LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON HEALTH, AGEING AND COMMUNITY SERVICES

(Reference: Inquiry into Child and Youth Protection Services (Part 2))

Members:

MS B CODY (Chair)
MRS V DUNNE (Deputy Chair)
MS C LE COUTEUR

TRANSCRIPT OF EVIDENCE

CANBERRA

TUESDAY, 25 FEBRUARY 2020

Secretary to the committee:
Dr A Cullen (Ph: 620 50136)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

CURTIS, MR ADRIAN, Member, Family Violence and Children's Committee, ACT Law Society **130**

DONOGHOE, MS COURTNEY, Member, Family Violence and Children's Committee, ACT Law Society **130**

DONOHUE, MR CHRIS, President, ACT Law Society **130**

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Amended 20 May 2013

The committee met at 2.31 pm.

DONOHUE, MR CHRIS, President, ACT Law Society
DONOGHOE, MS COURTNEY, Member, Family Violence and Children's Committee, ACT Law Society
CURTIS, MR ADRIAN, Member, Family Violence and Children's Committee, ACT Law Society

THE ACTING CHAIR (Mrs Dunne): I declare open the fifth public hearing of the Standing Committee on Health, Ageing and Community Services inquiring into part 2 of the reference from the ACT Legislative Assembly. Part 2 of the reference from the Assembly has asked the committee to inquire 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.

Before we proceed, I would like to take a moment to acknowledge that we meet on the lands of the Ngunnawal people, the traditional custodians. I respect their elders past, present and emerging, and acknowledge the continuing contribution of their culture to this city and this region.

Today the committee is hearing from representatives of the ACT Law Society: Mr Chris Donohue, President of the Law Society; Ms Courtney Donoghoe, a member of the Law Society's Family Violence and Children's Committee; and Mr Adrian Curtis, also a member of the society's Family Violence and Children's Committee. On behalf of the committee, I thank you for appearing today and for the Law Society's submission, which has been published in full.

I remind witnesses of the protection and obligations provided by parliamentary privilege and draw your attention to the pink laminated sheet. Could you confirm for the record that you understand the privilege implications of the statement? Come on—you are lawyers. I hope you do!

Mr Donohue: Well, if you want us to act like lawyers, we will have to take this away and get an advice on it and give you a written response. It will take a couple of weeks!

THE ACTING CHAIR: Actually, we will treat you like witnesses. I also remind witnesses that the proceedings are being recorded by Hansard for transcription purposes, as well as being webstreamed and live broadcast.

I remind witnesses to refrain from referring to information that may identify a child or young person who has been subject to proceedings in the Childrens Court. Witnesses will be aware that any information that is disclosed to, or obtained by, a person under the Children and Young People Act is subject to a strict set of secrecy provisions. The Assembly's reference to the committee also specifically requires that the committee take evidence and hold documents in a way that will not allow for individual people to be identified without their express consent.

Before we proceed, Mr Donohue, would you or someone else like to make an opening statement?

Mr Donohue: Yes, a few minutes.

THE ACTING CHAIR: Thank you.

Mr Donohue: I am Chris Donohue. I am the President of the ACT Law Society, and I have with me members of our Family Violence and Children's Committee. I will come back to that, but, before I do, I am afraid I have to say this: I am disappointed that the representative of the opposition is not here today.

MS LE COUTEUR: She is.

THE ACTING CHAIR: I am the representative of the opposition. That is me.

Mr Donohue: Okay. I have to say this: I must apologise.

MS LE COUTEUR: And we truly believe that the representative of the Labor Party is unwell.

Mr Donohue: Given that I have known Vicki Dunne for longer than either of us cares to remember—

THE ACTING CHAIR: A long time.

Mr Donohue: and I have always known which party she belongs to, I feel as though I should reprimand myself doubly.

THE ACTING CHAIR: There is a member absent today, but the member is absent today because she is ill.

Mr Donohue: Hence the confusion about how many people I have met over the last year or two. Going on, from one foot in the mouth to something better, the purpose of the Law Society getting involved in these things is to come up with what I call "good law". Good law is something that is fair and just, comprehensible, does not contradict itself, does not contradict other legislation and generally is not retrospective. In our work, often giving advice to government, giving commentary on government and so forth, we take a completely non-partisan view. You can see how confused I am. While various members of our committee act for parties to litigation and so forth, or parties that are involved in the child protection system, they do not come here representing children, carers, parents or CYPS people; they come here with the objective of looking at the law, to come up with a proper, fair and workable law.

The bottom line for us is justice, fairness. The committees of the Law Society work on a voluntary basis, so they put their own time in. They have their work. The particular members here today work, as it were, at the coalface of the child protection system. They deal with the people who are affected by decisions, and then they volunteer their time on our committee and so forth.

Our major concerns are with the lack of rights to information. There is a big difference between available information, which is the government's submission,

information which may be made available and information that must be made available. We are looking for "must". This kind of information must be made available. We are looking for rights to appeal, to review decisions, not just channelling it back through the CYPS system. But in the event that it is still unsatisfactory for whatever reason, we want to see rights to appeal, whether it is back to the Magistrates Court or to the ACAT or to some other body set up externally to the CYPS system.

Our main focus is on situations where the child has been put into care. So, really, we are looking at decisions of the director-general. Before a child is put into care there is usually a hearing, of some kind at least, in the Magistrates Court. Either people take the opportunity to raise things there or they do not. Sometimes they do not because they are befuddled by the whole thing and the thing goes through and they have a degree of faith in the decision of the court to have the director-general in charge of making day-to-day decisions.

Unfortunately, there has been shown, very blatantly and very clearly, a tendency for the director-general and the CYPS system to restrict information. Last year—it is in our papers—there was a change of law where we suffered a derogation of our rights to information relating to child protection. An amendment to the FOI Act, the Freedom of Information Act, removed the right of a person to use that act to "obtain sensitive information about themselves"—and only about themselves—"held by officials under the Children and Young People Act". I seemed to be reading there because I was. This is part of the same speech that I gave to the Supreme Court on the opening of the legal year. It was sufficiently important to the Law Society to make that point on that particular occasion because it is a very serious and very important point. With respect to the changes to the FOI Act, may I presume that you would recall it?

MS LE COUTEUR: I do recall it, and I recall the briefings.

THE ACTING CHAIR: I recall it.

Mr Donohue: We lobbied very hard to not have that happen. That part of the bill—it was an omnibus bill—treated a very serious thing as if it was a mere detail. Unfortunately, I was told by sources who should have been advised to tell me better, that it was merely closing off a back-door way of people obtaining information and that instead of that they should go to the front door.

It seems like a reasonable explanation, and if you are the person getting that advice from within your own department you might accept it, but the fact is that the front door does not exist. There is some kind of window, but you cannot open it. The information can be given to you or it cannot be; the right to get the information is not there. That is the right to the kind of information a person wants to know about themselves: "What did I do? I'm the person who had care of the child. The child's been moved out of my care and given to someone else. What have I done wrong?" They cannot get the information. If there is an external review right, how can it be used if the person does not have the information that was taken into account to remove the child? That is a very important point.

Our objectives are rights to information and rights to appeal and review. We put in the

submission that we presented a reference to the legislation in Queensland. It had been my thought at the time—which was some time back—to provide the same kind of information in relation to all the states, but I was happily relieved of that task when I read the Human Rights Commission's submission, pages 4 to 7, where they set it out very well. We support what they have said, in our request for the Assembly to make laws that give the person, the carer, some degree of confidence and feeling that there is justice in the rule of law. You can have a law, and we all comply with the rule of law, but if there is no justice in it you cannot feel comfortable with the rule of law. It is most important that people who are using this system feel that there is justice—not just there somewhere but there as a first step. Did I take longer than five minutes? Probably.

THE ACTING CHAIR: I will begin by going to your submission and touching on some of the issues that are there. You have touched on the FOI issue. The Law Society was very forceful at the time about the appropriateness of putting these FOI changes in omnibus legislation. It was portrayed to the Legislative Assembly that this was a technical issue and that this provision should not have been there in the first place.

But I want to touch on how you see that the use of the FOI Act would improve individuals' access to their own information. It was put to members of the Assembly that it was a closing of a loophole that should not have been there and that it would have perhaps given people access to who disclosers were. How does the Law Society interpret the rationale given to us that it was about protecting disclosers, and aren't there provisions in the Freedom of Information Act that would have protected disclosers?

Mr Donohue: Indeed. The right under the FOI Act was to obtain what is defined in the Children and Young People Act as "sensitive information". Now they are only entitled to obtain sensitive information about themselves. In the example I gave to the court, Aunty May—she was named after my own aunt—or "Aunty" for short, has a child in her care removed. She is a kinship carer. She wants to know all that is alleged against her and have a proper opportunity to correct errors. If she cannot get that information, she is not in a position to take any further steps. It has been there in the FOI Act for—

THE ACTING CHAIR: Forever?

Mr Donohue: Unfortunately, the ACT has not been here forever.

THE ACTING CHAIR: Well, so long as there has been an FOI Act.

Mr Donohue: For long enough. That fundamental right to be able to get information about yourself—not about other people—and which has had a severe impact on your life, is hardly a technical or minor amendment. It is fundamental. It was wrong, in my view, to put it in an omnibus bill.

MS LE COUTEUR: In the briefings that I had—you may or may not have had the same—basically we were told, and possibly foolishly believed, that the accesses through the real act, not the FOI Act, gave people access to reasonable information

about themselves. That is what was said to us—that it was, at best, a doubling up.

Mr Curtis: One of the issues that comes up—and it was an issue that came up when we were discussing the Freedom of Information Act—is that characterising it as a loophole is not entirely accurate, primarily because there is no other avenue that is freely available. I would like to stress that we are dealing primarily with very vulnerable people, whether it be the children when they have grown up or the parents themselves. Even though there may be a theoretical ability to access information, whether by seeking a court order as part of their ongoing care and protection proceedings or by a formal request, which can easily be rejected, we are talking about people who may not necessarily have the expertise to go through those processes, and we are dealing with a system where the act gives an incredible amount of power to caseworkers, to team leaders and to people in that service to simply say, "No, this information is protected under the secrecy provisions which prevent us from identifying parties or disclosers."

It is a bit of an ongoing problem, and it is a problem that comes up during court proceedings as well. In my role as child representative I have come up against issues—Ms Donoghoe can talk more about kinship assessments—and not been able to access information about that child. There have been examples where the child has been subjected to things such as criminal charges, and care and protection have been well aware of them but have failed to disclose them, and, unless forcefully pressed, have been completely unwilling to give any details about that information. So it does extend beyond simply the requests for information; it extends to court proceedings as well. It is not quite right to say that the Freedom of Information Act is a loophole when there is no other reliable mechanism to access the information.

THE ACTING CHAIR: Could you, Mr Curtis, or other members, reflect on the other means and perhaps outline to the committee what they might be and, in your experience, how they do or do not work to allow for the exchange of information.

Mr Curtis: My role is typically limited to when court proceedings are ongoing, so our requests are usually made directly to the solicitors during those proceedings. So unfortunately I cannot give experience of direct reflection about once those proceedings have ended. It is my understanding that it is incredibly limited, and it is largely based around specific requests being made. I am not sure if Ms Donoghoe can help any further with that issue.

Ms Donoghoe: Unfortunately, I am limited in the same capacity as Mr Curtis, in that requests for information-sharing that I have asked for are limited to during proceedings rather than once they have closed and moved on.

THE ACTING CHAIR: But in your limited experience, what processes do you need to go through to request information and how much is it like extracting blood from a stone?

Mr Donohue: You would have to start a court proceeding once the director-general has been—

Mr Curtis: There is no specific set of guidelines that I am aware of. The guidebook

that has been made public by CYPS—it is a document available on their website—goes through what it alleges to be internal policies that talk about how information is accessed, and it largely goes towards contacting your case manager or contacting the team that is dealing with your matter and requesting the information through them.

One of the difficulties that we identified when we were reading through that guide is that if your request is rejected you then have the opportunity to go and request that information from another source, but there is no internal policy or internal systems in the act that I am aware of which guarantee any sort of accessibility or even any sort of review of a decision to refuse access to information. And, again, one of the really big pieces of information comes around assessments of carers and kinship carers. Largely, if you are the person seeking to be appointed as a kinship carer, if you are knocked back, accessing information about why is almost impossible.

MS LE COUTEUR: Do they give any reasons why it is impossible? Because presumably they cannot be held for defamation?

Mr Curtis: Again, with limited experience, my understanding is that they typically rely on the secrecy provisions already contained within the act and simply say that, "We can't disclose that information. It would identify people that shouldn't be identified."

Ms Donoghoe: One example I might be able to speak to, which might assist in putting this issue in context, is around the areas of kinship assessments. I have had some experience with that in particular matters where I have been acting for a child in care and protection proceedings. A kinship assessment is quite a thorough assessment, but it is carried out by care and protection or a staff member of care and protection. Essentially, they are going through—this is based on my understanding—an assessment process to determine whether or not that particular person is a satisfactory carer or can be approved or not approved to be a carer for a child.

I have, in multiple matters, made requests to see copies of those assessments because from my perspective it contains absolutely critical information about not only the child—because the assessment does include information about the child—but also the person who potentially may be approved or not approved to be a carer for this child. On multiple occasions I have been informed that I cannot have a copy of that or cannot see a copy of that assessment because it contains sensitive information about the carer being assessed.

MS LE COUTEUR: Yes, well, by definition it will.

THE ACTING CHAIR: I think that goes without saying.

Ms Donoghoe: Absolutely. We are then normally directed to seek a formal court order to obtain that information. So essentially if we are to be able to have access to that information, to be able to represent the child in the proceedings, we have to request a formal court order to be able to access or see that document.

THE ACTING CHAIR: It is sort of "I will see you in court", basically?

Ms Donoghoe: Yes.

MS LE COUTEUR: When you get the court order do you then generally get the information?

Ms Donoghoe: Yes.

MS LE COUTEUR: Is it just a delaying tactic or does the court say yes or no, sometimes?

Ms Donoghoe: The difficulty from my perspective is that I have certainly had matters where that information and critical documents in cases have been denied. Then we get to court and we ask for a court order and that court order is made. But certainly in my experience I have not had a case where care and protection have then asked the court to redact pieces of particular information or anything like that. I am not sure of the reasoning behind it, because the document then is produced in accordance with the court order.

THE ACTING CHAIR: What you are saying, Ms Donoghoe, is that you ask for documentation which is relevant to your client, who is the child. would care and protection routinely say no?

Ms Donoghoe: Yes.

THE ACTING CHAIR: And would routinely say, "If you want it, take out a court order"?

Ms Donoghoe: "Ask the court to make an order."

THE ACTING CHAIR: Yes. Would you routinely get that information when you ask the court?

Ms Donoghoe: If a court order has been made by the magistrate then, yes, in my experience.

MS LE COUTEUR: Does the magistrate normally make that order?

THE ACTING CHAIR: Yes.

Ms Donoghoe: Yes.

THE ACTING CHAIR: And then you would routinely get the lot.

Ms Donoghoe: Yes.

THE ACTING CHAIR: You would not get redacted information?

Ms Donoghoe: That is right.

THE ACTING CHAIR: So it could be interpreted as a delaying tactic or some sort

of power play?

MS LE COUTEUR: It would appear to be a delay.

Ms Donoghoe: It could be, yes.

THE ACTING CHAIR: Yes.

MS LE COUTEUR: We could take that interpretation, that even if you were more polite—

Mr Donohue: We are just clarifying something.

Ms Donoghoe: That is when proceedings are on foot.

THE ACTING CHAIR: Yes.

Ms Donoghoe: To clarify that, that is when a court proceeding is ongoing and it is occurring at the time. The difficulty is to obtain that kind of information when proceedings are closed. That is a difficulty because if you do not have an ongoing proceeding there are only certain ways that you can reopen a matter once a final order has been made. I do not know that that would be sufficient grounds to then reopen a case to obtain information.

MS LE COUTEUR: Right.

Ms Donoghoe: There are very specific provisions around asking the court to amend or revoke an order or reopen a case.

MS LE COUTEUR: There is a review every 12 months or something.

Mr Curtis: So that is—

MS LE COUTEUR: I am wondering: is this a place where you can get info?

Mr Curtis: That is something that is set out in the guide for this review every 12 months. It is not reflective of what is in the legislation. What the legislation says is that the parents, every 12 months, are able to apply to have orders amended or reviewed and that if they try to do it more frequently than that they must seek leave of the court to do so. Just building on what Ms Donoghoe said, those orders really do have to be orders relating to the care or welfare of the child. I am not sure that an order simply for the release of information falls within the scope of the sections that enable you to reopen proceedings, because they talk to amending or revoking orders quite specifically.

MS LE COUTEUR: So an interested party, being the parent, the carer or whoever, could not say after 12 months, "I'd like to see this order reviewed," and as part of the considerations, "I want to find out blah, blah, blah about the child or myself," or the relevant party? That is not something they could do? They would have to find out in advance that there seemed to be a good reason to change things—is that what you are

saying?

Mr Curtis: They would have to apply first and then ask for the information. There is not really any way to get the information beforehand to know if you should be applying.

Ms Donoghoe: I think that it would be a matter of making those requests to care and protection, but the difficulty is that there is nothing that really compels care and protection to give you that information. That is my understanding.

MS LE COUTEUR: So if you go to care and protection and they say no, you then have to go to court?

Mr Curtis: And it would not be about the information request specifically; you would attach that to another application.

MS LE COUTEUR: And you would go to court and say, "Look, I've got issues. I think this should change, but I've got no information," and the court would presumably say—

Mr Donohue: That is why you need the right to the information, so that you can use that information to determine whether you go to the rather large difficulty of going off to the court again.

MS LE COUTEUR: Yes.

Mr Donohue: Section 866 says that the court may order sensitive information to be given or produced in a proceedings.

THE ACTING CHAIR: There has to be a proceeding on foot.

Mr Donohue: The proceeding is usually over by the time that—

MS LE COUTEUR: This is getting slightly broader. There is clearly a considerable power imbalance in most cases between the child in question, the carer, the parents, the associated adults and government. I understand that there is a system of representation for the children, but how often are the relevant adults represented by anybody?

Mr Curtis: Very rarely. I would say it is often by way of legal aid and as a result of limited funding—I do not want to speak in too much detail on it—my experience is that very rarely are parents represented. I have represented a few of them, but it certainly is not the norm.

MS LE COUTEUR: I would imagine not.

Mr Curtis: If I could just speak a little bit further to that.

MS LE COUTEUR: Sure.

Mr Curtis: That occasionally presents issues, especially when we are dealing with issues when the parents are consenting to orders. I have, on a number of occasions, as the child representative, had to speak up and suggest that perhaps we need to hold back on signing off on orders because I was not comfortable that the parents fully understood what they were agreeing to and what they were consenting to. I have had to insist on them going and seeking legal advice before entering into orders.

MS LE COUTEUR: And that generally would be legal aid.

Mr Curtis: The child representatives are often legal aid or external practitioners.

MS LE COUTEUR: Yes, but when you said parents really need legal advice, presumably generally that would be legal aid?

Mr Curtis: Typically it would be from legal aid.

MS LE COUTEUR: And is legal aid adequately resourced to deal with these issues?

Mr Curtis: I am just conscious that I may have a bit of an issue in respect to that.

MS LE COUTEUR: Sorry; okay.

THE ACTING CHAIR: That is perfectly okay.

MS LE COUTEUR: Fair enough.

THE ACTING CHAIR: Could I go to the issues that you outlined in the submission. Before I do, it seems to me that the Children and Young People Act has very limited or no provisions for internal review in the legislation. Is that the case?

Mr Curtis: In preparing our submission Ms Donoghoe and I certainly struggled to locate any internal review mechanisms that were enshrined in the act.

THE ACTING CHAIR: So, if there is an internal review mechanism, it is purely administrative—implemented through procedures and guidelines?

Mr Curtis: That was our understanding. Chris, am I allowed to raise this?

Mr Donohue: Yes, sure.

Mr Curtis: On further inquiries through JACS we found out that those internal policies are not consistent and there certainly is not a cohesive document that represents those policies.

THE ACTING CHAIR: So you were advised by the Justice and Community Safety Directorate that the internal guidelines which you referred to before, Mr Curtis, as guide 4, are inconsistent with the legislation?

Mr Curtis: Inconsistent with the legislation, but also that the policies that are alleged to exist within guide 4 do not actually exist.

THE ACTING CHAIR: Okay. So the take-out message is that there is no formal mechanism for internal review?

Mr Curtis: That is our understanding, following the communications with JACS.

THE ACTING CHAIR: Does that effectively mean that the Children and Young People Act sets aside the AD(JR)?

Mr Donohue: That is another one we will have to take on notice.

Ms Donoghoe: Yes.

THE ACTING CHAIR: It would seem that, unless it specifically excludes AD(JR), AD(JR) should apply to all legislation. I am not a lawyer.

Mr Donohue: No. You deal with laws every day.

THE ACTING CHAIR: I know, and that is why I am asking the question. I would be grateful for your interpretation of whether AD(JR) is applicable.

Mr Donohue: We will not probably give it now.

THE ACTING CHAIR: No, no.

Mr Donohue: But we are certainly very happy to continue to provide information.

THE ACTING CHAIR: Yes. The baseline that we are working from, as far as the learned people across the table are concerned, is that there are no internal review provisions in the legislation. What we are doing is starting from ground zero. You have said in your submission that there should be some underlying principles. The first one and the highest one is clearly the best interests of the child. Frankly, I struggle sometimes to understand what is meant by the "best interests of the child". Sometimes it seems—and I am a cynical old legislator of nearly 20 years standing—that the best interests of the child can be, "We're not telling you because it's in the best interests of the child." It can be a hold-all or a catch-all for not providing information. What would the members of the Law Society think would be the sorts of principles that should underpin the best interests of the child?

Mr Curtis: I would suggest that the Family Law Act actually sets it out fairly well, being a relationship with both parents, so long as that relationship can be done safely. It does go on to deal with a number of considerations that can go into making that determination, but I do not know that it needs to be any more complex than that on the face of it.

THE ACTING CHAIR: Thank you.

Mr Donohue: It means different things to different people, and that is always the problem.

MS LE COUTEUR: Yes.

THE ACTING CHAIR: Yes.

Mr Donohue: When you start defining it—saying that it means this—you are excluding that it might mean other things.

THE ACTING CHAIR: Yes, and it is a problem. I think that the committee have come up against a number of brick walls when we have tried to go down particular paths: "We can't talk to you about that because it would be against the best interests of the child."

Mr Donohue: Yes. That is probably not in the best interests of the child, I would suggest. I would suggest that more openness from the CYPS people—in a confidential way, perhaps, if it is appropriate—would be much more useful than just the blanket "it's not in the best interests".

THE ACTING CHAIR: The other question about the internal decision-making is: are you aware of any sort of case review mechanism inside CYPS where senior practitioners in the field would be reviewing the cases and the decisions that are made by lower level people?

Mr Curtis: I have heard reference to it from caseworkers, but I could not speak to what it specifically is.

THE ACTING CHAIR: Okay.

Mr Donohue: I have got a book of principles, ideas, flow charts and all of those.

THE ACTING CHAIR: What is that, Mr Donohue?

Mr Donohue: That is the government's submission.

THE ACTING CHAIR: Yes.

Mr Donohue: But going through all that, you could say, "Well, there's a way of doing it. There's another way of doing it." But there is no clear "you must do it this way".

THE ACTING CHAIR: What you are saying is that there are no transparent—

Mr Donohue: Mandatory.

THE ACTING CHAIR: mandatory pathways.

MS LE COUTEUR: You use the word "mandatory". Are you suggesting it should be part of legislation, the internal reviews?

Mr Donohue: Yes, but even the internal review is only one of the elements. There has got to be the external review.

THE ACTING CHAIR: Yes. I was getting to external review.

MS LE COUTEUR: Yes.

THE ACTING CHAIR: We heard in evidence from the minister that one of the reasons that we have not got to establishing an external review mechanism, as recommended by the Glanfield inquiry some time ago, is that there seems to be no agreed position from users as to what that should be. Does the Law Society have a view about what the external review mechanism should be?

Mr Donohue: We can cobble together the best from each of the states. We have not set out and prepared a comprehensive set of procedures.

THE ACTING CHAIR: Would one of the principles be accessibility for an average person?

Mr Donohue: In terms of accessing the process?

THE ACTING CHAIR: Yes.

Mr Donohue: Yes, of course.

THE ACTING CHAIR: One of the things that strike me about just about any system of external review—and we were always told that the ACAT-AAT type of system was going to be the acme because it was going to be lawyer free and people would just argue the case—is that it is always the case that when governments are taken to the AAT they lawyer up pretty radically.

Mr Donohue: They certainly do.

THE ACTING CHAIR: That, again, creates what Ms Le Couteur has talked about as a power imbalance.

Mr Donohue: One of the fundamental things that the external review has to work out is what is in the best interests of the child. That is the number one question, and it is going to vary from child to child and from circumstance to circumstance. In that family and for that child the best interests might be this. For the same child in another family, in another situation, the best interests may be different again. That is why the external review has to be—thank you for the word "accessible"—accessible to the ordinary person. A process something like the ACAT would make those kinds of assessments based on evidence. I do not mean the kind of evidence you have to have in the court. In the court you have a particular kind of evidence that is tight and well defined. In the ACAT they do not have to follow the rules of evidence; they have to get to the nub of the thing.

MS LE COUTEUR: Effectively, you are thinking that they should have investigative powers. Is that the sort of thing?

Mr Donohue: I hesitate to go down the European path, but a court or a tribunal—

maybe I am speaking out of turn—always has the opportunity to say to the parties, "Look, I'm not going to make this decision until I get information about this. You go and find that information and bring it to me." That is investigative in one way. It is a different thing for the adjudicator to go out and talk to the teachers, talk to the cousins. I would not support that.

MS LE COUTEUR: Who should do that work, then? I mean, if you are one of the adults who has lost custody, say, and you want this to change, how would you get that information?

Mr Donohue: Well, there are two things. There is the justice—the tribunal, if we can call it that for now—and there is the access to it. Sometimes the access to it requires government to appoint people who will facilitate.

THE ACTING CHAIR: So that could be, for instance, the young person's advocate, the child advocate?

Mr Donohue: Yes, it could be.

Mr Curtis: The only difficulty there would be that we may not necessarily be appointed at a stage where the review process would be taking place. Certainly, once the review commenced we could be appointed, but we could not be the instigators of the process.

THE ACTING CHAIR: No, but once there is a matter on foot then there is—what is the term, sorry?

Mr Curtis: The children's representative.

THE ACTING CHAIR: The children's representative. So there is that role. A parent or a caregiver does not necessarily have a comparable advocate acting on their behalf. And then there is the agency, which can lawyer up to glory if it wants to—which leads me to the next question. We have talked about the power imbalance, but does the power imbalance lead to a situation where the agency, the care and protection service, is not acting as a model litigant? It is a serious question.

Mr Donohue: Yes, I know it is.

THE ACTING CHAIR: It comes into my mind a lot.

Mr Donohue: I do not practise in the area myself, so I would be giving you secondary information.

Mr Curtis: Perhaps without being so bold as to answer the question directly, one example—

THE ACTING CHAIR: I would love you to.

MS LE COUTEUR: You can be bold.

THE ACTING CHAIR: I would love a really direct answer.

Mr Curtis: There was an incident in the last several weeks with a parent that I was representing where the documents relating to their matter were handed directly to them, even though it was well known that they were represented. That was done by a caseworker. Ordinarily in legal proceedings that sort of thing should not take place. The solicitor who was acting for care and protection, as far as I know, had no knowledge of that incident happening. Those sorts of incidents certainly are not unheard of. That might help answer the question.

Ms Donoghoe: Adding to Mr Curtis, I have an example that just popped into my mind as he said that. I had a matter where I was, again, acting for a child and I asked the solicitor who was representing care and protection or the solicitor from care and protection—I cannot remember whether it had been outsourced to the Government Solicitor or not—for a copy of an affidavit of service, which is a document that I was informed had been filed at the court, to show that one of the parties in the proceedings had been served with court documents.

I was told that care and protection or that person did not need to provide a copy to me. I actually had to go to court to inspect the court file to obtain copies of documents that had been filed in that matter by the director-general so that I could satisfy my records and myself whether or not a parent in the proceeding had actually been served with the application filed by the director-general.

THE ACTING CHAIR: And that was purely a process matter. You could have picked up the phone and said, "Can you tell me this," and they—

Ms Donoghoe: Yes; it was an email correspondence.

THE ACTING CHAIR: Email correspondence, yes.

Ms Donoghoe: But I recall having to consistently follow up multiple emails, and then I was informed that they did not need to provide that document to me. Of course, when I went and researched the rules and everything, I learnt that any document filed in a proceeding has to be served on all the parties. The only way that I could actually obtain that information was to make an appointment at the court to go and inspect the court file and uplift a copy of the document that I was asking for.

THE ACTING CHAIR: As the child's advocate, is it your understanding that you should have been entitled to receive that and any other document in the case?

Ms Donoghoe: Absolutely. Obviously, my job was representing the child. I needed to be satisfied that all parents or parties to the proceedings were aware of what was going on. That was a critical document that had been filed, and it was refused.

Mr Curtis: Effectively, it would have resulted in a document being before the court that had not been provided to the parties, because the magistrate or registrar would have been able to see that document but Ms Donoghoe would not have been able to.

THE ACTING CHAIR: Without doing the legwork herself.

Ms Donoghoe: Yes.

Mr Curtis: Yes. The court procedure rules are quite specific on that. I apologise, I cannot name the specific rule, but any document filed must be served on all parties.

Ms Donoghoe: That is just an example.

THE ACTING CHAIR: You have summarised in your submission—which was originally a submission to the JACS-auspiced inquiry—the things which you think are essential in relation to review of decisions and access to information. I am just mindful of the time, and we have run over. Is there anything that you feel that you need to add to your submission at this stage?

Mr Donohue: You might be opening up a big book. Once we start—

THE ACTING CHAIR: Okay.

Mr Curtis: In our submission we did not directly make a recommendation of any particular model.

THE ACTING CHAIR: No; I understand that.

Mr Curtis: But I would suggest that trialling any system is better than having no system at all, which is effectively where we are now, especially following the ACAT decision that we have raised, which was the only reportable decision that we could find where the external review process had actually been tested—that was W and the director-general. It was a 2015 matter.

THE ACTING CHAIR: Before we conclude, I would like to ask you a question because you are the Law Society. It has been put to the committee by a number of witnesses—I think Legal Aid and possibly the Human Rights Commission—that because the decisions in care and protection generally speaking tend not to be reportable there are not lengthy decisions and therefore we do not have any jurisprudence in this space. Does the Law Society have a view about the desirability of written decisions?

Mr Donohue: Yes, we certainly do. We are, of course, constrained by—and properly so—the privacy concerns, the confidentiality of things, but finding a way where the principles of a case can be made available to practitioners would assist immensely in the consistency of decisions, decision-making and submissions. We always look at previous cases to find out where this path goes.

Mr Curtis: And it should be noted that the Supreme Court decisions often are reported, so there does not seem to be any real reason why a Magistrates Court decision could not be. Arguably, in Supreme Court decisions it would be even easier to figure out who was involved, given the rare frequency with which they take place. The Family Law Act and the national disability insurance scheme review process all have systems in place for protecting parties involved and anonymising judgements. There is no reason that similar provisions could not be put in place for magistrates'

decisions in the care and protection jurisdiction.

Mr Donohue: Or, indeed, if we ever get there, to the external review process that we are hopefully going to achieve.

THE ACTING CHAIR: But it would be advantageous to everybody involved that there was a clear process of reporting decisions—

Mr Donohue: Yes, definitely.

THE ACTING CHAIR: so as to underline the principles by which decisions are being made?

Mr Donohue: Yes.

Mr Curtis: And if I could go back to the "best interests" question, the jurisprudence is around the really big, sticky questions. It does not deal with the basic stuff, and that is what we need more of—the basic little bits and pieces.

THE ACTING CHAIR: Okay. Thank you very much for your attendance here today and for your submission. There are a couple of issues that you said you would look at—mainly the one about AD(JR). Witnesses will receive a copy of the proof *Hansard* in the next few days. If there are questions or issues that you think need to be clarified you could take those up with Dr Cullen, the committee secretary, in the first instance. I thank you, Mr Donohue, Ms Donoghoe and Mr Curtis, for your attendance here today.

MS LE COUTEUR: Thank you very much.

Mr Donohue: Thank you to the Legislative Assembly for doing this inquiry.

The committee adjourned at 3.21 pm.