



Rachel Stephen-Smith MLA

Minister for Health

Minister for Children, Youth and Family Services

Minister for Disability

Minister for Aboriginal and Torres Strait Islander Affairs

Member for Kurrajong

Mr Peter Cain MLA
Chair of the Standing Committee on Justice and Community Safety
ACT Legislative Assembly
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Our ref: M-23/2063

Dear ~~Chair~~ *Peter*

I am writing to provide an update following comments made by the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role) (Committee) on D12023-202, the *Children and Young People (Kinship and Foster Carers Risk Assessment) Guidelines 2023* (Guidelines) regarding the lack of human rights analysis in the Guidelines' Explanatory Statement.

On 18 September 2023, following the Committee's comments, I wrote to you recognising that the Guidelines have the potential to impact human rights and noting that I had asked the Community Services Directorate (CSD) to revise the Guidelines' Explanatory Statement to include a human rights analysis. However, the Guidelines' Explanatory Statement was not able to be revised ahead of the 19 September 2023 deadline for the Legislative Assembly to move to disallow the Guidelines. Unfortunately, this meant it was not possible to substitute a revised Explanatory Statement on the ACT Legislation Register.

Despite this, I wish to provide an update on how the Committee's comments have been considered and actioned and provide assurance that CSD will address the learnings from this process in developing future explanatory statements.

In response to the Committee's comments, CSD undertook a thorough human rights analysis with regards to the Guidelines, focusing on rights under the *Human Rights Act 2004* (HR Act) which may be limited by the Guidelines. The analysis considered the extent to which each limitation pursues a legitimate purpose – keeping children and young people safe from harm and connected to their families and communities – and is therefore reasonable and proportionate. For your awareness, please see this thorough human rights analysis at [Annexure 1](#).

While I recognise it is disappointing that this thorough human rights analysis cannot be included in the Guidelines' Explanatory Statement on the ACT Legislation Register, I want to reaffirm that the

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human rights analysis demonstrates that the Guidelines' potential human rights limitations are proportionate and reasonable, and that learnings from this process will be addressed in the development of explanatory statements within CSD in the future.

I would like to thank the committee again for their observation and comments around the inclusion of a human rights analysis in the Guidelines' Explanatory Statement, and for their work to ensure human rights implications are duly considered in this and all explanatory statements. I trust this update and the human rights analysis are useful, and I look forward to opportunities to consider and discuss human rights implications in the course of developing explanatory statements in the future.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Rachel Stephen-Smith', with a stylized flourish at the end.

Rachel Stephen-Smith MLA

ANNEXURE 1

The Guidelines may limit several rights under the *Human Rights Act 2004* (HR Act), being rights to protection of the family and children (HR Act section 11), equality before the law (HR Act section 8), and privacy (HR Act section 12). The Guidelines were introduced to serve two parallel important and legitimate purposes: keeping children and young people both safe from harm and connected to their families and communities. Each potential limitation on human rights pursues one of these legitimate purposes and is balanced proportionately with the importance of these purposes.

Right to protection of children (HR Act section 11(2))

By enabling the exception to the ordinary WWVP requirement for approval as a carer, the Guidelines have the potential to impact the right to special protection for children under section 11(2) of the HR Act.

However, this limitation pursues the legitimate purpose of keeping children and young people connected to their families and communities by providing pathways for families to stay together, acknowledging that cultural and familial knowledge and connection may make a person more suitable to care for a child than measures of suitability which are less specific to an individual child. Additionally, the alternative approval process detailed in the Guidelines includes a robust set of criteria that prioritises ensuring safety in care environments. Noting this and the importance of the legitimate purpose the limitation pursues, this limitation is proportionate and justified.

Right to protection of family (HR Act section 11(1))

The Guidelines may indirectly limit the right to protection of family under section 11 of the HR Act by forming part of the broader ACT care and protection system, which enables the director-general to place children and young people in out-of-home care. This limits the ability of parents and families to make decisions about, spend time with, and otherwise be involved in the lives of their children.

However, this limitation pursues the legitimate purpose of keeping children and young people safe from harm: supporting the child protection system by regulating the approval process of carers through the Guidelines ensures children and young people are placed into safe homes where they will be cared for and protected from harm. Noting the importance of this legitimate purpose and that the Guidelines also seek to keep children and young people connected to their families and communities through implementing an alternative carer approval process for potential carers who face barriers obtain WWVP registrations, this limitation is proportionate and justified.

Right to privacy (HR Act section 12(a))

The Guidelines may limit rights to privacy under section 12(a) of the HR Act given the material that can be gathered and considered by decision-makers is extensive and can be considered on an ongoing basis following a person's approval as a carer. This information includes national criminal and police histories (including spent offences and information beyond convictions), child protection information (including historic information), and information about other adults in the household. The Guidelines also provide for ongoing monitoring post-approval. Accordingly, the right to privacy is potentially limited by these processes.

However, this limitation pursues the legitimate purpose of keeping children and young people safe from harm as a thorough risk assessment is required to ensure this alternative process results in safe foster and kinship placements for children and young people. Noting the importance of this legitimate purpose and that alternative less restrictive measures – such as only reviewing point-in-time information – would

not be effective in conducting effective holistic risk assessments, this limitation is proportionate to the legitimate purpose and justified.

Right to equality before the law (HR Act section 8)

Under the Guidelines, the director-general's ability to refuse to approve an applicant as a carer on the basis of an expanded criminal history check, including spent convictions, potentially limits the right to equality before the law under section 8 of the HR Act. This limitation pursues the legitimate purpose of keeping children and young people safe from harm by ensuring that offences relating to a person's ability to care for and protect a child or young person in their care are considered before they are approved as a carer. Noting the importance of ensuring child safety and that decision-makers must only consider the applicant's criminal history in relation to relevant offences, such as offences involving children, violent offences or sex offences, this limitation is proportionate to the legitimate purpose and justified.

A decision by the Director-General to refuse to approve a person as a foster or kinship carer is a reviewable decision under section 839 of the CYP Act.

The potential human rights limitations are required to support the legitimate purposes of keeping children and young people both safe from harm and connected to their families and communities. The limitations are proportionate to the need to realise these legitimate purposes and less restrictive means are not reasonably available to achieve the purposes.