OmbudsmanSA

De-identified and Redacted Final Report

Full investigation – *Ombudsman Act 1972*

Pseudonyms have been assigned to the relevant parties

Complainant	**Mrs Terri Harrington**
Department	**Department for Child Protection**
Ombudsman reference	**2018/08918**
Department reference	**18DCSI/1258**
Date complaint received	**21 August 2018**
Issues	**1. Whether the determination of the Department for Child Protection to suspend contact between a child and members of his biological family was unjust**

Jurisdiction

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

The complaint is a prescribed child protection complaint for the purposes of the Ombudsman Act and the *Health and Community Services Complaints Act 2004*.

The complaint concerns the determination of the Department for Child Protection (**the department**) to suspend contact between a child and members of his biological family, including the complainant, for a period of approximately seven months.

The department has the power to determine contact arrangements in respect of children who are under the Guardianship of the Minister for Child Protection or the Chief Executive of the department.

I have assessed the complaint as raising the question of whether the determination of the department to suspend the contact sessions involving the complainant was unjust for want of procedural fairness.

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Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking and considering further information from the complainant
- seeking a response from the department
- clarifying the response with the department
- reviewing the department's full file concerning the child
- considering:
  - the Ombudsman Act
  - the Health and Community Services Complaints Act
  - the *Children and Young People (Safety) Act 2017*
  - the *Children's Protection Act 1993*
  - the *Children and Young People (Oversight and Advocacy Bodies) Act 2016*
  - the United Nations *Convention on the Rights of the Child*
  - the Charter of Health and Community Services Rights
  - the department's *Practice Guidelines for Contact*
  - relevant case law
- preparing a provisional report and seeking the views of the parties
- preparing this final 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.[1] It is best summed up in the decision as follows:

> 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 … .[2]

Response to my provisional report

1. I provided my tentative views to the parties by way of my provisional report dated 16 November 2018.

2. Mrs Harrington responded to my provisional report by way of telephone discussion with my Deputy on 19 November 2018 and by way of subsequent email dated 6 December 2018.

3. Mrs Harrington expressed satisfaction with the views and recommendations foreshadowed in my provisional report.

4. Mrs Harrington made the following additional comments:
   - in her observation, poor documentation and a lack of communication between case workers working within different offices of the department made it more difficult for the family to advocate for increased contact

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1 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.

2 *Briginshaw v Briginshaw* at pp 361-362, per Dixon J.

- she considered that a lack of appropriate guidelines or standards in respect of contact with children in care encouraged ad hoc decision-making by departmental officers, leading children, in cases such as Daniel's, to a poor experience of contact arrangements.

5. Of the future contact arrangements, Mrs Harrington submitted:

> We [the family] would like our contact with [Daniel] to take the form of a bi-monthly day visit at one of our homes (as was originally scheduled by the [regional] office). [Redacted].

6. In the circumstances, I leave it to the department to consider the above comments in the course of its implementation of the recommendations arising from this matter.

7. The department responded to my provisional report by way of letter from its Chief Executive dated 11 January 2019. In this response, the department acknowledged my provisional views and indicated its acceptance of the three recommendations foreshadowed in my report.

8. In light of the responses from the parties, my views remain as expressed in my provisional report.

Background

Daniel

9. The complainant is Mrs Terri Harrington. Mrs Harrington is a biological relation of Daniel Hale (**Daniel**). At time of writing, Daniel is approximately five years-old.

10. In 2015 Daniel was placed under the guardianship of the Minister for Child Protection until the age of 18 years. The circumstances giving rise to the guardianship order are not relevant to the present investigation.

11. Daniel presently resides in foster care. Daniel's foster carers are not biologically related to Daniel.

12. Mrs Harrington has been involved in Daniel's life from an early age. She provided care to Daniel prior to the making of the guardianship order. Thereafter, and prior to the determination at issue in this investigation, she maintained a connection with Daniel by way of her participation in contact sessions involving the biological family.

13. Those contact sessions commenced on 8 December 2015, following a period in which Daniel was afforded the opportunity to stabilise in his placement with his foster carers. The first contact session involved only Daniel's [redacted]. Subsequent contact sessions were expanded to include the participation of Mrs Harrington and Daniel's [redacted].

14. During this same period, Daniel participated in regular contact sessions involving [redacted].

The Watherston assessment

15. Shortly after commencement of the contact sessions involving the biological family, Daniel's foster carers contacted the department (then known as Families SA) to express concerns as to perceived changes in Daniel's behaviour. These concerns were summarised in a subsequent psychological report as follows:

[Redacted].[3]

16. The concerns raised by the foster carers caused the department to consult with a psychologist, Ms Sarah Watherston, in respect of the recommended frequency for the contact sessions involving the family.

17. Ms Watherston subsequently arranged to observe the January and February contact sessions. The foster carers continued to report concerns about Daniel's behaviour during this period. The department consulted with Ms Watherston in respect of those concerns and in respect of Ms Watherston's own observations of the contact sessions.

18. On 11 February 2016 the department determined that Daniel's contact with certain members of his biological family would thereafter take the form of bi-monthly access visits of approximately 60-90 minutes duration. The access arrangements were to be reviewed on a six-monthly basis. This determination was consistent with preliminary recommendations made by Ms Watherston.

19. Ms Watherston subsequently observed three further contact sessions involving the biological family. It is of note that Ms Watherston did not report any significant concerns in respect of either the conduct of the family members or Daniel's presentation during these sessions.

20. On 9 August 2016 Ms Watherston recommended to the department's case workers that the access arrangements remain as scheduled. This recommendation was reinforced in a subsequent report from Ms Watherston dated 7 October 2016.

21. This notwithstanding, the foster carers continued to express concerns about Daniel's behaviour following contact with his biologicla family. The department subsequently undertook further consultation with Ms Watherston in respect of those concerns.

22. On 6 March 2017 the department determined to increase the duration of the bi-monthly contact sessions to two hours. This was again in keeping with recommendations from Ms Watherston.

The Ali-Vajdic report

23. On 10 July 2017 Mrs Harrington made a complaint to the Health and Community Services Complaints Commissioner (**HCSCC**) to the effect that the department was unreasonably limiting the duration and frequency of the contact sessions between Daniel and certain members of his biological family.[4] Mrs Harrington's complaint was subsequently forwarded to the department for a response.

24. On 18 July 2017 an officer of the department telephoned Mrs Harrington to discuss the next six-monthly review of Daniel's contact arrangements. At this time, Mrs Harrington requested that a psychological assessment be conducted in respect of the contact arrangements.

25. On 25 July 2017 the department submitted a referral to its Psychological Services unit requesting a psychological assessment on the following terms:

> Although Psych Services have undertaken observations of access and provided a recommended frequency of access this has not resolved the issue of [Daniel]'s family contact planning and best connections. DCP ask that a full assessment of family contact

[3] Psychological report dated 12 July 2018, p. 4. The summary is drawn from the department's case notes.

[4] In her response to my provisional report, Mrs Harrington clarified that this was in fact her second complaint to the HCSCC concerning the matter. I understand that the second complaint arose after an unsuccessful approach to the Office of the Guardian for Children and Young People. Prior to 18 December 2017, the HCSCC had primary jurisdiction in respect of child protection-related complaints in South Australia.

> occur so that [Daniel]'s family contact plans are suitable to his current developmental needs, address family connections and balance his current needs in his foster care placement.

26. On 1 August 2017 a representative of the department wrote to Mrs Harrington:

> Thank you for speaking with me today in regard to the concerns about your contact with Daniel that you raised with the Health and Community Services Complaints Commissioner (HCSCC).
>
> I understood that your main concern was that DCP had not referred [Daniel] for an assessment of his family contact with you and other [redacted] family members. You understood that a referral for assessment had not been conducted because of [Daniel's] case pending transfer to another office.
>
> We discussed that although [Daniel]'s case has not been transferred, this was not the reason that a referral for a Psychological assessment had not been made. I explained that we had not referred for an assessment due to Psychologist, Sarah Watherston being involved in late 2016 in the review of family contact which involved observations and recommendations. Further to this that a review in these family contact arrangements had occurred in February 2017 and that there were no significant changes recommended at that time. Given this recent involvement with the DCP Psychologist we did not believe that a referral for a further assessment was required.
>
> I explained that given the family's concerns about the frequency of contact not being resolved that we have now made a referral for an assessment with Psychological Services.
>
> I understand that you are pleased with the referral that has now been made.

27. The psychological assessment was subsequently assigned to Ms Feda Ali, Psychologist, and Mr Srdjan Vajdic, Principal Psychologist.

28. Ms Ali and Mr Vajdic thereafter conducted a number of interviews and observation sessions involving the foster carers and members of Daniel's biological family. [Redacted].

29. On 21 November 2017 a representative of the department emailed Mrs Harrington, together with Daniel's [redacted]:

> As you are aware the psychological assessment is still taking place. Once this has been complete which will not be until early next year, [the regional office] will arrange a meeting to share the recommendations from the assessment.

30. During the course of the psychological assessment, Daniel's foster carers continued to raise concerns with the department in respect of Daniel's behaviour following the access visits involving the biological family. The foster carers expressed concern that Daniel's behavioural and emotional difficulties appeared to be escalating in seriousness. Towards the end of the assessment, the department began to receive similar reports from Daniel's early learning centre.

31. On 24 May 2018 a meeting took place between Daniel's case workers, the psychologists, the foster carers and representatives of Daniel's early learning centre.

32. The minutes concerning this meeting record the following decision, made in consultation with the foster carers and the two psychologists:

> [It] was agreed that [there would be] a 6 months suspension of family contact with [redacted] to stabilise [Daniel] in placement and concurrently carers to assist [Daniel] to

> access appropriate therapy to understand access to scaffold his experiences to support future contact before resuming.[5]

33. The minutes otherwise provide:

> DCP feedback session (from the current assessment) is also to also take place with [redacted].

34. On 14 June 2018 a meeting was convened between the psychologists, Daniel's case worker, and members of the biological family. It is Mrs Harrington's recollection that it was during this meeting that the department first informed the biological family of the decision to suspend the contact arrangements. Disappointingly, the department does not appear to have made a contemporaneous record in respect of its discussions with the family.[6]

35. On 13 July 2018 Ms Ali and Mr Vajdic supplied Daniel's case workers with a psychological report (**the Ali-Vajdic report**), which ostensibly concluded:
    - there had recently been a relatively sharp escalation in the behaviours of concern following the contact sessions involving Daniel's biological family
    - this was not due to any inappropriate behaviour by Daniel's biological family; rather, the psychologists 'hypothesise[d] that Daniel's distress may be influenced by his struggle to develop a coherent understanding of his connection with his biological family, and to integrate how his connection with them fits into his family unit with foster family'
    - the foster carers were struggling with 'how best to help Daniel to develop a narrative around family connection' and possibly lacked 'understanding of the importance of connection with biological family'
    - it was important that Daniel maintain contact with his biological family
    - there were negative implications for Daniel's wellbeing and identity should his distress following the contact sessions continue
    - 'careful and considered planning and a collaborative approach involving Daniel's foster and biological family' offered the best likelihood of a positive outcome for Daniel.

36. The psychological report concluded with the following recommendations:

> - Family contact visits between [Daniel] and his biological family cease for a period of six months to enable an intense therapeutic intervention. […]
> - The recommended therapeutic intervention should primarily be based on conducting dyadic work involving [Daniel] and [the foster carers]. The therapy will also need to focus on assisting [Daniel], his foster parents and potentially [Daniel]'s biological family members to develop a more integrated view of his family network. Lastly, it is noted that therapeutic assistance to [Daniel]'s foster carers and his ELC would also be needed regarding how best to manage his problem sexualised behaviour and aggression. The writers note the crucial importance of consistency when it comes to this type of therapy and advise [the foster carers] to consider who would be in a best position to consistently partake in therapy with [Daniel]. […]
> - It may also be beneficial for [the foster carers] to undertake further training in Attachment and Trauma; Child Development and the purpose of Family Contact.
> - Regular reviews need to be conducted of therapeutic progress to enable careful and considered planning.
> - [Redacted].

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[5] The minutes are undated and are appended to a case note dated 31 May 2018. The surrounding records make it reasonably clear that the meeting in question took place on 24 May 2018.

[6] My investigation was supplied with a case note pertaining to the meeting, dated 27 September 2018, which I infer was created following enquiries from my Office. This case note is consistent with the account of the meeting provided by Mrs Harrington.

37. This was supplemented by an addendum psychological report from Mr Vajdic, dated 22 August 2018, which clarified the earlier recommendations:

> The writer wishes to clarify that [the final] recommendation needs to be considered together with the [the first recommendation] and if for some reason therapeutic progress becomes impossible, the primary reason for suspending [Daniel]'s contact visits becomes nullified. In case of such a scenario, consultation with Psychological Services is recommended to review the need for suspension of contact visits.

38. That same day, a meeting was convened between members of Daniel's biological family and Daniel's case worker.

39. The department's case notes concerning the meeting relevantly provide:

> - [The family] expressed how disappointed they were in the decsion [sic] to suspend access for 6 months, and noted they did not believe it was the right thing for [Daniel] to be having time away from them
>
> […]
>
> - SW discussed the decision behind the suspension being that [Daniel] was presenting with behaviours that demonstrated he was struggling with his sense of identity and understanding of family/care situation - and that he would benefit from a period of therapy to assit [sic] him and his carers in the process of stabilising behaviours
> - They agreed that the therapy was a great idea and were happy this was happening already, but commented that not seeing them in the meantime may be more harmful than good
> - SW advised the period of access suspension was now determined as being 22 May 2018 - 22 November 2018
>
> […]
>
> - SW also offerred [sic] regular meetings with the family (monthly) to review progress - which the family indicated they may not take up and would prefer email updates instead - OK
> - The family indicated they were pleased with today's meeting. [Terri] indicated specifically she thought that progress in todays [sic] meeting was positive. [Redacted].

Terms of the complaint

40. In her complaint to my Office, Mrs Harrington submitted:

> The psychological review conducted by DCP has recommended greater access to [Daniel] (so I have been told by [Daniel]'s caseworker […]).
>
> [Redacted]. Feda (the reviewing psychologist) initially sounded very positive about future access arrangements over the phone but this changed suddenly on 14th June when we ([the family]) were told access was suspended for 6 (now 7) months.
>
> Clearly this is a long time in the life of a 4 year old boy and we are afraid he will not remember us after this length of time. The arbitrary nature of the suspension also worries us, as it could be lengthened or re-imposed at any time for no apparent reason.

41. In respect of the contents of the Ali-Vajdic report, which was subsequently circulated to the biological family,[7] Mrs Harrington submitted:

[7] The department supplied the family with a redacted version of the report.

> We [the family] have problems with the report and its conclusions:
>
> - We don't accept any responsibility for [Daniel]'s sexualised behaviour, which we have never witnessed, and we feel that it's been used in the report to provide more 'weight' to the reasons listed for the suspension of our visits
> - The report insinuates that [Daniel]'s aggressive behaviour been caused by our visits. Surely the psychologists writing this report have attempted to record/measure this behaviour and validate its cause rather than relying on reports from the foster-carers and indulging in speculation that 'family contact was triggering feelings of rejection by his biological family'. The psychologists mention an 'observable escalation in the severity of [Daniel]'s behaviour following contact over the past few years...'. Again, who observed this and was it reported to [Daniel]'s caseworkers? We have had favourable verbal reports about our visits from both [Daniel]'s previous caseworkers [redacted], neither of whom felt the need to supervise our visits. The psychologist Sarah Watherston reported on our access favourably (2/5/16) and held no concerns with our interactions with [Daniel], nor mentioned any problems after our visits.
> - On this point, it also seems odd that [Daniel]'s aggression after visits was not mentioned earlier by the foster-carers, given that Feda Ali's review into access had been underway for 7 months prior to the decision to suspend access (from 22/5/18). I had a phone conversation with Feda on the 26th of April, and at that stage she was positive about the review, did not indicate that she had any concerns regarding our access, but she said the foster-carers were anxious.
>
> Suspension of our access based on these accusations is a drastic response and unnecessary, given there is no proof of our involvement.
>
> The report mentions that if progress is attained we can be reintroduced into [Daniel]'s life. Surely this progress is more likely due to the therapy he has received rather than the cessation of bi-monthly visits of less than 2 hours? Since we are now 4 months into the 7 month access suspension we would like some indication of how and when this reintroduction will be achieved. We are disappointed that we haven't been included in his therapy around his biological family connections and also concerned that [Daniel] may be confused and possibly react negatively when he meets us again because of the long gap between visits.
>
> At this point we feel that been left in limbo with regard to any future visits and are uncertain whether we will see [Daniel] again, regardless of any change in his behaviours.

Response from the department

42. In response to initial enquiries from my Office, the Chief Executive Officer of the department, Ms Cathy Taylor, submitted:

> The determination to suspend access with the family for a period of six months was recommended directly via the psychological assessment, and was for the purposes of enabling intense therapeutic intervention based on conducting dyadic work involving [Daniel] and his current foster carers […].
>
> It was recommended that therapy would also need to focus on assisting [Daniel], [the foster carers], and potentially [Daniel]'s biological family members to develop a more integrated view of his family network.
>
> Lastly, it was noted that therapeutic assistance to [the foster carers], and his Early Learning Centre would also be needed regarding how best to manage his problematic sexualised behaviour and aggression.
>
> The therapeutic intervention with [Daniel] had commenced by the time the Psychological report was finalised, and remains ongoing. [The department] outsourced the provision of this therapy to a well experienced private practitioner.

43. In subsequent correspondence dated 18 October 2018, Ms Taylor submitted:

> The decision to suspend contact with [the biological family] was a result of continuing concerns regarding the impact of family contact on [Daniel] based on the recommendations of a psychologist within the context of [Daniel]'s ongoing care and protection, and in the context of the guardian's role and obligations as prescribed under the [Children's Protection] Act.

44. My investigation asked Ms Taylor whether the department was satisfied that it had provided Daniel's biological family with procedural fairness in respect of the decision to suspend contact. Ms Taylor subsequently responded:

> The scope of the assessment was to assess the family contact arrangements with recommendations sought regarding future access arrangements.
>
> The family were of the reason for the referral (i.e. as a response to previous complaints raised by various family members and the carers) and were actively engaged throughout the assessment process.
>
> The recommendations of the psychological assessment guided the decision to suspend contact. Until the assessment was undertaken and report finalised it was not possible to predict the outcome of the assessment, nor is it practice to hypothesise what outcomes may eventuate from an independent assessment.
>
> The decision to suspend contact with [the family] was made on the advice of Psychological Services to enable critical therapeutic work to be undertaken with [Daniel's] carers.
>
> […]
>
> Family members were advised of assessment conclusions and recommendations including the decision to suspend contact through facilitated feedback sessions.
>
> […]
>
> Family members were able to avail themselves of the department's complaints process where they were unhappy with the decision, a process Ms [Harrington] accessed after the decision.
>
> The department has continued to engage with the biological families and remains committed to do so.
>
> Importantly, as part of the process, the department has continued to monitor the progress of the therapeutic intervention with the carers and assess the ongoing appropriateness of the determination.
>
> […]
>
> The challenges for the [department] in all case management decisions is weighing the relative interests of a number of related parties including extended family and carers, against the fundamental goal of supporting the safety, stability and indeed the best interests of the child or children involved. While the extended biological family were not parties to the original care and protection order in this instance, the department acknowledges that the decision to suspend contact is difficult and upsetting.
>
> The department also acknowledges that the extended family are important people in [Daniel]'s life and that ongoing family contact visits with family members are important to maintain this best connection with family. That said, and having regard to its obligations under the [Children's Protection] Act, the department considers that the decision making process adopted was reasonable in the circumstances of this case.

45. In response to my query as to whether the determination to suspend contact was in keeping with usual practice in such cases, Mr Taylor submitted:

> Decisions in relation to the care of children under guardianship are made on a case by case basis, taking into account the particular circumstances of the child and the Minister's obligations under the [Children's Protection] Act.

46. Ms Taylor notified my investigation of further developments in respect of the matter:

> On 12 October 2018 Psychological Services advised that "maintaining the suspension was no longer advised as the likelihood of achieving resolution via therapy currently seemed poor". Contact will [now] resume through a planned process to ensure a smooth and safe transition focussed on the best interests of [Daniel].

47. Ms Taylor otherwise confirmed that, in determining Daniel's contact arrangements, the department understood itself to be exercising the powers of the Minister for Child Protection under section 51 of the Children's Protection Act.

Relevant law/policies

The statutory framework

48. Both the Children's Protection Act and the Children and Young People (Safety) Act were in operation during the period relevant to my investigation.

49. At the time, section 38 of the Children's Protection Act provided for the power of the Youth Court to make orders concerning the guardianship of a child:

> **38—Court's power to make orders**
>
> (a1) The Court may, on an application under this Division, make an order under this section if the Court is satisfied—
>
> (a) that the grounds of the application have been made out; and
>
> (b) that an order under this section should be made in respect of the child.
>
> (1) In an order under this section, the Court may exercise 1 or more of the following powers:
>
> […]
>
> (c) the Court may place the child, until the child attains 18 years of age, under the guardianship of the Minister or such other person or persons (not exceeding two) as the Court thinks appropriate in the circumstances of the case;
>
> […]
>
> (f) the Court may make consequential or ancillary orders—
>
> (i) providing for access to the child; or
>
> (ii) providing for the way in which a person who has custody or guardianship of the child under an order of the Court is to deal with matters relating to the care, protection, health, welfare or education of the child; or
>
> (iii) requiring a parent, guardian or other person who has the care of a child to undertake specified courses of instruction, or programmed activities, in order to increase his or her capacity to care for and protect the child; or
>
> (iv) dealing with any other matter.

50. Section 43 of the Children's Protection Act clarified the effect of a guardianship of order:

> **43—Effect of guardianship order**
>
> If the Court places a child under the guardianship of the Minister or any other person or persons under this Division, the Minister or the other person or persons is, or are, the lawful guardian, or guardians, of the child to the exclusion of the rights of any other person.

51. Section 51 of the Children's Protection Act provided, *inter alia*, for the power of the Minister to make arrangements for the care of a child under the guardianship of the Minister:

> **51—Powers of Minister in relation to children under the Minister's care and protection**
>
> (1) Subject to this Act, the Minister may from time to time make provision for the care of a child who is under the guardianship of the Minister or of whom the Minister has custody pursuant to this Act, in any of the following ways:
>
> […]
>
> (b) by placing the child in the care of an approved foster parent or any other suitable person;
>
> […]
>
> (e) by making arrangements (including admission to hospital) for the medical or dental examination or treatment of the child or for such other professional examination or treatment as may be necessary or desirable;
>
> (f) by making such other provision for the care of the child as the circumstances of the case may require.
>
> (2) In making provision for the care of a child pursuant to subsection (1), the Minister must, if appropriate, have regard to the desirability of securing settled and permanent living arrangements for the child.

52. Section 57 of the Children's Protection Act permitted the Minister to delegate any of his or her powers under the Children's Protection Act. At all material times, the Minister's powers under section 51 of the Act were delegated to the Chief Executive and certain senior officers of the department.

53. Sections 3, 5 and 7 of the Children's Protection Act formerly provided for the objects and principles of the Children's Protection Act. These sections ceased operation on 28 February 2018 to coincide with the partial commencement of the Children and Young People (Safety) Act.

54. Sections 7 and 8 of the Children and Young People (Safety) Act provide:

> **Part 2—Priorities in the operation of this Act**
>
> **7—Safety of children and young people paramount**
>
> The paramount consideration in the administration, operation and enforcement of this Act must always be to ensure that children and young people are protected from harm.
>
> **8—Other needs of children and young people**
>
> (1) In addition to the paramount consideration set out in section 7, and without derogating from that section, the following needs of children and young people are also to be considered in the administration, operation and enforcement of this Act:
>
> (a) the need to be heard and have their views considered;
>
> (b) the need for love and attachment;
>
> (c) the need for self-esteem;
>
> (d) the need to achieve their full potential.
>
> […]
>
> (3) Without derogating from any other provision of this Act, it is desirable that the connection of children and young people with their biological family be maintained.

55. Section 9 of the Children and Young People (Safety) Act prioritises early intervention in cases where children and young people may be at risk:

9—Wellbeing and early intervention

Without limiting a provision of this or any other Act or law, State authorities whose functions and powers include matters relating to the safety and welfare of children and young people must have regard to the fact that early intervention in matters where children and young people may be at risk is a priority.

56. Section 10 of the Children and Young People (Safety) Act provides for certain principles of intervention:

10—Principles of intervention

(1) The principles of intervention are as follows:

(a) decisions and actions (if any) under this Act should be taken in a timely manner (and, in particular, should be made as early as possible in the case of young children in order to promote permanence and stability);

(b) if a child or young person is able to form their own views on a matter concerning their care, the child or young person should be given an opportunity to express those views freely and those views are to be given due weight in the operation of this Act in accordance with the developmental capacity of the child or young person and the circumstances;

(c) account should be taken of the culture, disability, language and religion of children or young people and, if relevant, those in whose care children and young people are placed;

(d) in each case, consideration should be given to making arrangements for the care of a child or young person by way of a family group conference if possible and appropriate.

(2) Each person or body engaged in the administration, operation or enforcement of this Act must exercise their powers and perform their functions so as to give effect to the principles of intervention.

(3) However, this section and the principles of intervention do not displace, and cannot be used to justify the displacement of, section 7.

57. Section 5 of the Children and Young People (Oversight and Advocacy Bodies) Act also provides:

5—State authorities to seek to give effect to *United Nations Convention on the Rights of the Child* etc

Each State authority must, in carrying out its functions or exercising its powers, protect, respect and seek to give effect to the rights set out from time to time in the United Nations Convention on the Rights of the Child and any other relevant international human rights instruments affecting children and young people.[8]

The HCSCC Charter

58. The Charter of Health and Community Services Rights (**the HCSCC Charter**) is established in accordance with Part 3 of the Health and Community Services Complaints Act. The HCSCC Charter provides for eight rights that apply to the provision and use of most health and community services within South Australia.[9]

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[8] A 'state authority' includes a public sector agency; *see* section 3(1).

[9] A community service includes 'a service for the care or protection of a child who is, or has been or may be at risk' within the meaning of the Children and Young People (Safety) Act); *see* section 3.

59. While I have had regard to the HCSCC Charter,[10] I do not consider its contents to be particularly relevant to the present matter.[11]

The Practice Guidelines

60. At all material times, the department has maintained guidelines relating to contact arrangements involving children and young people in care: *Practice Guidelines for Contact* (**the Practice Guidelines**).

61. The Practice Guidelines establish circumstances in which case workers should consider suspending or reducing family contact. Most relevantly, these include circumstances in which the child consistently '[s]hows decline in daily functioning […] as a result of the contact'.

62. Case workers are encouraged to consult with either a psychologist or the Principal Social Worker before determining to cease contact.

Whether the determination of the Department for Child Protection to suspend contact between a child and members of his biological family was unjust

63. I have considered whether the determination to suspend contact between Daniel and his biological family was unjust for want of procedural fairness.

64. In the absence of a clear contrary legislative intention, it is to be presumed that the legislature intends for the principles of procedural fairness to be observed in the exercise of statutory power.[12]

65. Procedural fairness is not concerned with the merits of a particular decision but with the procedure that must be observed by the decision-maker in arriving at the decision.[13]

66. The fundamental rule is that a statutory authority having power to affect the rights, interests or privileges of a person, or having power to deprive a person of a legitimate expectation, is bound to hear that person before exercising the power.[14]

67. There are two questions relevant to cases involving the exercise of statutory power: firstly, the question of whether the exercise of the power requires the observance of the principles of procedural fairness; secondly, in cases where such a requirement exists, the question of what the principles of procedural fairness require in the particular circumstances.[15]

68. Historically, it was considered that a right or interest held by a person needed to relate to proprietary or financial rights or to reputation if to be relevant to the doctrine. It has

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[10] Section 13(3e) of the Ombudsman Act provides that, in the course of investigating a prescribed child protection complaint, I must have regard, and seek to give effect, to the HCSCC Charter.

[11] Although the HCSCC Charter provides for a right of active participation in respect of 'decisions and choices about services planned and received', it appears unlikely that the determination in the present investigation amounted to a decision to provide or withhold services to the complainant.

[12] *Kioa v West* [1985] HCA 81 per Brennan J at [9]; the concepts of 'natural justice' and 'procedural fairness' should be equated: *see Kioa v West* [1985] HCA 81 per Mason J at [30].

[13] *Id.*, per Brennan J at [27].

[14] *FAI Insurances Ltd v Winneke* [1982] HCA 26 per Mason J at [17].

[15] *Kioa v West* [1985] HCA 81 per Brennan J at [14]. *See* also Brennan J's remarks at [20] ('There are interests beyond legal rights that the legislature is presumed to intend to protect by the principles of natural justice. It is hardly to be thought that a modern legislature when it creates regimes for the regulation of social interests – licensing and permit systems, means of securing opportunities for acquiring legal rights, schemes for the provision of privileges and benefits at the discretion of Ministers or public officials – intends that the interests of individuals which do not amount to legal rights but which are affected by the myriad and complex powers conferred on the bureaucracy should be accorded less protection than legal rights.'). Brennan J's remarks were influential upon the majority judgment in *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31.

since been observed that the presumption that the principles of procedural fairness qualify the exercise of statutory power 'appl[ies] to any statutory power which is apt to affect any interest possessed by an individual whether or not the interest amounts to a legal right or is a proprietary or financial interest or relates to reputation.'[16]

69. Thus, the presumption is not as much concerned with the kind of individual interest that may be affected by the exercise of statutory power, but with the manner in which it may be affected. If the exercise of a power may affect the interests of an individual in a way that is substantially different from the way in which it tends to affect the interests of the wider public, the relevant decision-maker will ordinarily be required or entitled to consider the interests of the individual before exercising the power.[17] In this sense, the interest that tends to attract the requirement to observe the principles of procedural fairness may be equated with the interest that, when affected, gives a person 'standing' in public law.[18]

70. There is no universally valid test as to what action is required by the doctrine of procedural fairness.[19] The requirements are to be determined by reference to the statutory framework within which a decision-maker exercises statutory power and will also depend upon the facts and circumstances of the particular case.[20] It has been observed that the expression 'procedural fairness' conveys 'the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.'[21]

71. In some cases, the particular circumstances of the case may mean that it is not possible or appropriate for the decision-maker to provide notice to a person whose interests are apt to be affected by the exercise of power. This may be the case when notice is likely to frustrate the purpose for which the power was conferred.[22] This is not to say that the exercise of such a power will always exclude the observance of the doctrine.[23]

72. The particular requirements of procedural fairness may also be affected by 'what is said or done during the process of decision making, and by developments in the course of that process, including representations made as to the procedure to be followed.'[24] If a decision-maker acts to mislead a person as to procedure, this may demonstrate unfairness. However, it is not the departure from the representation that is relevant but the unfairness occasioned by it.[25]

73. In respect of child protection matters, it has been observed that a decision to exercise section 51 of the Children's Protection Act to remove a child from the care of a foster carer attracts the requirements of procedural fairness because it is liable to affect the child's interest in 'the provision of a supportive, safe and secure home'.[26]

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16 *Kioa v West* [1985] HCA 81, per Brennan J at [23].
17 *Id.*, per Brennan J at [23]–[24].
18 *Plaintiff S10-2011 v Minister for Immigration and Citizenship* [2012] HCA 31, per at Gummow, Hayne, Crennan and Bell JJ at [68].
19 *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41 per Kitto J at [13].
20 *SZBEL v Minister for Immigration and Ethnic Affairs* [2006] HCA 63 at [26].
21 *Kioa v West* [1985] HCA 81 per Mason J at [33].
22 *Id.*, per Brennan J at [19].
23 *Id.*, per Brennan J at [19] ('Accepting that the content of the principles of natural justice can be reduced to nothingness by the circumstances in which a power is exercised, a presumption that observance of those principles conditions the exercise of the power is not necessarily excluded at least where, in the generality of cases in which the power is to be exercised, those principles would have a substantial content.')
24 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6 per Gleeson CJ at [24].
25 *Id.*, per Gleeson CJ at [24] ('[W]hat must be demonstrated is unfairness, not merely departure from a representation. Not every departure from a stated intention necessarily involves unfairness, even if it defeats an expectation.')
26 *L v South Australia; H-P v South Australia* [2017] SASCFC 133 per Kourakis CJ at [191]–[192]. Kourakis J at [192] appears to accept that there exists a degree of reciprocity between the interests of the child, so described, and the interests of the foster carer: ('At the very least, foster carers from whom children are removed have standing to seek orders requiring the Minister to comply with the express or implied obligations under s 51 of the [Children's Protection Act] which are calculated to protect that interest.')

74. In *J v Lieschke*, Brennan J similarly observed, in respect of the interests held by a child's parents:

> There is a natural reciprocity between the duty and authority of parents with respect to the nurturing, control and protection of their child and the child's rights and its interests in being nurtured, controlled and protected. The natural reciprocity between the interests of parents and child means that both the parents and the child have an interest in proceedings leading to the exercise of a power which is apt to affect the relationship between them.[27]

75. It has also been observed that efforts by the legislature to emphasise the paramountcy of the child's interests and welfare will not exclude the obligation to provide procedural fairness, but may in some circumstances qualify the operation of the doctrine.[28]

Was the department obliged to afford Mrs Harrington procedural fairness in respect of the determination?

76. It is trite to observe that children and young people have an interest in developing and maintaining a connection with members of their biological family. This is reflected in section 8(3) of the Children and Young People (Safety) Act and in the legislative provisions which permit a member of a child's family – including, critically, a member of a child's extended biological family[29] – to be heard in respect of child protection proceedings.[30] It is also reflected in certain rights recognised by the *Convention on the Rights of the Child*.[31]

77. I am satisfied that the exercise of section 51 of the Children's Protection Act to determine or alter arrangements relating to a child's contact with his or her biological family is liable to affect this interest. Indeed, the determination to suspend contact in this case was informed, at least in part, by the perceived importance of Daniel maintaining a connection with his biological family. I do not consider that section 43 of the Children's Protection Act, which at the relevant time provided that the guardianship of the Minister was 'to the exclusion of the rights of any other person', has any real bearing on the question.[32]

78. Mrs Harrington is a member of Daniel's extended biological family. She was one of three family members who provided primary care to Daniel in the period preceding the guardianship order. Most importantly, she continued to maintain a connection with Daniel following his entry into care through her participation in the contact sessions involving the biological family. As a member of Daniel's family and as a past carer, she had a right, albeit subject to the discretion of the Court, to be heard in any proceedings relating to Daniel brought under the Children's Protection Act or the Children and Young People (Safety) Act.[33]

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27 *J v Lieschke* [1987] HCA 4 at [11]. In those proceedings, regard was had to a legislative provision which was observed to identify the interests of the parent with the interests of the child or young person.

28 *L v South Australia; H-P v South Australia* [2017] SASCFC 133 per Kourakis CJ at [193]. *See also J v Lieschke* [1987] HCA 4 per Brennan J at [9] ('In some custody proceedings, some qualification of the principles of natural justice may be necessary in order to ensure paramountcy to the welfare of the child; for example, it may be necessary to keep a welfare report confidential[.] […] But a desire to promote the welfare of the child does not exclude application of the principles of natural justice except so far as is necessary to avoid frustration of the purpose for which the jurisdiction is conferred.' (citations omitted)).

29 Children's Protection Act, section 3; Children and Young People (Safety) Act, section 16.

30 Specifically, section 47A(a) of the Children's Protection Act and section 66(a) of the Children and Young People (Safety) Act.

31 Article 8(1) of the Convention provides that a child has a right 'to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference'. Article 16 also prohibits unlawful interference with a child's 'privacy, family, home or correspondence'.

32 *See RW v Minister for Education and Child Development & Anor* [2016] SASC 158 at [140] (concerning a question of standing to bring judicial review proceedings seeking equitable relief). As previously noted, the Supreme Court of South Australia determined in *L v South Australia; H-P v South Australia* [2017] SASCFC 133 that the exercise of section 51 of the Children's Protection Act was liable to attract the requirements of procedural fairness.

33 Children's Protection Act, sections 47A(a) and (b); Children and Young People (Safety) Act, sections 66(a) and (b).

79. In the particular circumstances of this matter, I am satisfied that the department's exercise of section 51 of the Children's Protection Act attracted a requirement to afford Mrs Harrington procedural fairness.

Was there a failure to observe the principles of procedural fairness?

80. The department has submitted that the determination to suspend the contact arrangements was informed by the provisional conclusions arising from the psychological assessment.

81. The psychological assessment itself came about as a result of Mrs Harrington's complaint to the HCSCC.[34] The nature of that complaint was that the existing contact sessions were too brief and too infrequent to allow Daniel to develop a meaningful relationship with certain members of his biological family.

82. Mrs Harrington was advised that a psychological assessment had been requested 'given the family's concerns about the frequency of contact not being resolved.' No reference was made in this letter to the concerns about Daniel's behaviour, nor did the department place Mrs Harrington on notice that one possible outcome of the review of the contact arrangements was a decrease in Daniel's contact with his biological family. I accept that the department may not have been contemplating such an outcome at this time.

83. It is evident that Mrs Harrington was afforded an opportunity to be heard in respect of the psychological assessment. Had the matter remained a question of whether or not to increase the contact arrangements, I do not believe that the process would have suffered from want of procedural fairness.

84. The fact remains that the focus of the exercise did shift in light of the perceived escalation in Daniel's behavioural and emotional difficulties.

85. I wish to emphasise that there was in my view nothing inappropriate in the psychologists considering the question of the impact of the contact arrangements upon Daniel's health and wellbeing, particularly in light of the concerns that were being expressed by the foster carers and Daniel's early learning centre.

86. The criticisms that follow do not so much concern the manner in which the psychological assessment was conducted, but the process observed by the department, on considering the advice of the psychologists, which resulted in the determination to suspend the contact arrangements.

87. In her complaint and in her subsequent communications with my Office, Mrs Harrington referred to her surprise on being made aware of that determination. According to Mrs Harrington, early feedback from the psychologists had caused members of Daniel's biological family to believe that an increase in access, [redacted], was most likely to follow the assessment.

88. The relevant members of Daniel's biological family were first informed of the determination to suspend the access arrangements during the 14 June 2018 meeting. It is clear that the determination was made in the weeks prior to that meeting and in a manner that did not involve input from the family.

89. In my view, the department fell into error by failing to notify Mrs Harrington of the provisional recommendations arising from the psychological assessment and,

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[34] This fact is made clear in the case notes and is further reflected in the Ali-Vajdic report ('A formal complaint had been submitted by Ms [Harrington] […]. Consequently, a referral was submitted to DCP Psychological Services'.

consequently, by failing to provide Mrs Harrington with an opportunity to be heard in respect of the proposal to suspend the contact arrangements.

90. I say this because the process observed by the department operated to misdirect Mrs Harrington as to the considerations that were likely to inform the department's exercise of the Minister's statutory powers. Consequently, Mrs Harrington and the biological family were not provided with a meaningful opportunity to present their views against the department suspending the contact arrangements.

91. Although no doubt otherwise appropriate, the department's efforts to explain the basis for the determination to members of the biological family during and after the 14 June 2018 meeting were fundamentally incapable of curing the unfairness inherent in the determination.

92. In the particular circumstances of this case, observing the principles of procedural fairness may merely have entailed telephoning Mrs Harrington to seek and consider her views about the provisional recommendations made by the psychologists.

93. In matters such as this it may be tempting to observe that the advice of a specialist will ordinarily be assigned considerable weight by a decision-maker. The department on considering Mrs Harrington's views may still have determined that suspension of the access arrangements was most likely to promote Daniel's safety and wellbeing. This does not detract from the importance of the department seeking and considering the views of those affected by the decision.

94. We each of us expect that the persons vested with the authority to exercise public power will do so fairly and reasonably and in a manner that is not arbitrary or capricious. This expectation becomes all the more important when the exercise of the power has the potential to shape the course of our lives or impact upon the relationships or connections we share with the people we love.

95. The legislature in seeking to safeguard and promote the welfare of vulnerable children and young people has seen fit to bestow the department with considerable power to affect the rights and interests of the persons living within this State. The exigencies inherent to the child protection jurisdiction may sometimes limit the department's ability to consult with all of the persons who may be relevantly affected by the exercise of its powers. Yet the department must in all cases endeavour to provide practical fairness to the parties.

96. I am of the view that the department's determination to suspend the access arrangements was, for want of procedural fairness, unjust within the meaning of section 25(1) of the Ombudsman Act.

Opinion and recommendations

It is my final view that the determination of the Department for Child Protection to suspend contact between Daniel and members of his biological family was unjust within the meaning of section 25(1) of the Ombudsman Act.

Following receipt of my provisional report, the department informed my investigation that Daniel's contact with his biological family had been resumed.

In the circumstances, I make the following recommendations under section 25(2) of the Ombudsman Act:

1. That the Department for Child Protection continue to engage with Daniel's biological family, foster carers and other relevant parties to ensure that, subject to the other principles in the Children and Young People (Safety) Act, Daniel maintains the best possible connection with his biological family.

2. That the Department for Child Protection amend its Practice Guidelines and any other associated materials to better recognise the requirement to observe the principles of procedural fairness in the making of decisions relating to contact arrangements.

3. That the Department for Child Protection supply a copy of my final report to its Contact Arrangements Review Panel for noting.

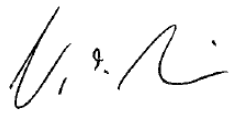
Final comment

In accordance with section 25(4) of the Ombudsman Act, the department should report to the Ombudsman by **15 March 2019** 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 recommendations.

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

I have also sent a copy of my report to the Minister for Child Protection as required by section 25(3) of the Ombudsman Act.



Wayne Lines
SA OMBUDSMAN

15 January 2019