LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON HEALTH, AGEING AND COMMUNITY SERVICES
Ms Bec Cody MLA (Chair), Mrs Vicki Dunne MLA (Deputy Chair)
Ms Caroline Le Couteur MLA

Submission Cover Sheet

Inquiry into Child and Youth Protection Services (Part 2)

Information Sharing under the Care and Protection System

Submission Number: 11

Date Authorised for Publication: 15.10.19

(without Attachment 2); 20.02.20 (Attachment 2)

actlawsociety

23 September 2019

The Committee Secretary
Standing Committee of Health, Aging and Community Services
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

via email: LACommitteeHACS@parliament.act.gov.au

Dear Committee Secretary,

Inquiry into Child and Youth Protection Services

On16 May 2019, the ACT Legislative Assembly asked the Standing Committee on Health, Ageing and Community Services to inquire into Child and Youth Protection Services, and referred the following matters to that Committee:

(a) to provide an analysis of the decisions of the ACT Court of Appeal in the case of CP v Director-General of Community Services Directorate {ACTA 32} and to identify potential systemic issues that may need to be addressed.

(b) inquire into the ability to share information inthe 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.

This is a submission by the ACT Law Society in relation to Part Two ((b) above).

1. The principal thrust of this submission is that there should be internal and external review procedures to enable decisions of the Director General of Community Services to be reviewed.

   These decisions include and are not limited to:

   a. where and with whom the child or young person lives particularly in relation to out of home care;
   b. contact with family members or other significant people in the child or young person's life;
   c. arrangements for temporary care of the child or young person by someone else;
   d. the personal appearance of the child or young person;
   e. the child or young person's education, training and employment;
   f. health treatments involving surgery (including immunisation);
   g. issuing a passport for the child or young person;
   h. administration, management and control of the child or young person's property; and
   i. religion and observance of racial, ethnic, religious or cultural traditions.

the law society of the australian capital territory a member of the law council of australia
fourth floor 1 farrell place canberra act 2601
gpo box 1562 canberra act 2601
dx 5623 canberra
telephone 02 6274 0300
mail@actlawsociety.asn.au www.actlawsociety.asn.au

2. In May 2019, the Society publicly stated that proposed amendments to the Freedom of Information Act would remove the rights of people to access "sensitive information" about themselves held by the Director-General of Child Protection.

   In addition to correspondence, a media statement was made, and a copy of that statement is attached as part of this submission.

3. On 28 June 2019, the Family Violence and Children's Committee of the ACT Law Society provided a submission to a discussion paper prepared by the Justice and Community Safety Directorate (in consultation with the Community Services Directorate) dated April 2019 regarding Review of Child Protection Decisions in the ACT.

   The issues raised in the discussion paper are very similar to the issues being inquired into under Part Two of this inquiry.

   Therefore, a complete copy of the submission of the Society's Committee is included by way of attachment to this submission and forms part of this submission.

4. Other jurisdictions in Australia adopt a more liberal and transparent approach to information and reviews of child protection decisions.

   To demonstrate, attached hereto and forming part of this submission is a copy of Section 247 and Schedule 2 of the *Child Protection Act 1999* (Qld).

I hope this information is of assistance to you.

Yours sincerely,

Chris Donohue
President

media release

actlawsociety

MONDAY 13 MAY 2019

Concerns about omnibus bill stripping FOI rights

The ACT Law Society today urged the Government to immediately withdraw part of an omnibus bill listed to be passed by the Legislative Assembly tomorrow. If passed, the Bill will remove the right of a person to obtain information about themselves held under the *Children and Young People Act 2008*.

The bill in question is the *Justice and Community Safety Legislation Amendment Bill 2019,* currently before the Assembly to amend the *Freedom of Information Act 2016* (FOI Act).

Ordinarily, omnibus bills are used for uncontroversial and technical amendments, however Section 17 of this Bill is anything but.

Section 17 of the Bill will remove the right of a person to use the FOI Act to obtain information about themselves held by officials under the *Children and Young People Act 2008*. This would include care and protection reports and appraisals, family group conferencing information, and contravention reports.

Indeed, an adult, having been under these regulations as a child, would be unable to obtain information about themselves.

The government has defended the proposed provision by saying it would prevent the release of material that "could reveal the identity of a ... reporter" of sensitive information. Plainly, the FOI Act already covers such instances, and it is common for documents obtained under FOI to be redacted of sensitive information.

This change is a serious variation to a person's existing rights to information, and its inclusion in an omnibus bill looks like an attempt to hide the change. It is not a minor technical amendment (as claimed by the minister), but a substantial change which seriously affects people's rights to information.

The Law Society calls on the Assembly to withdraw Section 17 of the Omnibus Bill and refer it to a committee for open and public consideration as to why this additional level of secrecy is required — is it indeed about the rights of children and young people, or the protection of officials?

For further information contact:
Mr Chris Donohue, President, ACT Law Society, T 02 6274 0300, M 0418 633 836

Submissions prepared by the ACT Family Violence and Children's Committee on the Discussion Paper prepared by the Justice and Community Safety Directorate (in consultation with the Community Services Directorate) dated April 2019 regarding Review of Child Protection Decisions in the ACT

DISCUSSION POINT 1 - What principles should underpin any future decision review process?

In considering a future decision review process, it will be necessary to first identify which decisions can be made under the *Children and Young People Act 2008* ("the Act") and under Care and Protection Orders made in accordance with the Act. It is the Committee's view that both internal and external review processes should be codified within the Act and made easily accessible to all parties involved in proceedings.

General underlying principles

The Committee is of the view that some basic, yet important considerations and principles underpinning any review process should include:

- That the best interests of the child be the primary consideration;
- That the right of all children to express their views freely and participate in decisions and matters affecting them should be promoted, subject to age and maturity;[1]
- Ensuring that decision makers have an awareness of and respect for the rights of children and young people;
- Consideration of the child and their family's specific race, ethnicity, culture, gender or sexual orientation, language, religion, political or other opinion, socioeconomic background, disability, birth or other status with a view to protecting the child, family and other important people from discrimination;
- Ensuring the child such protection and care as is necessary for their well-being;
- Respecting the right of a child to have a meaningful relationship with both parents, so far as is possible while protecting the child from any risk of harm;
- Ensuring the child is not denied the right to enjoy their culture, religion, language or other background;
- Ensuring the child is provided with measures to promote physical and psychological recovery and social reintegration in the event they have been subject to abuse or violence.

Internal review principles

For an internal review process, general underlying principles should include:

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

---

[1] Australian Law Reform Commission, Children's involvement in the care and protection system, viewed at https://www.alrc.gov.au/publications/17-childrens-involvement-care-and-protection-system/court-processes. Where children are able to participate in the court process involved in care and protection matters, they may be able to understand better what is happening and why.

External review principles

In many cases, an internal review is a satisfactory prerequisite to external review. If the internal review process has strong underlying principles, it should be effective and efficient.

An external review process should be legislated and based on the following underlying principles:

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

DISCUSSION POINT 2 – How can the accessibility of internal merits review information be improved?

Before proceeding, the Committee wishes to draw attention to the disparity between the Discussion Paper, the Discussion questions and the reality of accessible information. We note that, in our view, Discussion questions seeking to address codification of existing systems and of external processes are of little utility if such systems either do not exist, cannot be assessed or are ineffective.

The Committee notes that attempts were made to clarify what information was publicly available in respect of CYPS internal merits review policies. The Committee was directed to 'Guide 4', a publicly available guide to complaints and the review process. Further investigations were conducted on what internal processes exist and will be discussed as part of Discussion Point 3.

Concerns with 'Guide 4'

The Committee holds concern that the structure and wording of 'Guide 4' is designed to discourage parents and the public from making complaints and seeking review of decisions. The Guide also contains several statements which could be said to be misleading or inconsistent with policy, legislation and/or practice.

In reading 'Guide 4', the Committee had some difficulty establishing how one could go about accessing the internal review process. The Guide is focused on diverting people to the complaints handling system. The wording of 'Guide 4' makes clear that this process has an altogether different purpose. The system appears set up to explain decisions, rather than to seek review of possibly incorrect decisions.

The Guide further suggests that an unusual amount of power is given to the Complaints Unit in determining how a complaint or request for review is investigated.

Drafting concerns regarding 'Guide 4'

While not directly related to the issue of internal review, the Committee has identified concerns in relation to the drafting of 'Guide 4'. It is the Committee's view that the Guide attempts to steer individuals away from possible complaints or applications for review.

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

> *As part of the annual review of your child's Care and Protection Order (which CYPS is required by law to conduct every 12 months), you and any other original party to the order, can apply to the ACT Children's Court to request the order be amended or revoked.*

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

Reviewable Decisions

'Guide 4' establishes several decisions which are not open to review, and in some cases are not open to complaint either. Specifically, if a parent has difficulty with a case worker, they are actively discouraged from making any complaint or raising concerns. 'Guide 4' states:

> *"Complaints about individual staff regarding how 'likeable' the person is or whether you would prefer a different case worker, are not alone sufficient grounds to request a new caseworker and such requests will not be considered. As with colleagues in a workplace, it is not important whether you like the people in your child's Care Team."*

The Committee is concerned that such statements serve to discourage complaints or the raising of concerns. This section is also dismissive of what may be genuine concerns about a case worker's impartiality.

It is worth noting that arrangements regarding the parent's time with their child after removal do not appear eligible for review, or are not listed under any publicly available document as a reviewable decision. The Committee notes that decisions of contact are rarely made by way of Court Order in the Children's Court and that such time is more often set out in Care Plans which are open to frequent amendment and do not carry the force of law (e.g. the terms of a Care Plan cannot be enforced by the Children's Court in the event of non-compliance).

The only decisions open for review appear to relate to approvals for a role as carer. Unfortunately, Tribunal decisions have made such review considerations irrelevant. CYPS has clearly indicated that placement decisions are viewed as non-reviewable parenting decisions. The Tribunal reluctantly agreed.[2]

Conclusion regarding Discussion Point 2

The Committee is of the view that the current internal review process is vague and lacking in transparency and accessibility.

There is, unfortunately, difficulty with the question as set out in the Discussion Paper. Given that any internal review process outside of basic complaints handling is difficult to identify, the Committee is unable to determine whether the existing process is suitable. Indeed, the Committee is unable to determine if the process exists at all in any

---

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

practical sense. This problem is further exacerbated by the restrictive secrecy provisions in the Act. These provisions make it so that the details of any review process are unlikely to be available to the people who are the most heavily and critically impacted by internal decisions.

DISCUSSION POINT 3 - Should existing internal merits review mechanisms be codified by amending the *Children and Young People Act 2008*?

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

However, it has come to the attention of the committee that stemming from this ideology is one main issue, the fact that there does not appear to be an existing internal merit review mechanism in place by CYPS. The committee undertook research into the guides that they were directed to. Although it is acknowledged that these guides, which are available online, are useful and provide general information, they do not sufficiently establish what the internal review process is for CYPS.

The definition of codification means to arrange according to a plan or system. It is imperative that a plan or system (actual internal review mechanism) is created first before any codification process can be considered in relation to amending the Act. The discussion paper at page 22 makes reference to the fact that such issues of transparency, independence and accessibility can be resolved by codifying and following recommendations. However, this cannot be achieved with the lack of establishment or pre-existence of an internal merit review mechanism.

It is concerning that the discussion paper refers to the existence of an internal merit review mechanism, yet this is contrary to the investigation and information gathering that the Committee has undertaken.

The Committee is interested in and would be available to discuss and contribute to the creation of an internal merit review policy or mechanism. The Committee is of the view that members of the profession with an interest in and legal experience in care and protection matters, representing parents, children and sometimes foster carers, are informed about what procedures would be of the greatest assistance to their clients in terms of review procedures/mechanisms.

DISCUSSION POINT 4 - Should there be external review mechanisms for certain CYPS decisions and, if so, would decisions such as residency and contact benefit from external review?

Yes. Currently such decisions made by CYPS are not only final, they cannot be reviewed internally within CYPS and they are not open to review by an external mechanism.

ACAT is able to review certain decision made by CYPS but these are currently minimal. For example, kinship assessments are a reviewable decision, whereas placement is not. It is important to note that given that the foundation of the Act is the need to protect children and young people from risk of harm and in addition that the consideration of the best interest of the child is paramount, it would be assumed and recommended that external review mechanisms for these decisions would be in place, rather than assuming that a single entity would always make the best decision. Again, a specific set of requirements would need to be established in order to allow a decision to be deemed "externally reviewable".

Accountability is a key phrase that comes to mind when analysing discussion point 4. It is common sense and also respect for due process, that a decision that is made internally by an organisation, such as CYPS, should be open to review by external measures.

Conclusion

It is the Committee's respectful submission that decisions made by the Director General (CYPS) such as residency, permanency and contact would benefit from external review. Of course, this should not be with the view of "opening

the flood gates". Rather a process of external review should be put in place based on certain elements or requirements to allow for a decision to be reviewed.

It is accepted that each case and family will turn on its own facts and merits, however it is widely acknowledged by lawyers whom practice in the Care and Protection jurisdiction in the ACT that the decision-making process, powers and discretion that the Director General and delegates of the Director General hold in relation to determining residency, permanency and contact orders are to some extent failing. Respectfully, there are inconsistencies with the decisions that are also being made.

DISCUSSION POINT 5 – If an external merits review mechanism should be implemented, what is the most appropriate mechanism for the ACT?

External Review

It is the submission of the Committee that the external review processes as they currently stand are insufficient. Section 839 of the Act sets out the decisions capable of being reviewed. The decisions capable of review are limited in scope and are further limited by the decisions of the Tribunal in the case of *W v Director-General Community Services* [2015] ACAT 14 ("W v DG").

This case was the only decision the Committee could locate where a review of a CYPS decision was sought. The matter of W v DG is a clear example of the limitations in the current external system of review. In brief, this decision was a review of a decision about the placement of the child. The Applicant submitted that this amounted to a refusal to authorise them as carer. The Director-General submitted that the decision of where to place a child was not open to review. Paragraph 67 summarises the two opposing submissions of the parties in the case as follows:

- The Applicant submitted that a government authority should not be given absolute and unfettered power without some form of oversight.
- The Director-General's submissions were that they had authority to act in the best interests of the child and that the tribunal should not usurp that role. The Director-General held that the decision of placement could not be reviewed as it was a decision that arose from an Order which provided for Parental-Responsibility to be held by the Director-General.

The decision of the Tribunal effectively places the Director-General in a position of absolute power, where they can exercise authority under section 516 with impunity and no oversight. Importantly, the Tribunal also identified that in utilising the avenues available through section 516, the Director-General may have acted in a questionable manner.

It is the Committee's view that a robust External Review process is essential to ensure transparency and proper access to justice for vulnerable people. The clear establishment of a thorough internal review process would aid in limiting the need for external review and prevent undue abuse of such a system.

Proposed External Mechanisms

The Committee proposes that the mechanism for External Review should reflect the approach taken in Queensland. The ACT Civil Appeals Tribunal ("ACAT") could adequately provide for an external review system so long as proper training could be afforded to potential Members who would preside over such decisions.

The Committee submits that the scope of decisions available for external review could be broadened to include:

- Decisions about the authorisation of carers;
- Decisions about placement of children;
- Decisions about who the child has contact with and the frequency of that contact;
- Decisions about long term issues for the child, including decisions such as schooling, religion or non-life-threatening medical decisions; and
- The terms or conditions of any Care Plans.

Notwithstanding the above list, the Committee accepts that any decision which is made by way of a Court Order should not be open for review. The Committee accepts that Orders of the Children's Court are properly appealed through the existing Court process.

The Committee rejects any concern that external review would "open the flood gates" to a raft of issues. ACAT holds existing powers for summary dismissal of matters and case management within their own authorising act. Further, existing similar review systems, such as those for the National Disability Insurance Scheme, are similarly broad and appropriately dealt with by Tribunals.

ACT Family Violence and Children's Committee
Chair – Lessli Strong, Strong Law Pty Ltd
Dated 28 June 2019

Minister: Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence
Agency: Department of Child Safety, Youth and Women

Child Protection Act 1999

Reprint current from 1 December 2018 to date (accessed 20 September 2019 at 12:22)

247 Reviews of reviewable decisions

An aggrieved person for a reviewable decision may apply, as provided under the QCAT Act, to the tribunal to have the decision reviewed.

Note—

Aggrieved persons and reviewable decisions are in schedule 2.

Minister: Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence
Agency: Department of Child Safety, Youth and Women

Child Protection Act 1999

Reprint current from 1 December 2018 to date (accessed 20 September 2019 at 12:22)

Schedule 2

Schedule 2 Reviewable decisions and aggrieved persons

section 247 and schedule 3, definitions *aggrieved person* and *reviewable decision*

Reviewable decision	Aggrieved person
refusing a request to review a case plan under section 51VA or 51VB	the person making the request
directing a parent in relation to a supervision matter stated in a child protection order (section 78)	the parent given the direction
refusing to deal with a complaint about a permanent guardian (section 80D(1))	the person making the complaint
deciding in whose care to place a child under a child protection order granting the chief executive custody or guardianship (section 86(2))	the child's parents or the child
not informing a child's parents of person in whose care the child is and where the child is living (section 86(4))	a parent given the notice or the child
refusing to allow, restricting, or imposing conditions on, contact between a child and the child's parents or a member of the child's family (section 87(2))	a person affected by the decision
removing a child from the care of the child's carer (section 89)	a carer entitled to apply to have a decision reviewed under section 91 or a child to whom a notice must be given stating the matters mentioned in section 90(4)(b) to (d)
refusing an application for, or to renew, a licence (section 129) other than because a person mentioned in section 126(b)(i) or (ii) does not have a current positive prescribed notice or current positive exemption notice	the applicant or licensee
refusing an application for, or to renew, a certificate of approval as an approved foster carer or an approved kinship carer (section 136) other than because a person mentioned in section 135(1)(a)(iii) or (b)(iv) does not have a current positive prescribed notice or current positive exemption notice	the applicant or certificate holder
refusing an application to amend an authority other than a provisional certificate (section 137)	the authority holder

amending an authority other than a provisional certificate (section 138)	the authority holder
suspending or cancelling an authority other than a provisional certificate (section 140)	the authority holder
cancelling an authority (section 140AG(3) or (4) or 140AH)	the authority holder