Assembly by the last sitting day in August 2020 on the progress of its implementation of the recommendations of the *Report of the Inquiry: Review into the system level responses to family violence in the ACT*. This should include: (i) a summary of action to date, either completed or in progress (including milestones completed); and (ii) the proposed action (including timetable) for implementing recommendations (or parts thereof), where action has not yet commenced.

COMMUNICATION WITH PARENTS, CARERS, CHILDREN AND YOUNG PEOPLE

7.118 Several contributors to the inquiry called for improvements to how CYPS communicates with advocacy and support services, parents, carers, children and young people. Some contributors also noted that the Glanfield Report made a number of recommendations with regard to this issue.

SYSTEMS COMMUNICATION WITH YOUNG PEOPLE

7.119 ACTCOSS²⁵⁸ told the Committee that it had sought information on the best ways to communicate with children and young people—informed by the experience and contribution of the CREATE Foundation (who represent the experiences of children and young people in out-of-home care)—which has looked extensively at ‘systems

²⁵⁶ A discussion paper, *Review of child protection decisions in the ACT*, was released for consultation in mid-2019.

²⁵⁷ Ms Rachel Stephen-Smith MLA, *Transcript of evidence*, 5 February 2020, p. 114.

²⁵⁸ *Transcript of evidence*, 4 February 2020, pp. 80–81.

communication' with young people. Feedback from CREATE as to how CYPS can improve its communication with parents, carers, children and young people includes:

- the way information appears—plain simple English is really useful, not only for children and young people, but for a whole range of people in the community;
- making sure that information can be related to children and young people—depending on any disabilities they may have or developmental needs;
- navigating the system and accessing communication—something that CREATE have talked about is the stability of caseworkers, making sure that you have somebody as a central point of communication rather than having a lot of turnover—which can make permanency of information quite difficult. There is also the comfort of accessing information. This is really important for children and young people who may already be experiencing some marginalisation; and
- ensuring that communication is timely—the wait for hearing about the circumstances of your order can be unacceptably long for children, young people and their families.²⁵⁹

HEALTH INFORMATION BEING SHARED WITH CARERS

7.120 The Committee was told about difficulties foster carers have accessing critical medical information about their foster children due to legal and bureaucratic barriers. This has resulted in informal information-sharing networks amongst foster carers who may pass on information informally about children that they have had in their care when they have moved on to somebody else, which would be considered not appropriate. But this practice has stemmed from the desperation of foster carers seeking to know something about the children that they are dealing with and that they have in their care.²⁶⁰

7.121 The General Manager Operations, ACT Together, Barnardos Australia told the Committee:

...the issue of health information sharing to carers. As the chair of the care and wellbeing subcommittee, I can speak to the frustrations that carers experience in trying to access, what I would consider appropriately, information relating to the health and wellbeing of the child that they are trying to care for. And it expresses itself in lots of different ways. Part of it is a clash of legislation between child protection and Health. Part of it is about culture. Part of it is a lack of understanding—probably mutual understanding—between different areas of the sector about what information a carer needs to be able to provide the best possible care.²⁶¹

²⁵⁹ Ms Eliza Moloney, ACTCOSS, *Transcript of evidence*, 4 February 2020, p. 81.

²⁶⁰ *Transcript of evidence*, 28 January 2020, p. 4; Submission No. 12—Barnardos Australia, p. 3.

²⁶¹ Ms Melissa Bell, Barnardos Australia, *Transcript of evidence*, 28 January 2020, p. 4.

7.122 The difficulties in accessing information appears to be attributable to a few factors—
(i) legislative requirements between health and care and protection statutes, including issues as to whom health professionals can release information; and whether a carer has the appropriate authority to be the person to whom information is released to; (ii) culture; (iii) lack of understanding about what information a carer needs to be able to provide the best possible care.²⁶²

7.123 The Committee queried whether this situation might contribute to delays in treatment for children in care in particular, whether the extent to which failure to pass on health information in a timely way impacts on the therapeutic assistance given to children in care could be quantified. A representative from Barnardos Australia told the Committee:

I do not have reason to believe that it impacts on a child getting treatment when they need it because obviously the medical professionals will act accordingly. I think what it does is that, even if a carer ultimately does receive the information that they need, there is a frustration around that and it undermines their confidence, I think, in their role as a carer. It becomes quite convoluted for them.

When you ask me to quantify it, I cannot quantify it in terms of how often it happens. But in terms of quantifying carers' frustration levels about this, they are extremely high. The carer wellbeing committee has commissioned me as its chair to now formally express to the joint governance group of A step up their concerns about this issue. We are four years into the reform and they do not see the kind of change in that area around information sharing that they believe they need to do their job properly.²⁶³

7.124 Following the public hearing where concerns were raised about difficulties carers have accessing critical medical information about their foster children, the Minister for Health. The Minister explained:

The concerns raised by carers predominantly relate to the complexity surrounding the sharing of relevant and appropriate personal information with the relevant parties, ensuring that they do not breach the *Information Privacy Act 2014* and the *Health Records Act 2001*.

The decision to discharge a child or young person is a medical decision. CHS staff ensure discharge planning involves parents or legal guardians, and relevant government or non-government agencies where appropriate.

Discharge summaries from the Paediatric Department are physically handed to parents and legal guardians once a child or young person is discharged. If a child or young person is discharged into care, CHS lists the address as Child Youth and Protection

²⁶² *Transcript of evidence*, 28 January 2020, p. 5.

²⁶³ Ms Melissa Bell, Barnardos Australia, *Transcript of evidence*, 28 January 2020, p. 5.

Services (CYPS). The discharge summary is provided to the CYPS worker (without the maternal address).

For instances in the Neonatal Intensive Care Unit (NICU), discharge summaries are physically handed to parents and legal guardians on discharge. If a baby is going into care, CHS lists the address as CYPS and a copy is provided to the CYPS worker.

Discharge summaries are not given to foster carers as NICU discharge summaries contain maternal details.²⁶⁴

COMMITTEE COMMENT

7.125 The Committee is of the view that it is completely unsatisfactory that a carer encounters difficulties in accessing critical medical information about children in their care due to legal and bureaucratic barriers. Having to resort to informal information-sharing networks to acquire such information is also completely unsatisfactory and places carers and the children in their care in a very difficult situation.

7.126 The Committee acknowledges the advice provided by the Minister for Children, Youth and Families about information sharing arrangements between agencies regarding hospital discharge summaries for children and young people in care. The Committee also notes the Minister's advice that a working group has been formed to identify ways to address the concerns raised by carers regarding the sharing of information between Canberra Health Services (CHS) and carers.

7.127 Notwithstanding the further information provided by the Minister, the Committee notes that the difficulties faced by carers accessing medical information relating to children in their care has been an issue for a long time. The Committee believes that the concerns raised by carers regarding the sharing of information between CHS and carers needs to be addressed as a priority.

Recommendation 38

7.128 The Committee recommends that the ACT Government prioritise addressing the concerns raised by carers about information sharing arrangements between agencies regarding medical information in general and hospital discharge summaries in particular for children and young people in care.

²⁶⁴ Letter from Minister for Health to HACS Committee, dated 19 May 2020.

OUT-OF-HOME CARE PLACEMENTS

7.129 Three main categories of out-of-home care placements are used by CYPS to provide accommodation and care for children and young people who are unable to live at home. These categories are: (i) kinship care—care by a known relative or friend; (ii) foster care, managed via contract between CYPS and community service providers; and (iii) residential care, managed via contract between CYPS and community service providers which includes a number of residential places that accommodate children and young people who are not able to reside at their parent's or carer's home.²⁶⁵

7.130 CYPS' preference for placing children and young people in out-of-home care is firstly—kinship care; followed by foster care; and then residential care.²⁶⁶

7.131 Contributors to the inquiry raised a number of matters regarding information sharing limitations relating to the three categories of out-of-home placements. These matters are discussed below.

KINSHIP CARE—PLACEMENTS, ASSESSMENTS AND DECISIONS

7.132 In the main, kinship care—as a statutory arrangement—refers to children and young people:

...who have been placed with relatives, friends or local community members by child protection agencies. Kinship care is one option among various alternative arrangements within the out-of-home-care system for children and young people who are unable to live at home due to abuse and neglect...²⁶⁷

7.133 Further, kinship care is:

...a noticeably less formal arrangement than other statutory care options, such as foster care and residential care, due to an increased focus on the family system. In other forms of out-of-home-care, children and young people are much less likely to be placed with people or in communities they already know.²⁶⁸

7.134 A kinship care assessment is the mechanism used to determine the suitability of a known relative or friend to care for a child or young person in need of short or long-term care.

²⁶⁵ ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, p. 68.

²⁶⁶ Le Lievre, K. (2019) '9 children were adopted by their carers in 3 years, of the 835 in care', *Canberra Times*, 3 February; ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, p. 68.

²⁶⁷ Boetto, H. (2010) 'Kinship care—A review of issues', *Family Matters*, No. 85, Australian Institute of Family Studies, September, viewed 20 July 2020, <<https://aifs.gov.au/publications/family-matters/issue-85/kinship-care>>.

²⁶⁸ Boetto, H. (2010) 'Kinship care—A review of issues', *Family Matters*, No. 85, Australian Institute of Family Studies, September, viewed 20 July 2020, <<https://aifs.gov.au/publications/family-matters/issue-85/kinship-care>>.

7.135 Several contributors²⁶⁹ to the inquiry raised matters concerning information sharing around kinship assessments and placements. These matters included: disclosure during kinship care applications; the sharing of information around kinship findings when children are in short-term care; and accessing information about decision-making as part of assessments of kinship carers—in particular, if a known relative or friend is deemed unsuitable as a kinship carer.

7.136 As to defining kinship care and the assessment process—discussion with representatives from Beryl Women Incorporated ensued as follows:

Ms Hayden: I am going to make a comment here. The definition of kinship is across the board, with any family relationship that I have, as Aboriginal, white or non-English speaking background. It does not matter if it is the mother-in-law and I am an Aboriginal mum; that is still considered to be a kinship placement.

What we know with kinship is that the mother-in-law who is not Aboriginal is more likely to get the care of the child than any person who is biologically Aboriginal in my family, because there will be things that are picked up in their processes that will make them ineligible to be a kinship carer. That could be a marijuana charge for one gram of marijuana, which happened seven years ago. It is an automatic “You are not a suitable kinship carer.”

Getting anything through that process and understanding that process are different things. With emergency actions, with kids taken and kids put in places, there is no checking out if there is a family member who might be suitable. Women are asked to make decisions on the spot. They will go, “That person at least knows them a little tiny bit; we will go there.” They will think it is for two nights, and it will end up being for the next 10 years.

THE CHAIR: And you find that that information does not necessarily get shared with the women that you are assisting?

Ms Martin: It gets shared to a certain degree, to a certain point. We have had experiences where, as Linda said, women have indicated someone in their life that might be suitable, thinking it is going to be for one night. It has happened where the child is still in that person’s care and it is not the best place for that child to be indefinitely but the child is still there. Getting that changed through the system is almost impossible.²⁷⁰

7.137 The importance of access to information about decision-making as part of assessments of kinship carers for legal representatives was emphasised by Legal Aid ACT:

²⁶⁹ Submission No. 2—Name withheld, p. 3; ACT Law Society, *Transcript of evidence*, 25 February 2020, pp. 133–134; Submission No. 12—Barnardos Australia; Beryl Women Incorporated—*Transcript of evidence*, 28 January 2020, pp. 21–22; Barnardos Australia *Transcript of evidence*, 28 January 2020, pp. 7–8.

²⁷⁰ Beryl Women Incorporated, *Transcript of evidence*, 28 January 2020, p. 21.

These assessments are particularly relevant where the Director-General has declined to approve a family member as a kinship carer for a child and we want to seek a review of that decision in ACAT: without the kinship assessment report, it is very difficult to ascertain the basis for the Director-General's decision.²⁷¹

7.138 The ACT Law Society further added:

There is no specific set of guidelines that I am aware of. The guidebook that has been made public by CYPs—it is a document available on their website—goes through what it alleges to be internal policies that talk about how information is accessed, and it largely goes towards contacting your case manager or contacting the team that is dealing with your matter and requesting the information through them.²⁷²

One of the difficulties that we identified when we were reading through that guide is that if your request is rejected you then have the opportunity to go and request that information from another source, but there is no internal policy or internal systems in the act that I am aware of which guarantee any sort of accessibility or even any sort of review of a decision to refuse access to information. And, again, one of the really big pieces of information comes around assessments of carers and kinship carers. Largely, if you are the person seeking to be appointed as a kinship carer, if you are knocked back, accessing information about why is almost impossible.²⁷³

7.139 Regarding information disclosure during kinship care applications to potential carers and associated processes—a submitter to the inquiry told the Committee:

Where there are available pertinent independent medical and other assessments affecting a child in care, those reports with permission, (but not withheld unreasonably using the Act as a protection,) should be automatically provided to the kinship carer applicants. This would enable them to assess both their ability to care for the child and more importantly that they can understand the issues directly and not be “fed” second hand and potentially misleading /over dramatization interpretations of any issues.

...If an applicant for Kinship Care has been assessed previously, within say 2 years, the assessment should be able to be fast tracked, not take over 6 months.

...Also if any doubt as to the ability of potential kinship carers being able to look after a child in care with potential transitional and emotional issues, CYPs should seek references from specialists previously used by the kinship carers applicants, about the kinship carer applicants ability to handle such a child in care from a factual perspective, not a theoretical assessment.²⁷⁴

²⁷¹ Submission No. 1—Legal Aid ACT, pp. 3–4.

²⁷² Mr Adrian Curtis, ACT Law Society, *Transcript of evidence*, 25 February 2020, p. 135.

²⁷³ Mr Adrian Curtis, ACT Law Society, *Transcript of evidence*, 25 February 2020, pp. 135–136.

²⁷⁴ Submission No. 2—Name withheld, p. 3.

7.140 The lead agency for ACT Together²⁷⁵—Barnardos Australia—also noted limitations regarding the sharing of information around kinship findings when children are in short-term care. Barnardos Australia explained:

There is inconsistent sharing around kinship finding when children are in short term foster care.

The Step Up for Our Kids contractual arrangements specifically requires Barnardos to satisfy ourselves that kin has been explored and ruled out if we are to offer foster/residential care. It is also in the best interests of children that this is confirmed.

However, it is difficult for ACT Together to know when kin has been explored and identified. We are often given assurances that there are no kin for a child referred or in placement, however, we have no way of evidencing this. Our current practice is to request that this be documented at the time of case management transfer to ACT Together (which sometimes occurs more than two years after referral), but this information is often not available.

This creates challenges in terms of placement decision-making when kin come forward or are identified at a later stage.²⁷⁶

COMMITTEE COMMENT

7.141 The Committee notes CYPS' preference where children and young people need to be placed in out-of-home care that kinship care—care by a known relative or friend—be the option first considered. Further, the Committee also notes that kinship care placements may be either planned or emergency placements.

7.142 The Committee acknowledges that where a parent may no longer be able to care for their child either in the short- or long-term—the placement of a child or young person with a relative or close family friend, in addition to helping protect important connections with their family, culture and community, can be beneficial in helping to address added trauma that may arise from changes to the child or young person's living environment.

7.143 The Committee notes that evidence identified the: (i) importance of kinship care in focusing on the family system; (ii) disadvantaged position of potentially suitable kinship carers due to the prevalence of poverty, poor health, financial hardship and low education that may be factored into assessments decisions; (iii) complex needs of children and young people in out-of-home care; (iv) uniqueness of kinship care placements compared to other types of formal care arrangements; and (v) increasing role of non-government agencies in providing support to kinship care placements.

²⁷⁵ ACT Together—a consortium of agencies providing out-of-home services for children and young people who come into care in the ACT and carers from within the ACT region under the *A Step Up for Our Kids strategy*.

²⁷⁶ Submission No. 12—Barnardos Australia, p. 4.

7.144 The decision to place a child or young person with a foster or kinship carer is critical to the life-long outcomes for a child or young person. The Committee is firmly of the view that given the priority that suitable placements for children and young people should first and foremost be focused on the family system, of equal importance is the transparency of the decision-making regarding the outcome of the kinship care assessment process. This should extend to information sharing with potential carers, carers, legal representatives and non-government organisations that make up the consortium of agencies that constitute ACT Together.

Recommendation 39

7.145 The Committee recommends that—where the case management of a child or young person in short-term foster care is held by ACT Together—the ACT Government ensure, as a formal practice, that the outcomes of kinship findings are appropriately shared with service providers within ACT Together.

Recommendation 40

7.146 The Committee recommends that—where the Director-General of the Community Services Directorate has declined to approve a family member as a kinship carer for a child or young person—the ACT Government ensure that either the Kinship Assessment Report (de-identified as required) or a statement of reasons is provided to the potential kinship carer.

FOSTER CARE AND RESIDENTIAL CARE PLACEMENTS

7.147 The lead agency of ACT Together²⁷⁷—Barnardos Australia—identified a number of matters relating to information sharing when a child or young person is referred to ACT Together for placement.

7.148 While observing that information sharing works well where ACT Together has case management responsibility for a client, the Committee heard that there were limitations at the initial referral interface. The General Manager Operations, ACT Together explained:

...where we have a client referred to us for placement, we expect that there is appropriate information sharing. In some instances that occurs quite well, particularly once we are operating where we have a case management responsibility for that client.

²⁷⁷ ACT Together—a consortium of agencies providing out-of-home services for children and young people who come into care in the ACT and carers from within the ACT region under the *A Step Up for Our Kids* strategy.

We certainly do experience some concern at the initial interface where a child is referred for placement on occasions where there is a lack of information made available to us. That means it is more difficult for us to be able to make the most appropriate placement decision match—what we call a match in our language—between a carer and a child. That is because in order to make the right match you need to know what the child’s needs are so you can find a carer who will be able to manage those needs. That includes managing risk where that presents itself with a child’s or young person’s behaviour or where it might affect other children who live in the carer home.²⁷⁸

7.149 To better inform placement decisions that meet the unique needs of a child or young person and to ensure compliance with some legal obligations—Barnardos Australia identified the following areas where improvements to information sharing with ACT Together would be beneficial:

- a) Barnardos Australia noted there was inconsistent sharing of information about Child Concern Reports²⁷⁹ for children who are referred to ACT Together and it was difficult to ascertain whether these reports are being provided consistently. Further, if such reports are not made known—it risks ACT Together not fulfilling its obligations under the Reportable Conduct Scheme²⁸⁰. Barnardos Australia noted that ACT Together should receive notification of these reports when they occur, and it would welcome follow-up to ensure that this has and will continue to be implemented consistently in all cases.²⁸¹
- b) At times, Barnardos Australia noted there is a lack of information available at the time of referral from CYPs to ACT Together. This can include: the reason for removal, extent of involvement of the family and child with CYPs prior to removal; and the child’s emotional and behavioural presentation and their needs. Barnardos Australia advised that these information limitations can impact on the identification of suitable and successful placement matches and, in some circumstances, can place the children and carer/carer families at risk. It was indicated that the ‘reasons for this are unclear (e.g. whether it is due to ‘missing’ information/information not held or collected by CYPs, or constraints on the referring (government) worker to communicate information, or a combination of both factors)’.²⁸²

²⁷⁸ Ms Melissa Bell, Barnardos Australia, *Transcript of evidence*, 28 January 2020, p. 3.

²⁷⁹ The *Children and Young People Act 2008* (the Act) provides a legal framework for CYPs to receive and respond to Child Concern Reports (CCRs). CCRs relate to a child’s possible risk of abuse or neglect and can be made by anyone in the community.

²⁸⁰ The ACT Reportable Conduct Scheme is an employment-based child protection measure designed to ensure that allegations of abuse and misconduct by employees against are identified, reported and acted on appropriately by their organisation. Under the scheme, employers and organisations considered ‘designated entities’ are required to report allegations, offences or convictions relating to child abuse or child-related misconduct by an employee to the ACT Ombudsman.

²⁸¹ Submission No. 12—Barnardos Australia, p. 4.

²⁸² Submission No. 12—Barnardos Australia, p. 3.

- c) When children on short-term orders²⁸³ are referred to ACT Together—during this time, Barnardos Australia reported that it was not commonplace for it to receive a copy of the Child Protection Assessment Report (CPAR) or other comprehensive information. Caseworkers are required to prepare a CPAR. After approval by the CSD Application and Review Committee the Child Protection Assessment Report becomes part of the supporting evidence for the Court. Preparation of CPAR is ‘a comprehensive assessment process’. The written CPAR comprises six parts: (i) purpose of the assessment; (ii) child young person/s development; (iii) assessment of parenting capacity; (iv) extended family and environmental factors; (v) case analysis; and (vi) services to be provided.²⁸⁴

While Barnardos Australia understands that copies of CPARs may not be shared due to a requirement to protect sensitive information about a birth parent—this ‘constitutes a serious barrier to disclosure of possible risk to foster carers’.²⁸⁵ As to the long-term impact that limitations on the availability of such information can have for a child or young person and their carer/carer families—Barnardos Australia explained:

The child’s full story may not emerge until case management transfers when the child receives long term orders, which in the ACT can be up to two years.

The unintended consequence is that NGO caseworkers are currently constrained in their understanding of the child’s vulnerabilities arising from their abuse history, which in turn limits the ability of caseworkers to respond to the child’s needs and engage in comprehensive and meaningful planning.²⁸⁶

COMMITTEE COMMENT

7.150 The Committee acknowledges the importance of full disclosure of all pertinent information at the critical and life changing juncture of placing a child or young person in out-of-home care. The absence of full disclosure or, simply, limitations on disclosure attributable to inconsistencies in staff making information available significantly restricts decision-makers responsible for identifying suitable and successful placement matches and, in some circumstances, places children and carer/carer families at risk.

7.151 The Committee is firmly of the view that the information sharing limitations identified by Barnardos Australia in this regard need to be addressed as a priority. Accordingly, the Committee makes the following recommendations:

²⁸³ The most common orders are one-year orders, and this could follow an extended period of interim orders.

²⁸⁴ ACT Auditor-General’s Report No. 1 of 2013: *Care and Protection System*, pp. 59–60.

²⁸⁵ Submission No. 12—Barnardos Australia, p. 3.

²⁸⁶ Submission No. 12—Barnardos Australia, p. 3.

Recommendation 41

7.152 The Committee recommends that—where a child or young person is referred for an out-of-home care placement—the ACT Government ensure that ACT Together is provided with information that will assist with the identification of suitable placement matches. This should include information as to: (a) the reason for removal; (b) details of the involvement of the family and child with Child and Youth Protection Services prior to removal; and (c) the child’s emotional and behavioural presentation and their specific needs.

Recommendation 42

7.153 The Committee recommends that—where the case management of a child or young person is held by ACT Together and a Child Protection Assessment Report (CPAR) has been prepared—the ACT Government ensure, as a formal practice, that a copy of the CPAR (de-identified as required) be provided to ACT Together as soon as practicable.

Recommendation 43

7.154 The Committee recommends that—where the case management of a child or young person is held by ACT Together—the ACT Government should ensure that all Child Concern Reports Report (de-identified as required) relating to the child or young person are routinely shared with ACT Together.

EPILOGUE—COMMITTEE COMMENT

7.155 Through its inquiries into child and youth protection services as referred by the Assembly on 16 May 2019, the Committee has looked extensively at the operation of the CYP Act and has made numerous recommendations for its reform. The Committee is conscious that we are fast approaching the end of the Ninth Assembly. The Committee is of the view that it would be tragic to lose momentum on these much-needed reforms. The Committee encourages the incoming members of the Tenth Assembly to act decisively on the recommended reforms.

Recommendation 44

7.156 The Committee recommends that the Minister with portfolio responsibility for child, youth and protection services in the 10th ACT Legislative Assembly appoint by the end of 2020 a Children and Youth Services Council in accordance with Part 2.2 of the Children and Young People Act 2008. The Council to be tasked with overseeing the implementation of the recommendations of the 9th Assembly Standing Committee on Health, Ageing and Community Services' reports into Part 1 and Part 2 of its inquiry into child and youth protection services.

8 CONCLUSION

Trust comes on foot, but leaves on horseback.

Danish proverb²⁸⁷

- 8.1 As the aforementioned quote emphasises, trust takes time to build and it can be gone in the blink of an eye if we don't look after it. If the Committee was to scale back this inquiry to first principles, it would be about trust. Trust is essential for any kind of relationship and gives legitimacy to decision-making and the actions that follow. Trust is built, maintained (or eroded) in the array of interactions an individual has with representatives of a system or service (face-work trust) and/or with the service or system itself (face-less trust).
- 8.2 The integrity or quality of these interactions is premised on some form of information sharing. The effectiveness of information sharing in each of these interactions coupled with appropriate accountability for these exchanges can either build, maintain or erode trust. Trust in a system and/or service has benefits for those who work within the system to provide services, the recipients of services provided by the system, and the community of which the system is a part.
- 8.3 Trust in the ACT care and protection system has been in decline for many years. Despite numerous reviews and inquiries into various aspects of the system stretching back over a decade or more—trust in the system by the people to whom the system seeks to serve and the community of which the system is a part continues to remain at low levels.
- 8.4 The Committee acknowledges the efforts to date by the Government in conjunction with other stakeholders to bring about change. This has included:
 - The *Our Booris, Our Way* review into the high numbers of Aboriginal and Torres Strait Islander children in contact with the child protection system. The *Our Booris, Our Way*, Final Report acknowledged 'Minister Rachel Stephen-Smith who not only called for this review but has keenly supported the review and its framework of self-determination'.²⁸⁸
 - Improvements to the child and youth protection system to work with families in a trauma-informed and respectful way—including the therapeutic assessments²⁸⁹ under the A Step

²⁸⁷ Attributed to Johan Thorbecke—a Dutch politician who is considered responsible for Denmark's first Constitution in 1848.

²⁸⁸ *Our Booris, Our Way* review, Final Report, December 2019, p. 3, viewed 7 July 2020 <https://www.strongfamilies.act.gov.au/__data/assets/pdf_file/0011/1457813/Our-Booris-Report-FINAL-REPORT.pdf>.

²⁸⁹ As part of the Step Up for Our Kids program—it was identified that a key need for children and young people in the care and protection system was one of trauma informed response. To assist with this objective, it was determined that the continuum of care for each individual in the system needed to be informed by a therapeutic assessment. The ACT is the only jurisdiction in Australia that has made a decision that every child that is in out-of-home care will receive a therapeutic assessment.

Up for Our Kids program²⁹⁰; and the trial of the Functional Family Therapy—Child Welfare (FFT-CW) program²⁹¹ for Aboriginal and Torres Strait Islander families in partnership with the Gugan Gulwan Youth Aboriginal Corporation and OzChild.

- The identification of child protection as an area of focus for the disability justice strategy—to improve the way parents with a disability can be identified and supported when they come into contact with the child protection system.²⁹²
- The Government review examining internal and external merit review of child protection decision-making and an acknowledgement by the responsible Minister that ‘more review mechanisms should be available’.²⁹³

8.5 Notwithstanding the aforementioned work to date—the evidence to the inquiry made clear more needs to be done but also that any improvements need to be underpinned by legislative change.

8.6 A key area many submitters to the inquiry highlighted in need of improvement was the overarching ethos of the CYP Act as it relates to setting the culture or tone for information sharing. This primarily relates to two things: (i) a power imbalance inherent in the CYP Act that places a blanket prohibition on sensitive information that cannot be shared; and (ii) the definition of the ‘best interests test’ in the CYP Act not adequately recognising that children and young people, while individuals, are dependent persons and require the support of a family and others in the community for healthy development.

8.7 In seeking to respond to the many issues raised in evidence to this inquiry—the Committee has been forward-looking in setting out its views and recommendations using an overarching ethos that a care and protection system and its services should at all times be needs-led and not service-led.

8.8 The Committee has recommended reorientating the overarching focus of the CYP Act to embed the construct of the ‘best interests test’ being defined in terms of the relationships a child and young person has and needs for healthy development, as well as their individual needs. From this—the focus for sharing information is established—in that, people the child or young person has relationships with should be involved in the decision-making that affects them. The Committee has also made a number of recommendations to support and embed this relational approach to care and protection that includes: modifications to existing restorative practices; the trialling of further proven restorative approaches and practice to care and protection services; and bringing together in a cohesive way a

²⁹⁰ Ms Helen Pappas, Inquiry into 2018–19 Annual and Financial reports, *Transcript of evidence*, 12 November 2019, p. 187.

²⁹¹ Inquiry into 2018–19 Annual and Financial reports, *Transcript of evidence*, 12 November 2019, p. 174; CSD. (2019) *2018–19 Annual and Financial report*, p. 157.

²⁹² Ms Rachel Stephen-Smith MLA, *Transcript of evidence*, 5 February 2020, p. 104.

²⁹³ Ms Rachel Stephen-Smith MLA, *Transcript of evidence*, 5 February 2020, p. 104.

significant amount of restorative work that is already taking place in Canberra to not only strengthen the presence and value of this work but also for it to be a resource that can be drawn on to support similar work in the care and protection space.

- 8.9 Accordingly, this proposed reorientation will require changes to the legislative framework and practice associated with its implementation as it concerns information sharing.
- 8.10 The Committee acknowledges that all children and young people ‘have a right to protection including adequate care in an environment that is secure, safe and nurturing’. Importantly, providing this is the ‘responsibility of the whole community, not just government’. While there would be ‘general agreement on this right to protection—there are divergent views on how care and protection can best be achieved. This, coupled with the diversity of situations likely to be encountered, makes providing care and protection services challenging and contestable’.²⁹⁴
- 8.11 The Committee notes that the clients of care and protection services include some of the most vulnerable members of our community, and that their safety and well-being must attract our highest priority. For the majority of families who become known to CYPs, their children continue to remain at home and the family works with care and protection services to improve the safety and well-being of the children. While efforts are made to maintain children and young people safely at home—sadly, there are times when children and young people are at risk of abuse and neglect within their families, or families do not have the capacity to protect their children from harm. In these situations—child protection services have a critical role in ensuring the well-being and safety of children and young people.
- 8.12 The Committee accepts that questions about, and decision-making surrounding, the care and protection of children and young people in the Canberra community are often controversial, complex and require a balancing of rights. In that context, those working in the care and protection space work in a challenging, tough and complex environment. Equally important, is that keeping children and young people safe in their families and communities is not just the responsibility of child protection services—it is a whole-of-community responsibility.

²⁹⁴ ACT Auditor-General’s Report No. 1 of 2013: *Care and Protection System*, March 2013, p. 1.

- 8.13 The Committee has made **44** recommendations in relation to its report into CYPS (Part 2).
- 8.14 The Committee wishes to thank all of those who have contributed to its inquiry, by making submissions and/or appearing before it to give evidence. The Committee is grateful that it was able to draw on a broad range of expertise and experience in its deliberations.

Ms Bec Cody MLA

Chair

29 July 2020

Appendix A LIST OF WRITTEN SUBMISSIONS

Submissions received by the Committee to the inquiry:

Sub. No.	Submitter—individual/organisation
1	Legal Aid ACT
2	Individual submission
3	ACT Council of Social Service Inc. (ACTCOSS)
4/4a	ACT Human Rights Commission
5	Advocacy for Inclusion
6	ACT Government
7	Confidential
8	Confidential
9	Canberra Restorative Community Network
10	Confidential
11	ACT Law Society
12	Barnardos Australia
13	F. Tito Wheatland
14	Confidential
15	ACT Disability, Aged and Carer Advocacy Service (ADACAS)
16	Women's Legal Centre—ACT and Region
17	Confidential

Appendix B COMMITTEE PUBLIC HEARINGS

Witnesses who appeared before the Committee at public hearings:

Tuesday 28 January 2020

- Ms Melissa Bell, General Manager Operations, ACT Together, Barnardos Australia;
- Ms Elizabeth Cox, Executive Manager, Out of Home Care NSW & ACT, Barnardos Australia;
- Ms Bonnie Millen, Senior Policy Adviser, Advocacy for Inclusion;
- Ms Jamelle Boettcher, Senior Advocate, Advocacy for Inclusion;
- Ms Robyn Martin, Manager, Beryl Women Incorporated; and
- Ms Linda Hayden, Domestic Violence Specialist, Support Worker, Beryl Women Incorporated.

Wednesday 29 January 2020

- Mr Michael Bleasdale, Chief Executive Officer, ACT Disability, Aged and Carer Advocacy Service (ADACAS);
- Ms Katie Bulenda, Team Leader/Disability Advocate, ACT Disability, Aged and Carer Advocacy Service (ADACAS);
- Ms Jane Campbell, Deputy CEO, Legal Aid ACT;
- Ms Sally Hiles, Solicitor, Family Practice, Legal Aid ACT;
- Ms Claudia Maclean, Principal Solicitor, Women's Legal Centre (ACT and Region);
- Ms Mary Ivec, Convenor, Canberra Restorative Community Network;
- Dr Holly Northam, Member, Canberra Restorative Community Network; and
- Dr Fiona Tito Wheatland, Co-Convenor, Canberra Restorative Community Network.

Tuesday 4 February 2020

- Dr Emma Campbell, Chief Executive Officer, ACT Council of Social Service Incorporated (ACTCOSS);
- Ms Eliza Moloney, Policy Officer, ACT Council of Social Service Incorporated (ACTCOSS);
- Dr Helen Watchirs, President of the Commission and Human Rights Commissioner, ACT Human Rights Commission;
- Ms Heidi Yates, Victims of Crime Commissioner, ACT Human Rights Commission;
- Ms Karen Toohey, Discrimination, Disability, Health and Community Services Commissioner, ACT Human Rights Commission; and
- Ms Jodie Griffiths-Cook, Public Advocate and Children and Young People Commissioner, ACT Human Rights Commission.

Wednesday 5 February 2020

- Ms Rachel Stephen-Smith MLA, Minister for Children, Youth and Families;
- Ms Rebecca Cross, Director-General, Community Services Directorate;
- Ms Helen Pappas, Executive Group Manager, Children, Youth and Families, Community Services Directorate; and
- Ms Anne Martens, Senior Manager, Legal Services, Children, Youth and Families, Community Services Directorate.

Tuesday 25 February 2020

- Mr Chris Donohue, President, ACT Law Society;
- Ms Courtney Donoghoe, Member, Family Violence and Children's Committee, ACT Law Society; and
- Mr Adrian Curtis, Member, Family Violence and Children's Committee, ACT Law Society.

Appendix C A CHARTER OF RIGHTS AND RESPONSIBILITIES FOR PARENTS AND FAMILY MEMBERS WITH CHILDREN IN THE CARE OF CHILD PROTECTION SERVICES IN AUSTRALIA²⁹⁵

Guiding principles of rights and responsibilities for parents and family members involved with Australian Child Protection Services 'IN THE BEST INTEREST OF THE FAMILY'	
YOUR RIGHTS	YOUR RESPONSIBILITIES
<p>Respect—You have the right to:</p> <ul style="list-style-type: none"> ▪ have the integrity of your family unit protected; ▪ be treated with courtesy and respect by child protection workers and other statutory representatives; ▪ have your individual human dignity valued; ▪ have your expressions of anger or frustration understood with professional sensitivity by child protection workers; and ▪ be recognised and respected in your role as parent/family member in your interactions with child protection workers. 	<p>Respect—It is your responsibility to:</p> <ul style="list-style-type: none"> ▪ treat child protection workers with respect and in the same way you expect to be treated; ▪ recognise that child protection workers have a job to do and respond to workers in developing a respectful working relationship with you; and ▪ tell child protection workers when you feel they, as professionals, are not taking the lead in treating you with respect.
<p>Diversity—You have the right to:</p> <ul style="list-style-type: none"> ▪ be free from unlawful discrimination and have your individual needs respected regardless of race, colour, gender, sexual orientation, language, age, disability or other status. 	<p>Diversity—It is your responsibility to:</p> <ul style="list-style-type: none"> ▪ ensure that child protection workers are aware of you and your children's cultural, religious and medical needs.

²⁹⁵ Hamilton, S. and V. Braithwaite. (2014) *Parents and Family Members Matter: A Charter of Rights and Responsibilities for Parents and Family Members with Children in the Care of Child Protection Services in Australia*. Canberra: Regulatory Institutions Network, Occasional Paper 22, Australian National University.

YOUR RIGHTS	YOUR RESPONSIBILITIES
<p><i>Consultation and Dialogue—You have the right to:</i></p> <ul style="list-style-type: none"> ▪ be informed of your right to a support person; ▪ request flexibility when arranging meetings to take into account work, medical, Centrelink, or other significant commitments; ▪ be heard and have questions answered in a clear and understandable way; ▪ be consulted and kept informed of the placement, placement changes, health, education and all decisions made about your children when in out-of-home care; ▪ represent your position in fair and open decision-making forums which respect your right as a parent to have exclusive decision-making power over your child's upbringing; and ▪ receive all information in a form and language that you understand and be provided with decisions and meeting discussions in writing as a matter of course. 	<p><i>Consultation and Dialogue—It is your responsibility to:</i></p> <ul style="list-style-type: none"> ▪ tell child protection workers that you need a support person and organise for them to attend meetings with you; ▪ make yourself available, as far as possible given the constraints of other commitments i.e. employment/Centrelink requirements; ▪ be willing to engage; ▪ ask anything you need to know regarding your children's placement, health and education; ▪ ask questions when you do not understand; and ▪ ask for confirmation of decisions/outcomes of meetings in writing.
<p><i>Transparency and Accountability—You have the right to:</i></p> <ul style="list-style-type: none"> ▪ honesty and to know the reasons and the evidence for actions taken by Child Protection Services; ▪ adequate legal advice and representation in court proceedings; ▪ to attend all meetings with a support person; ▪ access independent advocacy and legal advice regarding your family's social needs; ▪ have your case reviewed; ▪ comment on any aspects of the care of your child and to have your concerns addressed; and ▪ receive information on mechanisms of complaint and redress. 	<p><i>Transparency and Accountability—It is your responsibility to:</i></p> <ul style="list-style-type: none"> ▪ be honest; ▪ ask why and on what grounds actions are being taken by Child Protection Services; ▪ ensure your support person has accurate and complete information about your situation; and ▪ ensure your legal representative has accurate and complete information about your situation.

YOUR RIGHTS	YOUR RESPONSIBILITIES
<p><i>Strengths and Weaknesses—You have the right to:</i></p> <ul style="list-style-type: none"> ▪ the recognition of both your strengths and weaknesses; ▪ to have change and positive steps acknowledged and taken into consideration when decisions are made about the care of your children; ▪ have child protection workers be responsive to changing circumstances and be a part of a resolution; and ▪ have child protection workers recognise the structural (socio/economic) constraints which affect your ability to change, and offer support resources to enable you to overcome the constraints so far as is possible. 	<p><i>Strengths and Weaknesses—It is your responsibility to:</i></p> <ul style="list-style-type: none"> ▪ recognise and consider your strengths; ▪ recognise and acknowledge your weaknesses and address them; ▪ ensure Child Protection Services are aware of all the services you receive; ▪ ensure Child Protection Services are aware of positive changes you have made; and ▪ embrace change and be part of solutions.
<p><i>Privacy—You have the right to:</i></p> <ul style="list-style-type: none"> ▪ protection of your personal privacy; ▪ privacy and confidentiality of your personal information; and ▪ access your records in accordance with the applicable Freedom of Information legislation. 	<p><i>Privacy—It is your responsibility to:</i></p> <ul style="list-style-type: none"> ▪ not breach the privacy of child protection workers approaching them or identifying them in a public place.

Appendix D CATEGORIES OF CHILD PROTECTION DECISIONS THAT SHOULD BE SUBJECT TO EXTERNAL MERITS REVIEW

Excerpt from Legal Aid ACT's submission to the Government's 'Review of Child Protection Decisions in the ACT' discussion paper—setting out the key comparative provisions from Victoria and Queensland with those of the ACT.²⁹⁶

Appendix 1: Administrative Review of Care and Protection decisions across jurisdictions.

Issue	ACT	Victoria	Queensland
Reviewability of care/case plans	NO No provision for review of care plans made by the director-general under s 455. Director-general is not obliged to follow a proposed care plan and care plans may be amended from time to time by the director-general.	YES Section 333(1)(a) of the Victorian Act allows a child or a child's parent to apply to VCAT for review of any decision contained in a case plan under s167 of the Act.	YES Div 5 Part 3A of the Queensland Act provides that the chief executive must periodically review a case plan, and must include certain participants in the review. Under s 247, a person may apply to QCAT to review a decision by the chief executive to refuse to review a case plan under s 51VA.
Providing information to parents	NO The Act does not contain provisions about providing information to parents. A decision by the director-general not to provide information to a child's parents about a care and protection order is not reviewable under the Act.	YES Under s 178(1) of the Victorian Act, if a child is in out-of-home care because of a child protection order, the Secretary has a responsibility to provide information to the parents of the child, including the provision of personal information. If the Secretary makes a decision to not provide the information under s 178(2), the parent may have this decision reviewed under s 333.	YES Where a child under a child protection order is placed in out-of-home care, the chief executive must give notice to the child's parents stating whose care the child is in, the reasons for the decision and how the child may apply to QCAT for review (s 86). If the chief executive refuses to provide this information because it would constitute a risk to the child, this decision may be reviewed under s 247 of the Act.

²⁹⁶ The table formed part of Legal Aid ACT's submission in response to the government's 'Review of Child Protection Decisions in the ACT' discussion paper, viewed 4 July 2020, <[http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Submission-Review of child protection decisions in the ACT - Legal Aid ACT - 11062019.PDF](http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Submission-Review%20of%20child%20protection%20decisions%20in%20the%20ACT-Legal%20Aid%20ACT-11062019.PDF)>.

Issue	ACT	Victoria	Queensland
Decisions made in relation to 'care and protection' orders	NO The Act does not provide for review of decisions of the director-general about the care and protection of a child subject to a care and protection order (e.g. contact between a child and parent).	YES Section 158 provides that the child, parent of the child or any other person whose interests are affected by the decision can apply to VCAT for review of a decision (after pursuing internal review) made under or in relation to a child care agreement relating to the care of a child.	YES Section 247 allows a parent to challenge a direction given by the chief executive in relation to a supervision matter stated in a child protection order (see s 78) and deciding in whose care to place the child under a child protection order granting the chief executive custody or guardianship (see s 86(2)).

Table prepared by Ashurst for the ACT Legal Assistance Forum (ACTLAF) working group on care and protection issues.