

## Report

### Full investigation - *Ombudsman Act 1972*

Complainant	■
Department	Department for Education and Child Development (the department)
Ombudsman reference	2016/02988
Date complaint received	8 April 2016
Issues	<ol style="list-style-type: none"><li>1. Whether the department's process to cancel the approval of the complainant as a foster parent was appropriate</li><li>2. Whether the decision to cancel the approval of the complainant as a foster parent was or should have been reviewed by the Chief Executive Officer</li></ol>

### Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Ombudsman Act 1972*.

### Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from the department
- considering the response from the department
- considering the *Family and Community Services Act 1972* and the department's Carer and Registration Procedure dated 28 October 2015 (**the CR procedure**) and the Step by Step Assessment Manual (**the manual**)
- providing the department and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

### Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.<sup>1</sup> It is best summed up in the decision as follows:

<sup>1</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...<sup>2</sup>

## Response to my provisional report

In response to my provisional report the department stated its acceptance of the findings. The department commented on paragraph 18 of the provisional report stating that while it did not take a decision to revoke the approval of the foster parent lightly however, the welfare of the child is paramount and:

while foster parents are an important part of ensuring safe and stable family environments, the interests of foster parents cannot prevail over the interests of a child.

In my view this is not in dispute.

Since my Office provided the complainant with a copy of the provisional report<sup>3</sup> [REDACTED] sent 28 emails responding to it. In my view the emails conflated a number of other complaints [REDACTED] had made to my Office and linked them back to the decision the subject of this investigation. Many of the emails raised issues that were not related to the investigation. I invited the complainant to meet with me to discuss the extent of the jurisdiction of the Ombudsman Act as a way of managing the flow and content of correspondence from the complainant. Regrettably, the complainant declined to meet with me.

In terms of the matters under investigation the complainant commented:

- that some material used in the 'Background' section of the provisional report was wrong or inaccurate and [REDACTED] provided some contextual information. As I will comment on later the complainant was not given adequate information to be able to understand or challenge the rationale for the department's decision. Any inaccuracies relied on by the department may be the subject of future discussion between the parties.
- that the department's Ms Rosemary Whitten decided to revoke [REDACTED]'s approval as a foster parent
- [REDACTED] was prepared to work with the department but only within the framework of the law and policy which, [REDACTED] claims, the department does not do
- [REDACTED] wished to see the report prepared by the department which recommended that approval as a foster parent be revoked
- [REDACTED] had passed all of [REDACTED] annual foster carer reviews
- [REDACTED] questioned the jurisdiction of the department to take the action to revoke [REDACTED] approval as a foster parent
- [REDACTED] was prepared to have someone mediate [REDACTED] complaint with the department
- it was irresponsible of the department to recruit new foster carers while [REDACTED] approval was revoked.

I have paraphrased other matters which the complainant sought to link with this investigation which included:

- challenging the status of certain Youth Court orders as being *void ab initio*
- alleging that a departmental Officer committed perjury when giving evidence to the Youth Court
- allegations that the department's officers did not follow its own Standards of Alternative Care in South Australia policy

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

<sup>3</sup> Provisional Report sent to the complainant by email on 22 September 2016.

- media reports on high profile cases considered and commented on in the recent Nyland Royal Commission and by the Coroner.

My Office has devoted considerable time to assessing these and other matters. I have responded to the complainant and have determined that investigations under the Ombudsman Act are not necessary or justifiable in relation to these issues.

In having regard to all of the matters raised by the complainant I have not changed my views as expressed in my provisional report.

### **Ombudsman Comment**

In the latter part of this investigation the complainant has complained that my Office failed to follow its policy of providing [REDACTED] with a copy of the department's response to [REDACTED] allegations prior to the commencement of the investigation.

In this matter my Office was in possession of information supplied by the department as a result of other complaints made by the complainant. On 8 July 2016 I informed the complainant that I was commencing a preliminary investigation of [REDACTED] complaint. On the same date I wrote to the department seeking further information and clarification on some matters. The department responded on 25 July 2016 confirming events which were previously known and providing commentary on some matters.

I provided the parties with my provisional report on 12 September 2016 and included in paragraphs 32, 37, 38 and 39 of the report references to the information obtained from the department's response. In my view, providing a summary of the department's response is consistent with the policy. The parties subsequently provided comment on the provisional report.

I consider that neither the complainant nor this investigation has been disadvantaged or compromised by the complainant not being provided with a copy of the department's response of 25 July 2016.

### **Background**

1. The Family and Community Services Act provides a mechanism for a person to be approved as a foster parent. It also enables a person to have their approval as a foster parent cancelled.
2. Prior to 2007 the complainant was a foster parent and had a child 'A' placed in [REDACTED] care. In December 2007 the complainant relinquished care of A and in June 2009 [REDACTED] resigned as a foster parent.
3. On 27 September 2011 the complainant was again approved as a foster parent. In November 2011 a child 'B' was placed in the care of the complainant. At the time the complainant was residing in Port Lincoln but [REDACTED] subsequently relocated to Roseworthy.
4. On 20 September 2013 the complainant informed the department that [REDACTED] was giving up caring for B. The child B was placed with another foster parent.
5. During 2015 the department commenced a process with a view to cancelling the approval of the complainant as a foster parent.
6. On 6 August 2015 Acting Judge Moss of the Youth Court delivered his judgment in relation to an application brought by the complainant and others in relation to the

guardianship of B. The application was not successful and Acting Judge Moss made orders in relation to B.

7. On 19 October 2015 a report (**the report**) was prepared for the department's Chief Executive Officer's delegate to consider a recommendation that the approval of the complainant as a foster parent be cancelled.
8. On 28 October 2015 the department informed the complainant of its intention to cancel the approval after 28 days.
9. On 30 October 2015 the complainant informed the department that if the approval was cancelled ■■■ would lodge an objection against the decision. ■■■ also said ■■■ was willing to work within the relevant guidelines for alternative care of foster children.
10. On 1 December 2015 the department's Deputy Chief Executive informed the complainant that ■■■ approval as a foster parent was cancelled.
11. On 23 December 2015 the complainant wrote to the department's Chief Executive Officer (CEO) enquiring how ■■■ could lodge an objection against the decision.
12. On 18 January 2016 the department noted the complainant's stated objection and informed ■■■ that ■■■ could seek a review of the decision by the CEO.
13. On 24 February 2016 the complainant sent an email to the CEO requesting that ■■■ wished to discuss the matter of ■■■ objection directly with him.
14. On 25 February 2016 the department informed the complainant that ■■■ matter was being processed.
15. On 21 March 2016 the CEO wrote to the complainant informing ■■■ as follows:

I refer to your emails of 24 February, 8 March and 9 March 2016 regarding various matters including that of your deregistration.

I have noted these emails and advise that I will take no further action regarding these matters which I consider closed.

#### Relevant law/policies

16. Subdivision 3 of Division 2 of Part 4 of the Family and Community Services Act provides *inter alia*:
  - 40–The purpose of foster care
 

The purpose of the foster care system is to provide for the care of a child in a safe and stable family environment during any period while the child cannot, for any reason, remain within the care of his or her own family.
  - 41–Foster parents must be approved
 

A person must not act as a foster parent to a child unless he is or she is approved as a foster parent under this Subdivision.

Penalty: Division 6 fine.

#### 42–Application for approval as foster parents

In considering any application for approval as a foster parent the Chief Executive Officer must attempt to assess the capacity and willingness of the applicant to care for a child according to adequate principles and standards of child care, and must, in such manner as the Chief Executive Officer thinks fit, satisfy himself or herself as far as reasonably possible–

- (a) that the applicant will have adequate interest in, and affection and respect for, a child placed in his or her care; and
- (b) that the applicant will treat the child in a consistent manner and will provide a safe and stable family environment for the child; and
- (c) that the applicant will understand adequately the developing personality of the child, and will provide opportunities to develop the abilities of the child; and
- (d) that the applicant will provide adequate accommodation for the child and any other material provision necessary for the welfare of the child; and
- (e) that, where appropriate, the applicant will provide opportunities for the child to maintain or recover his or her identity as a member of his or her own family and will allow the child reasonable access to his or her own family; and
- (f) that, where appropriate, the applicant will assist the child to return to his or her own family; and
- (g) that the applicant is in sound health and is able to withstand the demands of providing foster care; and
- (ga) that the applicant is otherwise a fit and proper person to provide foster care; and
- (h) on any other matters that the Chief Executive Officer may consider relevant.

#### 43–Approval of foster parents

- (1) A person is an approved foster parent for the purposes of this Part, if the person is so approved in writing by the Chief Executive Officer.
- (2) The written approval of a person as a foster parent must state the number of foster children that the foster parent is permitted to have in his or her care.
- (3) A foster parent is not permitted to have more than three foster children in his or her care unless the children are all of the same family, or unless the Chief Executive Officer is of the opinion that special reasons exist for permitting a greater number.
- (4) A foster parent must not have in his or her care more foster children than the number permitted under the approval.

Penalty: Division 7 fine.

- (5) The Chief Executive Officer may give approval under this section subject to such conditions as he or she thinks fit and specifies in the approval.
- (6) A foster parent must not fail to comply with the conditions to which the approval is subject.

Penalty: Division 7 fine.

...

#### 46–Cancellation of approval

- (1) Where, in the opinion of the Chief Executive Officer–
  - (a) a child is not being adequately cared for by a foster parent; or

- (b) the provisions of this Part are not being complied with by a foster parent; or
- (c) a foster parent would no longer qualify for approval under section 42; or
- (d) any other proper cause exists for the cancellation of an approval under this Subdivision,

the Chief Executive Officer may cancel the approval of the foster parent.

- (2) On the exercise of the Chief Executive Officer's powers under this section to cancel the approval of a foster parent, the person in respect of whom the approval was given ceases to be an approved foster parent.
- (3) The Chief Executive Officer must give the foster parent at least 28 days' written notice of his or her intention to cancel the approval.

**Issue 1: Whether the department's process to cancel the approval of the complainant as a foster parent was appropriate**

17. Section 42 of the Family and Community Services Act prescribes the matters that the CEO must consider in determining whether to approve a person as a foster parent.
18. Section 46 provides the criteria that would enable the CEO to cancel the approval of a person as a foster parent. In having regard to the importance of foster parents in terms of child welfare, decisions to cancel a person as a foster parent should not be taken lightly and only if there is sufficient evidence to show that the person is unsuitable for such a role. Accordingly, the department has established the CR procedure which provides a process to be followed when proposing that a foster parent's approval be cancelled.
19. On 19 October 2015 the department prepared a report detailing the history of the complainant's involvement with the department as a foster parent. This report also included a reference to the findings made by Acting Judge Moss and the rationale for concluding that the complainant did not meet core carer competencies outlined in the manual.<sup>4</sup> The report included a recommendation that the approval of the complainant as a foster parent be cancelled. The report or a summary of it was not provided to the complainant so [REDACTED] has not been able to consider or challenge its veracity.
20. Since relinquishing the care of B the department has not placed any children in the care of the complainant.
21. On 19 October 2015 the department's Executive Director Ms Rosemary Whitten as the Chief Executive's delegate, approved the recommendation to cancel the approval of the complainant as a foster parent.
22. On 28 October 2015 Ms Whitten wrote to the complainant as follows:

I am writing in relation to your current approval as a foster parent.

Your evidence in the recent trial in the Youth Court was that you cannot and would not work with Families SA. Acting Judge Moss went on to find that you do not have the resilience, commitment and ability to work with Families SA as a foster parent.

I am therefore of the opinion that your approval as a foster parent should be cancelled under section 46 of the *Family and Community Services Act 1972*.

<sup>4</sup> The manual is a resource used by the department for assessing potential foster carers.

Should you wish to provide a response to the proposed cancellation, you must do so within 28 days. Any response should be forwarded to:

Leanne Haddad  
Manager of Service Accountability Unit  
Families SA  
GPO Box 1152  
Adelaide SA 5000

23. The purpose of this letter was two-fold. First, the complainant was put on notice that the department was proposing to cancel [REDACTED] approval as a foster parent and gave brief reasons for the decision. Secondly, it afforded the complainant the opportunity to respond to the proposal should [REDACTED] want to put submissions as to why the department should not take the action. I presume the submissions had to be addressed to the Manager of Service Accountability Unit solely for the purpose of administrative efficiency, as the Deputy Chief Executive, as the Chief Executive's delegate, would be the decision maker.
24. In my view, the letter satisfies the requirement under the CR procedure (and section 46(3) of the Family and Community Services Act) that:
- The Executive Director Metropolitan Operations/Country Directorate will, if in agreement with the de-registration recommendation, approve the de-registration of the carer by signing the De-Registration Briefing and accompanying letter ('Letter 1 to Carer: Notice of Intention to De-Register'), and sending these back to the Senior Assessment Officer Carer Registration for uploading into C3MS.
- ...
- Carers requesting a review of the decision must do so in writing within the 28 day notice period, to the Deputy Chief Executive, Office for Child Protection. The Deputy Chief Executive will evaluate the de-registration information and consult with identified key parties to inform their decision.
25. The letter provides a brief rationale for the decision i.e. the hearing and determination by Acting Judge Moss. The department has told my investigation that current procedures provide that reasons for a (proposed) cancellation are included within the letter of intent to cancel. I accept the logic for that given the opportunity to the foster parent to make submissions within 28 days.
26. In my view, having regard to the rationale for the decision, it appears that the department was relying specifically on section 46(1)(c) of the Family and Community Services Act, despite the fact that the report referred to sections 42(a) and (b) of the Act. The relevant sub-section of section 46 on which the department relied was not made clear in the letter and it should have been. Further reasons for the department's decision should have been provided in sufficient detail so as to inform the complainant about the authority and the rationale for exercising the authority by the department.
27. I consider that the failure by the department to clearly explain the rationale for its stated intention to cancel the approval as a foster parent had the effect of denying the complainant procedural fairness.
28. On 30 October 2015 the complainant sent an email to Ms Whitten. [REDACTED] observed that the department's reference to the court judgment lacked context. [REDACTED] indicated a preparedness to comply with the *Children's Protection Act 1993* and other legal charters. In my view, the complainant was indicating in principle support for the statutory instruments as [REDACTED] claimed the department's current administration of child welfare was 'broken' and 'toxic' and [REDACTED] could not support that. The complainant also made observations about positive comments made about [REDACTED] (in Acting Judge Moss' judgment) showing 'exemplary care' and being well suited to a respite care role.

Finally, [REDACTED] informed the department that [REDACTED] would object to [REDACTED] removal as a foster parent.

29. On 1 December 2015 the department's Deputy Chief Executive, Child Safety advised the complainant in writing that he had considered the complainant's email dated 30 October 2015, but had cancelled [REDACTED] approval as a foster parent. There were no reasons given for the decision so I infer that he was relying on the reasons expressed in the department's letter to the complainant dated 28 October 2015.
30. In my view, a distinction should be made between the purpose of the letter putting the complainant on notice that [REDACTED] approval may be cancelled and the letter in which the decision to cancel is conveyed. The final decision maker should give reasons for the decision. I note there is no general rule of common law or principle of natural justice that requires reasons to be given for administrative decisions.<sup>5</sup> Having said this, the giving of reasons for an administrative decision enhances administrative justice, and the ideal of justice being done and being seen to be done in the exercise of public power. It also allows a person to see what was taken into account in the decision affecting them, to decide whether to seek a review of the decision.
31. In my view, having regard to the critical role of foster parents and the history of this complainant as a foster parent, it was open to the department to consider whether [REDACTED] was a suitable person to remain as a foster parent. The department had regard to the history of its involvement with the complainant, the welfare of B and the findings of Acting Judge Moss in concluding that it should recommend that the complainant's approval as a foster parent be cancelled. This, however, was not reflected in sufficient detail to assist the complainant to understand why [REDACTED] approval was cancelled. I consider that good governance and principles of fairness require that decision makers give good reasons for their decisions. This is particularly important when providing a review mechanism to a party.

## Conclusion

In light of the above, I consider that the department in exercising a power to cancel the approval of the complainant as a foster parent, failed to provide adequate reasons for the act within the meaning of section 25(1)(e) of the Ombudsman Act.

Further to this, I consider that the department in exercising a power to cancel the approval of the complainant as a foster parent, failed to provide procedural fairness to the complainant thereby acting in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

### Issue 2: Whether the decision to cancel the approval of the complainant as a foster parent was or should have been reviewed by the Chief Executive Officer

32. On 30 October 2015 the complainant sent an email to Ms Whitten in which [REDACTED] *inter alia*, informed the department that [REDACTED] would object to [REDACTED] cancellation as a foster parent.
33. On 1 December 2015 the department's Deputy Chief Executive, Child Safety in cancelling [REDACTED] approval as a foster parent also acknowledged the complainant's stated intention to object to the decision. The department has acknowledged that this letter did not give any information to inform the complainant how to lodge an objection. I am informed that since 4 April 2016, carers subject to cancellation decisions are sent

<sup>5</sup> *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 per Gibbs J at 662.



letters containing contact details for Families SA Registration and Contract Services who are responsible for providing information about avenues of appeal.

34. In an email to the CEO dated 23 December 2015, the complainant stated that the decision to cancel the approval was made with insufficient reason and [REDACTED] enquired how to lodge an objection.
35. In a letter dated 18 January 2016 the Deputy Chief Executive, Child Safety informed the complainant that [REDACTED] had a right to have the decision reviewed and that [REDACTED] should make submissions to the department's CEO. In that regard the CR procedure provides the following process:
 

The Deputy Chief Executive, Office for Child Protection, will notify the carer and the service provider, in writing, of the decision to either uphold the de-registration decision or re-register the carer. If the de-registration decision is upheld, the carer will be notified by 'Letter 3 to Carer: Response to Carer Appeal'. If the carer is not satisfied with the outcome, they may request the matter be reviewed by the Chief Executive of the Department for Education and Child Development.
36. I am advised that there are no procedures outlining how a review is to be conducted. In considering the detailed step by step process documented in the CR procedure, I am surprised that there is no instruction on how a review is to be conducted.
37. On 21 March 2016 the CEO informed the complainant that he had regard for emails sent on 24 February 2016 (requesting direct communication with him) and 8 and 9 March 2016 (unrelated matters alluding to a possible class action) and that 'I will take no further action regarding these matters which I consider closed'. In my view the letter implies that no review was conducted by the CEO.
38. The department has told my investigation that:
 

The advice given by [the CEO] within his letter dated 21 March 2016 reflected a decision not to conduct any further review of ... [REDACTED] cancellation. This decision was based on the view that a valid decision to cancel a foster carer's approval under Section 46 of the *Family and Community Services Act 1972* is final and affected carers do not have a statutory right to a review of such a decision by the Department.
39. There is an obvious contradiction between the statement from the department above and the statement from the Deputy Chief Executive, Child Safety in the letter dated 18 January 2016, informing the complainant that [REDACTED] has a right to have the decision reviewed, a view which is supported by the CR procedure. Further, the letter from the department refers to 'further review' which is not correct as the objection by the complainant was the first such request for a review.
40. The tenor of the department's letter implies an acceptance that the decision to cancel the complainant's approval was correct solely on the basis that it was done relying on section 46 of the Family and Community Services Act. There was no consideration given to the merits of the decision. Although there is no clear statutory right to have the decision reviewed, the CR procedure clearly recognises the good administrative practice of providing a review mechanism.
41. I note that in seeking to object to the decision to cancel the approval the complainant has not identified any error or omission by the department that could call into question the integrity of the decision. In my view, it would have been helpful if the complainant set out the reasons for [REDACTED] request for a review in detail. The department has not raised this as an issue, but I consider that a person should be required or be given the opportunity to state in general terms, why the decision should be reviewed. For this to occur the person would need to have a level of understanding of the reasons for the

decision. As I have stated above, my view is that the complainant was not given an appropriate level of explanation for the decision.

42. In my view, there was no review conducted and the complainant had a reasonable expectation that one would be conducted. A review should be conducted. As the decision to cancel the approval was made by the Deputy Chief Executive of the department, the review should be conducted by the CEO and it is a function that should not be delegated. I acknowledge that the department now has a different CEO.

## Conclusion

In light of the above, I consider that in not conducting a review of the decision cancelling the complainant's approval as a foster parent, the department acted contrary to the Carer and Registration procedure and in a manner that was wrong within the meaning of section 25(1)(g) of the Ombudsman Act.

To remedy the errors I have identified with respect to both issues, I recommend under section 25(2) of the Ombudsman Act that the department:

1. provide further details to the complainant explaining the rationale for the decision made on 1 December 2015
2. invite the complainant to make a submission in writing, identifying why [REDACTED] considers the decision made on 1 December 2015 to cancel [REDACTED] approval as a foster parent be reviewed
3. on receipt of the submission or if no submission is made by the complainant, the Chief Executive Officer conduct a review of the decision made on 1 December 2015 to cancel the approval of the complainant as a foster parent
4. amend the Carer and Registration Procedure to provide for clear and detailed reasons to be given to a foster parent to explain the decision to cancel their approval
5. amend the Carer and Registration Procedure to include a process explaining how a review of a decision is to be conducted.

## Final comment

In accordance with section 25(4) of the Ombudsman Act the department should report to the Ombudsman by **16 December 2016** on what steps have been taken to give effect to the recommendations above; including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines  
SA OMBUDSMAN

27 October 2016