INTERIM REPORT ON CHILD AND YOUTH PROTECTION SERVICES (PART 1)

STANDING COMMITTEE ON HEALTH, AGEING AND COMMUNITY SERVICES

MARCH 2020

REPORT 9

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 FGIA FCIS	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";

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

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

(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.

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RECOMMENDATIONS

RECOMMENDATION 1

4.27 The Committee recommends that the concept of cumulative harm should be expressly defined in the *Child and Young People Act 2008* and related care and protection policies and practices.

RECOMMENDATION 2

4.28 The Committee recommends that the Community Services Directorate—Child and Youth Protection Services should identify and address current gaps in the care and protection legislative response to cumulative harm identification and intervention.

RECOMMENDATION 3

4.35 The Committee recommends that the Community Services Directorate—Children, Youth and Protection Services should examine the feasibility of: (i) developing a system of categorisation to assist with determining the severity of various types of neglect or alleged abuse in care and protection matters; and (ii) adopt the system in the *Children and Young People Act 2008*.

RECOMMENDATION 4

4.55 The Committee recommends that the ACT Government ensure that action arising from its *Review of Children Protection Decisions in the ACT* addresses human rights principles, and directly addresses the human rights requirements (including public authority obligations) pursuant to the ACT *Human Rights Act 2008* that a review of this nature must consider.

RECOMMENDATION 5

4.77 The Committee recommends that 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 ACT Legislative Assembly.

RECOMMENDATION 6

4.90 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 Childrens Court in care and protection matters.

RECOMMENDATION 7

4.98 The Committee recommends, to the extent that work is not already taking place, that the Community Services Directorate—Children, Youth and Protection Services should ensure that decision-making regarding the number of placements a child or young person may have and the length of time at each placement actively considers all placement quality indicators including: placements in compliance with the Aboriginal Child Placement Principle; local placements; and placements with siblings.

RECOMMENDATION 8

4.108 The Committee recommends, to the extent that work is not already taking place, that the ACT Government should articulate in applicable governing policies, processes and practices the linkages between various initiatives currently taking place in the care and protection space—including the *Our Booris Our Way Review* and the *Review of Child Protection Decisions in the ACT*—in the context of the ACT as a human rights jurisdiction and Canberra becoming a restorative city.

RECOMMENDATION 9

4.109 The Committee recommends that the ACT Government table in the ACT Legislative Assembly its response to the ACT Law Reform Advisory Council final report—*Canberra–Becoming a restorative city* (provided to government in October 2018) by the end of June 2020.

RECOMMENDATION 10

4.124 The Committee recommends that the ACT Government should: (i) review its responses to recommendations made in Auditor-General's report No. 1 of 2013: *Care and Protection System* and those of the Standing Committee on Public Accounts inquiring further into the Audit Report in light of the matter subject to this inquiry; and (ii) inform the ACT Legislative Assembly whether it considers any further action is required in its response to recommendations made by the Auditor-General and the Public Accounts Committee, respectively.

1 INTRODUCTION AND CONDUCT OF INQUIRY

1.1 On Thursday, 16 May 2019 the 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.

INQUIRY REFERRAL AND TERMS OF REFERENCE

1.2 The Assembly asked the Committee to inquire into and report on two matters. As the matters have different reporting dates and coverage, the inquiry and respective reports have been divided into two separate reports—Part 1 and Part 2. This report—is concerned with the inquiry into the first matter (Part 1)—specifically:

- to provide an analysis of the decision of the ACT Court of Appeal in the case of *CP v Director-General of Community Services Directorate [2018] ACTCA 32* and to identify potential systemic issues that may need to be addressed.

1.3 The Assembly asked the Committee to report on the first matter by no later than March 2020.

CONDUCT OF THE INQUIRY

1.4 Due to the individual nature of this part of the Inquiry, the Committee did not call for public submissions. The Committee determined that it would invite contributions from parties with an interest in the matter. The Committee was also cognisant of the requirement of the Assembly in referring the matter for inquiry and report that it 'take evidence and hold documents in ways that will not allow for individual people to be identified without their express consent'.[3]

1.5 The Committee received a written submission to this part of the Inquiry from Legal Aid ACT. The Committee also wrote to the Minister for Children, Youth and Families (the Minister) on 17 October 2019 requesting a written submission (in a manner suitable for publication) identifying:

- the issues regarding the *Children and Young People Act 2008* (the CYP Act) and the administration of the CYP Act by the Directorate that arise from the court decision[4]; and
- what proper course of action is being taken to address the issues identified and including:

[3] ACT Legislative Assembly, Minutes of Proceedings, No. 98, 16 May 2019, p. 1467.

(i) a summary of the issues identified and associated recommendations; (ii) a summary of action to date, either completed or in progress (including milestones completed); and (iii) the proposed action (including timetable), for implementing recommendations (or parts thereof), where action has not commenced.

1.6 As noted at paragraph 1.5, in its request to the Minister for a written submission, the Committee asked that it be provided a submission suitable for publication.

1.7 The Committee received a written submission as per paragraph 1.5 from the Minister on 10 January 2020. The written submission provided to the Committee noted that it 'may contain sensitive and protected information as defined by the *Children and Young People Act 2008*. There are criminal offences attached to unauthorised use and disclosure of this information which are designed to protect the identity of children and young people involved in care and protection proceedings'.

1.8 The Committee subsequently wrote to the Minister on 20 March 2020 to advise that it was considering authorising the Government submission as provided. However, prior to doing this the Committee was seeking comment and advice as to whether there were any objections in relation to this proposed course of action. In particular whether the submission contains sensitive and protected information as defined by the CYP Act. The Committee indicated that a response by COB Wednesday 25 March 2020 would be appreciated.

1.9 The Committee was advised by the Minister's office on 26 March 2020 that its ask would involve a complicated response and the timeframe described in the letter would not be able to be met.

INTERIM REPORT

1.10 The Committee remains in discussion with the Minister for Children, Youth and Families regarding its access to information that is classed as protected and sensitive information under the CYP Act. Whilst acknowledging the sensitivity of the content of this information, the need for the Committee to have access to this statutorily protected information has raised some challenging procedural issues 'regarding parliamentary supremacy, parliamentary privilege and the capacity of a parliament to delegate unfettered discretion to an agency of its own creation'.[5]

[4] CP v Director-General of Community Services Directorate [2018] ACTCA 32.

[5] *Advice to the ACT Legislative Assembly's Standing Committee on Health, Ageing and Community Services on procedural matters related to child and youth protection services in the ACT* (March 2020).

1.11 The Committee has a full understanding of the privileged nature of the information it is seeking. The Committee is seeking to access protected and sensitive information not as a request under the CYP Act but as a proceeding of the Assembly.

1.12 For the Committee to fulfil the remit given to it by the Assembly—that is, to be able to consider the full and accurate facts of the matter to which the inquiry relates—it requires that protected and sensitive information be shared with it. After the Committee has had an opportunity to consider the protected and sensitive information it is seeking, it will at a later time, table a final report.

1.13 Accordingly, the Committee resolved on 17 March 2020 to table an interim report making comment, and where applicable recommendations, in relation to any potential systemic issues it identified, at this stage, after its analysis of the 2018 Court of Appeal decision.

1.14 Further, in preparing its interim report, the Committee has drawn from and, where applicable, quoted from the Government's written submission as referred to at paragraphs 1.5 through to 1.9. In light of the advice from the Minister's office at paragraph 1.9—to permit the Committee to report in the timeframe specified by the Assembly, it has carefully considered information from the Government's written submission referenced in its interim report to respect the requirements concerning sensitive and protected information as defined by the CYP Act.

1.15 The Committee met on 25; 27; and 30 March 2020 to consider the Chair's draft interim report and the report, as amended, was adopted by the Committee on 30 March 2020.

STRUCTURE OF THE COMMITTEE'S INTERIM REPORT

1.16 The Committee's interim report on the first matter is divided into two parts, comprising five chapters, covering the following main topics:

Part 1—Context to the inquiry

- Chapter 1—Introduction and conduct of the Inquiry
- Chapter 2—Inquiry context

Part 2—Views of the Committee

- Chapter 3—Inquiry guiding principles and management plan
- Chapter 4—Systemic analysis
- Chapter 5—Conclusion

1.17 At Chapter 2—in order to fully understand the context of the Court of Appeal decision—the Chapter summarises: (i) the court action/activity that took place leading up to and including the 2018 Court of Appeal decision; and (ii) Child and Youth Protection Services' (CYPS)—intake,

response and intervention processes as it concerns decision making regarding taking children into care through emergency action.

1.18 At Chapter 3—the Committee sets out how it determined to progress this inquiry—this includes: consideration of the hierarchy of authorities and guiding principles that are relevant to the inquiry—overarching and specific. The Chapter then considers the transition of the inquiry from an individual focus to a broad public interest mandate.

1.19 At Chapter 4—the Committee sets out potential systemic issues it has identified in connection with the Court of Appeal decision.

ACKNOWLEDGEMENTS

1.20 The Committee thanks all those who have contributed to its inquiry to date.

2 INQUIRY CONTEXT

2.1 The Assembly has asked the Committee to provide an analysis of the decision of the ACT Court of Appeal in the case of *CP v Director-General of Community Services Directorate [2018] ACTCA 32* and to identify potential systemic issues that may need to be addressed, and report these to the Assembly by no later than March 2020. This decision was handed down on 28 August 2018 and reported in the *Canberra Times* on 17 February 2019.

2.2 The case of *CP v Director-General of Community Services Directorate [2018] ACTCA 32* is concerned with an appeal to the ACT Supreme Court of a decision made by a magistrate in the ACT Childrens Court relating to care and protection orders.

2.3 In order to fully understand the context of the Court of Appeal (CoA) decision—this Chapter summarises: (i) the court action/activity that took place leading up to and including the 2018 CoA decision; and (ii) CYPS'—intake, response and intervention processes as it concerns decision making regarding taking children into care through emergency action.

2.4 Prior to identification of potential systemic issues—it is useful to summarise the court action/activity that took place leading up to and including the 2018 Court of Appeal decision. The court action followed a decision by the Director-General (D-G) of the Community Services Directorate (CSD) to take emergency action to remove five children from the care of their mother. Emergency action is available if there is an immediate need, or likely to be an immediate need of care and protection.

CYPS INTAKE, RESPONSE AND INTERVENTION PROCESSES

2.5 The case relevant to the CoA decision concerned the making of final care and protection orders on 24 June 2014 by the Childrens Court for the five children until each reached the age of 18 years.

2.6 The case in the Childrens Court was preceded by emergency action taken by the D-G on 10 and 12 July 2013 in respect of three children and, then two more children, respectively.

2.7 It is useful to set out CYPS'—intake, response and intervention processes as it concerns decision making regarding taking children into care through emergency action. For a schematic summary please refer to Figure 2.1.

2.8 Care and protection services for children and young people in the ACT are primarily governed and informed by the CYP Act. These services are provided by CYPS[6] in the CSD.

2.9 Importantly, the overarching ethos of the CYP Act is that the best interests of the child or young person is the primary consideration for decision making.

2.10 The ACT Audit Office examined the intake, response and intervention processes in 2013. It reported that the processes have been designed 'to implement legislation to ensure that actions taken are in the best interests of a child or young person'.[7] These processes are 'risk based and used to determine if a child or young person is being abused or neglected or is at risk of being abused or neglected. For those children and young people who are regarded as being a low risk, Care and Protection Services Branch assist their families through early intervention and prevention and/or family support with the intention of keeping these children and young people safe, with their families, and out of the care of the Director General'.[8]

2.11 When emergency action is taken, the responsibility for a child or young person is transferred to the D-G CSD. Section 410 of the CYP Act establishes the timeframe for child and youth protection services to obtain court orders for a child or young person who is removed from their parent or carer under an emergency action. The case must be presented to the Court within two days after the emergency action is taken or on the next Court sitting day if the working day is interrupted by the weekend or a public holiday.

2.12 Section 408 of the CYP Act requires that in transferring parental responsibility from a parent or carer to the D-G that the grounds for concern for the removal of a child or young person under an emergency action be documented.

2.13 Out-of-home care placements provide accommodation and care for children and young people removed from their parents or carers, as part of the intake, response and intervention processes.

2.14 If an emergency court order is granted the matter is referred to the Application Review Committee (ARC)—the ARC:

> …acts as an internal quality assurance and decision making body for applications for children and young people to be placed on Orders. The Application Review Committee is made up of senior managers in the Care and Protection Services Branch.

[6] Formerly Care and Protection Services Branch at time of 2013 ACT Auditor-General performance audit.
[7] ACT Auditor-General's Report No. 1 of 2013*: Care and Protection System*, p. 47.
[8] ACT Auditor-General's Report No. 1 of 2013*: Care and Protection System*, p. 47.

> The ARC reviews the practice and legal issues, which form the basis of a proposed application to Court. It also reviews and/or endorses the recommendations of the casework team.[9]

2.15 Care and Protection Orders can:

> …amongst other things, provide the Director General with the authority to find alternative care arrangements for a child or young person. Orders are generally not longer than two years or are to the age of 18 years.
>
> If the child or young person cannot be returned to the care of the family at the end of a two year order the Care and Protection Services Branch may apply for an extension to the two year order or apply for an order to 18 years of age. It is acknowledged that on occasions a child or young person would be placed on orders to 18 years without first having been on orders for 2 years.[10]

2.16 According to the CYP Act, the transfer of the care of a child or young person to the D-G can occur by one of three ways:

- Court Orders following approval by the Application Review Committee;
- Emergency action taken by the Director-General—which must then be presented to the Court within two days after the emergency action was taken or on the next Court sitting day if the working day is interrupted by the weekend or a public holiday[11]; and
- Voluntary Care Agreement between a parent or carer and the D-G.

2.17 The placement of a child or young person in out of home care requires a Care and Protection Court Order—a decision made by a judicial officer. Care and Protection Orders, amongst other things, provide the D-G with the authority to find alternative care arrangements for a child or young person. Orders can be short-or long-term—orders are generally not longer than two years or are to the age of 18 years.

2.18 Importantly, the placement of a child or young person in out-of-home care—requires decision making in two jurisdictions—namely decision making by the D-G (and their delegates) pursuant to the CYP Act; and decision making by judicial officers in the Courts.

2.19 A schematic summary of child and youth protection services—intake, response and intervention processes are set out in Figure 2.1.

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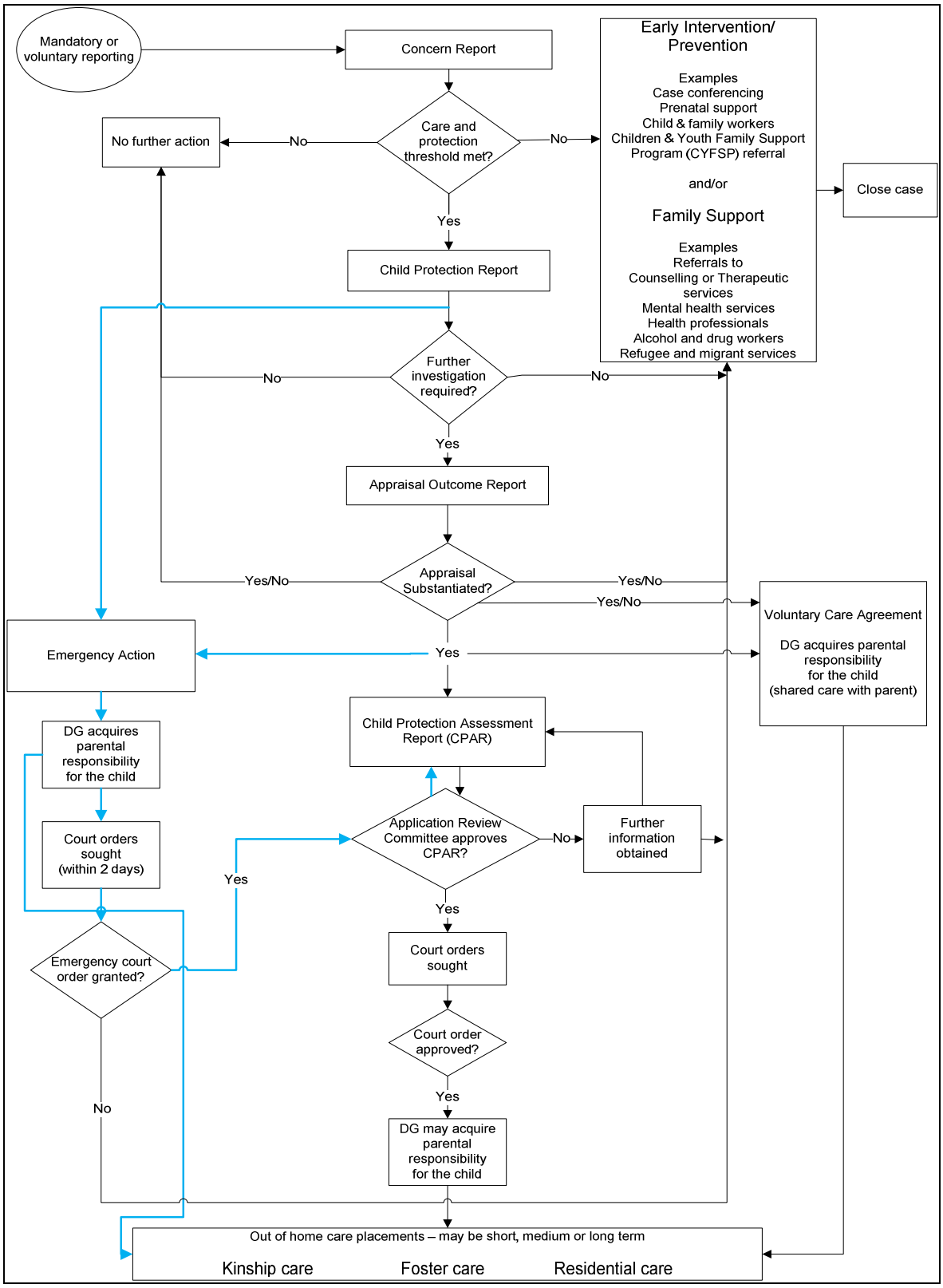
[9] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, p. 59.
[10] ACT Auditor-General's Report No. 1 of 2013*: Care and Protection System*, p. 61.
[11] Section 410, *Children and Young People Act 2008*.

Figure 2.1: Summary of Care and Protection services - intake, response and intervention processes



Key: Emergency Action pathway

Source: ACT Audit Office - AG Rpt No. 1 of 13: *Care and Protection System*, p. 48.

THE COURT OF APPEAL DECISION

2.20 The CoA case is concerned with final orders made by Magistrate Fryar in 2014 which the mother later appealed to the ACT Supreme Court in a case heard before Justice Refshauge (Refshauge, J.). It is not focused on emergency action taken by the D-G of the CSD or the Directorate itself. Specifically, the CoA was asked by the mother to examine the reasoning and decision of Refshauge, J. on two issues: (i) the definition of physical abuse adopted by Refshauge, J. in his judgements; and (ii) whether, even if Refshauge, J.'s definition of physical abuse was correct, 'on the facts of the case, the finding that the children were in need of care should not have been made'.[12]

2.21 A summary of court-related events and processes leading up to and including the CoA decision and other matters is set in Table 2.1.

Table 2.1—Summary of court-related events and processes leading up to and including the Court of Appeal decision[13]

Date	Event
10 July 2013	-CYPS takes emergency action in relation to three of the mother's children [D-G acquires parental responsibility for the three children for two days].
12 July 2013	-CYPS takes emergency action in relation to a further two of the mother's children [D-G acquires parental responsibility for the two children for two days].
Period between emergency action and interim (temporary) care and protection orders being made	-Interim (temporary) care and protection orders[14] made in respect of the five children by the Childrens Court. -Consent to interim orders and continuance of consent (2013–14) to the interim orders remaining in place for the duration of the proceedings until the Court made its judgment in June 2014—Refshauge, J. notes the continuance of consent in his judgment of 21 December 2017: '[a]ll parties were represented and interim orders in terms of those sought in the Originating Application were made by consent in favour of the Director-General until the date to which the proceedings were otherwise adjourned…'.[15] Refshauge, J. further notes '[t]he proceedings were then adjourned from time-to-time, with the consent interim orders being continued, until the final orders were made on 24 June 2014'.[16]

[12] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ, paragraph 25, p. 9.

[13] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J; CP v Director-General of CSD (No. 2) [2018] ACTSC 201 [Appeal from the Childrens Court—Hearing date: 22 December 2017; Decision date: 6 April 2018; Reasons date: 20 July 2018; Before: Refshauge, J; CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ; Submission No. 2—ACT Government—Inquiry into CYPS (Part 1); Submission No. 1—Legal Aid ACT—Inquiry into CYPS (Part 1).

[14] Pursuant to section 433 of the CYP Act—an interim care and protection order is often made at the first return of an application, as a means of putting in place short-term protective arrangements for a child and evaluating these arrangements prior to finalising the order. This provides time to see how the child is responding to the new arrangements, and to consider any changes the parents may make during this period to improve the safety of the child.

[15] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 15.

[16] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 16.

Date	Event
Application Review Committee (ARC)	-Application for final court orders considered by the ARC.[17] -ARC assesses whether a case should go to court. In cases where emergency action is taken this occurs the week after the action. -ARC acts as an internal quality assurance and decision-making body for applications for children and young people to be placed on Orders. The ARC is made up of senior managers in the CYPS. -The ARC reviews the practice and legal issues, which form the basis of a proposed application to Court. It also reviews and/or endorses the recommendations of the casework team. -After approval by the ARC the Child Protection Assessment Report becomes part of the supporting evidence for the Court.[18]
23 and 24 April 2014	-Hearing dates for final orders in Childrens Court before Magistrate Fryar.
24 June 2014	-Final orders made in the Childrens Court by Magistrate Fryar—care and protection orders made in respect of each of the five children until the age of 18 years. -In making such orders—the Childrens Court is required to itself be satisfied that a child is in need of care and protection. -D-G acquires parental responsibility for the five children until the age of 18 years. -After a care and protection order is made by the Courts—amongst other things, these orders provide the D-G with the authority to find alternative care arrangements for a child or young person and a range of other decisions relating to the care of the child or young person for whom the D-G has parental responsibility.
21 July 2014	-Mother files a notice of appeal in the Supreme Court
1, 2 & 7 April 2015[19]	-Hearing dates of mother's appeal in the Supreme Court before Refshauge, J.
21 December 2017[20]	-On appeal from the Childrens Court—Supreme Court proceedings were about the final orders made by Magistrate Fryar in June 2014. -First of Refshauge, J.'s written decisions—states that: '[i]n this appeal, the issue was whether care and protection orders should have been made, and, if so, whether they should have been made until the children reached the age of 18 years'.[21] -Whilst referring to the removal of the children, Refshauge, J. noted that whether emergency action was justified was 'not really an issue in these proceedings, however, for the appeal concerns the care and protection orders and not the Emergency Action'.[22]
22 December 2017[23]	-Further hearing date in relation to the orders the Court should make.
6 April 2018[24]	-Refshauge, J. dismisses the care and protection order in relation to one child; finds three of the children were at risk of physical abuse and one child was at risk of neglect.[25]

[17] Inquiry into CYPS (Part 2), Transcript of Evidence, 5 February 2020, p. 122; ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, p. 29.

[18] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, p. 59.

[19] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.].

[20] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.].

[21] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 637.

[22] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 624.

[23] CP v Director-General of CSD (No. 2) [2018] ACTSC 201 [Appeal from the Childrens Court—Hearing date: 22 December 2017; Decision date: 6 April 2018; Reasons date: 20 July 2018; Before: Refshauge, J.].

[24] CP v Director-General of CSD (No. 2) [2018] ACTSC 201 [Appeal from the Childrens Court—Hearing date: 22 December 2017; Decision date: 6 April 2018; Reasons date: 20 July 2018; Before: Refshauge, J.].

Date	Event
9 April 2018	-Refshauge, J. amends final orders in chambers.
3 May 2018	-D-G files a notice of appeal and application in proceeding in the Court of Appeal (CoA). The D-G sought to appeal Refshauge, J's decision to dismiss the care and protection order in relation to one child.
8 May 2018	-The mother files a notice of intention to respond to the D-G's application in the CoA.
9 May 2018	-The mother files a notice of cross-appeal in the CoA—seeking to appeal Refshauge, J.'s findings in relation to the three children that were found to be at risk of physical abuse.
20 July 2018[26]	-Refshauge, J. publishes reasons for orders made on 6 April 2018—elaborating on the role and nature of the Supreme Court appeal by way of rehearing in his reasons dated 20 July 2018 for his decision of 6 April 2018. In his reasons—Refshauge, J. reached the conclusion that three of the children were at risk of physical abuse and one was at risk of neglect. In subsequent findings dated 20 July 2018—Refshauge, J. recorded findings that: (i) three of the children were at risk of physical abuse; (ii) one child was at risk of neglect; and (iii) the question of whether the mother was able to protect the children from that physical abuse and neglect required further investigation. -Refshauge, J. listed a further hearing on the matters at (iii). For the purpose of a future hearing—Refshauge, J. made an order to arrange for a care and protection assessment of the mother in relation to the four children (pursuant to s. 436 of the CYP Act) prior to that hearing.
30 July 2018	-The mother files an amended cross-appeal in the CoA.
31 July 2018	-D-G provides a copy of a notice of discontinuance of appeal—re Refshauge, J's decision to dismiss the care and protection order in relation to one child.
7 August 2018[27]	-Hearing date of mother's appeal in the CoA. -The CoA was asked by the mother to examine the reasoning and decision of Refshauge, J. on two issues: (i) the definition of physical abuse adopted by Refshauge, J. in his judgements; and (ii) whether, even if Refshauge, J.'s definition of physical abuse was correct, 'on the facts of the case, the finding that the children were in need of care should not have been made' .[28] -The mother did not seek to challenge the finding that one child was at risk of neglect. The scope of matters before the CoA as per the mother's application for leave to appeal was in relation to the three children found to be at risk of physical abuse.[29]
28 August 2018	-CoA hands down its decision. -CoA held that the evidence was not sufficient to establish that the three children found by Refshauge, J. to be at risk of physical abuse were at risk of such abuse. Further, it found that Refshauge, J.'s definition of 'physical abuse' was not correct. -The CoA of appeal set aside the care and protection orders in relation to the three children that were found to be at risk of physical abuse and dismissed the D-G's application in the Childrens Court in relation to these three children.[30]

[25] CP v Director-General of CSD (No. 2) [2018] ACTSC 201 [Appeal from the Childrens Court—Hearing date: 22 December 2017; Decision date: 6 April 2018; Reasons date: 20 July 2018; Before: Refshauge, J.], pp. 1–2.

[26] CP v Director-General of CSD (No. 2) [2018] ACTSC 201 [Appeal from the Childrens Court—Hearing date: 22 December 2017; Decision date: 6 April 2018; Reasons date: 20 July 2018; Before: Refshauge, J.].

[27] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ].

[28] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ], paragraph 25, p. 9.

[29] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ], p. 9.

[30] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ].

3 INQUIRY GUIDING PRINCIPLES AND MANAGEMENT PLAN

3.1 This Chapter sets out how the Committee determined it would progress this inquiry—this includes consideration of the hierarchy of authorities and guiding principles that are relevant to the inquiry—overarching and specific. The Chapter then considers the transition of the inquiry from an individual focus to a broad public interest mandate.

3.2 The Committee has a hierarchy of authorities and guiding principles it must consider in the management of inquiries generally. Further, attributable to the nature of its terms of reference (ToR), there may also be inquiry specific authorities and guiding principles that also require consideration.

3.3 The overarching and inquiry specific authorities and guiding principles the Committee needed to be cognisant of in managing this inquiry are summarised below.

OVERARCHING AUTHORITIES AND GUIDING PRINCIPLES

SEPARATION OF POWERS—SOVEREIGNTY OF THE DECISION MAKING OF PARLIAMENT AND THE COURTS.

3.4 It is not the role of the Committee to second guess or unpack decision-making of the Courts regarding the specified case (or give that perception or impression).

3.5 The Committee is not looking at the legality of the decisions of the Court(s). The Committee is looking at whether the CoA decision raised any issues regarding the relevant Act and the administration of the Act by the responsible directorate.

3.6 Further, it is not the role of the inquiry process to be a form of review of any decisions related to the case.

ROLE OF PARLIAMENTARY COMMITTEES

3.7 Parliamentary committees have a broad public interest mandate and are not in a position to determine the rights and wrongs of individual cases. The Committee process is not a forum to resolve issues pertaining solely to individual cases or grievances but is a forum to explore the general matters of principle, policy or public administration relevant to an inquiry's ToR.

3.8 The individual case as specified will be considered with regard to the general matters of principle, policy or public administration relevant to the T of R. The Committee is also not a secondary review body.

3.9 For Part 1 of the report, the specific T of R—at its meeting on Thursday, 16 May 2019, the Assembly passed the following resolution—"That this Assembly:

(2) also notes that:

(2)(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;

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

(3)(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;

3.10 The Committee is confining its inquiry to the T of R for part 1 of the inquiry as referred by the Assembly.

MEMBERS' CODE OF CONDUCT

3.11 The Legislative Assembly's Continuing resolution 5—states that the following principles, amongst others, shall guide the conduct of Members in all matters:

> (3) Members should uphold the separation of powers and the rule of law
>
> (4) Members should always act in the public interest…
>
> (8) Members should respect the dignity and privacy of individuals, and not disclose confidential information to which they have official access other than with consent or as required by law.

PRIVACY CONSIDERATIONS

3.12 The ACT has a Human Rights Act[31] (the HR Act). One of the human rights specifically protected in the HR Act is the right to privacy. A person's identity should be protected, unless there are very good public policy and public interest reasons for releasing the information. This means that Committees when dealing with information must at all times weigh up the public interest versus the right to privacy (and the protection of the interests of those to whom the right to privacy belongs or resides).

3.13 Section 12 of the HR Act states:

> 12 Privacy and reputation

[31] *Human Rights Act 2004.*

> Everyone has the right—
>
> (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
>
> (b) not to have his or her reputation unlawfully attacked.

INQUIRY SPECIFIC AUTHORITIES AND GUIDING PRINCIPLES

ASSEMBLY REFERRAL

3.14 At clause (4) of the referral—the Assembly 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;

SPECIFIC STATUTORY REQUIREMENTS

3.15 The Committee needs to be cognisant of specific statutory provisions in the CYP Act[32] and the *Criminal Code Act 2002*[33] as it concerns: (i) information secrecy; and (ii) sharing and publication of identifying information about children's proceedings, respectively.

INTERESTS OF SPECIFIC FAMILY INVOLVED

3.16 The interests and privacy of the specific family involved are paramount. Canberra is a small jurisdiction and the interests of the mother and her family is a significant consideration.

COMMITTEE REPUTATION

3.17 The Committee has an obligation to exercise its decision about receipt and any authorisation of information in the most rigorous and considered way, especially where information relates to matters covered by this inquiry. At times the public interest will best be served by disclosure; at others public and personal interests will require the maintenance of confidentiality.

PROCEDURES IN THE CHILDRENS COURT

3.18 The Committee also has an obligation to observe requirements associated with procedures in the Childrens Court—namely that:

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[32] *Children and Young People Act 2008* [Chapter 25—Information secrecy and sharing].

[33] *Criminal Code Act 2002* [712A—Publishing identifying information about childrens proceedings].

- Proceedings not open to the public—Childrens Court proceedings are not open to the public.
- Child's identity not to be disclosed—It is an offence to publish an account or report of proceedings in the Childrens Court if the account or report discloses the identity of the child, young person or a family member or allows the child's, young person's or a family member's identity to be worked out.[34]

BOUNDING THE INQUIRY—BROAD PUBLIC INTEREST MANDATE

3.19 The Committee has carefully considered how it can best transition from the individual case to which this inquiry relates whilst respecting the overarching and inquiry specific authorities and guiding principles to a broad public interest mandate—to ascertain the matters of principle, policy or public administration relevant to the T of R.

3.20 The Committee has determined that it can transition from the individual case to a broad public interest mandate by its systemic analysis of the CoA decision focusing on two elements—namely matters relating to the: (i) the legislative framework for protecting and safeguarding children (legislation and related policies); and (ii) implementation and administration of the legislative framework—structures, systems and individual practice.

[34] Refer also to section 712A—Publishing identifying information about childrens proceedings—*Criminal Code Act 2002*.

4 SYSTEMIC ANALYSIS—COMMITTEE COMMENT

4.1 As noted in Chapter 3—the Committee's systemic analysis is focused on two elements—matters relating to the: (i) legislative framework for protecting and safeguarding children (legislation and related policies); and (ii) implementation and administration of the legislative framework—structures, systems and individual practice.

COURT RELATED EVENTS AND PROCESSES

4.2 Prior to identification of potential systemic issues—the Committee believes it is useful for it to set out its observations as it concerns the summary of court-related events and processes leading up to and including the CoA decision as set out in Table 2.1 in Chapter 2. Accordingly, the Committee makes the following observations:

- Proceedings in the Supreme Court Appeal and CoA were about the final orders made by Magistrate Fryar in the Childrens Court in June 2014.
- Final orders made in the Childrens Court by Magistrate Fryar—care and protection orders—were made in respect of each of the five children until the age 18 years. In making such orders—the Childrens Court is required itself to be satisfied that a child is in need of care and protection.
- The Supreme Court Appeal was asked to examine whether care and protection orders should have been made for each of the five children, and, if so, whether they should have been made until the children reached the age of 18 years.[35]
- The CoA was asked by the mother to examine the reasoning and decision of Refshauge, J. on two issues: (i) the definition of physical abuse adopted by Refshauge, J. in his judgements; and (ii) whether, even if Refshauge, J.'s definition of physical abuse was correct, 'on the facts of the case, the finding that the children were in need of care should not have been made'.[36]
- The decision by CYPS to take emergency action has not been subject to review—neither the Supreme nor CoA—has been asked to review the legality of the decision by CYPS to remove the five children in July 2013.[37]

[35] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 637.

[36] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ], paragraph 25, p. 9.

[37] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 624.

- After emergency action is taken by CYPS—the D-G holds parental responsibility for children taken into care for only a maximum of two business days without a court order. The D-G's decision-making power regarding taking children into care through emergency action has a limited lifespan.
- Every decision beyond 12 July 2013 which had the effect of the children remaining in care rested with a judicial officer not the CYPS.
- The delay in the court proceedings—in that it took nearly three years from the hearing of the initial appeal for the Supreme Court to reach a decision was a matter that rested with the Courts. Refshauge, J. has set out in his second written judgement a summary of the court related matters to assist with understanding how these may have contributed to the delay (refer paragraph 4.42 in this report).

4.3 The Committee notes that the placement of a child or young person in out-of-home care—requires decision making in two jurisdictions—namely decision making by the D-G (and their delegates) pursuant to the CYP Act; and decision making by judicial officers in the Courts.

LEGISLATIVE FRAMEWORK FOR PROTECTING AND SAFEGUARDING CHILDREN

4.4 As noted at paragraph 4.1—the Committee's systemic analysis is focused on two elements—this section is focused on potential issues arising from the CoA decision concerning the legislative framework for protecting and safeguarding children (legislation and related policies).

LACK OF *RES JUDICATA* OR *ISSUE ESTOPPEL* IN CARE PROCEEDINGS

4.5 The matter of there being a lack of *res judicata*[38] or *issue estoppel*[39] in care proceedings has been raised.

4.6 There is no *res judicata* or *issue estoppel* in care proceedings—meaning that the D-G can recommence proceedings in care matters. However, it has been suggested that this does not necessarily mean that the D-G should recommence proceedings—in particular, in the context of the matter to which this inquiry relates—where the appellate judgments were concerned with the lack of evidence supporting the D-G's case.

[38] *res judicata*—a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties.

[39] *issue estoppel*—a party to litigation is prevented from re-arguing an issue determined by a Court in an earlier proceeding.

4.7 It is noted that in any other type of matter (civil or criminal), the party that commenced proceedings is precluded from re-starting the proceeding on the same issues if they are unsuccessful.[40] Importantly, in considering legal proceedings relating to care and protection:

> These proceedings do not involve a cause of action, in the traditional sense, in which the facts and law can merge into judgment. Nor do they typically involve a conclusive determination of discrete questions of fact or law as might occur in other civil or criminal proceedings. Where a Court hears and decides an application in a proceeding involving the welfare and protection of children, it is exercising power akin to bail or protection orders in which findings as to past facts are relied upon in the assessment of future risk by the application of a statutory test – for example, that a child or young person is in need of care and protection.[41]

4.8 It has been a long-standing practice that the legal principles of *res judicata* or *issue estoppel* do not apply in proceedings relating to the welfare and protection of children. This non-application equally affects parents, child representatives, the D-G and any other party to a proceeding. It also means that as this practice rests on general principles of law—its application is not discretionary, in that it is not free for either CYPS, any other party to proceedings, or the Court to decide whether it will or won't apply.

4.9 The non-application of these two legal principles to care proceedings was confirmed by Refshauge, J. in his written judgement of 21 December 2017:

> There is, in care proceedings, no *res judicata* nor *issue estoppel*. See *In the Matter of A (A Child); Semple v Heijer* (Unreported, Full Court of Supreme Court of Western Australia, Malcolm CJ, Nicholson and Ipp JJ, 2167 of 1992, 22 December 1992) at 32.[42]

4.10 The reason why these principles do not apply to care proceedings is that:

> It has been well established that the primary reason for excluding the operation of these rules is that the welfare of the child is the paramount consideration, and that all available evidence must be considered to ensure the child's best interests are served. It is also recognised that the Court hearing the matter maintains the discretion to decide how it conducts its inquiries and can exercise its own judgment as to what weight to place on any evidence put before it.[43]

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[40] Submission No. 1—Legal Aid ACT—Inquiry into CYPS (Part 1), pp. 4–5.

[41] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 5.

[42] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.]—paragraph 454.

[43] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 5.

> In examining and determining what is in a child's best interests, it is vital that all relevant information is made available to the decision-maker, without the complexities of evidential rules and restrictions.[44]

4.11 Other measures that support the principal decision-makers in care and protection matters having all available and relevant information—includes section 716 of the CYP Act—Court not bound by rules of evidence—which provides that the Rules of Evidence do not apply to proceedings in the ACT Childrens Court.

COMMITTEE COMMENT:

4.12 The Committee notes that the practice of non-application of the legal principles of *res judicata* or *issue estoppel* to care and protection matters recognises that family circumstances are dynamic; that a finding that a child is in need of care and protection is a decision applying a statutory test at a specific time.

4.13 The Committee further notes that as this practice rests on general principles of law—its application is not discretionary, in that it is not free for either CYPS, any other party to proceedings or the Court to decide whether it will or won't apply.

4.14 The Committee also notes that the appeals in both the Supreme Court and CoA were in the main based on evidence presented in the hearing in the Childrens Court in June 2014—evidence several years old. Given the delay in the decision handed down in the Supreme Court appeal hearings, all parties in the CoA were required to present arguments which relied on evidence that was several years old.

4.15 As a consequence, this meant that all parties were limited in providing the most relevant information concerning the current and future best interests of the children for the judicial decision-makers.

4.16 The commencement by the D-G of fresh proceedings in the jurisdiction of the Childrens Court would provide for a determination based on current evidence. The CoA acknowledged in its written decision on 28 August 2018 that the D-G had a right to commence fresh proceedings in the Childrens Court and that this was an option being considered by the D-G.[45]

4.17 The Committee notes that subsequent to the CoA judgement the D-G did launch fresh proceedings. These proceedings have not been focused on in this interim report.

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[44] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 5.

[45] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ], paragraph 25, pp. 17–18.

CUMULATIVE HARM

4.18 Cumulative harm in child protection is concerned with the 'effects of multiple adverse circumstances and events in a child's life'.[46] The unrelenting impact of these types of experiences on a child 'can be profound and exponential, and diminish a child's sense of safety, stability and wellbeing'.[47]

4.19 Evidence to the Committee observed that:

> It is unclear whether the harm of removing a child from their family or long-term carer, for example, is considered in the decision-making of Child Protection Services, or whether this evidence is provided to the court. However, with the strength of the evidence available, long-term harm should be part of the equation. If removals were only made in an emergency situation, (i.e. significant risk of imminent harm), this could be supervised e.g. by a warrant before a magistrate. In this way, the overall level of harm and trauma of removal could be somewhat minimised, by limiting it to cases, where the balance of likely harms was sufficiently high to justify removal of the child at that time.[48]

4.20 In considering the specific case subject to this inquiry, it appears that different approaches were taken concerning assessment of cumulative harm.[49]

4.21 Assessment of cumulative harm is an important consideration. For the Childrens Court to be in a position to assess this risk at a later time in a matter—it would require the D-G to present evidence related to the period over which CYPS had been involved with a family, including evidence that had been previously tendered. This would be consistent with the view that:

> …the welfare of the child is paramount in these matters, and all relevant information should be available to enable the decision-maker to examine and determine what is in the child's best interests.[50]

COMMITTEE COMMENT

4.22 How cumulative harm is assessed across the care and protection system is an important systemic issue. In considering the specific case subject to this inquiry, it appears that different judicial officers took different approaches concerning assessment of cumulative harm. How the construct of cumulative harm is understood and defined in child protection legislation,

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[46] Bromfield, L. et al (2014) Resilience Practice Framework—Practice Resource Guide, The Benevolent Society.

[47] Bromfield, L. et al (2014) Resilience Practice Framework—Practice Resource Guide, The Benevolent Society.

[48] Submission No. 13—Fiona Tito Wheatland—Inquiry into CYPS (Part 2), p. 25.

[49] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.]—paragraph 619.

[50] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 5.

policy and practice in the ACT is important. Further, the concept of cumulative harm is not defined in the CYP Act.

4.23 The Committee is of the view that cumulative harm of adverse childhood experiences is a significant consideration in child protection. Further it can have far reaching consequences for the development and well-being of children which can extend into adult life.

4.24 The Committee notes recent research[51] on cumulative harm in the child protection system in Australia that explored—how cumulative harm to children was identified, assessed, and ultimately incorporated into child protection and legal structures; and what were the most effective responses to cumulative harm in child protection practice—found that although the construct of cumulative harm is increasingly incorporated into child protection practice and legislation, in practice, it remains crisis-driven.[52] The Committee further notes this research also found that 'there is negligible research on what constitutes an effective response to cases involving cumulative harm'.[53]

4.25 The Committee also notes other research which explored the prevalence of cumulative harm as a subtle and pervasive harm type and found that it was often dismissed or ignored in child protection assessment and reporting practices.[54]

4.26 The Committee considers it would be beneficial to (i) expressly define the concept of cumulative harm in child protection legislation, policy and practice in the ACT; (ii) prioritise prevention and early intervention as responses to reducing the cumulative impact of adverse childhood experiences; and (iii) that current gaps in the legislative response to cumulative harm identification and intervention should be identified and addressed.

Recommendation 1

4.27 The Committee recommends that the concept of cumulative harm should be expressly defined in the *Child and Young People Act 2008* and related care and protection policies and practices.

[51] Sheehan, R. (2019). 'Cumulative harm in the child protection system: The Australian context', *Child and Family Social Work,* 24 (10).

[52] Sheehan, R. (2019). 'Cumulative harm in the child protection system: The Australian context', *Child and Family Social Work,* 24 (10)

[53] Sheehan, R. (2019). 'Cumulative harm in the child protection system: The Australian context', *Child and Family Social Work,* 24 (10).

[54] Bryce, I. (2018). 'A Review of Cumulative Harm: A Comparison of International Child Protection Practices'. *Children Australia,* 43(1), pp. 23–31.

Recommendation 2

4.28 The Committee recommends that the Community Services Directorate—Child and Youth Protection Services should identify and address current gaps in the care and protection legislative response to cumulative harm identification and intervention.

CLARITY ABOUT CONCEPTS OF ABUSE AND NEGLECT

4.29 One of the determinations which needs to be made in child protection matters is about whether there has been abuse or neglect or whether there is risk of abuse or neglect.[55]

4.30 The CoA was asked by the mother to examine the reasoning and decision of Refshauge, J. on: (i) the definition of physical abuse adopted by Refshauge, J. in his judgements; and (ii) whether, even if Refshauge, J.'s definition of physical abuse was correct, 'on the facts of the case, the finding that the children were in need of care should not have been made'.[56]

4.31 The CoA held that the evidence was not sufficient to establish that the three children found by Refshauge, J. to be at risk of physical abuse were at risk of such abuse. Further, it found that Refshauge, J.'s definition of 'physical abuse' was not correct.[57]

COMMITTEE COMMENT

4.32 Whilst the Committee is not commenting on either the Supreme Court or CoA's decision making with regard its respective definitions of risk of abuse and/or neglect, as the Committee understands there is no 'categorisation available at the moment to determine the severity of various types of neglect or alleged abuse'.[58]

4.33 The Committee notes that categorisation to assist with determining the severity of various types of neglect or alleged abuse may assist with ensuring that evidence used in support of neglect and abuse determinations in care proceedings is more substantial and precise.

4.34 The Committee, however, further notes that determinations of the severity of abuse and/or neglect can be inextricably linked to context—which therefore, in the absence of having full understanding of the context, make it difficult to prescribe. Notwithstanding, the Committee is of the view that work should be undertaken to explore the feasibility of categorisation to assist with determining the severity of various types of neglect or alleged abuse.

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[55] Submission No. 13—Fiona Tito Wheatland—Inquiry into CYPS (Part 2), p. 22.

[56] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ], p. 9.

[57] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ].

[58] Submission No. 13—Fiona Tito Wheatland—Inquiry into CYPS (Part 2), p. 22.

Recommendation 3

4.35 The Committee recommends that the Community Services Directorate—Children, Youth and Protection Services should examine the feasibility of: (i) developing a system of categorisation to assist with determining the severity of various types of neglect or alleged abuse in care and protection matters; and (ii) adopt the system in the *Children and Young People Act 2008*.

DELAY

4.36 The matter of delay in the Supreme Court Appeal—in that it took nearly three years from the hearing of the initial appeal for the Supreme Court to reach a decision—was raised by the CoA in its written decision. The CoA stated:

> It must be observed that a delay of two years, eight months and 14 days in deciding an appeal from the Childrens Court involving care and protection orders made in favour of the Director-General is too great. The orders made by the Childrens Court had the effect of taking each of the five children out of the care of their mother. Whatever the outcome of the appeal to the Supreme Court, the parties and the children were entitled to a decision within a reasonable time.[59]

4.37 The CoA further noted that if the effect of considerable delay was not apparent 'from the nature of the proceedings and the nature of the orders made, s 9 of the CYP Act makes the need for prompt disposal of proceedings relating to children an explicit principle applying to decisions under the Act'.[60]

4.38 Section 9 of the CYP Act specifies:

> (1) In making a decision under this Act in relation to a child or young person, a decision-maker must have regard to the following principles where relevant, except when it is, or would be, contrary to the best interests of a child or young person:
>
> (d) delay in decision-making processes under the Act should be avoided because delay is likely to prejudice the child's or young person's well-being.

COMMITTEE COMMENT

4.39 The Committee notes that justice delayed is justice denied—in particular, where it concerns decisions about placing children in care and subsequent decisions for children to remain in care. Whilst the legal proceedings on the matter subject to this inquiry encompassed in total

[59] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ]—paragraph 9.

[60] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ]—paragraph 9.

approximately a five-year timespan—the Committee observes it does not automatically imply that the D-G and CYPS had been involved in a five-year legal battle with the mother, as some have suggested.

4.40 The Committee observes that the CoA stated that:

> …a delay of two years, eight months and 14 days in deciding an appeal from the Childrens Court involving care and protection orders made in favour of the Director-General is too great.[61]

4.41 The Committee emphasises that regardless of the outcome of the appeal to the Supreme Court, the mother and her children were entitled to a decision within a reasonable time.

4.42 The Committee notes that Refshauge, J. set out in his second written judgement a summary of court related matters to assist with understanding how these may have contributed to the delay:

> Proceedings were commenced in the Childrens Court on 12 July 2013 and the first Interim Orders were made by consent on that day. The proceedings were then adjourned and there were six further adjournments which appear to have been made so that directions could be given at further directions hearings from time to time to facilitate the hearing. The proceedings were ultimately heard on 23 and 24 April 2014. After yet a further directions hearing, final orders were made on 24 June 2014.
>
> The Appeal to this Court was commenced on 21 July 2014. Because the parties were awaiting the transcript of the proceedings in the Childrens Court, the index of appeal papers was not settled until 16 October 2014. The Appeal Books, involving three large lever-arch folders of a total of 1,056 pages, were filed on 5 November 2014.
>
> There were, in this Court, further directions hearings. Leave was given for the Notice of Appeal to be amended and for [the mother] to adduce further evidence, which required an application that had to be heard and which was ultimately granted. Leave was sought and given to [the mother] to issue subpoenas, following which leave was given to the parties to access the documents then produced.
>
> The Notice of Appeal was, however, not finally amended until 11 March 2015, the time for doing so having been extended on a number of occasions.
>
> Finally, the interlocutory matters having been resolved, the proceedings were heard on 1, 2 and 7 April 2015. At that hearing, the further evidence admitted consisted of two lever-arch folders of documents consisting of 594 pages with no index nor any specific attention being drawn to particular documents during the hearing, though [the

[61] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ]—paragraph 9.

> mother] relied on them all as particular evidence of the behaviour of her children while in out-of-home care and on visits with her.
>
> The issues in the proceedings were complex, not least because of the rather problematic way that the proceedings had been conducted before the Childrens Court, especially by counsel for [the mother], a matter to which I referred in the Primary Decision. There were also 14 grounds of appeal, three of them with up to eight particulars, which required careful and detailed consideration of the evidence in the Childrens Court and of the relevant law. The further evidence also required careful scrutiny and consideration.
>
> Regrettably, this delayed the completion of the judgment and reasons which were pronounced and delivered on 21 December 2017.
>
> Because of the need for further consideration of what consequential orders should be made, the parties were heard as to this matter on 22 December 2017 when I reserved my further decision.[62]

4.43 The Committee also notes Refshauge, J.'s acknowledgement that:

> The proceedings show a regrettable, likely unacceptable, delay in bringing them to a conclusion and I regret the part that I have played in this.[63]

NO EXTERNAL INDEPENDENT REVIEW PROCESS FOR CYPS DECISIONS

4.44 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.

4.45 According to the Human Rights Commission—the lack of independent merits review for many CYPS decisions could be incompatible with the right to a fair hearing under the *Human Rights Act*.[64] The Commission has 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).[65]

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[62] CP v Director-General of CSD (No. 2) [2018] ACTSC 201 [Appeal from the Childrens Court—Hearing date: 22 December 2017; Decision date: 6 April 2018; Reasons date: 20 July 2018; Before: Refshauge, J.]—paragraphs 27–34.

[63] CP v Director-General of CSD (No. 2) [2018] ACTSC 201 [Appeal from the Childrens Court—Hearing date: 22 December 2017; Decision date: 6 April 2018; Reasons date: 20 July 2018; Before: Refshauge, J.]—paragraph 35.

[64] 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.

[65] ACT Human Rights Commission—Response to QToN—PH of 4 February 2020—Inquiry into CYPS (Part 2), p. 5.

4.46 The 2016 *Review into the System Level Responses to Family Violence in the ACT* (the Glanfield report)[66] by Laurie Glanfield recommended that Justice and Community Safety Directorate and CSD work together to review what CYPS decisions should be subject to either internal or external merits review.[67] 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.[68]

4.47 In light of this recommendation, the ACT Government released the *Review of Children Protection Decisions in the ACT* discussion paper, seeking feedback on the current decision-making framework. Submissions closed 28 June 2019.

4.48 The Our Booris, Our Way Steering Committee (the Steering Committee) strongly supports external review mechanisms for certain CYPS decisions. In accord 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.
- 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.
- 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.[69]

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[66] Laurie Glanfield, Report of the Inquiry: Review into the system level responses to family violence in the ACT (April 2016), available at: https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0010/864712/Glanfield-Inquiryreport.pdf

[67] 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.'

[68] Laurie Glanfield, Report of the Inquiry: Review into the system level responses to family violence in the ACT (April 2016), p 74, available at: https://www.cmtedd.act.gov.au/__data/assets/pdf_file/0010/864712/Glanfield-Inquiryreport.pdf

[69] Our Booris, Our Way. (2019) Submission to Review of Child Protection Decisions in the ACT Discussion Paper. Available at: http://cdn.justice.act.gov.au/resources/uploads/JACS/Submission_-_Review_of_child_protection_decisions_in_the_ACT_-_Our_Booris_Our_Way_-_13062019.PDF (Accessed: 16 January 2020).

COMMITTEE COMMENT

4.49 The Committee notes that the Minister for Children, Youth and Families will report back to the Legislative Assembly by the last sitting day in March 2020 on the next stages of the Government's review of children protection decisions—in particular how the 'voices of children and young people have been included in the consultation process; the progress and outcomes of the review and the consultation processes; and what steps will follow'.[70]

4.50 The Committee further notes the Human Rights Commission 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 Human Rights Act.[71]

4.51 Furthermore, the Human Rights Commission 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'.[72]

4.52 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 the right to a fair hearing under the HR Act.

4.53 The Committee is also inquiring into sharing information under the care and protection system in part two of its inquiry into child and youth protection services. The Committee will consider further the report of the Minister regarding what CYPS decisions should be subject to either internal or external merits review and other evidence it has received from written submissions and witnesses as part of that inquiry.

4.54 The Committee emphasises that the ACT is a human rights jurisdiction and there needs to be appropriate safeguards in care and protection legislation to ensure that procedural fairness and natural justice considerations are an inbuilt part of decisions made by the D-G pursuant to a care and protection order made by the Childrens Court.

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[70] JACS—Review of Child Protection Decisions in the ACT homepage. Available at: http://www.justice.act.gov.au/news/view/1777 (Accessed: 19 January 2020). https://www.justice.act.gov.au/have-your-say/review-child-protection-decisions-act

[71] ACT Human Rights Commission—Response to QToN—PH 4 February 2020—Inquiry into CYPS (Part 2), p. 5.

[72] ACT Human Rights Commission—Response to QToN—PH 4 February 2020—Inquiry into CYPS (Part 2), p. 5.

Recommendation 4

4.55 The Committee recommends that the ACT Government ensure that action arising from its *Review of Children Protection Decisions in the ACT* addresses human rights principles, and directly addresses the human rights requirements (including public authority obligations) pursuant to the ACT *Human Rights Act 2008* that a review of this nature must consider.

IMPLEMENTATION AND ADMINISTRATION OF THE LEGISLATIVE FRAMEWORK

4.56 As noted at paragraph 4.1—the Committee's systemic analysis is focused on two elements—this section is focused on potential issues arising from the CoA decision concerning the implementation and administration of the legislative framework—structures, systems and individual practice. Further, if there is a gap between implementation and administration, is it a matter of law or implementation or both?

EXCESSIVELY ADVERSARIAL APPROACH TO LITIGATION

4.57 Evidence to the Committee has advanced that the court action suggests an 'excessively adversarial approach to litigation'[73]—in that the manner in which the D-G conducted this matter was unduly adversarial and not in accordance with the D-G's model litigant obligations.[74]

4.58 Further, it has been recommended to the Committee 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.[75]

4.59 In response, the D-G strongly rejected the assertion that the manner in which the D-G conducted the matter subject to this inquiry, was "overly adversarial" and not in accordance with the D-G's Model Litigant Obligations.[76] In support of this position it was observed that the:

> …*Law Officer (Model Litigant) Guidelines 2010 (No 1)* (Guidelines), permit the Territory and its agencies to act firmly and properly to protect their interests. The Guidelines do

[73] Submission No. 1—Legal Aid ACT—Inquiry into CYPS (Part 1), pp. 5–6.
[74] *Law Officer (Model Litigant) Guidelines 2010 (No 1)* (ACT).
[75] Submission No. 4—ACT Human Rights Commission—Inquiry into CYPS (Part 2), p. 8.
[76] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 15.

> not prevent the Territory from taking all legitimate steps in pursuing litigation. Further, the Guidelines to do not prevent the Territory from commencing an appeal that may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Territory or an agency.[77]

4.60 Further, the D-G has a statutory function 'to take steps to protect children and create systems which allow this to occur'. Accordingly, the D-G is required:

> …to ensure that each child who may be at risk is afforded the necessary protection and care within the present legislative framework. It is reasonable, therefore, for the Director-General to pursue proceedings as provided by law to protect children who her delegates assess to be at risk of abuse or neglect.[78]

4.61 The D-G 'maintains that the Territory acted honestly and fairly throughout the duration of all proceedings' as it concerns the matter subject to this inquiry.[79]

COMMITTEE COMMENT

4.62 As noted previously, whilst the administrative and legal proceedings on the matter subject to this inquiry encompassed in total approximately a five-year timespan—the Committee observes it does not automatically imply that the D-G and CYPS had been involved in a five-year legal battle with the mother, as some have suggested.

EVIDENTIARY ISSUES

4.63 The evidence upon which the D-G relied in the Childrens Court came under some scrutiny on appeal in the Supreme Court. In some significant respects, it was found lacking; Refshauge, J. undertook a very careful analysis of that evidence and concluded that major portions were deficient.[80] Some of the main criticisms regarding evidence presented on the D-G's behalf included:

a) As it concerned the 36 Care and Protection Assessment Reports—Refshauge, J. noted that it 'is difficult to summarise the reports'—providing some comment 'to give a picture'.[81] This included that '[s]ome of the reports were generalised without a clear outcome' and Refshauge, J. noted that '[s]o far as being helpful in these proceedings, it was difficult to see the relevance' of a report made on 13 July 2004 and regarding other reports.[82]

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[77] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 15.

[78] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 15.

[79] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 15.

[80] Submission No. 1—Legal Aid ACT—Inquiry into CYPS (Part 1), pp. 8–9.

[81] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 70.

[82] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 71.

b) As it concerned the 36 Care and Protection Assessment Reports—Refshauge, J. noted that whilst the 'reference to 36 reports' is 'arguably accurate but misleading in itself'. Refshauge, J. found that some reports 'were also described as being the same or multiple reports of earlier reports, suggesting that there were, in truth, 33 reports. This inaccuracy is a concern when, given the nature of the reports, as I have described them, the intentions seems to have been to use the number of reports as some evidence of the need for court intervention, since the detail is often so vague and unhelpful'.[83]

c) Information concerning complaints provided in some of the Care and Protection Assessment Reports 'appeared to be allegations and there was no evidence that they had been verified or even assessed in some cases'.[84]

d) Some of the evidence presented to support the children's needs was 'general in description with little attention to the effects or consequences of the issues and a relation of that to the statutory criteria'.[85]

e) As it concerned medical needs—Refshauge, J. noted '[i]t was asserted that some of [the children's] medical needs had not been met but details were scant so it was not clear the extent or seriousness of this. Examples given did not appear to be particularly serious, though the apparent care of [one child's] asthma did not appear to be optimal; precise, helpful evidence was lacking'.[86]

f) The manner in which findings and/or evidence in 'earlier proceedings' was relied upon was found to be 'problematic' and needed 'to be considered very carefully to avoid unfairness and prejudice to the parent'.[87] Refshauge, J. implied that the 'passage of time itself was relevant and had to be evaluated'.[88]

g) After reviewing all the evidence, Refshauge, J. was left with a number of unanswered questions directly related to the relevant statutory test. Refshauge, J. said, '… these questions were simply inadequately addressed or not addressed at all…that, however does not mean that the evidence actually adduced could not have sustained some findings were each child to be considered separately and evidence of the consequences adduced'.[89]

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[83] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 76.

[84] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 75.

[85] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 509.

[86] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 96.

[87] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 342.

[88] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 343.

[89] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.]—paragraph 580.

h) In his written judgment of 20 July 2018, Refshauge, J. concluded that 'a careful and thorough assessment of the evidence did not show that [one of the children] was in need of care and protection'.[90] This follows Refshauge, J.'s comments in his December 2017 judgement where he stated: '[t]he difficulty in this case is that there are issues which could have disclosed the need for care and protection…'.[91]

i) Refshauge, J. noted in his 21 December 2017 judgment that the assessments by CYPS of four of the children by the case worker were 'individualised and addressed the issues relating to each child separately and comprehensively'. The evidence provided 'on the children's development were also quite individualised'.[92]

j) Refshauge, J. also noted that in the course of the appeal, the mother challenged the Childrens Court's reliance on the Care and Protection Assessment Reports completed by the case manager by 'submitting that they were not cogent, the foundation for the opinions expressed were questionable, the correctness of the facts were disputed and the qualifications and training of the author of them did not justify her expressing the opinions that she did'.[93]

k) Refshauge, J. determined that 'while an appeal is a re-hearing, it is not the occasion to conduct a different case to that put at trial'. Refshauge, J. further noted that '[a]n appeal is not the opportunity to raise points not taken at trial and to conduct a different case than that conducted at trial'.[94] Refshauge, J. observed that no objection was taken by the mother's barrister at the Childrens Court hearing regarding 'the expertise' of the case manager, 'nor was any objection taken to the admissibility of the Care and Protection Assessment Reports'.[95]

4.64 In its written submission, the Government acknowledged that Refshauge, J. was critical of some evidence presented by the D-G in the Childrens Court in 2014. Further, the Government stated:

> In relation to the critique of the evidence presented by the Director-General regarding CYPS' analysis of information and the application of the relevant law, the Director-

[90] CP v DG, CSD [2018] ACTCA 31 [Hearing date: 7 August 2018; Decision date; 28 August 2018; Before: Burns, Elkaim & Mossop, JJ]—paragraph 108.

[91] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 575.

[92] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraphs 109; 110.

[93] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 562.

[94] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 563.

[95] CP v Director-General of CSD and Ors [2017] ACTSC 394 [Appeal from the Childrens Court—Hearing dates: 1, 2 & 7 April 2015; Decision date: 21 December 2017; Before: Refshauge, J.], paragraph 565.

General is very willing to accept Justice Refshauge's comments and consider them when implementing improvements to practice within CYPS.[96]

4.65 The Minister for Children, Youth and Families advised that since the final decision of the Childrens Court in 2014, significant improvements in practice had been made regarding the evidence presented to Courts. A summary of the main changes that have resulted regarding the presentation of evidence to Courts are:

(a) A number of the CYPS Practice Guidelines have been reviewed and amended to provide information regarding child protection principles in an easily understood format. Practice Guidelines on new, or emerging, issues have also been developed and added to the available resources. These changes have allowed case managers and other CYPS staff to quickly gain an accurate understanding of key concepts and apply them to their daily work.

(b) The CYPS Family Assessment Procedure has been reviewed and amended. The current version (as at June 2019) requires case managers to form an objective and professional analysis of a child's circumstances and care arrangements. The Procedure steps through each phase of the family assessment and provides detailed prompts as to the information necessary for a thorough analysis to be completed. The current policy also encourages case managers to relate the facts and any findings to clinical research, which also prompts reflection on the evidence relied upon and its relevance to fundamental child protection principles.

(c) The Application Review Committee (ARC) is taking a more active role in ensuring the quality of material being presented to families and Courts, as well as legislative compliance.

(d) CYPS now conducts two forms of "Giving Evidence" training as part of its regular staff development and training program: a "general" training session and an "intensive" course. As part of both courses, staff are provided with advice on writing affidavits and family assessments, as well as guidance on giving helpful and effective oral evidence in Court. Staff are informed about basic principles of evidence, such as preferring direct evidence where possible. These training opportunities allow feedback from Courts regarding the Director-General's evidence to be provided to staff and subsequent changes to practice can be embedded during these sessions.

(e) CYPS also runs specific training on writing family assessments. This is a day long program run by a CYPS Principal Practitioner which provides professional instruction on completing high quality family assessments.[97]

[96] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 17.
[97] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), p. 17.

COMMITTEE COMMENT

4.66 The Committee welcomes the Government's acknowledgement that Refshauge, J. was critical of some evidence presented by the D-G in the Childrens Court in 2014. Further, the Committee acknowledges that the D-G has given an undertaking to accept Refshauge, J.'s comments and consider them when implementing improvements to practice within CYPS.

4.67 The Committee notes that the Minister for Children, Youth and Families advised that since the final decision of the Childrens Court in 2014—improvements in practice had been made regarding the evidence presented to Courts. These include: review and amendment to a number of CYPS Practice Guidelines; review and amendment to the CYPS Family Assessment Procedure; the ARC taking a more active role in ensuring the quality of material being presented to families and Courts, as well as legislative compliance; conducting two forms of "Giving Evidence" training as part of CYPS regular staff development and training program; and running specific training on writing family assessments.

JURISPRUDENCE IN CARE AND PROTECTION FIELD OF WORK

4.68 There is almost no ACT jurisprudence of the care and protection field of work because decisions in the Childrens Court are not published decisions and are therefore not publicly available. This circumstance makes it difficult to make decisions based on precedent when no precedent is published—with only the CYP Act to fall back on because there is no common law in the care and protection space.

4.69 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 also[98] 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…'.[99]

4.70 The Committee sought clarification that Childrens Court decisions only get published if they go to the Supreme Court or the 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.

[98] Transcript of Evidence, 29 January 2020—Inquiry into CYPS (Part 2), p. 60.

[99] Ms Claudia Maclean, Transcript of Evidence, 29 January 2020—Inquiry into CYPS (Part 2), p. 60.

> 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.[100]

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

4.72 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.[101]

COMMITTEE COMMENT

4.73 The Committee notes the limitations concerning jurisprudence in the care and protection field of work due to decisions of the Childrens Court not being published decisions.

4.74 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.

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[100] Ms Anne Martens, Transcript of Evidence, 5 February 2020—Inquiry into CYPS (Part 2), p. 127.
[101] Transcript of Evidence, 29 January 2020—Inquiry into CYPS (Part 2), p. 61.

4.75 The Committee acknowledges the issues raised as it concerns privacy of parties to which court matters relate and the significant resourcing implications for the Childrens Court were magistrates required to write a decision on every matter that comes before them.

4.76 Given the value of published court decisions in providing a clear body of case law, the Committee believes the feasibility of the merits, or otherwise, of the publication of Childrens Court decisions—that balances privacy and the resourcing implications—should be explored further.

Recommendation 5

4.77 The Committee recommends that 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 ACT Legislative Assembly.

ADDRESSING OVER-REPRESENTATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN IN CARE

4.78 The 2020 Productivity Commission's report on Government Services—Child Protection Services reported that in:

> …the 2018-19 reporting period there were 9.4 children on care and protection orders for every 1,000 children in the ACT. More concerning, there were 91.9 Aboriginal and/or Torres Strait Islander children on a care and protection order for every 1,000.[102]

4.79 The Committee also notes that Auditor-General's report No.1 of 2013: *Care and Protection System* (the Audit report) was presented to the ACT Legislative Assembly on 7 March 2013 found that strategies:

> …were needed for reducing the over representation of Aboriginal and Torres Strait Islander children and young people, particularly males, in the care of the Director General. Information on the culture and language/s spoken by children and young people who are subject of care and protection processes needs to be recorded and reported numerically to enable better service planning to support people from culturally and linguistically diverse backgrounds.[103]

4.80 In its written submission, the Government details work being undertaken to provide: (i) ongoing training to CYPS staff on culture and unconscious bias; (ii) more funding to

[102] Dr Emma Campbell, Transcript of Evidence, 4 February 2020—Inquiry into CYPS (Part 2), p. 79.
[103] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, pp. 2–3.

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.[104]

4.81 The Committee notes that a number of programs are in place to provide early support for families experiencing care and protection interventions or emergency action—including: Early Support initiative; A Step Up for Our Kids: Out of Home Care Strategy 2015–2020; Family Group Conferencing (FGC); and Functional Family Therapy—Child Welfare (FFT–CW).[105]

COMMITTEE COMMENT

4.82 Over-representation of Aboriginal and Torres Strait Islander children and young people in care has been an ongoing issue for many years in the ACT. The Committee is firmly of the view that more needs to be done with regard to addressing this on-going over-representation.

4.83 The Committee notes that a number of programs are in place to provide early support for families experiencing care and protection interventions or emergency action—including: Early Support initiative; A Step Up for Our Kids: Out of Home Care Strategy 2015–2020; Family Group Conferencing (FGC); and Functional Family Therapy—Child Welfare (FFT–CW).

4.84 Whilst the Committee commends all these programs—it believes that FGC is an important initiative for addressing over-representation of Aboriginal and Torres Strait Islander children and young people in care.

4.85 The success of the concept of family-led decision making in care and protection matters as diverting children and young people from further engagement in the child protection system is supported by evidence in other jurisdictions. For example, as it concerns, care and protection—in 1989, New Zealand (NZ) introduced the Children, Young Persons and their Families Act.[106] As part of the Act, all families have a legal entitlement to a restorative family group conference. The use of family-led decision making, before the state can take over and before a matter is referred to court, reportedly had the effect of halving the institutional care population which continued to decline for a period of time after that.[107]

4.86 Currently in the ACT, FGC is offered to Aboriginal and Torres Strait Islander families as an alternative to court processes, before these processes and occasionally where they may have commenced, in the Childrens Court. However, unlike the situation in NZ, it is not a mandated

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[104] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1).

[105] Submission No. 2—ACT Government—Inquiry into CYPS (Part 1), pp. 19–20.

[106] The *Oranga Tamariki Act 1989* or *Children's and Young People's Well-being Act 1989* (titled the *Children, Young Persons, and Their Families Act 1989* prior to 14 July 2017) is an Act of the New Zealand Parliament, passed in 1989. The Act provided for the care and protection of children as well as youth justice.

[107] Submission No. 9—Canberra Restorative Community Network—Inquiry into CYPS (Part 2), p. 3.

requirement, but a voluntary program and families must provide their consent to participate.[108]

4.87 The Committee welcomes the Government's commitment to FGC, including work undertaken as part of the 12-month pilot program which commenced in November 2017 and on-going work to embed FGC in CYPS' practice with two Aboriginal and Torres Strait Islander staff members employed to facilitate this work.[109]

4.88 As to engagements with the FGC program to date—the Committee notes that:

> From the beginning of the pilot in November 2017 to 14 December 2019, 37 families have participated in an FGC, involving 77 children. Two additional families are currently waiting to commence their FGC process.[110]

4.89 The Committee believes there is merit in exploring the feasibility of codifying in statute that all families have a legal entitlement to family group conferencing before the Territory can intervene and before a matter is referred to court in care and protection matters.

Recommendation 6

4.90 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 Childrens Court in care and protection matters.

STABILITY OF PLACEMENTS FOR CHILDREN AND YOUNG PEOPLE IN CARE

4.91 The stability of placements for children and young people in care together with improved transparency as to decision-making regarding placements is an important systemic issue arising from the matter subject to this inquiry.

4.92 The Committee notes that the Auditor-General in report No. 1 of 2013 recommended that CSD should improve its ability to give paramount consideration to the best interests of a child or young person by: (i) monitoring the stability of placements for each child and young person including the number of placements and the length of time at each placement; and (ii) reducing the level of placement instability for children and young people in the care of the Director General in out-of-home care.[111]

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[108] Transcript of Evidence, 12 November 2019—Inquiry into 2018-19 Annual and Financial reports, p. 174; ACT Government—Response to QToN No. 5—PH 5 February 2020—Inquiry into CYPS (Part 2).

[109] ACT Government—Response to QToN No. 5—PH 5 February 2020—Inquiry into CYPS (Part 2).

[110] ACT Government—Response to QToN No. 5—PH 5 February 2020—Inquiry into CYPS (Part 2).

[111] Recommendation 1 (j) and (k)—ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System.*

4.93 An expert on care and protection services—Emeritus Professor Dorothy Scott—has observed that:

> Placement instability is now known to be the major cause of serious psychological harm inflicted on children [and young people] in care.[112]

4.94 As to views on number of placements and length of placements, the Report on Government Services has stated that:

> …a low number of placements (one or two) is desirable but must be balanced against other placement quality indicators, such as placements in compliance with the Aboriginal Child Placement Principle, local placements and placements with siblings. Multiple short term placements may occur for appropriate reasons like compatibility or to remove a child or young person from an unsatisfactory or unsupportive placement. Older children and young people are also likely to have multiple placements as they move towards independence.[113]

COMMITTEE COMMENT

4.95 The Committee considers the stability of placements—including the number of placements a child or young person may have and the length of time at each placement—as fundamental considerations to the best interests of a child or young person.

4.96 The Committee also notes that transparency as to decision-making by the D-G and CYPS regarding placements is an important contributor to engendering confidence in the ACT care and protection system.

4.97 As noted earlier in this chapter, the ACT is a human rights jurisdiction and there needs to be appropriate safeguards in care and protection legislation to ensure that procedural fairness and natural justice considerations are an inbuilt part of decisions made by the D-G pursuant to a care and protection order made by the Childrens Court—including decision-making regarding out-of-home placements.

Recommendation 7

4.98 The Committee recommends, to the extent that work is not already taking place, that the Community Services Directorate—Children, Youth and Protection Services should ensure that decision-making regarding the number of placements a child or young person may have and the length of time at each placement actively considers all placement quality indicators

[112] Quoted in ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, p. 71.
[113] Quoted in ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, p. 71.

including: placements in compliance with the Aboriginal Child Placement Principle; local placements; and placements with siblings.

SYSTEM CULTURE

4.99 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 has led to around 1 in 10 of our Aboriginal children and young people being in care in the ACT.[114]

4.100 The ACT is a human rights jurisdiction and has 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 Human Rights Commission 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.[115]

4.101 In 2016 the ACT Legislative Assembly called on the Canberra community:

> …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 safety, more connected communities.[116]

4.102 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

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[114] Submission No. 9—Canberra Restorative Community Network—Inquiry into CYPS (Part 2), p. 4.

[115] ACT Law Reform Advisory Council. (2018) Final report: *Canberra–becoming a restorative city*, p. 16.

[116] ACT Legislative Assembly Debates. (2016). Restorative Justice motion moved by Ms Mary Porter MLA, 10 February, pp. 122–126.

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.

4.103 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 FGC . Specifically, the Council made the following recommendations:

> Recommendation 5
>
> A commitment to adhere to the set of values and principles outlined in Chapter 2 be inserted in the *Children and Young People Act 2008* under Part 1.2, 'Objects, Principles and Considerations'.
>
> Recommendation 6
>
> The use of FGCs using the framework contained in Chapter 3 of the *Children and Young People Act 2008* become the default form of response for child protection in the ACT.
>
> Recommendation 7
>
> Evaluation and research, including a series of randomised controlled trials, be conducted to examine the effectiveness of FGCs, using the framework provided in Chapter 3 of the *Children and Young People Act 2008*.
>
> Recommendation 8
>
> The FGC Standards under section 887 of the *Children and Young People Act 2008* be amended, as informed by the result of any research carried out and in line with the set of values and principles outlined in Chapter 2 of this report.[117]

COMMITTEE COMMENT

4.104 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.

4.105 The Committee considers that within the ACT's broad human rights and obligations framework, that pursuing a relational focus at a city level could seek to prioritise restorative practices, policies and procedures across many facets of government decision-making—

[117] ACT Law Reform Advisory Council. (2018) Final report: *Canberra–becoming a restorative city*.

including care and protection matters. The Committee believes that this may bring lasting change to a system in need of change.

4.106 The Committee supports the recommendations the ACT Law Reform Advisory Council has made with regard to achieving a more relationally-focussed child protection system—in particular, the use of some form of FGC. The Committee notes that FGC is discussed earlier in this report at paragraph 4.84. Further, the Committee believes the Government should provide a timely response to the recommendations of the ACT Law Reform Council's Final Report and table the response in the Assembly.

4.107 Further, the Committee considers that the Government should articulate the linkages between various initiatives currently taking place in the care and protection space—including the *Our Booris Our Way Review* and the *Review of Child Protection Decisions in the ACT*—in the context of the ACT as a human rights jurisdiction and Canberra becoming a restorative city.

Recommendation 8

4.108 The Committee recommends, to the extent that work is not already taking place, that the ACT Government should articulate in applicable governing policies, processes and practices the linkages between various initiatives currently taking place in the care and protection space—including the *Our Booris Our Way Review* and the *Review of Child Protection Decisions in the ACT*—in the context of the ACT as a human rights jurisdiction and Canberra becoming a restorative city.

Recommendation 9

4.109 The Committee recommends that the ACT Government table in the ACT Legislative Assembly its response to the ACT Law Reform Advisory Council final report—*Canberra–Becoming a restorative city* (provided to government in October 2018) by the end of June 2020.

OTHER MATTERS

REVIEW OF AUDITOR-GENERAL'S REPORT NO. 1 OF 2013: *CARE AND PROTECTION SYSTEM*

4.110 Auditor-General's report No.1 of 2013: *Care and Protection System* (the Audit report) was presented to the ACT Legislative Assembly on 7 March 2013. The Audit report presented:

> …the results of a performance audit that reviewed the ACT Government's care and protection services for children and young people who are considered to be at high risk and vulnerable.[118]

4.111 The Audit was a multiple agency audit involving: the CSD , the statutory office-holders involved in care and protection services for children and young people (Children and Young People Commissioner and the Public Advocate); and the Justice and Community Safety Directorate (in the context of its accountability for reporting on the Public Advocate and Human Rights Commission performance indicators).

4.112 The Audit made a number of conclusions in relation to the following five audit themes: (i) best interests of a child or young person; (ii) knowledge management and governance; (iii) the working environment; (iv) working together; and (v) statutory office-holders.

4.113 The Audit made 11 recommendations (each with multiple parts) to address the audit findings—across the five audit themes, and a number of parts of recommendations were identified as 'high priority'.

COMMITTEE COMMENT

4.114 The Committee notes that, amongst other audit conclusions, the Audit found that the 'number of Aboriginal and Torres Strait Islander children and young people and in particular males, placed in the care of the Director General, *[at that time were]*…significantly over represented' when contrasted with non-Aboriginal and Torres Strait Islander children and young people.[119]

4.115 The Committee further notes that the Audit was of the view that:

> Strategies are needed for reducing the over representation of Aboriginal and Torres Strait Islander children and young people, particularly males, in the care of the Director General. Information on the culture and language/s spoken by children and young people who are subject of care and protection processes needs to be recorded and reported numerically to enable better service planning to support people from culturally and linguistically diverse backgrounds.[120]

4.116 The Committee also notes that, as it concerns statutory officers[121] tasked with monitoring and overseeing the support services provided by the CSD to children and young people in care and protection, the Audit found that:

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[118] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, March 2013, p. 1.
[119] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, March 2013, p. 10.
[120] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, March 2013, p. 42.
[121] The Public Advocate and the Children and Young People Commissioner (in the Human Rights Commission).

> …the effectiveness and efficiency of this is restricted because of a lack of definition in the legislation, particularly in relation to what are 'systemic matters' and what are the obligations of the Human Rights Commission in its 'consideration' of such matters. Assuming that some 'systemic matters' may warrant a major inquiry/investigation by the Human Rights Commission, a mechanism for it to secure additional funding when warranted, needs to be identified.[122]

4.117 The Audit recommended as a high priority that the Justice and Community Safety Directorate should identify:

> …how funding, when needed, is to be provided to the Human Rights Commission to undertake major inquiries/investigations on 'systemic matters'.[123]

4.118 In relation to this recommendation the Directorate indicated that 'the *Financial Management Act 1996* provides a clear framework for the appropriation of funds through the budget process'.[124]

4.119 The Public Accounts Committee (PAC) in its report reviewing the Audit report was of the view that the Directorate's response avoided:

> …the substance of the recommendation. The Audit findings indicate not only that statutory office-holders in this area are limited, by resources, in their capacity to inquire into systemic matters, but also that their reliance on the conventional budget bid process makes them reliant on the good graces of government for inquiries of any scale.[125]

4.120 The PAC recommended that the ACT Government 'devise, in consultation with statutory office-holders, and implement a new model for funding inquiries into systemic matters by statutory office-holders'.[126] In its response, the Government noted the recommendation stating that:

> After comprehensive consultation, the ACT Government has decided to introduce a new rights protection framework that will strengthen the leadership, governance, and coordination of the operations of these key rights protection services.
>
> The Human Rights Commission will consist of a president and three commissioners. All existing commissioner titles will be retained and shared between the three commissioners.
>
> The president will be responsible for the financial management and administration of the Commission. They will be required to develop an agreed governance and corporate

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[122] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, March 2013, p. 165.

[123] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, March 2013, p. 36; 189.

[124] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, March 2013, p.38.

[125] 8th Assembly PAC Report No. 15—*Review of Auditor-General's report No. 1 of 2013: Care and Protection System*, p. 20.

[126] Recommendation 1—8th Assembly PAC Report No. 15—*Review of Auditor-General's report No. 1 of 2013: Care and Protection System*, pp. 19–20.

> support protocol between the Commission and JACS, rather than the administrative arrangements previously in place. The protocol will deal with agreed performance indicators and processes for resolving disputes about the president's allocation of resources between the commissioners and for reporting on and auditing of Commission performance. It will also set out a process for requesting supplementary and special project funding.[127]

4.121 Further, the PAC noted the Directorate's response to Audit Recommendations 8 (b) and (c) recommending a clarification in statute of 'consideration' and 'systemic matters' reserves a right to consider whether these should be clarified in statute. The PAC was of view the Audit report proved beyond doubt that this was an important area requiring legislative amendment if a proper differentiation between the Public Advocate and the Human Rights Commission was to be achieved.[128]

4.122 Accordingly, the PAC recommended that the ACT Government 'introduce in the ACT Legislative Assembly—legislative amendments which, if passed, would provide reliable and constructive definitions for 'consideration' and 'systemic matters' for the purposes of subsection 11(2) of the *Public Advocate Act 2005'*.[129] In its response, the Government again noted the recommendation stating that:

> The specific issue of the definitions for 'consideration' and 'systemic matters' for the purposes of section 11(2) of the *Public Advocate Act 2005* will be mitigated by the move of the advocacy functions of the Public Advocate into the Human Rights Commission minimising the risk of confusion about what constitutes a systemic matter, and who has responsibility for dealing with systemic matters.[130]

4.123 The Committee is of the view that the Government should review its responses to the Audit report recommendations and those of the PAC inquiring further into the audit report in light of the matter subject to this inquiry and inform the Assembly whether it considers any further action is required in response to recommendations made by the Auditor-General and the PAC, respectively.

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[127] ACT Government. (2016) Response to PAC Report No. 15—*Review of Auditor-General's report No. 1 of 2013: Care and Protection System.*

[128] 8th Assembly PAC Report No. 15—*Review of Auditor-General's report No. 1 of 2013: Care and Protection System*, pp. 20–21.

[129] Recommendation 2—8th Assembly PAC Report No. 15—*Review of Auditor-General's report No. 1 of 2013: Care and Protection System*, pp. 19–20.

[130] ACT Government. (2016) Response to PAC Report No. 15—*Review of Auditor-General's report No. 1 of 2013: Care and Protection System.*

Recommendation 10

4.124 The Committee recommends that the ACT Government should: (i) review its responses to recommendations made in Auditor-General's report No. 1 of 2013: *Care and Protection System* and those of the Standing Committee on Public Accounts inquiring further into the Audit Report in light of the matter subject to this inquiry; and (ii) inform the ACT Legislative Assembly whether it considers any further action is required in its response to recommendations made by the Auditor-General and the Public Accounts Committee, respectively.

5 CONCLUSION

> The removal of a child from their parents is one of the gravest decisions that can be made. In our efforts to protect children, I believe that we have not yet fully reflected or acknowledged, in the policy and practices of child protective services, the momentousness of the decision that leads to the removal of a child from a parent.
>
> As a result of this failure, we have neglected our responsibility as a community to provide the support necessary to families to manage the challenges that they face that lead to the involvement of child protection agencies. As a result of that failure, we have not ensured that there is robust accountability and appropriate transparency for a child protection system that can take a child from its parents and/or its extended family permanently.
>
> Dr Emma Campbell, CEO ACTCOSS[131]

5.1 Sadly, the matter subject to this inquiry involved the removal of five children from the care of their mother. In that context, the Committee was asked by the Assembly to analyse the 2018 CoA decision—to identify potential systemic issues that may need to be addressed, and report these to the Assembly. At Chapter 3, the Committee set out how it determined to progress this inquiry whilst respecting a range of overarching and specific authorities and guiding principles that are relevant to the inquiry.

5.2 The Committee has approached the remit given to it by the Assembly with great care and empathy and with a deeply held concern to ensure that any potential systemic issues arising are identified and addressed. In its consideration of the matter the Committee has applied careful, rigorous and thoughtful consideration and has been acutely aware and alert to the sensitivity of the matters raised by this inquiry.

5.3 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'. Whilst 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'.[132]

5.4 The safety and well-being of children and young people in the ACT is a critical community issue. Protecting children is everyone's responsibility—parents, communities, governments and business all have a role to play.

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[131] Dr Emma Campbell, Transcript of Evidence, 4 February 2020—Inquiry into CYPS (Part 2), p. 79.

[132] ACT Auditor-General's Report No. 1 of 2013: *Care and Protection System*, March 2013, p. 1.

5.5 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.

5.6 The Committee further notes 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, as mentioned in paragraph 5.4, is that all in the Canberra community have a role to play in the well-being and safety of children and young people in our community.

5.7 The Committee is still in discussion with the Minister for Children, Youth and Families about the provision of material which will inform its final report on this matter.

5.8 The Committee has made **10** recommendations in relation to its interim report into child and youth protection services (part 1).

5.9 The Committee wishes to thank all of those who have contributed to its inquiry to date.

5.10 In concluding, the Committee notes the wisdom of Nelson Mandela:

There can be no keener revelation of a society's soul than the way in which it treats its children.[133]

Ms Bec Cody MLA

Chair

30 March 2020

[133] Mandela, N. (1995) Address by President Nelson Mandela at the launch of the Nelson Mandela Children's Fund, Pretoria, 8 May. Available at: http://www.mandela.gov.za/mandela_speeches/1995/950508_nmcf.htm (Accessed: 19 January 2020).