



Committee Secretary
Standing Committee on Health, Ageing and Community Services
ACT Legislative Assembly
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Dear Committee Secretary

Inquiry into Child and Youth Protection Services: Part Two – Information Sharing under the Care and Protection System

Thank you for the opportunity to make a submission to the Standing Committee on Health, Ageing and Community Services' inquiry into the ability to share information in the care and protection system in accordance with the *Children and Young People Act 2008*, with a view to providing the maximum transparency and accountability so as to maintain community confidence in the ACT's care and protection system.

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 transparency and accountability of child protection system is therefore an area of considerable interest for the Commission as a whole. Our submission sets out the key areas where we believe improvements could be made.

A. Overly restrictive information sharing and secrecy provisions

The *Children and Young People Act 2008* (CYP Act) sets out a framework for the handling of care and protection information held by 'information holders'¹ under that Act. All Child and Youth Protection Services (CYPS) officers are information holders for the purposes of the CYP Act.

Any information received by a person as an information holder is considered to be 'protected information' under the CYP Act.² However, some 'protected information' is considered to be 'sensitive information', which is subject to more stringent rules. 'Sensitive information' includes a wide range of information such as:³

- care and protection reports and appraisals;
- contravention report information;
- interstate care and protection information;
- family group conference information; and
- prenatal reports.

CYPS can share protected information, with the consent of the person the information is about, provided that the information *is not sensitive information*.⁴ Outside of court proceedings,⁵ however, CYPS (on behalf

¹ An 'information holder' is defined in s 843 of the CYP Act as a person who is (or has been in the past):

- the Director-General;
- the Public Advocate;
- an Official Visitor;
- an approved researcher;
- another person who exercises a function under the CYP Act; or
- a person who has been given information by one of the people listed.

² CYP Act, s 844.

³ CYP Act, s 845.

⁴ CYP Act, s 849.

⁵ CYP Act, s 866.

of the Director-General) can only share sensitive information, even with the person's consent, if it considers that doing so is in the best interests of a child or young person.⁶ This delineation between protected and sensitive information came into force in 2010,⁷ and was inserted 'to require consideration of the best interest, safety and wellbeing of the child or young person' and so allow 'for the release of sensitive information in limited circumstances.'⁸

The CYP Act accordingly gives CYPS (on behalf of the Director-General) very broad discretion to make 'best interests' decisions about whether sensitive information about a child or young person's care can be shared. These decisions are not subject to any external review.⁹ They are also not, to our knowledge, expressly subject to any internal review process.

Moreover, other than in relation to court proceedings, the CYP Act imposes a blanket prohibition on CYPS from sharing sensitive information, even if it would be in the best interests of the child or young person to do so, if the information identifies a person who made a child concern report, a care and protection report, a pre-natal report, provided interstate care and protection information, a contravention report or family group conference information.¹⁰ This includes any information that would allow someone to work out the identity of the reporter.¹¹ This bar applies irrespective of whether the notifier consents to the information being shared.

Case study 1 – complaints handling

The Commission receives a number of complaints each year about CYPS. These involve children and young person service complaints as well as discrimination complaints.

Over the last year, the Commission has noticed that CYPS, in its responses to the Commission, has stated that the Commission cannot provide a copy of the CYPS response letter to the person who has made the complaint, whereas in the past it would include any 'protected information' in attachments so that some information could still be provided to the complainant.

In one matter involving a young person in Bimberi who made a complaint to the Commission, CYPS stated to the Commission that:

'The Children and Young People Act 2008 does not provide for the release of information as you have requested below. CYPS cannot release this information to [the young person's] legal representative, nor provide authority for you to do so.'

This placed the young person and her legal representative in a position where they would be unable to meaningfully participate in a conciliation conference because they had not seen the response by CYPS to the concerns raised in the young person's complaint.

This raises concerns of lack of procedural fairness and significant power imbalance for complainants when participating in a complaints resolution process without relevant information available to them.

⁶ CYP Act, s 851.

⁷ *Children and Young People Amendment Act 2010*, s 10.

⁸ Legislative Assembly for the ACT, *Hansard*, 10 December 2009, 5657 (Joy Burch MLA, Minister for Children and Young People).

⁹ Section 839 of the CYP Act sets out the limited categories of CYPS decisions that may be reviewed by the ACT Civil and Administrative Tribunal (ACAT).

¹⁰ CYP Act, s 857.

¹¹ CYP Act, s 857(b).

Case study 2 – advocacy

Under s 879 of the CYP Act, the Public Advocate may ask CYPS to provide information in relation to care and protection matters. In the Commission’s experience, it has become necessary to be increasingly specific in terms of framing those requests. If the right question is not specified, the information sought may not be provided. Unlike in the past, there appears to be little consideration given to providing information in the spirit of the request.

There is also limited ability to pick up the phone to speak with the relevant case worker to obtain information that would assist the Public Advocate to determine whether there is a need for advocacy or not. Instead, the Public Advocate is often required to issue a s 879 request and to wait for weeks to get the information back. This prevents the timely provision of advocacy, which is counter to the best interests of the child or young person.

In recent times, the Public Advocate’s team has also been challenged about their participation in care team matters with questions being raised about what their ‘value-add’ to the process would be.

These experiences are concerning because they appear to seek to control the way in which the Public Advocate provides oversight of care and protection matters, which is to the potential detriment of children and young people, and that certainly impacts timely and responsive advocacy.

In comparison, other Australian jurisdictions take a more nuanced approach. For example:

- In **New South Wales**, the disclosure of information obtained in connection with the administration or execution of the relevant Act is permitted with the consent of the person from whom the information was obtained.¹² Information capable of identifying someone who has reported a risk of harm to a child (i.e. ‘a notifier’) is also permitted to be disclosed with the consent of the notifier.¹³ Moreover, after leaving out-of-home care, a person is expressly entitled to free access to personal information directly relating to them that is held by the relevant entity.¹⁴
- In **South Australia**, the disclosure of information obtained in connection with the performance of functions or the exercise of powers under the relevant Act is permitted with the consent of person to whom the information relates.¹⁵ Identifying information can be disclosed with the consent of the notifier.¹⁶ Express provision is also made for a person who has left out-of-home care, to apply to the CEO to obtain information directly relating to them.¹⁷ Decisions to refuse to provide information to a person who has left out of home care, or to redact information that is provided, are subject to internal review.¹⁸
- In **Western Australia**, the disclosure of information obtained in connection with the performance of functions under the relevant Act is permitted with the consent of person to whom the information

¹² See, *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 254(1)(a).

¹³ See, *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 29(1)(f).

¹⁴ See, *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 168.

¹⁵ See, *Children and Young People (Safety) Act 2017* (SA), s 164(1)(b).

¹⁶ See, *Children and Young People (Safety) Act 2017* (SA), s 163(1)(a).

¹⁷ See, *Children and Young People (Safety) Act 2017* (SA), s 153.

¹⁸ See, *Children and Young People (Safety) Act 2017* (SA), s 154.

relates.¹⁹ The disclosure of identifying information is permitted with the written consent of the notifier.²⁰ The disclosure of identifying information about a notifier is also permitted if the disclosure had already been made in legal proceedings and court/tribunal has not prohibited further disclosure.²¹ Identifying information about a child or young person may be disclosed, subject to the CEO's authorisation, if the person is under 18 years of age, or with the young person's authorisation, if they are over 18 years.²²

- In **Queensland**, the disclosure of personal information to a person is permitted to extent that the information is about them.²³ The disclosure of information is also permitted for purposes related to a child's protection or wellbeing.²⁴
- In the **Northern Territory**, the disclosure of information to a person is permitted to the extent that the information is about them,²⁵ or is provided to another person with the consent of the person to whom the information relates.²⁶

The restrictive confidentiality requirements in the ACT care and protection system raise grave concerns. The privacy of children and young people involved with the system and the identity of those who report child abuse must of course be protected. However, greater transparency, including through the provision of appropriate exceptions, need not compromise those interests. Rather, greater transparency and accountability is foundational to the cultural change required to improve the care and protection system for the best interests of children and young people and enhance community confidence in the system. To this end, the Commission suggests that consideration should be given to:

- introducing a legislative requirement for the Director-General to develop and publish guidelines on when and how the discretion to share sensitive information under s 851 of the CYP Act will be exercised;
- express provision of review rights for decisions to refuse to provide sensitive information on the basis that it is not in the best interests of the child or young person to do so;
- permitting identifiable information about a reporter to be shared with the consent of the person;
- introducing specific provisions about when certain parties should receive information such as in NSW where the department must provide parents or other significant people with particular information;²⁷

¹⁹ See, *Children and Community Services Act 2004* (WA), s 241(2)(f).

²⁰ See, *Children and Community Services Act 2004* (WA), s 124F(2)(b) (in relation to sexual abuse reports) and s 240(2)(a)(ii) (in relation to wellbeing concerns).

²¹ See, *Children and Community Services Act 2004* (WA), s 124F(2)(k).

²² See, *Children and Community Services Act 2004* (WA), s 124F(2)(k).

²³ See, *Child Protection Act 1999* (Qld), s 187(4)(a).

²⁴ See, *Child Protection Act 1999* (Qld), s 237.

²⁵ See, *Care and Protection of Children Act 2007* (NT), s 308(2)(c)(i).

²⁶ See, *Care and Protection of Children Act 2007* (NT), s 308(2)(c)(ii).

²⁷ See *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 145 (children and young people to be given information about proposed carer), s 149C (agency must disclose information to any parent of a children and young person or other significant person to a child).

- introducing specific provisions to enable a person who has left out-of-home care to access their own records;²⁸ and
- whether Official Visitors, particularly those with responsibility for children and young people, are able to access sufficient information to effectively fulfill their roles.

B. Lack of effective scrutiny

The impact of the restrictive disclosure provisions in the CYP Act is exacerbated by the lack of any mechanism for the external review of decisions made by CYPS in relation to a broad range of matters concerning the care of a child or young person.

As noted above, under the CYP Act, CYPS is not permitted to share sensitive information unless it is in the best interests of a child or young person to do so. A decision by CYPS about what is in the child or young person's best interest is final in this regard. There is no right of external review to test whether CYPS has made the right decision.

In addition, under the CYP Act, many care and protection decisions made by CYPS, which turn on a 'best interests' assessment, are similarly non-reviewable. 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);
- decisions regarding applications for change of name;
- 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.

This approach is significantly out of step with the approach adopted in the majority of other Australian jurisdictions. For example:

- 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.²⁹ 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

²⁸ To address this issue in the interim, the Public Advocate has developed a consent form for the purposes of giving young people exiting care the opportunity to give consent for the Public Advocate to continue to act on their behalf post their 18th birthday in the interests of supporting their ongoing wellbeing given the challenges that young people often face when trying to access information about what supports are or should be available to them post 18.

²⁹ See, *Children, Youth and Families Act 2005* (Vic) s 333.

and contact with the child.³⁰ 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.³¹

- 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.³²
- In **Western Australia**, a person may apply to the State Administrative Tribunal for a review of a care planning decision made by the CEO.³³ 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.³⁴
- 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,³⁵ 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.³⁶
- In **New South Wales**, 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.³⁷

As detailed in our submission to the government's current inquiry into whether care and protection decisions made by CYPS should be subject to review,³⁸ 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.

The Commission considers that the availability of external merits review of child protection decisions is necessary to fully comply with fair hearing obligations under s 21 of the HR Act.³⁹ 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 CYPS is not adequately held to account for its decisions. There is also an inherent conflict when reviews are carried out by supervisors/managers of staff making the original

³⁰ See, *Children, Youth and Families Act 2005* (Vic) s 166.

³¹ See, *Children, Youth and Families Act 2005* (Vic) s 158.

³² See, *Child Protection Act 1999* (Qld), section 247 and Schedule 2.

³³ See, *Children and Community Services Act 2004* (WA), s 94.

³⁴ See, *Children and Community Services Act 2004* (WA), s 89(1)(c).

³⁵ See, *Children and Young People (Safety) Act 2017* (SA), s 158.

³⁶ See, *Children and Young People (Safety) Act 2017* (SA), s 95.

³⁷ 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.

³⁸ A copy of our submission is available at: <https://hrc.act.gov.au/wp-content/uploads/2019/07/HRC-submission-Review-of-child-protection-decisions-in-the-ACT.pdf>.

³⁹ 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.

decision. As noted above, the ACT is an outlier in this regard. In our view, this is an issue that should be remedied as a matter of urgency.

C. Court proceedings

Another area of concern for the Commission relates to CYPS decision-making with regard to commencing or continuing legal proceedings. We accept that decisions to bring proceedings in the care and protection jurisdiction are always going to be controversial and complex. However, we are aware of ongoing community concerns about CYPS decision-making processes in this area.

For example, 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. We also note that the CEO of Legal Aid ACT, Mr John Boersig, has recently expressed concerns about the Directorate taking an 'excessively adversarial approach to litigation', which can result in the delayed resolution of matters.⁴⁰

We 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 Victorian Law Reform Commission 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.'⁴¹

Given the high numbers of Aboriginal and Torres Strait Islander children and young people in out of home care, 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 seeking and considering any submissions made by kin before submitting the application to the court.

Finally, to increase transparency of decision-making in the litigation process, consideration should be given as to whether there should be broader scope for enabling the reporting of court decisions in appropriate circumstances. It is currently an offence to publish information that identifies someone as being the subject of a 'childrens proceeding'⁴² unless the person is an adult and consents; or if the person has died and their representative consents, or 100 years have passed.⁴³ This prohibition applies to everyone, including anyone required or entitled to attend a proceeding under the CYP Act.

⁴⁰ See, Dr John Boersig (Legal Aid ACT), *'Improving the care and protection system in the ACT'*, ACT Bar Association Bulletin, August 2019 Edition.

⁴¹ Victorian Law Reform Commission, *Protection Applications in the Children's Court: Final Report 19* (2010), p 397.

⁴² 'Childrens proceeding' is defined broadly in s 712A(5) of the *Criminal Code Act 2002*, and also includes:

- being subject to an interim or final care and protection order;
- being subject to an appraisal order; and
- being subject to a final or interim therapeutic protection order;
- being subject of a child concern report; or
- the Director-General having had parental responsibility for the child or young person.

⁴³ *Criminal Code Act 2002*, s 712A.

Care and protection proceedings inevitably raise difficult questions as to how best to balance transparency and open justice, with the right of children and families to have their privacy protected, consistent with s 21(3) of the HR Act. However, appropriate media reporting, and the publication of judgments, can be important for promoting public understanding and confidence in the ACT's care and protection system.

We look forward to the progression of the Committee's inquiry. Please let us know if we can be of further assistance.

Yours sincerely,



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