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**Response to the Discussion Paper - 'Review of child protection decisions in the ACT'**

Thank you for the opportunity to make a submission to the above consultation.

The attached submission is made on a whole of Commission basis, and we would be happy for it to be made available publicly.

Yours sincerely

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President and Human  
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## About the ACT Human Rights Commission

The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005*. Its main object is to promote the human rights and welfare of people in the ACT. The Human Rights Commission Act became effective on 1 November 2006 and the Commission commenced operation on that date. The Commission includes:

- The President and Human Rights Commissioner;
- The Public Advocate;
- The Children and Young People Commissioner;
- The Disability and Community Services Commissioner;
- The Discrimination Commissioner;
- The Health Services Commissioner; and
- The Victims of Crime Commissioner.

The President and Human Rights Commissioner's role includes advising government on the impact of laws and government services on human rights, including obligations of public authorities to comply with human rights.

The Public Advocate's role includes monitoring services for the protection of children and young people, specifically, children and young people involved with Child and Youth Protection Services (CYPS). In undertaking this role, the Public Advocate receives information about children and young people's circumstances through a range of statutory pathways, primarily associated with a number of provisions within the *Children and Young People Act 2008*. For example, the Public Advocate receives annual review reports for children and young people in care; and notification advices when the director-general takes emergency action in relation to a child or young person who is believed to be in need of emergency care and protection. The Public Advocate may also at times undertake individual advocacy in care and protection matters in the Childrens Court.

The Discrimination, Disability and Community Services Commissioner's role involves considering complaints about services provided in the ACT, including services for children and young people. The Commissioner also handles complaints about unlawful discrimination, for example where a person is treated unfavourably in the provision of goods and services because of a particular attribute such as their race, or their family, carer or kinship responsibilities, or their subjection to domestic or family violence.

The Victims of Crime Commissioner performs a range of functions in relation to domestic and family violence, and has a strong interest in CYPS decision-making processes particularly in cases of family violence, given the vulnerability of children, young people and families who are affected by such decisions.

As independent office holders with key oversight functions in relation to children and young people, the adequacy, transparency and effectiveness of child protection decisions made by CYPS are areas of considerable concern for the Commission as a whole. We therefore welcome the opportunity to provide a submission to this long anticipated consultation on merits review processes for child protection decisions made by CYPS. Our comments are directed at the five discussion points identified in the Discussion Paper, and are informed by the *Human Rights Act 2004*, as well as our experiences and observations of the care and protection system. They are also informed by our previous submissions on these issues.<sup>1</sup>

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<sup>1</sup> See, for example, HRC Submission to the ACT Law Reform Advisory Council's (LRAC) inquiry on '*Canberra – becoming a restorative city*' (September 2017). We note that the LRAC report is yet to be made publicly available. See also, submissions made by the Discrimination, Disability and Community Services Commissioner, and the Public Advocate and Children and Young People Commissioner to the *Our Booris Our Way* review currently underway.

## Summary of our submission

- The Commission considers that the provision of external merits review of child protection decisions made by CYPS (as well as by outsourced service providers, such as ACT Together) is necessary to uphold the rights of children and young people, and their families, and is essential for achieving full compliance with the ACT's human rights obligations.
- Internal merits review on its own is not sufficient to meet the requirements of the HR Act.
- For the reasons set out below, the Commission considers that the broad discretionary framework under the CYP Act to make decisions about a child or young person's care, combined with the lack of appropriate mechanisms to challenge and remedy such decisions, is incompatible with the HR Act.

## 1 What principles should underpin any future decision review process? (Discussion Point 1)

### Human rights obligations

- 1.1 The Commission considers that the *Human Rights Act 2004* (HR Act) must inform the development and implementation of proper decision-making processes and review mechanisms for child protection decisions made by Child and Youth Protection Services (CYPS). The HR Act is also relevant to decisions made by outsourced service providers, such as ACT Together (see further at paras 4.1 – 4.5). Decisions of this nature invariably have significant human rights implications, both for the child or young person involved and their families. It is therefore essential that the requirements of the HR Act expressly underpin and inform the reforms being contemplated by this consultation, which, we note, comes at a critical time when serious concerns are being raised about the accountability of decision-making in the ACT's care and protection system.<sup>2</sup>
- 1.2 In our view, public trust and confidence in the system risks being further eroded without such a commitment. The HR Act has a fundamental role to play in improving the quality of outcomes for children and young people in care in the ACT, and provides a foundation for ensuring that their human rights are protected. We note, however, that the HR Act is not addressed or referenced at any point in the Discussion Paper. Instead, only passing mention is made to human rights in terms of being 'higher' or 'community' derived principles.<sup>3</sup> This language is concerning as it gives the impression that compliance with human rights is optional or aspirational.
- 1.3 Contrary to this description, the HR Act places legal obligations on public authorities in the ACT to act and make decisions consistently with human rights. These obligations are mandatory. It is unlawful for a public authority to act in a way that is incompatible with a human right; or in making a decision, to fail to give proper consideration to a relevant human right. Obligations to uphold the rights of children and families also arise from international human rights treaties to which Australia is a State Party, in particular the UN Convention on the Rights of the Child (CRC). These international obligations reinforce and mutually support the HR Act rights.
- 1.4 The rights protected by the HR Act that are particularly relevant to this consultation include:
  - *Protection of children and families:* Section 11(1) of the HR Act provides that families are the fundamental group unit of society and are entitled to be protected by society. Section 11(1) recognises that one of the principal ways in which the family is to be protected is through the promotion of family unity. Section 11(2) provides that every child has the right, without discrimination, to such protection as is needed by him or her by reason of being a child. Section

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<sup>2</sup> Kimberley Le Lievre, 'Court finds it was wrong for government to take children, five years on', *Canberra Times*, (Canberra), 17 February 2019.

<sup>3</sup> See, Justice and Community Safety Directorate (JACSD) and Community Services Directorate (CSD), *Review of child protection decisions in the ACT: Discussion paper*, April 2019, pp 20, 21.

11(2) effectively incorporates a right to special or positive measures. The rights of children and families are also protected in s 12 of the HR Act, which prohibits arbitrary and unlawful interferences with home and family life.

- *Right to equality and non-discrimination*: Section 8 of the HR Act provides that everyone is entitled to equal protection of the law without discrimination. Treatment that disproportionately affects members of a group with particular characteristics (such as race, sex, or disability), will amount to differential treatment on the basis of that protected attribute for the purposes of human rights law. Thus, for example, legislation or a policy may be based on race for the purposes of human rights law even if it does not explicitly refer to race, if its impact is disproportionate on the members of a particular racial group.
- *Right to a fair hearing*: The right to a fair hearing in s 21 of the HR Act is also relevant to proceedings relating to the care and protection of children. The right to a fair hearing is an essential aspect of the judicial process and is indispensable to ensure the protection of other human rights. Many of the elements of a fair hearing relate not just to the conduct of the hearing itself, but also relate to notions of procedural fairness and the ability of an individual to access the justice system to vindicate his or her rights.
- *Rights of Aboriginal and Torres Strait Islander peoples*: Section 27(2) of the HR Act protects the distinctive cultural rights of Aboriginal and Torres Strait Islander peoples, including rights to maintain, control protect and develop cultural heritage, languages and kinship ties. These considerations must therefore also be incorporated into decision-making processes regarding the care and protection of Aboriginal and Torres Strait Islander children and young people.

### **Best interests principle**

- 1.5 As emphasised throughout the Discussion Paper, the *Children and Young People Act 2008* (CYP Act) requires the best interests of children and young people to be the paramount consideration for decisions made under the Act (s 8). For the purposes of care and protection decisions made under the CYP Act, s 349(1) specifies a list of twelve factors that must be taken into account by decision-makers when determining the best interests of any child or young person. A decision-maker may also consider any other fact or circumstance the decision-maker considers relevant when deciding the best interests of a child or young person (s 349(2)).
- 1.6 Section 350 of the CYP Act sets out a further series of care and protection principles that must be applied in care and protection matters, including the principle to prioritise support to preserve the family environment. However, the application of these principles is not mandatory if it would be contrary to the best interests of a child or young person.
- 1.7 The Discussion Paper states that the best interests principle in the CYP Act reflects the comparable principle enshrined in article 3 of the CRC.<sup>4</sup> The child's best interest principle in article 3 of the CRC is not defined, but guidance as to its scope and content is provided in the 2013 General Comment on article 3, issued by the UN Committee on the Rights of the Child.<sup>5</sup> In Part V of the General Comment (*Implementation: assessing and determining the child's best interests*), the Committee outlines seven elements that should be considered when a decision about the child's best interests is to be made: (a) the child's views; (b) the child's identity; (c) preservation of the family environment and maintaining relations; (d) care, protection, and safety of the child; (e) situation of vulnerability; (f) the child's right to health, and (g) the child's right to education.

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<sup>4</sup> *Review of child protection decisions in the ACT: Discussion paper*, April 2019, p 6.

<sup>5</sup> UNCRRC, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).

1.8 The seven elements outlined in the CRC General Comment provide an indication of the minimum factors that must be taken into account for determining a child’s best interest. However, not all of these factors are reflected in the best interests criteria specified in s 349(1) of the CYP Act. The Commission considers that there is scope to better reflect the standards contained in article 3 of the CRC by including further detail through amendment of the CYP Act on the relevant factors to be taken into account when determining the best interests of the child or young person. In our view, this could improve decision-making by targeting evidence at more specific criteria and support the decision-maker to make informed decisions.

**(i) Principle to prioritise support to preserve the family environment**

1.9 The Commission is particularly concerned that the CYP Act does not expressly recognise the principle of prioritising support to preserve family unity as forming part of the best interests principle. Under the CYP Act, this principle is instead viewed as a factor to be balanced against the best interests of the child (s 350(1)(b)).

1.10 Under human rights law, the preservation of the family environment and maintaining family relations has been identified as a key component of the best interest principle guaranteed under article 3 of the CRC:

61. Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child. Before resorting to separation, the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family’s capacity to take care of the child, unless separation is necessary to protect the child. Economic reasons cannot be a justification for separating a child from his or her parents.

62. The Guidelines for the Alternative Care of Children<sup>6</sup> aims to ensure that children are not placed in alternative care unnecessarily; and that where alternative care is provided, it is delivered under appropriate conditions responding to the rights and best interests of the child. In particular, “financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care [...] but should be seen as a signal for the need to provide appropriate support to the family” (para. 15).<sup>7</sup>

1.11 The principle of prioritising support is also relevant to upholding the rights of children and families to protection under s 11 of the HR Act. In *Secretary to the Department of Human Services v Sanding* [2011] VSC 42, the Victorian Supreme Court considered the application of a similar right under the Victorian *Charter of Human Rights and Responsibilities Act 2006*. The Court said that in determining what protection was in the best interests of children, the Children’s Court must also include consideration of the protection of the family as the fundamental group unit in society.

1.12 In the Commission’s experience, the principle in s 350(1)(b) of the CYP Act that priority must be given to supporting parents or other family members to provide for the wellbeing, care and protection of the child has not been given sufficient weight in CYPS decision-making processes. We are also concerned by the surprising suggestion in the Discussion Paper that only the following principles are

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<sup>6</sup> UN General Assembly resolution 64/142.

<sup>7</sup> UNCRC, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1).

the 'most relevant' for the purposes of any merits review process involving the best interests of children:

- that it is important for the child or young person to have settled, stable and permanent living arrangements (section 349(1)(h))
- the need to ensure that the earliest possible decisions are made about a safe, supportive and stable placement (section 349(1)(i))
- if the child or young person does not live with the child's or young person's parents because of the operation of [the CYP Act], the safety and wellbeing of the child is more important than the interests of the parents (section 350(1)(e)).<sup>8</sup>

### **Better support for families**

Support is needed in many situations, including for families experiencing poverty (which can be confused with neglect), migrant or refugee families experiencing trauma, parents with disabilities and parents experiencing trauma from family violence.

A typical family violence situation involves violence directed against the mother by the father or mother's partner. The lack of support for victims to recover from the trauma of the abuse and manage risks, and for perpetrators to stop using violence, often results in decisions to remove a child. This is in spite of it often being in the best interests of an often already traumatised child to remain with their non-abusive parent. In these cases the mother (and child) is effectively punished for being a victim of family violence and the perpetrator is not held accountable or supported to stop using violence.

A routine requirement is for the mother to be asked to obtain a Family Violence Order (FVO) to manage risk of harm, but there is often little support to assist her and the children. As with separation, obtaining a FVO does not always guarantee safety and in some situations may increase risk of harm. Requirements for separation and/or FVOs effectively pass the responsibility to manage the violence to the victim, whereas the focus instead should be on supporting the victim and her children, holding the perpetrator to account and supporting him to stop the violence.

1.13 We note, by contrast, that under the Victorian *Children, Youth and Families Act 2005*:

- (i) Determining a child's 'best interests' requires specific consideration of 'the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child' (s 10(3)(a)).
- (ii) Further, before making a protection order, the Victorian Children's Court must be satisfied that 'all reasonable steps have been taken by the Secretary to provide the services necessary in the best interests of the child' (s 276(1)(b)).

1.14 The principle that priority be given to supporting parents and family members to provide for the wellbeing, care and protection of children is an important and essential principle to guide decisions regarding the best interests of the child or young person.

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<sup>8</sup> *Review of child protection decisions in the ACT: Discussion paper*, April 2019, p 19.

1.15 We consider that expressly recognising this principle as being part of best interests decision-making in the CYP Act, along with independent external review, is critical to ensure that prioritising support to parents and family members is adequately considered in child protection decisions.

1.16 The Commission is strongly of the view that requirements similar to the Victorian provisions must be included in the CYP Act to better ensure that services and supports reasonably required are offered to parents and that parents are encouraged and supported to access them. We consider that amendments along these lines would greatly enhance public confidence in the system.

**(ii) Principles regarding Aboriginal and Torres Strait Islander children and young people**

1.17 The CYP Act contains several principles that are applicable to decisions concerning Aboriginal and Torres Strait Islander children and young people. These include assigning ‘a high priority to protect[ing] and promot[ing] the child or young person's cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to family, community and culture’, when determining their best interests for the purposes of care and protection decisions (s 349(1)(g)). The CYP Act also sets out specific criteria for the placement of an Aboriginal and Torres Strait Islander child or young person with an out of home carer, which prioritises placement with a kinship carer (s 513).

1.18 The disproportionate rate of Aboriginal and Torres Strait Islander children in out of home care in the ACT, however, points to these principles not being given adequate weight in decision-making. The Government has acknowledged the ‘very significant over-representation of Aboriginal children in the system’.<sup>9</sup> We welcome the recent increased use of family group conferencing by CYPS, which seeks to bring family members together in a positive way to make a plan for a child or young person. We also welcome the Government’s progress on implementing the initial recommendations from the *Our Booris, Our Way* review to improve the cultural safety, knowledge and practice of CYPS.

1.19 The Commission supports the recommendations made by the *Our Booris, Our Way* Steering Committee in its Interim Reports, and agrees that change in this area should be decided and led by the Aboriginal and Torres Strait Islander community. We consider that adequate implementation of the relevant principles in the CYP Act can only be achieved with the leadership and expertise of Aboriginal and Torres Strait Islander people. It is not realistic or appropriate for non-Indigenous decision-makers to identify and allocate appropriate weight to traditions and cultural values (including kinship rules) of Aboriginal and Torres Strait Islander people within the child’s family, kinship or community.

1.20 To this end, we recommend that the requirement in s 10(b) in the CYP Act for a decision maker to take account of any submissions made by or on behalf of any Aboriginal or Torres Strait Islander people or organisations identified by the Director-General as providing support to the child or family should be amended to require decision-makers to actively seek out and consult with appropriate Aboriginal or Torres Strait Islander people or organisations. We further suggest that consideration be given to elevating the priorities for placement in s 513 to Part 10.3 of the CYP Act alongside other principles for Aboriginal and Torres Strait Islander children.

1.21 The Commission is aware that the *Our Booris, Our Way* review has raised concerns about ‘apparent bias towards non-Aboriginal and Torres Strait Islander foster carers’.<sup>10</sup> We note that these concerns have also been reported in the local media.<sup>11</sup> In our view, such concerns underscore the need for external merits review of contested CYPS decisions. External review would ensure greater rigour and

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<sup>9</sup> Community Services Directorate, *Annual Report 2017-18*, p 24.

<sup>10</sup> *Our Booris, Our Way* Review, Recommendations May 2019.

<sup>11</sup> The Canberra Times, ‘Bias’ against Indigenous carers cause for grave concern’, 10 June 2019.

transparency to the accountability framework of the ACT's child protection system, and provide greater reassurance that the system is meeting community expectations.

- 1.22 The Commission considers that the provision of a direct remedy through the availability of external merits review would assist to ameliorate concerns in the community about bias or systemic discrimination in decision-making. It will also be imperative to ensure that the constitution of a mechanism for external review of decisions regarding Aboriginal and Torres Strait Islander children and young people include appropriate Aboriginal and Torres Strait Islander decision-makers from the child or young person's family, kinship or community.

### **Complaints about lack of review rights where decisions appear to prioritise early decisions and permanency over support and restoration**

Some of the complaints that are made to the Commission relate to difficulties experienced by complainants in seeking a review of these types of CYPs decisions where there is no merit review process available. For example, the Commission is aware of cases where a decision has been made to place a child with a foster carer, and when other family members are later identified and are approved as kinship carers, the decision is made to continue the child's placement with the foster carers because of the amount of time that has elapsed resulting in the child's attachment to the new foster carers which CYPs says would not be in the child's best interests to disrupt.

In some instances this has been where the child is still quite young and it is unclear what consideration is given to the long-term benefits of a kinship placement versus the short-term considerations of attachment to the current foster carer. It is also unclear what input is sought from community members or staff with cultural expertise to inform these decision making and internal review processes.

Concerns have also been raised about the adequacy and transparency of CYPs decision-making processes for seeking long-term care and protection orders where a child is under 5 years of age. Long-term care and protection orders until the child reaches 18 years of age are designed to provide more stable living arrangements for children who cannot safely be restored to the care of their parents. However, in the Commission's experience it has not always been clear whether there was sufficient uncontroversial evidence to support a decision to seek such long-term orders. It is also unclear what access to supports and legal advice the parent or potential kinship carer has had in those situations.

### **(iii) Equivalence of support for kinship carers**

- 1.23 The Commission is concerned that supports for kinship placements arising from informal arrangements differ from those applied to other types of placements. Under the CYP Act, carers will only receive financial assistance from CYPs where the Director-General has (or had) parental responsibility for a child or young person. However, where arrangements are made through family group conferencing for children or young people to be placed with other adults in their extended families or kinship groups, these carers are not provided with financial support. This can place a significant financial burden on the carer and may result in that child or young person being forced to enter into out of home care because the carer is unable to financially support the care of the child.
- 1.24 Where placements of children are made through family group conferencing, there is no compelling reason to provide them with less support than that which would have been provided if the placement were made formally. Vulnerable families should not be placed in a position of having to decide



between using restorative family group conference practices on the one hand, and having placements within the extended family or kinship group adequately financially supported after formal intervention by CYPS on the other hand.

- 1.25 The Commission understands that there is no legislative barrier to CYPS providing financial support to kinship carers in informal care arrangements but it is not currently a discretion exercised in favour of kinship carers. In our view, decisions of this nature should be subject to external review.

#### **Case study - Financial assistance for kin placements**

A grandmother had been caring for her four grandchildren after a family arrangement was put in place while her daughter's property was assessed by CYPS to be a suitable and safe environment for them. The children's mother passed away before the assessment was finalised, and CYPS supported the fulltime placement of the children with their grandmother rather than with their father who had not been involved in their lives for around five years at that time.

The Commission received a complaint from the grandmother who was advised by CYPS that she was not eligible for any financial assistance in relation to caring for her grandchildren. CYPS advised the Commission that because the Director-General never held parental responsibility for the children, and because there were no court orders in relation to them, the grandmother was not eligible for any financial assistance from CYPS.

The Commission was unable to resolve the complaint due to CYPS maintaining its position that it would not provide financial support to the grandmother, and there was no other avenue to appeal that decision.

#### **(iv) Principle for the views of children and young people to be heard**

- 1.26 Participation of children and young people in decisions that affect them is a core human right, which is guaranteed under article 12 of the CRC. The UN Committee on the Rights of the Child has confirmed that any decision that does not take into account the child or young person's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or young person to influence the determination of their best interests.<sup>12</sup> Further, a key element of child safety is empowering children and young people to participate in decisions affecting their lives.<sup>13</sup>
- 1.27 The CYP Act provides that the views or wishes expressed by the child or young person must be considered, when determining their best interests for the purposes of care and protection decisions (s 349(1)(b)). This is an important statutory recognition of established human rights standards.
- 1.28 However, the Commission remains concerned about the extent to which the ACT care and protection system and the ACT legal system are equipped to ascertain children and young people's views, advocate for children and young people's views, and support children and young people with the outcomes of decisions that affect them.

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<sup>12</sup> UNCRC, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), [53].

<sup>13</sup> Moore, T, '*Protection through participation: Involving children in child-safe organisations*', Practice Paper, Child Family Community Australia (CFCA), April 2017.

- 1.29 The Commission considers that specialist support should be made available to children and young people to ascertain and support their views, and assist in bringing those views to the court or other decision-making forums, including for the purposes of reviewing CYPS decisions. Adequate safeguards should also be built in so that assessment of the capacity of children and young people is sufficiently robust. There also needs to be sufficient oversight of the decision-making process to ensure that decisions are not tainted by specific or system level pressures, duress or outcome bias.

**Case study – Lack of meaningful participation by young people in decision-making and inadequate provision of supports**

X was 14 when he was first removed from his family home under an emergency order. X has a chronic medical condition, which had required corrective surgery on a number of occasions, and mental health issues.

A year later, X's mother entered into a 12-month voluntary care agreement with the Director-General, as she was unable to support X at home.

In accordance with the agreement, X was to live in an identified residential facility to receive therapeutic intervention & supports until CPYS assessed he was safe to move home. Six months into the agreement, X went to live with his older brother, Y (19), in a property leased by Housing ACT to a third brother, Z, who was at that time remanded in youth justice.

A few months later, X's mother advised CYPS that she would not resume care of X. CYPS conducted a formal review of the proposed kinship arrangement at Z's house. X's brother, Y, was assessed as a suitable carer subject to a Working with Vulnerable People (WWVP) check and securing suitable housing.

Shortly thereafter, CYPS advised X of its decision not to extend the voluntary care agreement. CYPS noted later that a factor in the decision was X's 'lack of meaningful engagement with CYPS'. CYPS sent a referral to a community provider to assist with accommodation. In a follow up telephone call by CYPS, X was angry at 'being dumped' and the voluntary care agreement ending. At that stage, CYPS withdrew any further support for X because of his behaviour.

At the time the voluntary care agreement lapsed, housing had not been approved through Housing ACT for either X or Y. Housing ACT attended Z's house and insisted X and Y leave the property, as they were not approved to reside there.

X had repeatedly advised he did not want to live in a refuge or similar crisis accommodation particularly because of his medical and mental health issues. However, it is unclear what processes CYPS used to engage X prior to being required to leave the property, or to communicate with Housing ACT regarding X's situation.

When X's mother contacted CYPS for assistance with Centrelink & housing, she was advised that his file had been closed and no further assistance could be provided.

**(v) Principles for conduct of child protection proceedings**

- 1.30 The Commission notes that CYPs decision-making with regard to commencing or continuing legal proceedings is not within the scope of this particular consultation. We accept that decisions to bring proceedings in the care and protection jurisdiction are always going to be controversial and complex.
- 1.31 However, we are aware of ongoing community concerns about CYPs decision-making processes in this area. For example, as noted above, in some matters brought to the Commission's attention, it was not always clear whether there was sufficient uncontroversial evidence to support a decision to seek long-term care and protection orders until the child reaches 18 years of age. Moreover, it was unclear what access to supports and legal advice the parent had in those situations.
- 1.32 To increase transparency of decision-making in the litigation process, we believe there needs to be review of whether and how other jurisdictions report court decisions and consideration of legislative change to allow reporting of court decisions with parties being de-identified.
- 1.33 We also consider that it would be useful for CYPs to develop specific litigation guidelines, which could build on existing obligations to act as a model litigant. We note that the VLRC made a similar recommendation in its 2010 report on *Protection Applications in the [Victorian] Children's Court*:

Given the unique nature of child protection proceedings, it appears highly desirable to develop specific guidelines for use in this jurisdiction that recognise the state's obligations, parents' responsibilities and rights, and the need to always consider the child's best interests.<sup>14</sup>

- 1.34 We also suggest that the Director-General, when applying for a long-term care and protection order, should be required to consult with Aboriginal or Torres Strait Islander people who have an interest in the wellbeing of the child or young person through family, kinship and cultural ties. This includes notifying the child or young person's kin, making appropriate inquiries to identify potential kinship placements, and considering any submissions made by kin before submitting the application to the court.
- 1.35 We further recommend that, where a person has been given a copy of an interim care and protection order that requires them to do certain things, such as in relation to contact, drug use, residency, supervision and anything else, they should be provided with a copy of those orders in Easy English or equivalent, to better assist the person in understanding the orders and enabling better opportunity for increasing compliance with interim orders so that the child or young person can more quickly exit care and be restored to family.

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<sup>14</sup> Victorian Law Reform Commission, *Protection Applications in the Children's Court: Final Report 19* (2010), p 397.

**2 Should there be external review mechanisms for certain CYPS decisions and, if so, would decisions such as residency and contact benefit from external review? If an external merits review mechanism should be implemented, what is the most appropriate mechanism for the ACT? (Discussion Points 4 & 5)**

**Lack of effective scrutiny of child protection decisions**

2.1 The Commission is concerned that a wide range of discretionary decisions made by CYPS about children and young people for whom the Director-General has some aspect of parental responsibility, are not currently subject to any meaningful safeguards.

2.2 The CYP Act provides for various circumstances when parental responsibility for a child or young person may be transferred to, or shared with the Director-General, including under a voluntary care agreement to share parental responsibility with the Director-General (Part 12.3); or pursuant to a care and protection order issued by the Childrens Court, which includes a parental responsibility provision (Part 14.6).

- If the Director-General shares daily care responsibility for a child or young person, no other person with daily care responsibility for the child or young person may discharge the responsibility in a way that would be incompatible with the Director-General's discharge of the responsibility (s 475 (2)).
- If the Director-General shares long-term care responsibility for a child or young person and under a parental responsibility provision that includes a consultation requirement, the Director-General must consult with each person who shares long-term care responsibility for the child or young person in making a decision about a long-term matter for the child or young person (s 504(1)). If there is disagreement about the Director-General's proposed decision, the person or the Director-General may apply to the Childrens Court for an order about the matter and the Director-General is required to not make the decision without the person's agreement (see s 504 (2)). However, if a consultation provision is not included in the care and protection order, the Director-General is only required, as far as practicable, to have regard to the views and wishes of any person who previously had long-term care responsibility for the child or young person (s 505).
- The CYP Act does not contain any express provisions for the Director-General to consult or have regard to the views of any person who shares long-term care responsibility with the Director-General pursuant to a voluntary care agreement.

2.3 In broad terms, this means that, once parental responsibility for a child or young person is transferred or shared with the Director-General of CSD, CYPS (on behalf of the Director-General) will have the final say on the vast majority of decisions relating to the day-to-day or long-term care of the child or young person. These include decisions about:

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

- 2.4 The Director-General also has broad discretion to vary the content of established care plans. The Childrens Court must consider a care plan prepared by the Director-General under s 455 of the CYP Act for meeting the child's protection and or care needs before making a care and protection order (s 464). In *MC v The Director General of the Community Services Directorate* [2017] ACTSC 354, the Supreme Court considered that the courts cannot review decisions made by the Director-General to vary a care plan if the Director-General was given the discretion to make decisions about issues such as parental responsibility, contact and residence under the care and protection order. This is even if in exercising that discretion the Director-General 'radically departs' from the content of the care plan which informed the Childrens Court's original decision to make the care and protection order.<sup>15</sup>

**Case study - MC v The Director General of the Community Services Directorate [2017] ACTSC 354**

The Chief Magistrate made final care and protection orders, granting parental responsibility and care of MC's two children to the Director-General for a period of one year. The orders provided for the daily and long-term care responsibility for the children to be transferred to the Director-General. The orders also gave the Director-General the discretion to decide with whom the children may have contact (and to decide any condition for the contact); and to decide where and with whom the children may live.

The Chief Magistrate expressly finalised the matter based on the care plans prepared by the Director-General, covering the period of one year, which stated that current contact arrangements were for MC to have supervised contact with each child, twice a week for two hours. In her judgment, the Chief Magistrate highlighted the importance of an ongoing relationship between MC and her children.

However, within a matter of months of the order being in force, CYPS (on behalf of the Director-General) varied the care plans so that one child was allowed to see MC for only 1½ hours per fortnight, and arrangements for the second child to have contact with MC were removed altogether.

MC was told by the Supreme Court that, even though it 'seems to run counter to the intent of the [CYP] Act that the Director-General would be able to radically depart from that care plan without further reference to the Court', neither the Childrens Court nor the Supreme Court had the ability to review the Director-General's decisions.

- 2.5 It is clear that, once a child or young person had passed into the care of the Director-General, there are in practice imperfect mechanisms of judicial control available. Under ss 466 and 467 of the CYP Act, parties can apply to the Childrens Court for a variation or revocation of care and protection orders once every 12 months or more often if there has been a significant change in any relevant circumstances. In the case of *MC v The Director General of the Community Services Directorate*, the Supreme Court emphasised that it was 'the [Childrens Court], not the Director-General, [who] has been designated by the legislature as the supervisory body for changes to orders for the care and protection of a child'.<sup>16</sup> However, as illustrated in that case, the Director-General does not appear to be bound to utilise those mechanisms, and is free to make changes to the content of a care plan used to inform the care and protection order granted by the Childrens Court, irrespective of whether those changes fundamentally alter their character. These concerns led the Supreme Court to recommend that

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<sup>15</sup> At para [141].

<sup>16</sup> *MC v The Director General of the Community Services Directorate* [2017] ACTSC 354, [145].

‘consideration ought be given to a form of orders in future which is more closely aligned with the care plans that found the orders, while still providing a degree of flexibility for the Director-General’.<sup>17</sup>

- 2.6 Similarly, while decisions of the Childrens Court can be appealed to the Supreme Court, this kind of judicial scrutiny, as acknowledged in the Discussion Paper, will only apply to the orders that the Childrens Court can make under the CYP Act, and is not focused on the review of decisions made by the Director-General in accordance with care and protection orders. Decisions made by the Director-General pursuant to a care and protection order made by the Childrens Court are likewise not reviewable under the *Administrative Decisions and Judicial Review Act 1989* because they are not technically ‘decisions’ made under the CYP Act.
- 2.7 The case study below demonstrates that these concerns are not just confined to decisions made by the Director-General while a care and protection order is in force. They also arise in the context of voluntary care agreements.

**Case study – details excerpted from *W v Director-General, Community Services (Administrative Review)* [2015] ACAT 14**

In December 2013, W applied to ACAT, seeking review of a decision by the Director-General of the Community Services Directorate to remove her three nieces (all under five years old) from her care and into another placement. W had been caring for the children since June 2011, first informally and later through a kinship care arrangement under the CYP Act. The children’s mother (who was W’s sister) had signed a number of voluntary care agreements for the children to reside with W over this period of time.

In July 2013, a CYPS officer attended W’s home and informed her of the Director-General’s intention to seek an alternative long-term placement for the three children. In September 2013, upon application by the Director-General, the Childrens Court made final care and protection orders until the age of 18 years in relation to all three children. In November 2013 the CYPS officer visited W’s home to inform her that permanent carers had been identified for all three children. W did not welcome this news and said that she did not want to let the children go. The CYPS officer recounted that the meeting became heated as W became highly emotional and aggressive. Various personnel from the Directorate and the Australian Childhood Foundation met to discuss the transition of the children to their new placement. It was decided that the children should not be left in W’s care as she was likely be in a state of distress and unable to meet the children’s emotional needs due to her own distress. The participants decided that ‘one day of trauma was better than a drawn out and extended period of trauma’ and therefore that the children should be removed the following day. The next day the CYPS officer attended W’s home and removed the children and transported them to their new foster carers.

ACAT noted that ‘opinions may differ as to whether that decision was the best approach for the Director-General to take, or whether other options or greater supports should have been put in place so that the children could remain in the care of family’. However, ACAT was forced to dismiss W’s application because it did not have the jurisdiction to review a decision by the Director-General to change the placement of the children.

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<sup>17</sup> Ibid.

## Human rights implications

- 2.8 The Commission considers that the current lack of effective oversight of CYPS decision-making about children and young people for whom the Director-General has parental responsibility gives rise to serious issues of incompatibility with the HR Act. These types of decisions have the capacity to significantly impact on the rights of children and families, which are expressly recognised in s 11 and s 12 of the HR Act. The definition of ‘family’ for the purposes of human rights law encompasses relationships between children and their carers or foster parents.<sup>18</sup> Decisions of this nature are also likely to interfere with a range of related rights, including the cultural rights of Aboriginal and Torres Strait Islander peoples (s 27(2)), and the rights to equality and non-discrimination (s 8). Depending on the particular circumstances, other rights such as the rights to freedom of movement and association (ss 13, 15) may also be engaged.
- 2.9 It is important to note that while the Director-General has the authority and responsibilities of a parent under the CYP Act, in exercising this parental responsibility, the Director-General is subject to a higher standard than that applied to a parent. In particular, as a public authority, the Director-General also has obligations under s 40B of the HR Act. CYPS must act compatibly with the HR Act in deciding upon appropriate action or when making a decision about a child or young person. As noted above, rights that are guaranteed under the HR Act must be given proper consideration in decision-making and may be subject to only reasonable limits, set by laws, which can be demonstrably justified in a free and democratic society. Accordingly, any restrictions on human rights arising from decisions taken by CPYS in this regard, must not only be within the scope of ordinary parental responsibility, but must also be reasonable and justifiable under s 28 of the HR Act.
- 2.10 The broad powers accorded to the Director-General under the CYP Act to make decisions about a child or young person’s care, combined with the lack of appropriate mechanisms to challenge and remedy such decisions where they may amount to an unlawful interference with human rights, is, in our view, incompatible with the right to a fair hearing guaranteed in the HR Act (s 21). In coming to this conclusion, we note that any opportunity to challenge such decisions under s 40C of the HR Act is likely to be more theoretical than real. The direct right of action in the HR Act is rarely utilised and remains a remedy that is out of reach for the vast majority of people in the ACT community.
- 2.11 The Commission considers that the availability of external merits review of child protection decisions is necessary to fully comply with obligations under s 21 of the HR Act.<sup>19</sup> Internal merits review on its own will not be sufficiently independent to meet the requirements of the HR Act. It would not address a key deficiency in the system whereby, in the absence of detailed court orders and judicial oversight of case planning, CYPS is not adequately held to account for its decisions.
- 2.12 We therefore welcome the acknowledgement in the Discussion Paper that:

The provision of a merits review mechanism is a recognition that despite best intentions, first instance decision-makers do not always make the correct and preferable decision. Like any statutory decision-maker, decisions made by CYPS may in hindsight, or with the benefit of new or better information, be worthy of being unmade, remade or amended.<sup>20</sup>

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<sup>18</sup> See, for example, *G v E and Ors* [2019] EWHC 621 (Fam) (26 March 2010).

<sup>19</sup> Judicial review is not sufficient for these purposes as it focuses on the jurisdiction and legality of court actions, not on whether the decision was correct.

<sup>20</sup> *Review of child protection decisions in the ACT: Discussion paper*, April 2019, p 6.

## Types of decisions

2.13 In our view, a mechanism for external review must at minimum be empowered to examine both the merits and any alleged procedural irregularities of the following categories of decision-making:

**Decisions that significantly alter the relationship between parents and their children or between children and siblings or other people significant in children’s lives.**

The types of conditions that would fall in this category include:

- Care plans decisions and other decisions relating to placement, contact and the provision of supports would fall in this category.
- This category would also include decisions to grant to, or to remove from, an authorised carer the responsibility for the daily care and control of the child or young person.

**Decisions (including the imposition of conditions) that amount to limitations on a person’s human rights.**

The types of decisions/conditions that would fall in this category include:

- Conditions relating to child-parent or child-sibling contact (for example, requiring a parent obtain a FVO in order to ensure contact with or care of a child).
- Conditions that involve the parents or caregivers undergoing some form of treatment or drug and alcohol screening; or
- Decisions that involve the child or young person’s culture, religion, health or education would also come within this category (for example, decisions about whether a child goes to a religious school or participates in cultural ceremonies or decisions about health treatments).

2.14 The Commission considers that the availability of external merits review for these decision-making categories would improve accountability for decisions that have a significant impact on the lives of children and young people, and their families and carers, and would promote high quality evidence-based decision-making by CYPS. We note that many of these matters are subject to external review in other Australian jurisdictions:

- In Victoria, a parent or a child can apply to the Victorian Civil and Administrative Tribunal (VCAT) for a review of a case plan decision.<sup>21</sup> A case plan must contain all of the Secretary’s significant decisions concerning the child that relate to the child’s present and future wellbeing, including the placement of and contact with the child.<sup>22</sup> A child, a parent, or anyone whose interests are affected by a decision made under a voluntary care agreement can also seek for the decision to be reviewed by VCAT.<sup>23</sup>
- In Queensland, a person can apply to the Queensland Civil and Administrative Tribunal (QCAT) for review of a range of decisions made by the Chief Executive in relation to a child in care. These include decisions about placement, contact, directions given to parents as part of a supervision order, as well as decisions to remove a child from the care of the child’s carer.<sup>24</sup>

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<sup>21</sup> See, *Children, Youth and Families Act 2005* (Vic) s 133.

<sup>22</sup> See, *Children, Youth and Families Act 2005* (Vic) s 166.

<sup>23</sup> See, *Children, Youth and Families Act 2005* (Vic) s 158.

<sup>24</sup> See, *Child Protection Act 1999* (Qld), Schedule 2.



- In Western Australia, a person may apply to the State Administrative Tribunal for a review of a care planning decision made by the CEO.<sup>25</sup> A care planning decision includes decisions about placement arrangements; and decisions about contact between the child and a parent, sibling or other relative of the child or any other person who is significant in the child's life.<sup>26</sup>
- In South Australia, a person may apply to the South Australian Civil and Administrative Tribunal for review of various decisions made by the Chief Executive in relation to a child in care,<sup>27</sup> including decisions relating to placement, education and medical arrangements for a child or young person. A specialist Contact Review Committee, which must be established by the Minister, reviews decisions about arrangements for contact with a child or young person.<sup>28</sup>
- In NSW, a person may apply to the NSW Civil and Administrative Tribunal for a review of a decision to grant to, or remove from, an authorised carer the responsibility for the daily care and control of the child or young person.<sup>29</sup>

2.15 Providing external review for such decisions can also be a powerful motivating factor for parents to change behavior. These decision making categories are frequently based on a parent's lifestyle. If that lifestyle is positively improved including resolving addiction issues or finding alternative housing arrangements, such a change should allow parents to seek amendments to care plans and other decisions. This is particularly relevant to decisions about contact, attendance at child health appointments, and participation in school-based activities.

#### **Appropriate mechanism for external merits review**

2.16 As described above, the Commission considers that the implementation of an external review mechanism is necessary for compliance with the HR Act. The Discussion Paper suggests that there are various options for an appropriate model for external merits review. Including:

- an external review panel (such as that used in South Australia and Western Australia);
- an extension of the ACAT to include a care and protection tribunal;
- an extension of the ACT Childrens Court to include a separate review arm; or
- a combination of the above options.<sup>30</sup>

2.17 The Commission considers that an external review panel based on the model adopted in Western Australia would not meet the requirements of the HR Act. In our view, it is a mischaracterisation to view the WA Care Review Panel in terms of a mechanism for external merits review. The WA Care Plan Review Panel does not 'stand in the shoes' of the decision-maker to make the correct and preferable decision, but instead simply reports its recommendations to the CEO.<sup>31</sup> Members of the Panel are appointed by the CEO, and they can be removed and replaced by the CEO.<sup>32</sup> The South Australian

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<sup>25</sup> See, *Children and Community Services Act 2004* (WA), s 94.

<sup>26</sup> See, *Children and Community Services Act 2004* (WA), s 89.

<sup>27</sup> See, *Children and Young People (Safety) Act 2017* (SA), s 158.

<sup>28</sup> See, *Children and Young People (Safety) Act 2017* (SA), s 95.

<sup>29</sup> See, *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 245(1)(c). Note, however, that the right of review does not extend to decisions which are made in relation to the preparation or enforcement of a permanency plan.

<sup>30</sup> *Review of child protection decisions in the ACT: Discussion paper*, April 2019, p 23.

<sup>31</sup> *Children and Community Services Act 2004* (WA), s 93(5).

<sup>32</sup> *Children and Community Services Act 2004* (WA), s 92.

model may suffer from a similar lack of independence as the majority of its membership may be drawn from officers or employees of the relevant Department.<sup>33</sup>

- 2.18 ACAT currently has the ability to review various administrative decisions made by the Director-General, such as a refusal to approve an individual as an 'approved carer'; a refusal to authorise a person as a foster carer; or a decision to revoke a person's approval as an 'approved carer'.<sup>34</sup> We would support expanding this jurisdiction to enable ACAT to also review care plan decisions and other discretionary CYPs decisions on their merits.
- 2.19 As noted in the Discussion Paper, ACAT already has administrative review functions and has experience making decisions about certain classes of vulnerable people including decisions about guardianship and mental health. Concerns about the ability of 'a review body to make decisions from a position of child development expertise, in a timely manner and in the best interests of children',<sup>35</sup> are, in our view, likely to be overstated. We reject the implication that decisions of this nature cannot be responsibly subject to external review. Similarly, while we appreciate certainty and timeliness of decision-making is critical for children and young people, we do not agree that external review by ACAT would be unnecessarily lengthy. If properly resourced and constituted to take on this function, and subject to appropriate criteria for the conduct of such proceedings, we believe that ACAT would be able to provide a less formal, timely, fair and credible avenue for resolving disputes about child protection decisions. We note that some of the factors that go to the timeliness of these types of proceedings will be within the capacity of CYPs to manage, for example, by ensuring that documents and material relevant to the appeal are made available to the applicant in a timely way to prevent unnecessary delays or adjournments.
- 2.20 The Commission is opposed to making internal review a prerequisite for external review. While it would generally be more straightforward to first seek internal review, a person should not be prevented from seeking to use an external review process where they believe internal review is unlikely to be helpful. Requiring internal review to be a prerequisite to external review would create an additional hurdle to be negotiated in the review process and risks unnecessarily lengthening the process. We consider that it would be important to minimise the number of steps required of vulnerable children and families. It will also be important to ensure that individuals seeking external review have access to adequate legal representation so that they are not disadvantaged by having to represent themselves. Children and young people to whom the proceedings relate must also be given a reasonable opportunity to personally present their views. This may necessitate additional advocacy or specialist supports which are child centred in facilitating the expression of their views and wishes.
- 2.21 The Commission is open to exploring the alternative option outlined in the Discussion Paper, which would involve expanding the remit of the Childrens Court to include a Review Panel. We recognise that this option would have the benefit of vesting a unified jurisdiction in the Childrens Court, and would avoid the risk of a review being heard in the tribunal, while a parallel proceeding is run in the Childrens Court regarding the variation or finalisation of a related order. However, we feel that the disadvantages of this option, including the imposing and formal nature of the court system, the frequent lack of legal representation available for families, and resourcing issues that result in lengthy delays, outweigh any advantages.
- 2.22 One way to address this issue could be to give the Childrens Court and ACAT concurrent jurisdiction in relation to care plan and other related decisions. The Victorian Law Reform Commission (VLRC), for example, considered that 'it would be highly desirable for the Children's Court to have concurrent jurisdiction in relation to hearing case plan reviews, for reasons of both efficiency and accessibility for

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<sup>33</sup> Children and Young People (Safety) Regulations 2017, Regulation 25.

<sup>34</sup> CYP Act, s 839.

<sup>35</sup> *Review of child protection decisions in the ACT: Discussion paper*, April 2019, p 3.

participants'.<sup>36</sup> Noting that 'there is often substantial overlap between the issues raised in a protection application and those that inform a case plan following a protection order', the VLRC took the view that it would be 'inefficient and undesirable to force participants to apply to a separate decision-making body for case plan review from the body (the Children's Court) that made the initial protection order'.<sup>37</sup> We note the recent recommendation of the Australian Law Reform Commission to establish family courts in all states and territories to exercise jurisdiction concurrently under the Commonwealth Family Law Act, as well as state and territory child protection and family violence jurisdictions. Such a change could potentially vest these powers in the ACT Children's Court.<sup>38</sup>

2.23 In this regard, we consider that there would also be benefits in enabling the Commission to refer complaints about services for children and young people to ACAT for an enforceable remedy. At present, the Commission only has the power to refer discrimination disputes to ACAT in circumstances where the matter is not appropriate for conciliation, unlikely to be successfully conciliated, or where the dispute is not resolved through conciliation. Extending this jurisdiction to complaints about services for children and young people would provide complainants with more streamlined options for resolving their disputes, and also provide a greater incentive for CYPS to participate in the conciliation processes conducted by the Commission in the early stages of the dispute.

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<sup>36</sup> Victorian Law Reform Commission, *Protection Applications in the Children's Court: Final Report 19* (2010), p 344.

<sup>37</sup> *Ibid.*

<sup>38</sup> Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System ALRC Report 135* (2019), Recommendation 1.

**3 How can the accessibility of internal merits review information be improved? Should existing internal merits review mechanisms be codified by amending the *Children and Young People Act 2008*? (Discussion Points 2 and 3)**

**Adopting best practice**

- 3.1 As described above, the Commission considers that the provision of an external review mechanism is a necessary safeguard to ensure that CYPS decision-making structures are compatible with the HR Act. However, this is not to suggest that there is no need for an effective internal review process. As the Administrative Review Council (ARC) has noted, effective internal review processes can be a useful mechanism to resolve matters that might be particularly time-sensitive. It could also guard against an over-reliance on external review processes, including by explaining and elaborating on the reasons for adverse primary decisions to the satisfaction of some complainants.<sup>39</sup>

**Case study – Lack of adequate reasons**

X and her husband are retired and on low incomes. X has had care of a young person since early primary school. X was encouraged by her caseworker to apply for the extended continuum of care allowance for additional financial support for the young person's ongoing living expenses, while he undertook higher-level studies.

Her application was rejected. X complained to the Commission as she felt that she had met the published criteria for the allowance and the reasons provided for decision did not address the impact of the additional expenses being incurred by the family. X told the Commission that her partner had come out of retirement to assist with expenses. Internal review of the decision was sought and the original decision confirmed.

X felt she was not given adequate guidance about the information she was required to provide or the criteria that would be applied in considering her application. X noted the decision was made on the papers, and appeared to be inconsistent with published policy and she believed the reasons provided were not adequate.

The complaint was not able to be resolved, as CYPS did not wish to participate in conciliation at the Commission.

- 3.2 The Commission acknowledges that improvements have been made to internal decision-making and review processes, as outlined in the Discussion Paper,<sup>40</sup> but considers that more remains to be done. The Commission would be strongly in favour of the option of establishing an internal review mechanism with a statutory basis. We agree with the ARC's view that:

The most obvious advantage of an internal review system with a statutory basis is that it can give the applicant a guaranteed right to a review. [It also] allows for a formal delegation of power to review officers, and would allow for further detail to

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<sup>39</sup> Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995).

<sup>40</sup> *Review of child protection decisions in the ACT: Discussion paper*, April 2019, pp 5, 21.

be specified, such as the conditions under which review can occur, and the categories of cases amenable to review by a delegate can be delineated.<sup>41</sup>

- 3.3 The Discussion Paper suggests that a disadvantage of statutory based internal review is that ‘it becomes difficult for the applicant or reviewer to deviate from the specific requirements of legislation, even if by agreement’.<sup>42</sup> In our view, concerns about the process becoming overly prescriptive or insensitive to individual circumstances can be easily addressed by including appropriate flexibility and discretion into the legislative framework. Such a framework should also ensure that complainants are advised of their rights of external review, along with information about the types of assistance that would be available to them.
- 3.4 We consider that the Western Australian model, which provides for legislated internal review through the establishment of a Care Plan Review Panel including non-Departmental members, represents a best practice approach. We would urge serious consideration be given to adopting a similar model in the ACT.

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<sup>41</sup> Administrative Review Council, *Internal Review of Agency Decision Making* (Report No 44, 2000).

<sup>42</sup> *Review of child protection decisions in the ACT: Discussion paper*, April 2019, p 12.

## **4 Additional matters**

### **Status of outsourced service providers**

- 4.1 We note that the powers granted to the Director-General under the CYP Act, pursuant to the transfer of parental responsibility, are delegable not just to officers within CYPS, but also to responsible persons within approved kinship and foster care organisations as well as approved residential care services (s 833A). Moreover, they can be further sub-delegated to individuals within the responsible person's organisation (s 883B).
- 4.2 This means that outsourced service providers, such as ACT Together, make many important decisions regarding a child or young person's care in the first instance. While the Director-General must ensure the delegated or sub-delegated function is properly exercised,<sup>43</sup> the Commission remains concerned whether there are adequate safeguards in place to ensure accountability for the exercise of these powers by outsourced service providers.
- 4.3 It is imperative that any outsourcing arrangements for the care and protection of children and young people do not result in a diminution of HR Act protections. The Commission considers that it is essential to have clarity that ACT Together and other responsible persons and sub-delegates are public authorities under the HR Act and have obligations to comply with human rights in relation to all decision-making and actions taken.
- 4.4 Any ambiguity about the status of organisations such as ACT Together, and their obligations under the HR Act, should be remedied as a matter of urgency. To ensure that any outsourced service delivery remains human rights compliant, it is recommended that a requirement be inserted for outsourced service providers to comply with the public authority obligations in s 40B of the HR Act. This could be reflected in the relevant contractual arrangements and/or specified in the provisions of relevant service provider frameworks or codes.
- 4.5 It would be a poor outcome for the ACT community if the government could contract out of its human rights obligations by outsourcing these functions. The provision of child protection services must be subject to the HR Act.

### **Data collection and statutory review of scheme**

- 4.6 The Commission recommends that ongoing data collection and evaluation obligations should be built into the review model (for example, against timeliness, cultural safety, number of long-term orders sought for children under 5 years of age, number of internal v external reviews, etc).
- 4.7 Reporting data would provide an empirical picture of whether and how decision-making processes are improving and identify any systemic trends in complaints that can be then appropriately addressed. Such reports would be valuable to help to inform any later amendments.
- 4.8 We also recommend that, as a new review jurisdiction concerning significant impacts on vulnerable people, the model, and its underlying framework, be subject to statutory review after a reasonable period.

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<sup>43</sup> See, *Legislation Act 2001*, s 238.