



STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

JEREMY HANSON CSC MLA (CHAIR), MARISA PATERSON MLA (DEPUTY CHAIR), JO CLAY MLA

**Inquiry into referred 2019–20 Annual and Financial Reports and Budget Estimates 2020-21**  
**ANSWER TO QUESTION ON NOTICE**

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Asked by Mrs Elizabeth Kikkert MLA: To ask the Public Advocate and Children and Young People Commissioner

In relation to: **The views of children and young people and their role in decision-making**

Ref: ACT Human Rights Commission Annual Report 2019–20, pp. 14–15, 74

1. The commissioner wrote in the 2019–20 annual report that her focus is ‘on designing and delivering ways to empower children and young people by enabling them to have their views heard’ (p. 14). I was recently told in a briefing regarding a five-year-old child who had repeatedly locked herself in the bathroom to avoid being taken away from her foster carers that those who made the decision to remove this child by physical force could not consider the child’s view because she is too young. In the commissioner’s professional judgement, does a five-year-old child have a right to have her view heard and considered?
2. From a human rights perspective, what role should a child or young person’s view play in decision-making in the statutory child protection system?
3. When I asked what mechanisms are in place to seek the views of children and young people in such matters, I was told that this mostly occurs through observations – which the commissioner identifies as the primary means in preparing annual review reports as well (p. 74). In the commissioner’s professional judgement, what guidelines and procedures need to be in place to make sure that observations accurately reflect children’s and young people’s views?
4. Are such guidelines and procedures in place in the ACT?
5. Generally speaking, are there other ways besides or in addition to observations that are more effective and/or accurate at obtaining the views of children and young people? If so, what are these other ways, and which cohorts are they best suited for?
6. Has the commissioner ever been asked to help design a better approach for the ACT Government? If so, what was the outcome?
7. The CREATE Foundation’s survey released in Dec. 2018 (‘Out-of-Home Care in Australia: Children and Young People’s Views after Five Years of National Standards’) found that the ACT has the highest rate of children and young people who ‘indicated that they had been moved from a placement they didn’t want to leave’ and the second lowest rate of those who reported that they ‘had been consulted before the action was taken’ (p. 30).



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In addition, the ACT has the second lowest rate of children and young people who reported that they had been 'heard' in decision-making (p. 59). In the commissioner's professional judgement, what changes are needed to improve these three specific data?

8. I have been informed that the foster carers mentioned in question 1 have been stripped of contact rights and were told that it was specifically because they had spoken publicly about what they saw happen in their home. From a human rights perspective, what role should carers play in making sure that the views of a child or young person are heard, and what rights do they and should they have to speak publicly about such matters?

ACT Human Rights Commission: The answer to the Member's question is as follows:—

Thank you for these questions and your interest in ensuring that the views of children are taken into account in decision-making. As you have noted, this is a core part of the Children and Young People Commissioner's role, and the Commissioner continues to advocate and work towards embedding the right for children and young people to be heard in decisions that affect them across the Territory.

1. While, the Commissioner is unable to comment on the specific case, guidance on this issue can be drawn from the United Nations Convention on the Rights of the Child, which is the foundation document that sets out the rights of children to be heard in decisions that affect them (Article 12). As noted by the UN Committee on the Rights of the Child in General Comment No. 12 (2009) the child's right to be heard in Article 12 is to be construed broadly and does not impose any age limit on the right of the child to express his or her view. Age alone is not the defining characteristic of a child's capacity and ability to express their view. Full implementation of the child's right to be heard in Article 12 requires 'recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences' (at [21]). In particular:

States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary. States parties should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity. (General Comment No 12 (2009), [20])

2. The ACT *Human Rights Act 2004* (HR Act) imposes direct obligations on ACT public authorities to act compatibly with the human rights protected in the Act, and to take relevant human rights into account in decision making (s 40B). Children and young people are entitled to all the human rights guaranteed under the HR Act. The HR Act also specifically provides in s 11(2) that 'every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind'. This is a right to special or positive measures, which also requires a higher standard to be adopted in relation to children when the application of other human rights is considered. Section 31 of the HR Act recognises that international law can be used to interpret human rights and is an important source of guidance as to the scope and meaning of rights protected in the HR Act. As noted above, the UN Convention on the Rights of the Child is the key



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international treaty on children's rights and assists to elucidate the content of rights protected in the HR Act where relevant to children.

The UNCROC sets out the right of children to be heard in decisions that affect them, and for that view to be given due weight. As General Comment 12 makes clear, this right pertains to individual children, as well as groups of children. Importantly, the right is to have their views heard and taken into consideration:

Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views. (General Comment 12 (2009), [5])

The child's view is one element in a decision-making process, not the sole determinant of an outcome. General Comment 12 notes that, if the child is capable of forming her or his own views in a 'reasonable and independent manner' then the views of the child must be considered a 'significant factor' in the settlement of the issue. Further, feedback should be given to the child not only on the outcome of the decision, but how their views were considered. Thus, from a human rights perspective, a child or young person's view should absolutely be sought and taken into account in decision-making within statutory child protection systems. This includes ensuring child-friendly methods for seeking those views, and for explaining processes and decisions.

3. Observation is one relevant method of discerning children and young people's views and is important in the sense that children communicate in a range of ways, including through body language and behaviour. However, there is a wide variety of other tools and methods for engaging meaningfully with children and young people to seek their views, which should also be employed and can be used to triangulate conclusions drawn from observation. Observation requires well trained personnel and professional supervision to ensure, for example, that unconscious bias does not influence conclusions. The Commissioner strongly encourages continuous improvement in both written guidance and training to enhance the knowledge and skills of front-line workers to ensure they are capable and confident in meaningfully engaging with children and young people in a manner that enables appropriate interpretation and analysis of what is seen and heard, as well as the 'unsaid' nuances that typically underlie the perspectives of children and young people. The response to question 5 below provides some examples of tools and methods that have proven effectiveness in engaging meaningfully with children and young people.
4. We are unaware of specific guidelines and procedures with regard to the use of observation in child protection matters in the ACT, however this question may be better directed to CSD as it relates to their internal procedures.
5. As noted in my response to question 3, there is a range of methods and tools for seeking the views of children and young people in developmentally appropriate ways. Such methods, unlike observation, have the explicit benefit that children and young people understand themselves to be part of a decision-making process and feel heard. How these tools and methods are employed needs to be considered on a case by case basis, for example: whether the views of a single child are being sought, or the views of a group of children; whether the child/ren have specific communication needs; and the current and long-term safety needs of the child/ren.



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While the myriad of literature and methods in this space are too numerous to list here, two examples can be highlighted which showcase different approaches to meaningfully seeking the views and opinions of children. The first is the KidsCentral Toolkit, developed by the Institute of Child Protection Studies, which provides a range of tools for working in a child-centred way with children, young people and families. The second is the Intermediary Program that is operated by the Human Rights Commission. The Intermediary Program commenced operation in the ACT in 2020 and assists children (and other witnesses with specific communication needs) to give their best evidence in criminal cases. The methods employed by intermediaries point to some of the considerations required when assisting children and young people to express themselves in adult-centric processes.

Links to both these resources are provided below:

- Kids Central Toolkit

<https://www.acu.edu.au/about-acu/institutes-academies-and-centres/institute-of-child-protection-studies/kids-central-toolkit>

- Intermediary Program

<https://hrc.act.gov.au/act-intermediary-program/>

6. It is not clear whether this question relates to helping design a better approach to children's participation for the ACT Government as a whole, in all areas of practice and policy relating to children, or is specific to the methods used to discern children's views in regard to care and protection placement decisions. Regardless, in neither case, have I, in my capacity as Children and Young People Commissioner, been specifically approached and asked (and funded) to design an overarching improved approach for the ACT Government. I have nevertheless continued to work to improve the ACT Government's approach to hearing the views of children. For example:
- My office conducted capacity building workshops for ACT Government staff on children's participation in policy development and service design. These workshops received overwhelmingly positive responses from participants, with requests for further and more in-depth workshops, which I would be happy to provide with further funding;
  - A number of Directorates have approached my office for advice with regards to specific projects that involved seeking the views of children and young people, leading to improved participatory practices;
  - My staff and I attend a number of ongoing working groups regarding improving children's participation, including the ACT Together's Participation Reference Group;
  - My office partnered with the Family Safety Hub to undertake a consultation with young people with lived experience of domestic and family violence that, by extension, improved the Family Safety Hub's skills and understanding of child-safe, child-friendly practice in engaging children and young people about sensitive issues.

In addition to these ad hoc opportunities, I would welcome the opportunity and resources to provide a more comprehensive and systemic improvement to children's participation within both CYPS and the ACT Government as a whole



# LEGISLATIVE ASSEMBLY

## FOR THE AUSTRALIAN CAPITAL TERRITORY

JACS No. 47

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7. The data in CREATE Foundation's survey point to underlying cultural challenges within the ACT regarding the full implementation of children and young people's right to be heard, along with inadequacy of the existing tools for seeking the views of children and young people in out-of-home-care and ensuring their views are given due weight. There is a range of barriers to be addressed, including: cultural change to mainstream understanding of children's capacity and right, to have their views heard and given due weight; capacity and skills uplift in child-centred practice in seeking and understanding the views of children and young people; transparency of decision making processes with regard to how children's views have been sought, understood and given weight; and improved ongoing communication with children and young people, before, during and after decision making. As Children and Young People Commissioner, I reiterate my interest in supporting the ACT Government to develop an approach that gives due consideration to these challenges, should this be considered of sufficient importance to warrant funding my office to do so.
8. Alongside others with knowledge of and/or a role in the life of a child/young person, carers have an important role to play in ensuring that as much relevant information as possible is brought to bear in decisions affecting a child. In any process whereby important decisions such as these need to be made, enquiries should be made with all relevant parties to ensure a thorough and comprehensive understanding of the matter at hand. At all times, the focus must be of what is in the best interests of the child/young person, noting that this requires a broad range of considerations to be taken account of.

In considering the best interests of a child/young person, I would always advocate caution with respect to involving the media in matters regarding individual children, particularly given the potential exposure of children (without their informed consent) and the potential for trauma. The portrayal of children in the media is an issue of wider concern, and relatively unregulated, and has the potential to do more harm than good when it involves sensitive circumstances.

Any adult who has concerns about a matter of child safety, or the treatment of a child within a service or system should always contact relevant authorities, such as police and Child and Youth Protection Services (for matters relating to suspected abuse and neglect).

Should the process or outcomes of doing so be unsatisfactory, such matters can be brought forward to the ACT Human Rights Commission as a complaint or by raising a concern with me as Public Advocate and Children and Young People Commissioner.

Approved for circulation to the Standing Committee on Justice and Community Safety

Signature:

A handwritten signature in black ink, reading "Jm Griffiths-Cook".

Date: 9 March 2021

By the Public Advocate and Children and Young People Commissioner, Jodie Griffiths-Cook



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Signature:

Date: 9 March 2021

A handwritten signature in blue ink, which appears to read "Helen Watchus".

By the President and Human Rights Commissioner