FOSTER AND KINSHIP CARERS' RIGHTS TO REVIEW GOVERNMENT DECISIONS: JURISDICTIONAL TANGLES & UNACCEPTABLE REALITIES

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I INTRODUCTION

Providing children and young people in the child welfare system with the care they need would 'not be possible without foster and kinship carers' (herein referred to collectively as 'carers').[1] This paper critically explores South Australian carers' rights to review government decisions about children in their care. The discussion begins in Part II with an overview of out-of-home care in South Australia. Part III examines the complex and intertwined relationship between state and federal jurisdictions in child welfare matters, with legislative divisions of power resulting in overlapping systems. Part IV summarises the legislative rights available to carers to review government decisions about children in their care, finding that review rights exist only within state jurisdiction pursuant to the *Children and Young People (Safety) Act 2017* (SA), with no equivalent rights existing in the federal arena. Part V critically explores the circumstances in which a child's welfare arrangement is governed by state jurisdiction, arguing that where the practical reality demonstrates a child's care is being administered by state laws, carers should have the right to review decisions made by the government about that child, irrespective of the jurisdiction under which the child entered the welfare system. Following this, Part VI justifies the importance of legislative review rights for carers, finding that in the absence of review rights, the best interests of the child, executive accountability, and carer recruitment and retention are threatened. Part VII critically analyses how legislative rights operate in practice, showcasing the void that exists between carers' review rights in legislation, and the realistic worthwhileness of those rights in practice. Finally, Part VIII concludes that reform must occur to overcome the jurisdictional tangles enlivened by carers' rights to review government decisions, and ensure that rights existing in legislation are mirrored in practice to alleviate unacceptable realities.

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[1] Department for Child Protection, 'Statement of Commitment', *Government of South Australia* (Document, June 2020) <https://www.childprotection.sa.gov.au/carers/how-dcp-works/statement-of-commitment> ('Statement of Commitment').

II OUT-OF-HOME CARE IN SOUTH AUSTRALIA

Out-of-home care refers to the different types of care for children and young people who are unable to live with their birth family, and are under guardianship or custody orders of the Minister or Chief Executive of the Department for Child Protection ('the DCP').[2] Foster and kinship care are forms of out-of-home care placements relevant to the scope of this paper. Foster care refers to the state approved placement of children with carers who have no previous relationship with the child.[3] Kinship care involves the state approved placement of a child with a carer who is a relative, close friend, or member of the child or young person's community.[4]

As of 31 August 2021, there were 1704 children and young people in foster care, and 2266 children and young people in kinship care in South Australia.[5] As of 30 June 2020, there were 856 households providing foster care placements,[6] and 1354 households providing kinship care placements, with many households having more than one child or young person in their care.[7]

In 2016, the Nyland Royal Commission produced a report following an investigation into the laws, policies and practices of South Australia's child protection system. The Commission's report described a system in 'urgent need of reform' and made 260 recommendations to improve child protection.[8] In response to this, the South Australian Government undertook 'the biggest change to child protection in 25 years', overhauling the system and bringing the *Children and Young People (Safety) Act 2017* (SA) ('*Children and Young People (Safety) Act*') into effect.[9]

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[2] Department for Child Protection, 'Different types of out-of-home care', *Government of South Australia* (Web Page, 28 January 2020) <https://www.sa.gov.au/topics/care-and-support/foster-care/the-difference-between-foster-and-kinship-care>.
[3] Ibid.
[4] Senate Community Affairs References Committee, Parliament of Australia, *Out of Home Care* (Report, August 2015) 5.
[5] Department for Child Protection, 'Reporting and Statistics', *Government of South Australia* (Web Page, 1 June 2021) <https://www.childprotection.sa.gov.au/department/reporting-and-statistics>.
[6] Australian Institute of Health and Welfare, *Child Protection Australia* (Child Welfare Series No 74, 2019-2020) S7.2.
[7] Ibid S7.3.
[8] *Royal Commission into Child Protection System* (Report, August 2016) vol 1.
[9] Department for Child Protection, 'Child safety laws and you', *Government of South Australia* (Web Page, 28 January 2020) <https://www.childprotection.sa.gov.au/department/child-safety-laws-and-you>.

III THE RELATIONSHIP BETWEEN THE FAMILY LAW JURISDICTION AND CHILD WELFARE JURISDICTION

A *Division of legislative powers*

The relationship between the federal family law jurisdiction and state child welfare jurisdiction is provided for by the Australian Constitution. The Constitution specifically affords the Commonwealth power to make laws with respect to '…matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants'.[10] The *Family Law Act 1975* (Cth) ('*Family Law Act'*) is the main legislation governing these areas, specifically the issues that arise following the breakdown or separation of a family, including the arrangements to be made for children. Despite this conferral of power to the Commonwealth, states and territories retained legislative power over child welfare, which also includes custody and guardianship matters. As such, each state and territory have their own child protection system and legislation. In South Australia, the *Children and Young People (Safety) Act* is the main law concerning the protection and welfare of children and young people.

Notwithstanding the child welfare jurisdiction remaining with the states and territories, the Federal Circuit and Family Court of Australia ('Family Court') does have the power to 'make orders relating to the welfare of children'.[11] Despite a law of the Commonwealth usually prevailing over a law of a state where there is an inconsistency,[12] the *Family Law Act* unambiguously reverses this hierarchy. Section 69ZK of the *Family Law Act* states that '[state] child welfare laws are not affected' by the *Family Law Act*, and Family Courts must not make an order affecting such laws unless the order comes into effect once the child's care has ceased under the state child welfare laws,[13] or if the written consent of a state or territory child welfare officer has been obtained.[14]

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[10] *Australian Constitution* s 51(xxii).
[11] *Family Law Act 1975* (Cth) s 67ZC(1) ('*Family Law Act*').
[12] *Australian Constitution* s 109.
[13] *Family Law Act* (n 11) s 69ZK(1)(a).
[14] Ibid s 69ZK(1)(b).

B *Overlapping systems*

Despite the states retaining legislative power in relation to child protection, and the *Family Law Act* reinforcing the primacy of the power to the states, child welfare matters often present themselves in family law proceedings. The 'bulk of the cases' that come to the Family Court contain 'allegations of family violence and/or child abuse'.[15] The frequency of child welfare matters being raised in the Family Court results in significant overlap between the state child welfare systems, and the federal family law system.

This interaction is particularly important when a child or young person is likely to be placed under the guardianship or custody of a Minister or Officer within a state child protection system. In such instances, the intersection between state child protection systems and the federal family law system arises in two main areas.[16] Firstly, where a child protection department is already involved with a child's care, the *Family Law Act* may be an instrument by which care placements are determined via the department seeking orders in the Family Court.[17] Secondly, where it is determined neither parent is a viable carer in a matter being heard in the Family Court, the Court invites a child protection department to become a party to the proceedings, and makes an order of parental responsibility in favour of the department.[18] The type of order by which a child comes into the care of a child protection department is important in determining the jurisdiction that governs their care, and by extension, the rights carers have in relation to that care.

IV CARERS' LEGISLATIVE RIGHTS TO REVIEW

A *South Australian Legislation*

The *Children and Young People (Safety) Act* provides the DCP with authority to intervene when a child or young person's welfare is at risk.[19] This can include removing a child from the care of their parents or guardians and placing them into the custody of the Chief Executive of

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[15] National Child Protection Clearinghouse, *Child protection and family law... Joining the dots* (Issues Paper No 34, 2011) 8.
[16] Ibid 13.
[17] Ibid.
[18] Ibid.
[19] *Children and Young People (Safety) Act 2017* (SA) s 41 ('*Children and Young People (Safety) Act*').

the DCP.[20] Following this, an order from the Youth Court of South Australia can be sought to place the child or young person under the guardianship of the Chief Executive.[21] The Chief Executive has wide powers in relation to the children and young people in their custody or guardianship, including the power to place the child or young person in the care of a carer, remove the child or young person from such care, and make a number of decisions as to their care.[22]

If a carer is aggrieved by a decision of the Chief Executive or a child protection officer under the *Children and Young People (Safety) Act*, they are entitled to a review of the decision.[23] An internal review is available for 'decisions made by the Chief Executive under Chapter 7 (other than Part 4 of that chapter) of the Act'.[24] This includes the right to review decisions as to the placement or removal of a child from the care of a carer, and a number of other decisions regarding the provision of care for a child as required. A carer must apply for a review within thirty days of receiving a decision.[25] A member of the DCP who was 'not involved in the decision' is assigned the review, with the process usually including a meeting with the carers and the child welfare officer who made the decision.[26] On application for an internal review, the Chief Executive may confirm, vary or reverse the decision under review.[27]

Following the internal review, a carer is further entitled to an external review of the decision.[28] The South Australian Civil and Administrative Tribunal ('SACAT') is conferred with jurisdiction to undertake the external review.[29] Here, the carer and the DCP present evidence as to whether the Chief Executive has made the correct and preferable decision.[30] The Tribunal is afforded wide discretion, and may 'affirm or vary' the decision that is being reviewed, 'substitute its own decision', or 'send the matter back to the [DCP] for reconsideration in accordance with any directions or recommendations considered appropriate'.[31]

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[20] Ibid s 43.
[21] Ibid ss 50(3), 53.
[22] Ibid s 84(1).
[23] Ibid ch 12.
[24] Ibid s 157(4); *Children and Young People (Safety) Regulations 2017* (SA) s 40.
[25] *Children and Young People (Safety) Act* (n 19) s 157(2)(b).
[26] Department for Child Protection, 'Application for Internal Review', *Government of South Australia* (Application Form) <https://www.childprotection.sa.gov.au/documents/form/application-internal-review-form.pdf>.
[27] *Children and Young People (Safety) Act* (n 19) s 157(3).
[28] Ibid s 158.
[29] Ibid.
[30] *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 34(4) ('*SACAT Act*').
[31] Ibid s 37.

The existence of carers' rights to review decisions made by the DCP are contested when a child is placed into the care of the Chief Executive or Minister by an instrument other than the *Children and Young People (Safety) Act*.

B *Federal legislation*

The *Family Law Act* governs laws relating to children, particularly children in family separation proceedings, in the federal arena. The Family Court possesses wide jurisdiction relating to children, including the ability to make orders relating to the welfare of children.[32] Within this jurisdiction, the Court has the power to issue parenting orders,[33] which deal with the care arrangements for a child.[34] Such orders include the allocation of parental responsibility for a child.[35] Any person 'concerned with the care, welfare or development of the child' may apply for a parenting order,[36] and such order may be made in favour of someone other than the parents of the child.[37] The Family Court can order a relevant Minister of the Crown, such as the South Australian Minister for Child Protection, to have sole parental responsibility of a child.

Following the order that sole parental responsibility be assigned to the Minister, the care arrangement of the child is determined by the Minister, which often entails being placed with a carer. While the Family Court has jurisdiction to vary the parenting order,[38] a carer has no recourse via the *Family Law Act* to have any decisions made by the Minister regarding the care of the child reviewed.

V THE QUESTION OF JURISDICTION: WHEN IS A CHILD GOVERNED BY STATE LEGISLATION?

The jurisdiction governing a child or young person determines the availability of carers' rights to review government decisions. The interplay between state child welfare systems and the

[32] *Family Law Act* (n 11) s 67ZC(1).
[33] Ibid s 65D.
[34] Ibid s 64(2).
[35] Ibid s 64(2)(c).
[36] Ibid s 65C(c).
[37] Ibid s 64C.
[38] Ibid s 70NBA.

federal family law system can enliven questions of whether the care of a child or young person within the child protection arena is governed by state or federal jurisdiction.[39] This points to the need for 'close consideration and care to be taken in deciding wherein lies authority, jurisdiction and power' in the administration of child welfare.[40]

A *The 'saving provisions' of the Family Law Act*

The *Family Law Act* specifically defers power to the states and territories in relation to child welfare.[41] Section 69ZK of the *Family Law Act* provides:

> nothing in [the federal family law jurisdiction] affects the jurisdiction of a [state] court, or the power of a [state] authority, under a child welfare law to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under a child welfare law.[42]

The *Children and Young People (Safety) Act* is recognised as a 'child welfare law' for the purposes of this provision.[43]

The effect of section 69ZK is to preserve the operation of state laws by limiting the operation of the Commonwealth law and the jurisdiction of courts applying the Commonwealth law. However, unless a child or young person has been the subject of action under a child welfare law as defined, 'section 69ZK *will have nothing to do*'.[44] This means that despite the *Family Law Act* 'saving' the jurisdiction of the states in relation to child welfare matters, state child welfare laws cannot apply to a child unless action has been brought under such laws.

However, should state welfare laws, such as the *Children and Young People (Safety) Act,* apply to a child even if their care arrangements originated in the federal jurisdiction under the *Family Law Act*? While no conclusive statements of law exist in relation to this question, there may be some circumstances where this transfer of jurisdiction is required in practice. The considerations below suggest that if a child's care arrangement is being administered in accordance with state welfare laws in practice, then that child should be seen to be governed by such state laws, despite no official proceedings to transfer jurisdiction being brought. This premise is integral to the rights then available to the carers of such child.

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[39] *Re Felicity* [2012] NSWSC 494 ('*Re Felicity*').
[40] *AA v Secretary to the Department of Health and Human Services* (2020) 61 VR 436 (Incerti J).
[41] *Family Law Act* (n 11) s 69ZK(2)(a).
[42] Ibid 69ZK(1).
[43] Ibid s 4(1); *Family Law Regulations 1984* (Cth) reg 12B, sch 5 item 20A.
[44] *Re Felicity* (n 39) (White J) (emphasis added).

B *Originating jurisdiction*

Jurisdiction refers to the scope of a court's authority to hear and determine legal matters.[45] As discussed, both the federal Family Court and state Children's Courts have jurisdiction to determine matters relating to child welfare. The Youth Court of South Australia ('Youth Court') is the relevant state court that has authority to determine child welfare and related care arrangement matters.[46] When a matter is heard within the Family Court, it belongs to the federal jurisdiction, and the *Family Law Act* applies. When a matter is heard in the Youth Court, it belongs to the state jurisdiction, and the *Children and Young People (Safety) Act* applies. To transfer proceedings relating to the care of a child from the federal jurisdiction to the state jurisdiction, orders must be sought within the Youth Court pursuant to the *Children and Young People Safety Act*.[47]

However, in the absence of orders being sought in the Youth Court, the practical reality of a child's care arrangement may suggest that they are governed by state child welfare laws, and as such, belong within state jurisdiction. This argument is substantiated by the construction of section 69ZK of the *Family Law Act*. Section 69ZK states that 'the care (however described) of a person under a child welfare law' is not affected by the *Family Law Act*.[48] This expression should be construed consistently with the evident intention of the section to preserve the operation of state child welfare laws.[49] Per White J:

> it would not be consistent with that legislative purpose to construe the expression so that some aspects of care under a child welfare law were preserved to the states and territories by s 69ZK and some not. The words 'care (however described)' indicate that a *wide meaning* is to be given to the expression.[50]

The 'wide meaning'[51] of 'care (however described)'[52] and the purpose of the *Family Law Act* to not abrogate from state child welfare laws implies that the Commonwealth Parliament did

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[45] LexisNexis, *Halsbury's Laws of Australia* (online at 20 September 2021), 125 General Jurisdiction of Courts, '2 Courts and Judicial System' [125].
[46] *Youth Court Act 1993* (SA) s 4.
[47] *Children and Young People Safety Act* (n 19) pt 6.
[48] *Family Law Act* s 69ZK(2)(a).
[49] *Re Felicity* (n 39) [60] (White J).
[50] Ibid (emphasis added).
[51] Ibid.
[52] *Family Law Act* (n 11) s 69ZK(2)(a).

not intend the lines of federal jurisdiction retract from the availability of state legislative rights, should the practical reality support an entitlement to such rights.

The broad interpretation of 'care however described' can be purported to inexplicitly transfer the governance of Commonwealth parental responsibility matters where the Minister for Child Protection is involved, to state child welfare matters in two main ways. Firstly, where it appears as though the Minister assigned parental responsibility in the federal jurisdiction has delegated their parental responsibility to a state government department. Secondly, where the parental responsibility assigned to the Minister in the federal jurisdiction is indistinguishable in practice from the custody or guardianship of the Chief Executive within the state jurisdiction.

C *Delegation of parental responsibility*

Parental responsibility is defined in the *Family Law Act* as meaning 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.[53] Regarding the actual duties and powers this entails in daily life, the legislation 'gives little helpful guidance'.[54] However, the most common powers relate to education, religion, medical treatment, residence, the persons with whom the child may associate, and the general day-to-day care, welfare and development of the child.[55]

Where sole parental responsibility has been delegated to a Minister or other prescribed body, such person is entitled to exercise the obligations of parental responsibility in all respects on a day-to-day basis.[56] Furthermore, where such delegation of sole parental responsibility exists, a court 'has no jurisdiction to interfere in any way with the exercise by the Minister of that sole responsibility'.[57] However, as a matter of practical necessity, a Minister cannot possibly exercise their powers of parental responsibility to all children within the welfare system on a daily, first-hand basis. Instead, the Minister delegates the decision making in respect of the child to the child's 'care team'.[58] A care team includes 'the child or young person, family

[53] Ibid ss 4(1), 61B.
[54] Belinda Fehlberg et al, *Australian Family Law: The Contemporary Context* (Oxford University Press, 2nd ed, 2014) 292.
[55] Ibid.
[56] *AQY v Administrative Decisions Tribunal (NSW)* [2013] NSWSC 1028 [63].
[57] *Re Josie* (2004) 32 Fam LR 64, 64; *George v Children's Court of New South Wales* (2003) 31 Fam LR 218.
[58] Department for Child Protection, *Who can say OK? Making decisions about children in family-based care* (Booklet, 2019) 7.

members, carers, [DCP] caseworkers, carer support workers, cultural workers and other professionals who may be involved in supporting the child or young person and their carers'.[59] While the *legal* rights and duties of parental responsibility remain with the Minister, the exercise and implementation of such powers and duties on a day-to-day basis rests with the care team.

The DCP, who administer state child welfare and determine issues such as care placements, care concerns, and care plans, operate in accordance with the policies and guidelines that are enabled pursuant to section 145 of the *Children and Young People (Safety) Act*. As such, when a child is placed under the parental responsibility of the Minister for Child Protection, the DCP are tasked with the administration of such child's care, not the Minister personally.[60] Consequently, while an order for the parental responsibility of a child may have come into existence at a federal level, the practice of such responsibility is administered at a state level by the DCP, in accordance with the *Children and Young People (Safety) Act*.[61] This suggests that if a child's care is being administered in accordance with state legislation and policies, then by extension, the review rights for carers pursuant to that same state legislation are enlivened.

D *The indistinguishability between 'parental responsibility' of the Minister and 'guardianship or custody' of the Chief Executive*

When an order pertaining to a child or young person's welfare is made in the federal jurisdiction, 'parental responsibility' is awarded to the Minister pursuant to the *Family Law Act*.[62] When an order pertaining to a child or young person's welfare is made in the state jurisdiction, 'custody or guardianship' is awarded to the Chief Executive of the DCP, pursuant to the *Children and Young People (Safety) Act*.[63] The lack of practical difference between the Minister's parental responsibility, and the Chief Executive's guardianship or custody, may suggest that a child's care arrangement should be interpreted as being governed by state jurisdiction, despite their care arrangement originating in the federal jurisdiction.

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[59] Ibid
[60] *Children and Young People (Safety) Act* (n 19) s 146.
[61] Ibid ch 11.
[62] *Family Law Act* (n 11) s 64D(1).
[63] *Children and Young People (Safety) Act* (n 19) ss 50(3), 53.

The *Children and Young People (Safety) Act* contains no provision as to how a child must come to be under the guardianship or custody of the Chief Executive, only that once they are under such guardianship or custody, the Chief Executive possesses powers in relation to the child's care.[64] Consequently, an order made within state jurisdiction pursuant to the *Children and Young People (Safety) Act* is not legislatively required for a child to be considered under the guardianship or custody of the Chief Executive. By extension, this suggests that an order made within the federal jurisdiction, that assigns parental responsibility to the Minister, may suffice in bringing the child within the state jurisdiction of the 'Chief Executive's custody or guardianship'. This incorporation within the state jurisdiction is likely, firstly, due to the role of the Minister being transitioned to be more closely aligned to that of the Chief Executive due to changes in legislative framing,[65] and secondly, where the 'parental responsibility' assigned to the Minister can be interpreted as being within the wording of 'guardianship or custody' of the Chief Executive of the Department.[66]

In federal Family Court matters where the child is resident in South Australia, orders for parental responsibility made in favour of a state child protection authority are usually made to the South Australian Minister for Child Protection.[67] While the Minister for Child Protection previously undertook the guardianship function, the *Children and Young Person (Safety Act)* now authorises the Chief Executive of the DCP to undertake the guardianship and custody function instead.[68] This conferring of responsibility to the Chief Executive 'better align[ed] the South Australian system with systems in other jurisdictions'.[69] As such, while Family Court orders may assign parental responsibility to the Minister for Child Protection, the practical outcome suggests that this function is more likely to be administered by the Chief Executive.[70]

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[64] Ibid s 84.
[65] South Australia, *Parliamentary Debates*, Legislative Council, 13 April 2017, 6532 (Peter Malinauskas, Minister for Police, Minister for Correctional Services, Minister for Emergency Services, Minister for Road Safety).
[66] *Children and Young People (Safety) Act* (n 11) ch 11.
[67] Australian Institute of Health and Welfare, *Permanency planning in child protection* (Child Welfare Series No 64, 2016) app B, 5.
[68] Department for Child Protection, 'Major Changes', *Government of South Australia* (Web Page) <https://www.childprotection.sa.gov.au/department/child-safety-laws-and-you/major-changes>.
[69] South Australia, *Parliamentary Debates*, Legislative Council, 13 April 2017, 6532 (Peter Malinauskas, Minister for Police, Minister for Correctional Services, Minister for Emergency Services, Minister for Road Safety).
[70] Ibid.

Furthermore, the lack of practical difference between 'parental responsibility' and 'guardianship and custody' assigned to child welfare authorities supports the assertion that parenting orders created in the federal jurisdiction can be implicitly transferred to the state child welfare jurisdiction. Guardianship is synonymous with parental responsibility, with the 'bundle of rights comprising each term' including and being included by the other.[71] As such, the terminology of 'parental responsibility' as assigned in federal Family Court orders should be read as equivalent to that of 'guardianship and custody' as identified in the *Children and Young People (Safety) Act*.[72]

These indistinguishable terms infer that a child's care arrangement, originating as parental responsibility to the Minister in the federal jurisdiction, should be encompassed within the definition of 'in the Chief Executive's custody or guardianship' under the *Children and Young People (Safety) Act*. Subsequently, as the child's care arrangements are therefore governed by state jurisdiction, an entitlement to state legislative rights is enlivened for carers.

In other words, if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck.

E *Jurisdictional effects on carers' rights to review: an example*

The effect of this jurisdictional tangle on carers' review rights, and the importance of this question of law, is particularly evident in situations where multiple children are being cared for by the same carer, however, those children came to be within the child welfare system under different instruments. The absurdity in the potential for jurisdictional tangles to impact carers' rights to review is demonstrated by the following example.

A family is providing care for two children. The first child came to be within the child welfare system through an order of the Family Court, which assigned parental responsibility to the Minister, pursuant to the federal *Family Law Act*. The second child came to be within the child welfare system through an order of the South Australian Youth Court which placed the child under the guardianship of the Chief Executive, pursuant to the state *Children and Young People*

[71] *Re Lucy (Gender Dysphoria)* [2013] FamCA 518 [52] (Murphy J).
[72] Ibid.

(Safety) Act. Despite this, the DCP, who operate under state jurisdiction, have administered both children's care. The same caseworkers comprise both children's care teams. The same standards and policies of care are applied to both children. Both children are removed from the same carers, through the same procedures and by the same DCP staff. Despite this, the carers of these children are only able to review the decision to remove the second child, who came to be within the child welfare system through an order of the Youth Court under the *Children and Young People (Safety) Act*. The decision to remove the first child is deemed unreviewable, as the child came to be within the child welfare system through an order of the Family Court under the *Family Law Act*.

This example showcases the absurdity that may result if the originating jurisdiction of a child's care arrangement is determinative of carers' rights to review. If the practical reality demonstrates that a child's care arrangement is being administered pursuant to state child welfare laws and state government departments, then that child should be seen to be governed by state jurisdiction, thereby enlivening carers' rights to review.

VI THE IMPORTANCE OF CARERS' RIGHTS

The importance of a child or young person in care being governed by state jurisdiction is the subsequent availability of carers' rights, accessible pursuant to the *Children and Young People (Safety) Act*. Carers' rights to review decisions by the government are integral in upholding the best interests of the children in care, maintaining executive accountability, and improving the retention and recruitment of carers. The Statement of Commitment, developed together by the DCP and non-government organisations, 'recognises…[and] values carers as an essential and respected part of the care team for children and young people'.[73] The Statement of Commitment includes a guarantee to 'be transparent about the legal rights of carers, [and] how carers can…ask for decisions to be reviewed', demonstrating formal recognition of the importance of carers' rights.[74]

[73] Department for Child Protection, 'Statement of Commitment' (n 1).
[74] Ibid.

A *Best interests of the child*

The best interests of a child or young person are the 'paramount consideration in child welfare matters'.[75] The *Children and Young People (Safety) Act* states that such interests include, foremost, the protection from harm,[76] but also a child's need to be loved, heard, and be able to achieve their full potential.[77] A carer's role is to facilitate these interests.[78] As such, carers aim to provide care that supports the best interests of the child. However, issue may arise when the best interests of the child are contended, often between a child welfare authority and carers.[79] In these circumstances, carers' review rights are crucial in confirming whether a decision by the DCP, such as to remove a child from a carer's care, was in the child's best interests.[80] Carers' rights to review decisions by the government are not incompatible or conflicting with the best interests of the child. Instead, carers' review rights act as a mechanism to uphold and further the paramount consideration of the best interests of the child.

B *Executive accountability*

The exercise of public power by the executive has a 'unique capacity to affect individuals'.[81] The *Children and Young People (Safety) Act* confers wide powers on the Chief Executive to make decisions in relation to the children and young people in their custody or guardianship.[82] These decisions directly alter legal rights and interests, and can 'severely impact' both the child in care, and the carers.[83] The magnitude of this power on the lives of individuals requires accountability mechanisms that allow executive action to be 'open to inspection and challenge'.[84] Carers' rights of review pursuant to the *Children and Young People (Safety) Act* promote such accountability. These review mechanisms ensure that the DCP apply best practice in administrative decision making, which is an integral feature of Australia's system

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[75] *L & Anor v State of South Australia; H-P v State of South Australia* [2017] SASCFC 133 [193] (Kourakis CJ).
[76] *Children and Young People (Safety) Act* (n 19) s 7.
[77] Ibid s 8.
[78] Department for Child Protection, 'Supporting document to the Statement of Commitment with South Australian Foster and Kinship Carers', *Government of South Australia* (Document, June 2020) 1 <https://www.childprotection.sa.gov.au/carers/how-dcp-works/statement-of-commitment>.
[79] Sarah Font and Elizabeth Gershoff, *Foster Care and Best Interests of the Child* (Springer, 2020) 23.
[80] Ibid 24.
[81] Judith Bannister, Anna Olijnyk and Stephen McDonald, *Government Accountability: Australian Administrative Law* (Cambridge University Press, 2nd ed, 2020) 5.
[82] *Children and Young People (Safety) Act* (n 19) s 84(1).
[83] Families SA, *Consultation required for removal of children placed on a guardianship order* (Divisional Circular No 131, 29 July 2013) 2.
[84] Bannister, Olijnyk and McDonald (n 81) 17.

of government.[85] Enhanced accountability is a 'critical element' for an effective child welfare system, with carers' rights to review government decisions strengthening the system.[86]

C *Retention and recruitment of carers*

The retention and recruitment of carers is paramount to providing secure and stable care for children and young people within the child welfare system.[87] The 'most effective' form of carer retention and recruitment is through 'word of mouth', where satisfied carers generate interest in others, creating a cycle.[88] As such, it is imperative that existing carers feel supported and satisfied in their roles. The relationship a carer has with a child welfare authority and its caseworkers can significantly impact a carer's overall satisfaction with their role.[89] Means that ensure decisions made by caseworkers can be re-assessed are crucial in improving partnerships and perceptions between carers and child welfare authorities.[90] Legislative rights to review government decisions provide an accountability mechanism that increases carer satisfaction and support, ensuring their right to be heard and be subject to fair and responsible decision-making. Without such rights, carer satisfaction and supports are jeopardised, thereby negatively affecting carer retention and recruitment.[91]

VII REVIEW RIGHTS IN PRACTICE

Carers' rights to review decisions by the DCP exist at law pursuant to the *Children and Young People (Safety) Act*, both internally by a member of the DCP not involved in the original decision, and externally by SACAT.[92] However, the realistic efficacy of such mechanisms

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[85] Attorney-General's Department, 'Administrative Law', *Australian Government* (Webpage) <https://www.ag.gov.au/legal-system/administrative-law>.
[86] Sandra Bass, Margie Shields and Richard Behrman, 'Children, Families, and Foster Care: Analysis and Recommendations' (2004) 14(1) *The Future of Children* 4, 19.
[87] Lorraine Thomson, Morag McArthur and Erin Barry, *Recruiting and Retaining Foster Carers* (Research to Practice Series No 16, 2016) 2.
[88] Queensland Government, 'Important factors in the recruitment, support and retention of carers', *Child Safety Practice Manual* (Webpage, 2021) <https://cspm.csyw.qld.gov.au/practice-kits/care-arrangements/working-with-carers-1/seeing-and-understanding/important-factors-in-the-recruitment-and-support-o>.
[89] Australian Institute of Family Studies, *Working Together to Care for Kids* (Research Report, 2018) 49.
[90] Leith Harding et al, 'The wellbeing of foster and kin carers: A comparative study' (2020) 108 *Children and Youth Services Review* 104566:1–8, 6.
[91] Jacquelyn Mallette, Lindsey Almond and Hannah Leonard, 'Fostering healthy families: An exploration of the informal and formal support needs of foster caregivers' (2020) 110 *Children and Youth Services Review* 104760:1–8, 4.
[92] *Children and Young People (Safety) Act* (n 19) ss 157, 158.

suggests that these rights are not being translated into practice. Pertinently, the accessibly and effectiveness of administrative tribunals, the denial of procedural fairness for carers, and the outcomes of such matters, suggest that the rights that exist at law may not result in worthwhile procedures that provide 'individualised justice'.[93]

A *Administrative tribunals*

While administrative tribunals sit within the system of decision-making bodies, they are understood as 'essentially different institutions from courts'.[94] Administrative tribunals have jurisdiction to review decisions made by the executive branch of government. Within this function, tribunals can look at the merits of a matter to ensure that the 'correct and preferable' decision is made.[95] In essence, this means that administrative tribunals 'stand in the shoes of the primary decision-maker'.[96] Administrative tribunals were largely established at a time when there was 'general dissatisfaction' with the court system, which was seen as 'too slow, too expensive, too formal and too complicated'.[97] Administrative tribunals aimed to alleviate these issues, embodying a 'fair, just, economical, informal and quick mantra'.[98]

SACAT is the primary South Australian administrative tribunal, dealing with an array of administrative matters, such as requests for reviews of government decisions.[99] SACAT aims to be 'accessible, flexible and responsive', and to process and resolve disputes efficiently and inexpensively.[100] Pertinently, SACAT purposes to 'promote the best principles of public administration', including 'independence and procedural fairness, quality and consistent decisions, and transparency and accountability'.[101]

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[93] John McMillan, 'Administrative Tribunals in Australia – Future Directions' (Conference Paper, International Tribunals Workshop, 5 April 2006) 9.
[94] Peter Cane, 'Judicial Review and Merits Review: Comparing Administrative Adjudication by Courts and Tribunals' in Susan Rose-Ackerman and Peter Lindseth (eds) *Comparative Administrative Law* (Edward Elgar Publishing, 2010) 426, 428.
[95] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 68 (Bowen CJ and Deane J).
[96] *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139, 143 (Smithers J)
[97] Kay Ransome, 'The Effectiveness and Efficiency of Administrative Law: The Tribunal Perspective' (Australian Institute of Administrative Law Forum No 58, June 2007) 68.
[98] Ibid.
[99] South Australian Civil and Administrative Tribunal, 'About SACAT', *SACAT* (Webpage) <https://www.sacat.sa.gov.au/about-sacat>.
[100] South Australian Civil and Administrative Tribunal, 'Our purpose & Values', *SACAT* (Webpage) <https://www.sacat.sa.gov.au/about-sacat/our-purpose-values>.
[101]Ibid.

B *'Lawyerising' the process*

According to the *South Australian Civil and Administrative Tribunal Act 2013*, the 'main objectives' of SACAT are to be 'accessible', 'flexible' and to act with 'as little formality as possible'.[102] However, SACAT, along with administrative tribunals in other jurisdictions, has become increasingly 'lawyerised'.[103] This is evident, firstly, in the members who constitute the Tribunal, and secondly, in the extensive occurrences of highly trained and experienced government litigants appearing before the Tribunal. While SACAT members can be selected from a variety of different professional backgrounds, most members who constitute the Tribunal are legal professionals.[104] This trend, which sees members with legal qualifications 'dominating' most Australian tribunals, has intensified over time.[105]

This emphasis on formal legal qualifications can hamper the utility of administrative tribunals, by creating proceedings that require parties to possess a higher level of legal skill to navigate. According to John McMillan, former Commonwealth Ombudsman, 'it helps to be a lawyer' in a tribunal setting.[106] Consequently, a growing number of proceedings are seeing highly trained government litigants appearing before tribunals, while most non-government parties remain self-represented.[107] Pertinently, the DCP are 'always represented by lawyers from the Crown Solicitor's Office' in SACAT external reviews.[108] The presence of government litigants makes it difficult for parties with no legal qualifications to competently self-represent and ensure they receive fair proceedings. This is particularly problematic for carers, who feel as though they require legal assistance in matters such as care arrangement reviews, yet often have limited access to legal support.[109] This 'lawyerisation' of tribunals weakens the objectives of SACAT, making it less accessible and appealing for carers to request external reviews of government decisions.

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[102] *SACAT Act* (n 30) s 8.
[103] McMillan (n 93) 9.
[104] South Australian Civil and Administrative Tribunal, 'Tribunal members', *SACAT* (Webpage) <https://sacat-stage.azurewebsites.net/about-sacat/leadership-and-members/tribunal-members>.
[105] McMillan (n 93) 11.
[106] Ibid 10.
[107] Justice Michael Barker, 'The emergence of the generalist administrative tribunal in Australia and New Zealand' (Speech, Australian Institute of Judicial Administration Conference, 10 June 2005) 58.
[108] Connecting Foster and Kinship Carers SA, 'External review at the South Australian Civil and Administrative Tribunal (SACAT)' (Carer Guide, December 2020) 3 ('SACAT reviews').
[109] Australian Institute of Family Studies, *Working Together to Care for Kids* (Research Report, 2018) 56.

C *Timeliness*

Timeliness reflects a 'balance' between the time necessary to properly obtain, present and consider a matter, and unreasonable delay due to 'inefficient processes and insufficient resources'.[110] SACAT aims to 'process and resolve [matters] as quickly as possible'.[111] For the most part, this objective is achieved. Undoubtedly, most proceedings brought before SACAT are resolved far more expediently than they would have been within a court.[112] However, there are occasions where the Tribunal is 'slow to react to varying demands' in high volume jurisdictions,[113] with more complex matters taking 'longer than they should' to be resolved through SACAT.[114]

Timeliness in decision making in child welfare matters is crucial to avoid negative consequences that can compromise a child's care.[115] Pursuant to the *Children and Young People (Safety) Act*, a key principle in child welfare matters is that decisions are made in a 'timely manner' to 'promote permanence and stability'.[116] While a child's best interests are 'at the heart of all plans and action', not efficiency,[117] delays in proceedings prolong the disruption and distress in a child or young person's life.[118]

Despite the inherent risks in delays within child welfare proceedings, reviews of government decisions made under the *Children and Young People (Safety) Act* by SACAT are often an extensive process. After an application for review is made by a carer to SACAT, a first directions hearing will be scheduled. Additionally, the DCP will send the carer all relevant documents regarding the original decision.[119] These documents are usually extensive and time-consuming to review.[120] If there is an issue with the documents, such as missing information

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[110] David Bleby, *2017 Statutory Review South Australian Civil and Administrative Tribunal [SACAT]* (Report, 1 August 2017) 24.
[111] *SACAT Act* (n 30) s 8(1)(c).
[112] Bleby (n 110) 83.
[113] Ibid 77.
[114] Ibid 83.
[115] Chris Beckett, Bridget McKeigue and Hilary Taylor, 'Coming to conclusions: social workers' perceptions of the decision-making process in care proceedings' (2006) 12(1) *Child and Family Social Work* 54, 54.
[116] *Children and Young People (Safety) Act* (n 19) s 10(1)(a).
[117] Australian Institute of Family Studies, *Timely decision making and outcomes for children in out-of-home care* (Report, June 2019) 23, quoting J Selwyn, L Frazer and D Quinton, 'Paved with Good Intentions: The Pathway to Adoption and the Costs of Delay' (2006) 36(4) *British Journal of Social Work* 561, 575.
[118] Rosemary Sheehan, 'The marginalisation of children by the legal process' (2003) 56(1) *Australian Social Work* 28, 35.
[119] Connecting Foster and Kinship Carers SA, 'SACAT reviews' (n 108) 6.
[120] Ibid.

or inadequate time for the carer to review the documents, further directions hearings will be ordered.[121] Following this, a conference will likely be scheduled, where the DCP, carers, and the parties' legal representation, can participate in a discussion presided over by a Tribunal Member in an attempt to negotiate an agreement.[122] If an agreement cannot be reached, a full hearing is scheduled. A full hearing can take days to complete, especially where complex issues are involved.[123] By the time a matter is finalised, significant time can have elapsed. Despite this time likely being lesser than that of a court deciding child welfare matters, it can still be extensive.[124] These delays, while disruptive and distressing in all matters, are particularly harmful where a carer is reviewing a decision regarding the removal of a child from their care, meaning the child is in the care of another party while proceedings are occurring. The longer the proceedings take, the less likely it is the child will be returned to the carer who sought review of the decision, despite it possibly being the correct and preferable decision.[125] As such, the potential for delays in SACAT proceedings makes carers' legislative review rights less worthwhile in practice.

D *Procedural fairness*

The limited applicability of procedural fairness to decisions made under the *Children and Young People (Safety)* Act affects carers' rights to review decisions made by the DCP. The rules of procedural fairness are concerned with the process by which a decision is made, rather than the substance of a decision.[126] Such rules of procedural fairness protect some of the 'most cherished' values of our system of governance, namely fairness and impartiality in executive decision making, and the notion that people deserve to be included in decisions that affect their individual rights and liberties.[127] Procedural fairness requires government decision-makers to give a fair hearing to affected persons, and that such decision-makers be, and appear to be,

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[121] Ibid.
[122] South Australian Civil and Administrative Tribunal, 'Conferences', *SACAT* (Webpage) <https://www.sacat.sa.gov.au/bringing-a-case/conferences>.
[123] Connecting Foster and Kinship Carers SA, 'SACAT reviews' (n 108) 6.
[124] Bleby (n 110) 83.
[125] Interview with Carissa Inglis, Senior Team Leader at Queensland Foster and Kinship Care (Ruby Preece, Connecting Foster and Kinship Carers SA Inc, 6 August 2021). See also Tommie Forslund et al, 'Attachment goes to court: child protection and custody issues' *Attachment & Human Development* DOI 10.1080/14616734.2020.1840762: 1–52; Rosemary Sheehan, 'The marginalisation of children by the legal process' (2003) 56(1) *Australian Social Work* 28, 35.
[126] Bannister, Olijnyk and McDonald (n 81) 392.
[127] Ibid.

impartial.[128] The rules of procedural fairness apply to decision-making if the decision has the potential to affect the applicant's rights or interests in a direct, immediate, and individualised way, and the legislation under which the decision is made does not contain provisions that narrow or exclude procedural fairness.[129]

However, a recent South Australian Supreme Court decision has had 'chilling effects' on carers' rights to procedural fairness in decisions made about them by the DCP.[130] In *L & Anor v State of South Australia; H-P v State of South Australia,*[131] the Full Court held that, firstly, carers have no right to be afforded procedural fairness by the DCP when investigating concerns as to the quality of care.[132] Secondly, the Court held that while carers are entitled to be afforded procedural fairness in decisions regarding the removal of children from their care, a failure by the DCP to accord carers procedural fairness will not invalidate the removal.[133]

Worryingly, investigations regarding care concerns are not considered reviewable decisions under the *Children and Young People (Safety) Act*, meaning that even if the findings of such investigation are not substantiated, they are not able to be subject to independent SACAT review and scrutiny.[134] This can have 'devastating consequences' for carers, often resulting in the removal of a child if the report finds a deficit in the quality of care, even if this finding is not substantiated.[135]

Unlike judicial review mechanisms, the internal and external administrative review rights pursuant to the *Children and Young People (Safety) Act* do not require a breach of procedural fairness to review the merits of the decision. However, the lack of procedural fairness accorded to carers nevertheless affects such review rights overall. Importantly, procedural fairness contributes to better decision-making, and recognises people's right to be treated with respect

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[128] Matthew Groves, 'Waiver of Natural Justice' (2019) 40(3) *Adelaide Law Review* 641, 642.
[129] *Kioa v West* (1985) 159 CLR 550; *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636.
[130] Joe McIntyre, 'What is Administrative Law About? Power, Rights, and Judicial Culture in Australia', *Australian Public Law* (Blog Post, 23 April 2018) <https://auspublaw.org/2018/04/what-is-administrative-law-about/>.
[131] *L & Anor v State of South Australia; H-P v State of South Australia* [2017] SASCFC 133.
[132] Ibid 190.
[133] Ibid 193.
[134] Connecting Foster and Kinship Carers SA, White Paper Submission to the Minister for Child Protection, *Children and Young People (Safety) Act 2017* (December 2019) 3 ('White Paper Submission').
[135] Ibid.

and dignity regarding government decisions that affect them.[136] As such, decisions that do not comply with the rules of procedural fairness may be 'less well-informed', and 'fail to treat carers with respect and fairness'.[137] The lack of requirement for procedural fairness in decisions made under the *Children and Young People (Safety)* Act makes carers' rights to review decisions made by the DCP less worthwhile, and demonstrates a larger 'systemic risk'.[138]

E *Outcomes*

While the *Children and Young People (Safety) Act* may appear to provide satisfactory review rights for carers, this is not the reality. The limited accessibility and efficiency of SACAT in child protection matters, paired with a lack of requirement for procedural fairness, demonstrates that the rights that exist at law may not result in worthwhile procedures that provide fair and just outcomes. For tribunals to be effective, they must 'actually be useable by the people they have been set up to serve'.[139] Without fair and effective procedures in practice, review rights are rendered far less valuable to carers.

VIII REFORM

While South Australian carers do have access to legislative rights to review government decisions, the practical and procedural issues that accompany these rights limit their effectiveness. To ensure that the review rights that exist at law are reflected in practice, review procedures be reformed.

A *Overcoming jurisdictional tangles*

To overcome questions of jurisdiction and the availability of carers' legislative review rights, the *Children and Young People (Safety) Act* must be amended. A provision should be inserted to clarify that children whose care is being administered by the DCP, irrespective of the jurisdiction in which their care arrangement originated, are considered as being under the guardianship or custody of the Chief Executive, and, therefore, governed by the *Children and*

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[136] Bannister, Olijnyk and McDonald (n 81) 392.
[137] Ibid; Kelly Ryan, 'Who would be mad enough to choose to care?', *InDaily* (online, 4 Decemeber 2017) <https://indaily.com.au/opinion/2017/12/04/mad-enough-choose-care/>.
[138] Ryan (n 137).
[139] Ransome (n 97) 68.

Young People (Safety) Act. The inclusion of such provision will clarify that an order made within state jurisdiction pursuant to the *Children and Young People (Safety) Act* is not required for a child to be legislatively considered under the guardianship or custody of the Chief Executive. It would ensure that an order made within the federal jurisdiction, that assigns parental responsibility to the Minister, is incorporated within state jurisdiction when the child's care is subsequently administered pursuant to state child welfare laws and by state governmental departments. This would consequently enliven section 69ZK of the *Family Law Act*, which gives primacy to state child welfare laws when a child is subject to such law. This amendment will ensure that carers' legislative review rights are not contested when caring for a child whose welfare arrangement originated in the federal jurisdiction, thereby avoiding the absurdity that may result in the absence of such clarifying provision.

B *Improving internal review practices*

A good relationship between carers, carer advocacy bodies, and the DCP is essential in ensuring that internal review practices are effective.[140] Pertinently, open communication and information sharing allows carers to be informed and prepared to participate in an internal review, and ultimately understand why a decision was made. Without effective information sharing, government transparency is compromised, and carers are alienated from the decision-making process they are legislatively appointed to be a part of.[141] Furthermore, working together in a respectful manner allows all parties to feel heard and supported in what can be a 'heartbreaking' process.[142] To ensure successful partnerships between carers and the DCP, the Statement of Commitment should be upheld in all decision-making processes, as well as an affordance of procedural fairness to ensure carers are treated with respect and fairness.[143]

The internal review process would further benefit from the inclusion of legislative provisions that clarify the nature and form of the review.[144] Section 157 of the *Children and Young People (Safety) Act* only provides that an internal review can be sought, the timelines in which to do

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[140] Inglis (n 125); Interview with Fay Alford, Director at Foster Care Association WA (Ruby Preece, Connecting Foster and Kinship Carers SA Inc, 30 August 2021); Interview with Monalisa Fungalei, Practice Manager at Foster and Kinship Carers Association NT Inc (Ruby Preece, Connecting Foster and Kinship Carers SA Inc, 30 August 2021).
[141] *Children and Young People (Safety) Act* (n 19) s 82.
[142] Inglis (n 125).
[143] Department for Child Protection, 'Statement of Commitment' (n 1).
[144] Connecting Foster and Kinship Carers SA, White Paper Submission (n 134) 5.

this, and the decisions that can be made. The lack of legislative provisions relating to the processes of the review can result in 'inconsistent and inconclusive' decisions that 'lack transparency and clarity'.[145] These inconsistencies can go to the very foundation of the review, with the grounds of what is considered a 'reviewable decision' varying between different DCP workers. Worryingly, this means that the same type of decision can one day be deemed reviewable, and the next day unreviewable, 'dependent on the reviewer at the time'.[146] This demonstrates a lack of clarity and consistency in the legislation and regulations and suggests that provisions need to be inserted that prescribe a procedure to be undertaken regarding internal reviews, and the exact types of decisions that can be reviewed.

C *Improving external review practices*

Overarchingly, administrative tribunals that hear child welfare matters need to be steeped in a 'framework reflective of the best interests of the child', as opposed to an adversarial framework.[147] When proceedings are informed by principles of child welfare, the resolution of matters in tribunals is more effective, fair, and just for both children in care, and carers.[148] Pertinently, external reviews should be 'empowering' for carers, who have a legal right to be heard by the tribunal pursuant to the *Children and Young People (Safety) Act*.[149]

A tribunal framework that is centred around the best interests of the child can be supported through the constitution of the tribunal members. Integral to an effective tribunal process in child welfare matters is a multi-disciplinary tribunal panel, with child protection expertise being 'crucial'.[150] While SACAT aims to be constituted by a variety of members from different professional backgrounds, most members who constitute the tribunal are legal professionals.[151] This can create a 'temptation' for the tribunal to 'behave more like a court'.[152] To increase the effectiveness of external reviews, SACAT should adopt an approach to member constitution similar to that of the Queensland Civil and Administrative Tribunal. There, when hearing child

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[145] Ibid.
[146] Ibid 6.
[147] Inglis (n 125).
[148] Ibid.
[149] Ibid.
[150] Queensland Child Protection Commission of Inquiry, *Taking responsibility: A Roadmap for Queensland Child Protection, June 2013* (Discussion Paper No 10, February 2013).
[151] South Australian Civil and Administrative Tribunal, 'Tribunal members', *SACAT* (Webpage) <https://sacat-stage.azurewebsites.net/about-sacat/leadership-and-members/tribunal-members>.
[152] Bleby (n 110) 78.

welfare matters, the tribunal consists of one legally qualified member, and two other members who are committed to the principles of Queensland's child welfare legislation and have extensive professional knowledge and experience in child welfare, usually being people with a social work background.[153] The inclusion of specialist members in child welfare matters before SACAT will increase the effectiveness of carers' review rights, and allow the tribunal to operate in a collaborative and 'trauma-informed way', upholding the framework of the best interests of the child as opposed to an adversarial practice.[154]

A framework that is 'de-lawyerised' and less adversarial in nature would further allow SACAT to finalise child welfare proceedings more expediently and fairly. Importantly, the significant time that can elapse between the multiple stages of conferences, directions hearings and full hearings is not in the best interests of the child, and further disadvantages carers' chances of receiving a fair outcome.[155] A practice that reflects the best interests of the child instead of an adversarial approach between parties would allow SACAT conferences to be more successful in reaching a suitable outcome, thereby reducing the number of matters that proceed to a full hearing. Furthermore, reducing the instances of extensive teams of government litigants appearing in child welfare matters would further promote a child protection framework as opposed to an adversarial framework in SACAT hearings. Crown litigation, who often appear before SACAT in child welfare matters, 'annihilate' the fair and just processes the tribunal aims to embody.[156] This is particularly evident when carers lack the resources to obtain their own legal representation.[157] 'Crown law does not belong in tribunal matters', and jeopardises the very foundations and aims of administrative tribunals being informal, accessible and flexible.[158] A framework that focuses on fostering a good partnership between the DCP and carers, and removes unnecessary legal presence, would increase the efficiency, worthwhileness and fairness of carers' review rights.

[153] *Child Protection Act 1999* (Qld) s 99H.
[154] Inglis (n 125).
[155] Ibid.
[156] Ibid.
[157] Connecting Foster and Kinship Carers SA, White Paper Submission (n 134) 12.
[158] Inglis (n 125).

IX CONCLUSION

'Becoming a carer is a complicated choice', and is made more convoluted due to the lack of surety in carers' rights to review government decisions pertaining to children in their care.[159] The complex relationship and overlap between state and federal child welfare laws, paired with carers' review rights existing only within state legislation, can result in jurisdictional tangles that lead to absurd and unjust outcomes for carers requesting reviews of government decisions about children in their care. This is problematic not only for carers, but for the best interests of the children in their care, and the continuance of enhanced accountability to ensure an effective child welfare system. Furthermore, the void that exists between the rights to review within state legislation, and the reality and outcomes of these rights, demonstrates procedures and practices that lack fair and just outcomes for carers. Until the administrative review process is reformed, the jurisdictional tangles and unsatisfactory procedures that carers' current legislative review rights enliven will continue to threaten the retention and recruitment of carers, the best interests of children and young people in care, and the very foundations of governmental accountability.

[159] Thomson, McArthur and Barry (n 87) 2.

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