30 March 2016

Laurie Glanfield AM

Dear Mr Glanfield,

Legal Aid ACT Submission on your Review of Systemic Responses to Family Violence in the ACT

Thank you for the opportunity to meet with you on 22 March 2016 to discuss your inquiry. As noted in that meeting, Domestic and Family Violence arises in a significant proportion of legal assistance provided by Legal Aid ACT. Over the past 5 years, the number of family violence services provided by Legal Aid ACT and other Australian Legal Aid Commissions have increased substantially (outlined in Annexures 1 and 2). The commission has a strong interest in the effective management of cases of family violence across ACT. We are also continuously reviewing and improving our service provision to persons subjected to, and using, Domestic and Family Violence.

It is our belief that there is significant scope for improvement in systemic responses to family violence in the ACT. In particular, we are concerned that the policies and practices of Child and Youth Protection Services (CYPS) are often insufficient for adequately preventing, and addressing, Domestic and Family violence. In particular, the lack of an external oversight body means that many important CYPS decisions are not reviewable. This is of significant concern given the vulnerability of the children and young people, and their families, who are impacted by such decisions.

Our submission outlines key areas where we believe significant improvements could be made. These include:

- Review procedures available for decisions made by CYPS;
- The way CYPS engages with and responds to Aboriginal and Torres Strait Islander people;
- The way CYPS engages with the domestic violence order regime; and,
- The way CYPS engages with fathers who use domestic violence.

We would be more than happy to further discuss any of the issues raised below.

Yours Sincerely,

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Legal Aid ACT
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1. The lack of external merits review for CYPS decisions

As noted above, LA submits that the ACT Civil and Administrative Tribunal should be given jurisdiction to review a greater range of CYPS decisions. There is dire need for the availability of external review regarding decisions made by CYPS about children for whom the Director-General has parental responsibility. These include 'care plan' decisions about whom a child or young person will spend time with, where the child or young person will live and arrangements for their education and health care.

1.1. What decisions are reviewable?

The *Children and Young People Act 2008* (ACT) ('the Act') sets out the procedure for care and protection matters in the ACT. The Act provides that the Director-General of the CYPS can apply to the Children's Court to obtain a care and protection order (s 424). The court may then issue a care and protection order after considering a care plan prepared by the Director-General (s 464).

The care plan made by the Director-General may contain a number of significant decisions about the long term care of the child (s 455). In making the initial care and protection order, the Children's Court may make specific orders on a particular aspect of the child's care, and/or provide decision-making authority to the Director-General.

Critically, the Director-General is not bound to comply with the terms of the established care plan, and has discretion to vary the arrangement at any time. The powers granted under the Act are delegable to lower level officers within CYPS. This gives CYPS very broad discretion to make decisions about important aspects of the child's care.

Section 839 of the Act outlines the decisions that may be reviewed by ACAT. Many of the decisions that can be made by the Director-General are not subject to external administrative review, including:

- Where the child will live
- Which family members, or other important people, the child will have contact with; and,
- Decisions about the education and training of the child.

1.2. Other jurisdictions

Some other Australian jurisdictions allow for the external review of a greater range of care and protection decisions. Decisions that are likely to significantly affect the interests of the child are subject to external review to ensure that the decisions are made correctly. The table in Annexure 3 details the types of administrative decisions that are reviewable across some other jurisdiction.

Annexure 4 describes the procedure for the administrative review of care plans in Western Australia. The WA scheme provides for both independent internal review, and external administrative review at the State Administrative Tribunal. This scheme can be looked to as a positive benchmark for thorough administrative review.

1.3. The need for external review

The Commonwealth Administrative Review Council (ARC) notes that internal review without access to external review does not make administrative decisions accountable. Internal review bodies frequently

are not sufficiently independent to correctly resolve complaints,[1] and often lack transparency.[2] Where CYPS decisions are only subject to internal review, there is a risk that CYPS is perceived as unaccountable.

Internal review can be a helpful adjunct, but is not a substitute for external review.[3]

By contrast, external merits review ensure that a decision can be reviewed in an independent forum. The ARC state that external review should be available where the power exists to make administrative decisions that are likely to affect the interests of a person.[4] The powers exercised by the director-general fall under this category.

The availability of external merits review is likely to improve decision-making processes. The ARC note that the benefits of external review include:[5]

- Improvement in the quality and consistency of agency decisions;
- Provision of the correct or preferable decision in individual cases;
- Ease of access to stakeholders seeking merits review; and,
- Improvement in the perception of openness and accountability of government.

Legal Aid ACT is concerned that the current review system limits CYPS' capacity to protect children. While CYPS 'hold all the cards', they have little reason to listen to the concerns of people who are important to the child and who know the child well. An external avenue of appeal changes this dynamic by allowing scrutiny of CYPS decisions. In this way, external review can help address structural deficiencies in decision-making and agency policy and practice.

Given the Act already makes a range of other powers reviewable by the ACAT, it is unclear why a particular set of decisions are not subject to external review. External review is an effective avenue towards providing natural justice and upholding the quality of decisions made by CYPS.

Case Study: The Director-General applies to the Children's Court for a care and protection order for Ms X's children. The Magistrate makes a care and protection order, providing the Director-General with parental responsibility for the children until they are 18. In her judgement, the Magistrate notes that the children are currently having contact with their mother 3 times a week, and highlights the importance of an ongoing relationship between Ms X and has children. A CYPS caseworker later varies the care plan so that the children will only see their mother once a year.

Dissatisfied with the explanation for this change given by the Caseworker at a roundtable meeting, Ms X asks for written reasons for this drastic change. The caseworker declines to provide anything in writing, simply stating that 'things have changed' and that 'the new arrangements are in the children's best interests.' Ms X seeks assistance from Legal Aid regarding the change to the Care Plan. She is advised that there is no pathways for her to seek external review of this decision.

[1] Australian Administrative Review Council, 'Better Decisions: Review of Commonwealth Merits Review Tribunals' (Report No. 39, ARC, 1995), [6.50].
[2] Ibid, [6.63].
[3] Ibid, [6.67].
[4] Administrative Review Council, 'What decisions should be subject to merit review?' (Report, ARC, 1999).
[5] Above n 1, [2.11].

2. Current internal review procedures at CYPS

2.1. What internal review is available?

The need for external review of a greater range of CYPS decisions is highlighted by the limited nature of existing internal review mechanisms. CYPS has little information available to the general public about their internal review procedures. For example, from the Directorate's publication titled '*Guide for families involved in care and protection'*:

> Decisions about whether or not your child can be safely returned to your care will be based on an assessment by CPS of any changes to the level of risk and safety in your home. It is expected that the CPS case worker will complete a Child Protection Assessment Report (CPAR) and present it to the Application Review Committee for the Committee's consideration of the recommendations relating to your child's ongoing care. The Application Review Committee is an internal committee comprised of CPS senior managers.[6]

The Guide also provides:

> Q. What if I'm not happy with my child's Care Plan?
> A. Parents should always have a copy of their child's Care Plan and have regular opportunities to contribute to the arrangements spelled out in the Care Plan. Usually Care Plans are updated at meetings with CPS such as Review of Arrangements meetings, Child Protection Case Conference (CPCC) meetings or in the context of an Annual Review process. If you are not happy with your child's Care Plan, you should explain to CPS what your concerns are (in writing wherever possible) and also attend meetings convened by CPS to discuss the Care Plan and care arrangements.[7]

There is no further information readily available that explains the role and procedures of the Application Review Committee, including information about how information or evidence can be presented to, or considered by the committee and/or how the Committee's reasons will be provided to the complainant within reasonable timeframes.

After first-stage internal review, complaints may be referred to the Regulation Oversight and Quality Service (ROQS). This is an internal body that has narrow discretion to make recommendations about a decision made by a department in the Community Services Directorate. The ROQS cannot re-make a decision, and has limited power to make a recommendation on merits.

For applicants, CYPS internal review is opaque. Decisions made by the Application Review Committee will frequently fail to contain a comprehensive statement of reasoning, nor will they allow the applicant to present information in person to substantiate their complaint. The take away impression for applicants is that internal review simply affirms the original decision. In these circumstances, it is unlikely that the review body will come to the correct or preferable decision.

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[6] Care and Protection Services, 'Guide for families involved in care and protection' (Factsheet, Community Services Directorate, ACT Government, 2014), 6.
[7] Ibid, 32-33.

2.2. How should internal review operate?

As previously mentioned, internal review without access to external review does not provide accountability. External review is a quality check on the efficacy of internal review, and essential to the perception that the review process is a genuine check on administrative power.

When an avenue to external review *is* available, internal review can be a useful mechanism to provide clients a quick and accessible form of review.[8] The ARC note:

> In jurisdictions where internal review is a mandatory precondition to seeking external merits review, rates at which review by review tribunals is sought tend to be lower than in other jurisdictions.[9]

This is only true, however, where internal review is effectively designed. Efficacy in internal review requires both actual and perceived independence from the original decision maker.[10] Particularly where internal review is mandatory, the reviewing body must be rigorous in coming to the correct decision. If the review panel simply 'rubber stamps' the original decisions, it only services to introduce delay in reaching the correct outcome.[11]

The ideal standard for internal review is that 'the applicant gains as much in the way of efficacy [as] the agency does.'[12] As CYPS internal review currently operates, all the convenience lies with the agency. This does not benefit the quality of decision making. The ARC provide that:

> If internal review is seen as a truly distinct aspect of agency decision making, that will help to promote within internal review sections the culture that their role is to undertake a genuinely fresh reconsideration of decisions. It will also give internal review the credibility within agencies necessary to enhance its normative effects.[13]

The current internal review system at CYPS does not meet the standard recommended by the ARC. Where an applicant raises legitimate concerns about a child's wellbeing, the review body is likely to give undue weight to the opinion of a CYPS officer. While this practice continues, the review body is unlikely to come to the decision that correctly recognises the child's interest.

3. The way CYPS engages and responds to Aboriginal and Torres Strait Islander People

3.1. Cultural Awareness

Section 7(d) of the *Child and Young Person Act* stipulates that the objects of the Act are to ensure that Aboriginal and Torres Strait Islander people are included in the provision of care for Aboriginal and Torres Strait Islander children. Section 10 requires that decisions made under the Act must take into

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[8] Above n 1, [6.49].
[9] Above n 1, [6.53].
[10] Above n 1, [6.49].
[11] Above n 1, [6.50].
[12] Australian Administrative Review Council, 'Internal Review of Agency Decision Making', (Report, ARC, 2000), [3.13].
[13] Above n 1, [6.62].

account a number of factors; including traditions and cultural values, submissions made by any Aboriginal or Torres Strait Islander People or organisations, and the need to maintain connection with lifestyle, culture and traditions.

The *Guide for families involved in care and protection* states that CYPS 'seeks to provide and promote the importance of culturally appropriate practice', including 'the importance of cultural difference' and 'the damage which may be caused by making cultural assumptions.'[14]

As it currently stands, we do not believe that CYPS are meeting the standards set out in the Act and policy. We have received complaint from a number of Aboriginal and Torres Strait clients who believe that they have had adverse action taken against them stemming from the failure of CYPS to understand cultural practices and norms. They have further felt that their views had been marginalised on the basis that they are an Aboriginal or Torres Strait Islander person.

Where there is a systemic failure to recognise and address the concerns of people who have a close relationship with the child, it is unlikely that CYPS will correctly identify the best interest of the child. CYPS training procedures should better reflect the importance of cultural awareness in protecting children.

Case Study: Y collected his/her children from an ACT Government daycare program and noticed they had suffered bruising. Y requested information from the daycare agency on what had caused the injury. The agency instead reported the injury to CYPS. CYPS required that the children were subject to a highly intrusive medical examination in front of CYPS workers. CYPS demanded that Y agree to a home assessment. Y's children were then placed on a Care and Protection Register until age 18.

Throughout the process, CYPS threatened that they would involve police if Y did not consent to CYPS decisions. Y was afraid CYPS would remove his/her children from care. Y was never informed about how the children were initially injured.

This case demonstrated unnecessary escalation and a substantial breach of the children's privacy. CYPS clearly misused their discretion, exacerbating the situation and failing to act in the best interests of the children. Y believes that CYPS only acted as they did because Y and his/her children are Aboriginal.

3.2. Hiring Practices

Legal Aid ACT is aware that CYPS have hired a number of staff internationally in order to meet staffing demand. We have received complaint from our clients that these international staff often lack awareness of Aboriginal and Torres Strait Islander history and culture, and treat Indigenous Australians unfavourably as a result.

[14] Care and Protection Services, 'Guide for families involved in care and protection' (Factsheet, Community Services Directorate, ACT Government, 2014), 6.

While we do not oppose overseas hiring, it is critical CYPS ensure that any international staff are given sufficient training in cultural awareness. CYPS recognise the importance of understanding cultural difference in pursuing the best interest of children;[15] appropriate training is necessary to achieve this objective.

4. How CYPS handles Domestic Violence Orders

4.1. A 'box to tick'

Legal Aid ACT has encountered a number of cases where CYPS has demanded a parent obtain a DVO in order to ensure contact with or care of a child. In many of these cases, there has been little consideration of whether the DVO will promote the safety of the parent and child in each circumstance.

We are concerned that this requirement often sets up parents and carers to fail. By requiring a DVO even where it is unwanted, CYPS can later use breaches of DVO as justification for removing the child. There is little evidence that CYPS attempts to initiate rehabilitative processes that would more appropriately represent the child's interest. In this way, it appears that CYPS uses DVOs as a 'box to tick' so as to grant them broader discretion over the child's care arrangements.

Case Study: Z and her partner are living together. CYPS have told Z and her partner to obtain a mutual DVO or they will remove her child, however they will not put this demand in writing. Z and her partner would prefer an agreement by consent.

If a mutual DVO is made, an argument could result in criminal charges for breach of a DVO. This would result in CYPS removing the child. The intervention demanded by CYPS is a 'box ticking exercise' to better allow them to remove the child; rather than a less drastic intervention that better represents the child's interest.

4.2. Transparency

Legal Aid ACT clients have reported that CYPS will verbally communicate that they will remove a child if the parent or carer does not obtain a DVO. However, they will not provide written notice of this representation. In this way, CYPS can affect the conduct of carers without any accountability for the statements they make.

This concern reflects a broader trend where CYPS is unwilling to provide written directions to clients. It is essential that any representation made by a public agency is communicated by writing so that the client has evidence of the communication. As a matter of procedural fairness, CYPS officers should be instructed to not make any attempt at communication unless they are able and willing to record that representation.

[15] Ibid.

5. How CYPS engage fathers using violence

5.1. Tools to mitigate family violence

Frequently CYPS will require a mother to protect her child from a violent partner, at risk of having her child removed. This will usually occur through a requirement that she obtain a DVO. The 'protective' approach often places undue pressure on the mother to avoid the father, which in some cases may be highly difficult, especially where the father has engaged in stalking, etc. Often where a mother is unable to keep the father away, CYPS will choose to remove the child to address the risk of harm, despite the child's best interest being to remain in the mother's care.

As a first-stage intervention, CYPS should provide tools to engage the father and stop the incidence of violence, rather than focusing on the mother's capacity to protect a child from risk. The father may still be restricted from contacting the child during this step. The effect of changing the onus to protect the child would address the actual violence threatened, rather than penalising the mother for being victim to the violence. This would further ensure that CYPS continues to act in the interest of the child, and not simply the interest of convenience.

Annexure 1: Legal Aid ACT domestic violence, child protection and family law matters

Domestic Violence Services Provided	2011-12	2012-13	2013-14	2014-15	2015-16 Expected
Grants	160	231	151	207	199
Advice/Duty/MA/Advocacy	521	796	644	982	1109
Helpline Calls	129	147	321	505	512

% Increase in DV Services	2011-12	2012-13	2013-14	2014-15	2015-16 Expected	Average Increase
Grants	N/A	44%	-35%	37%	-4%	11%
Advice/Duty/MA/Advocacy	N/A	53%	-19%	52%	13%	25%
Helpline Calls	N/A	14%	118%	57%	1%	48%

Care and Protection Services Provided	2013-14	2014-15	2015-16 (YTD)	2015-16 (predicted)
Care and Protection Proceedings[16]	**228**	**285**	**211**	**293**
↳ **In House**	**59**	**89**	**77**	
% Representing Children	47%	66%	70%	
↳ **Referred**	**169**	**196**	**134**	
% Representing Children	60%	43%	49%	
Independent Child Lawyer	**151**	**168**	**121**	**169**
↳ **In House**	**59**	**88**	**63**	
↳ **Referred**	**92**	**80**	**58**	

[16] Children's Court and Child Representative proceedings.

Annexure 2: National Legal Aid Commission family violence, care and protection and family law matters

Services provided	2010-11	2011-12	2012-13	2013-14	2014-15
Grants approved (total)	140,989	144,111	140,407	129,990	132,115
↳ **Grants approved for family violence, child protection &/or family law matters (Commonwealth & State)**	**41,429**	**46,401**	**47,080**	**45,357**	**45,943**
↳ **% of total**	**29.4%**	**32.2%**	**33.5%**	**34.9%**	**34.8%**
Duty lawyer (total)	380,525	387,739	387,851	398,290	422,342
↳ **Duty lawyer services relating to family violence, child protection &/or family law matters (in-house & assigned)**	**25,562**	**31,296**	**32,175**	**30,508**	**32,495**
↳ **% of total**	**6.7%**	**8.1%**	**8.3%**	**7.7%**	**7.7%**
Legal advice (total)	315,096	306,744	315,183	317,510	320,373
↳ **Legal advice services relating to family violence, child protection &/or family law matters (Inhouse & assigned)**	**109,436**	**106,391**	**106,471**	**105,937**	**102,025**
↳ **% of total**	**34.7%**	**34.7%**	**33.8%**	**33.4%**	**31.8%**
Minor assistance (total)	43,176	65,033	62,653	64,856	74,549
↳ **Minor assistance services relating to family violence, child protection &/or family law matters (in-house & assigned)**	**11,677**	**22,044**	**23,991**	**24,367**	**28,244**
↳ **% of total**	**27.0%**	**33.9%**	**38.3%**	**37.6%**	**37.9%**
Family Dispute Resolution Conferences (total)	7,306	7,953	8,177	8,219	7,921
Community Legal Education[17] (total) (numbers of attendees)	23,292	73,092	47,139	109,144	82,206
Information/referral[1] (total)	943,862	1,150,828	1,188,037	1,300,583	1,364,618
Total services provided	**1,854,246**	**2,135,500**	**2,149,447**	**2,328,592**	**2,404,124**

Sourced from National Legal Aid Statistics as at March 2016 http://lacextra.legalaid.nsw.gov.au/NLAReports/Default.aspx.

Community Legal Education & Information/referral services sourced from legal aid commissions' reporting pursuant to the National Partnership Agreement on Legal Assistance Services 2010-2015.

[17] Including family violence, child protection, family law and related matters such as tenancy, mortgage stress, debt relief etc.

Annexure 3: Administrative review of care and protection decisions across jurisdiction

Issue	ACT	Victoria	Queensland
Reviewability of care/case plans	NO No provision for review of care plans made by the director-general under s 455. Director-general is not obliged to follow a proposed care plan and care plans may be amended from time to time by the director-general.	YES Section 333(1)(a) of the Victorian Act allows a child or child's parent to apply to VCAT for review of any decision contained in a case plan under s167 of the Act.	YES Div 5 Part 3A of the Queensland Act provides that the chief executive must periodically review a case plan, and must include certain participants in the review. Under s 247, a person may apply to QCAT to review a decision by the chief executive to refuse to review a case plan under s 51VA.
Providing information to parents	NO The Act does not contain provisions about providing information to parents. A decision by the director-general not to provide information to a child's parents about a care and protection order is not reviewable under the Act.	YES Under s 178(1) of the Victorian Act, if a child is in out of home care because of a child protection order, the Secretary has a responsibility to provide information to the parents of the child, including the provision of personal information. If the Secretary makes a decision to not provide the information under s 178(2), the parent may have this decision reviewed under s 333.	YES Where a child under a child protection order is placed in out of home care, the chief executive must give notice to the child's parents stating whose care the child is in, the reasons for the decision and how the child may apply to QCAT for review (s 86). If the chief executive refuses to provide this information because it would constitute a risk to the child, this decision may be reviewed under s 247 of the Act.
Decisions made in relation to 'care and protection' orders	NO The Act does not provide for review of decisions of the director-general about the care and protection of a child subject to a care and protection order (eg contact between a child and parent).	YES Section 158 provides that the child, parent of the child or any other person whose interests are affected by the decision can apply to VCAT for review of a decision (after pursuing internal review) made under or in relation to a child care agreement relating to the care of a child.	YES Section 247 allows a parent to challenge a direction given by the chief executive in relation to a supervision matter stated in a child protection order (see s 78) and deciding in whose care to place the child under a child protection order granting the chief executive custody or guardianship (see s86(2)).

Table prepared by Ashurst for the ACTLAF working group on care and protection issues.

Annexure 4: Review of care plans in Western Australia

Section 89 of the *Children and Community Services Act 2004* (WA) provides that the Chief Executive Officer of the Department for Child Protection and Family Support may make a care plan that sets out decisions about the child, including placement arrangements and contact. Section 89(4) allows the CEO to modify a care plan at any time.

Section 92 stipulates that the CEO must establish an independent Care Plan Review Panel. This panel may review any decisions made by the CEO about a child's care plan. After the review, the panel makes a recommendation to the CEO about which decision they believe is in the best interest of the child. The CEO is not obliged to follow the panel's recommendation. People with an interest in the wellbeing of the child have standing to seek review.

93. Initial Review

(1) An application for the review of a care planning decision may be made to the CEO by –

(a) The child; or
(b) A parent of the child; or
(c) Any carer of the child; or
(d) Any other person considered by the CEO to have a direct and significant interest in the wellbeing of the child. (…)

(6) The CEO, after considering the report of the care plan review panel and other information available to the CEO, must –

(a) confirm, vary or reverse the care planning decision or decision under section 89(7); or
(b) substitute another decision for the care planning decision or decision under section 89(7); or
(c) refer the matter back to the care plan review panel for further consideration and report.

If the applicant is unhappy with the CEO's decision following review by the Care Plan Review Panel, they may apply to the State Administrative Tribunal under s 94 to have the decision reviewed.

94. Review of CEO's decision

(1) A person who is aggrieved by a decision made by the CEO under section 93(6)(a) or (b) may apply to the State Administrative Tribunal for a review of the decision.

(2) Subsection (3) applies if —

(a) an application is made to the State Administrative Tribunal under subsection (1); and
(b) the State Administrative Tribunal's decision on the application (the Tribunal decision) results in the modification of a care plan (the relevant modification).

(3) The CEO must not, within the period of 12 months after the Tribunal decision, exercise the power in section 89(4) so as to affect the relevant modification unless the CEO is satisfied that there has been a significant change in facts or circumstances, or that new facts or circumstances have arisen, since the Tribunal decision was made.