Promoting the rights and best interests of children and young people involved in care and protection proceedings in the ACT Children’s Court

The significance of Public Advocacy

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Abstract
The Public Advocate of the ACT (PA ACT) has a statutory role to monitor and foster the provision of services for the protection of children and young people and to advocate for and protect their rights, specifically for those children and young people who are in need of protection from abuse, exploitation or neglect. In undertaking this role, the PA ACT is able to provide ‘best interests advocacy’ in care and protection proceedings before the ACT Children’s Court.

The purpose of this paper is to discuss the significance of the ‘public advocacy model’ of practice in the ACT Children’s Court. In advocating for the ‘best interests’ of children and young people, the PA ACT provides a separate form of representation to that of the child’s legal representative, although can work in close association with the child legal representative.

The legislative framework in the ACT allows for the PA ACT to be present and be heard at hearings and proceedings before the ACT Children’s Court. The PA ACT can become a party to care and protection proceedings and may also be present at proceedings thereby providing an independent voice concerning the best interests of the child or young person. Case study examples will highlight the significance of public advocacy before the ACT Children’s Court in promoting the rights and best interests of children and young people involved in care and protection proceedings.
Introduction
The Public Advocate of the Australian Capital Territory (PA ACT) is an independent statutory office which focuses on protecting the rights and best interests of vulnerable people. In jurisdictions across Australia, offices of the Public Advocate are principally involved in functions related to guardianship and systemic advocacy for people with a disability and adults with impaired decision-making capacity, thereby ensuring their protection from neglect, exploitation or abuse.

In the Australian Capital Territory (ACT) however, unique public advocacy functions also extend to children and young people, especially those involved with care and protection systems and young people coming to the attention of youth justice. The PA ACT, previously known as the Office of the Community Advocate has undertaken individual advocacy on behalf of children and young people since the 1990’s.

The ACT is a human-rights based jurisdiction. Due to the Public Advocate’s legislative underpinnings, this office is well placed to ensure children and young people have their rights upheld and their best interests served. This paper will consider the model of public advocacy that exists in the ACT and its significance in promoting the rights and best interests of children and young people involved in care and protection proceedings before the Children’s Court.

Model of Public Advocacy in the ACT
Public advocacy in the ACT, where systemic as well as individual advocacy is provided, on behalf of children and young people involved with the care and protection, youth justice, disability and mental health systems is distinctive, when compared with offices of the public advocate in other jurisdictions.

The Public Advocate externally monitors care and protection matters before the Children’s Court. In other Australian jurisdictions, oversight functions such as service reviews or inquiries are undertaken by Commissioners for Children and Young People and Children’s Guardians. In the ACT, the broader
systemic inquiry or review function regarding children and young people generally is performed by the Children and Young People Commissioner.

The Public Advocate however undertakes the Children’s Guardian function in monitoring services for the protection of children and young people which is significant to the overall child protection system. The capacity to undertake individual advocacy in the Children’s Court further differentiates the model of practice in the ACT and seems unparalleled in other Australian jurisdictions.

Statutory advocacy provided by the Public Advocate differs from advocacy by community agencies where advocacy is based on the client’s instructions or their views and wishes. The PA ACT may hold a different view or position concerning the best interests of the child or young person.

In accordance with legislative responsibilities outlined in the Public Advocate Act 2005 (ACT), section 10(d), the PA ACT is to act as advocate for the rights of children and young people. As part of acting as advocate for those rights the PA ACT can undertake the following:

- fostering the provision of services and facilities for children and young people
- supporting the establishment of organisations that support children and young people
- promoting the protection of children and young people from abuse and exploitation.

The Public Advocate Act (2005) also confers on the PA ACT the following responsibilities:
- monitoring the provision of services for the protection of children and young people
- dealing, on behalf of people with a disability and children and young people, with entities providing services.
Section 11 of the Public Advocate Act relates to investigations and allows the PA ACT to, ‘listen to concerns from children and young people about the provision of services for the protection of children and young people.’ This provision permits the PA ACT to provide advocacy, for children and young people under the protection of the Territory, for matters that may not constitute a complaint.

**Systemic advocacy and monitoring of child protection services**

Statutory responsibilities for the PA ACT in monitoring child protection services in the ACT are also stipulated in the *Children and Young People Act 2008*. This legislation covers child protection, youth justice and therapeutic protection and confers on the PA ACT a number of compliance monitoring functions concerning statutory child protection services provided by the ACT Office of Children, Youth and Family Support (OCYFS).¹

The PA ACT under this Act receives documents relating to children or young people in care and those in youth detention. For example, applications for care and protection orders, Notifications of Emergency Action, initiating affidavits, applications for appraisal orders and assessment orders, notices of interstate transfers and notices of registered family group conference agreements etc.

There are approximately 70 references to the Public Advocate in the Children and Young People Act 2008, over half of these areas relate to statutory compliance across child protection, youth justice or therapeutic protection.

The Public Advocate prioritises the monitoring of annual reviews of children and young people in care, leaving care plans and care and protection applications. Reports received regarding children or young people under the parental responsibility of the Chief Executive, who have been subject to abuse or neglect whilst in care, are also prioritised.² The PA ACT also closely

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¹ OCYFS is an Office under the Department of Disability, Housing and Community Services
² See Section 507 of the Children and Young People Act, 2008 confers responsibility of the Chief Executive to provide reports to the PA ACT for children
monitors notices for Emergency Action, when a child or young person is taken into care on an emergency basis. Of significance to individual advocacy is the legislative capability to request documents, information or services for children and young people in care pursuant to section 879 of the Children and Young People ACT 2008.

879 ACT child welfare services must assist public advocate

(1) For the purpose of exercising a statutory function, the public advocate may ask an ACT child welfare service to provide information, advice, guidance, assistance, documents, facilities or services in relation to the physical or emotional welfare of children and young people.

(2) If the public advocate makes a request of an ACT child welfare service under subsection (1), the service must comply with the request promptly.

The PA ACT is able to obtain contemporary information about a child or young person’s circumstances. From a review of this material the best form of advocacy is determined, for example attending children’s court case management conferences, undertaking a file audit, or special investigation or representing a child or young person’s best interests at panel meeting or at a case conference.

Individual Advocacy

Individual advocacy occurs in various ways in addition to representing the child or young person’s best interests in a hearing or a conference in the Children’s Court. Advocacy can be provided for proceedings in the Family Court or Supreme Court, particularly in matters where the Public Advocate of the ACT has been appointed as Litigation Guardian (or Next Friend) for young people under the age of 18 years.

The Supreme Court has appointed the PA ACT as litigation guardian for young people with personal injury compensation matters. The PA ACT has

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3 Section 406/8 of the Children and Young People Act, 2008
4 Child welfare service mean any of the following entities if the entity is involved in providing welfare services for children and young people: (a) an administrative unit; (b) a territory authority; (c) a territory instrumentality; (d) a public employee; (e) a police officer.
also been involved in proceedings before the Family Court of Australia when appointed case guardian.

In undertaking the role of litigation guardian, the PA ACT provides an independent voice for young people, whilst ensuring that their wishes and best interests are paramount. In these matters, the PA ACT stands in the place of the child or young person in proceedings and instructs counsel on their behalf.\textsuperscript{5}

Individual advocacy is provided on behalf of children and young people with disabilities and those admitted to hospital due to mental illness or mental dysfunction. Best interests advocacy and representation by the PA ACT also takes place when young people appear before the ACT Civil and Administrative Tribunal for a mental health hearing.

The PA ACT has responsibilities under the \textit{Domestic Violence and Protection Orders Act 2008} in protecting the rights of vulnerable individuals. The Magistrates Court refers to the PA ACT, the notice of proceedings, application and the interim and final orders under this legislation for those individuals with a legal disability, for example when a child or young person is named in the application or interim order.

The applicant or respondent may be a child or young person or an application may include a child or young person. The PA ACT reviews all documents received to determine if a respondent has a defined legal disability (aged under 18 years) and whether a parent or guardian is available to provide support. The Public Advocate may attend conferences and hearings to support the young person and can undertake the role of ‘litigation guardian’ when necessary. Priority is given to supporting respondents where parent/s are the applicants and in instances where the respondent is subject to Care Orders.

\textsuperscript{5} The Office of the Public Advocate Victoria has published a paper on Litigation Guardian 2008, see www.publicadvocate.vic.gov.au/.../PG15_Litigation_Guardian_09.pdf
**Best interests advocacy in the Children’s Court**

Individual ‘best interests’ advocacy by the PA ACT in the Children’s Court, is a unique feature of the child protection system in the ACT. The monitoring role of PA ACT is critical to identifying matters where this office provides best interests advocacy on behalf of children and young people. As a statutory office, the PA ACT provides an independent voice in upholding the rights and best interests of children and young people in the Children’s Court.

Best interests advocacy is defined by the PA ACT as:

> “that course of action which maximises what is best for a client and which includes consideration of the least intrusive, most normalising and least restrictive course of action possible, given the needs of the client; there is an emphasis on safety, quality of life and overall wellbeing including the potential long term outcomes of any proposed course of action.”

10 Definitions, Public Advocate of the ACT Annual Report 2009 - 2010, p.43

The PA ACT reviews all care and protection applications which come before the ACT Children’s Court, identifying issues or concerns in prioritising matters for attendance and representation at court.

Examples of cases which can be prioritised include:

- under 5 year olds, particularly infants
- children and young people under supervision of the OCYFS
- children and young people previously in care
- where the PA ACT has provided advocacy
- issues regarding the adequacy of child protection risk assessment
- an extensive history of child protection reports.

The Public Advocate attends hearings or conferences where concerns have been identified or when contacted by a client or another agency about a particular matter.
Right of appearance by the PA ACT

Pursuant to the Court Procedures Act 2004, the Public Advocate may be present at court proceedings involving children and young people. The PA ACT is entitled to appear, be heard and may call witnesses for a court proceeding against a child or young person, for an application, proceeding or matter under the Children and Young People Act 2008.

74C Chief executive and public advocate etc may appear at proceedings 12
(1) This section applies if there is a hearing in a court of—
(a) a proceeding against a child or young person; or
(b) an application, proceeding or matter under the Children and Young People Act 2008 or in relation to which that Act applies.
(2) Each of the following is entitled to appear and be heard and may call witnesses:
(a) the chief executive responsible for the Children and Young People Act 2008;
(b) an authorised person under the Children and Young People Act 2008;
(c) the public advocate;
(d) a person authorised by the public advocate for this section.

Public Advocate as a party to care and protection proceedings

In addition to right of appearance, the Children and Young People Act 2008, section 704, enables the PA ACT to apply to be a party to a care and protection proceeding. The Public Advocate is a party only when an application to be joined has been presented to the court. If this application is made, the Children’s Court must join the Public Advocate.

704 Parties—application to join party 13
(3) If the applicant is the public advocate, the court must join the public advocate as a party to the proceeding.

The Public Advocate represents the best interests of children and young people before the Children’s Court in several ways. The PA ACT can participate in family group conferences, attend a hearing or a court case management conference and may submit a court report. The PA ACT has also been requested by the court to conduct specialist assessments regarding the best interests of the child or young person.

11 Section 72, 1(g) Court Procedures Act 2004.
12 Section 74C, Court Procedures Act 2005.
13 Section 704 (3) Children and Young People Act 2008
**PA ACT involvement with the child or young person’s legal representative**

The role of the Public Advocate in the Children’s Court is separate and distinguished from the child or young person’s legal representative, responsible for undertaking direct and/or best interests legal representation. In some matters there is close liaison between the PA ACT and the legal practitioner in representing the best interests of the child or young person.

However the model of practice adopted by the PA ACT has a different focus in protecting the rights and interests of children and young people before the Children’s Court. In addition to concerns about the best interests of the child or young person, the PA ACT considers the child protection practice or process issues which may present. For example, the adequacy of child protection assessments, whether the child or young person has had the opportunity to participate and engage in proceedings and ensuring that the voice of the child or young person is adequately heard.

The PA ACT provides independent statutory advocacy on behalf of a child or young person to achieve an outcome considered to be in the child or young person’s best interests. The best interests position of the PA ACT may differ from the legal representative and the views and wishes of the child or young person. If the PA ACT opposed the position of the child or young person’s legal representative, the Public Advocate would consider applying to become a party to the proceedings. There has been an occasion where the Magistrate considered that the legal representative was not acting in the best interests of the child and specifically requested the PA ACT to independently assess the child’s views and wishes.

**Proceedings dismissed or adjourned for care and protection reasons**

According to section 74K of the Court Procedures Act 2004, if when hearing an indictment against a child or young person, the Children’s Court is satisfied that the child or young person is in need of care and protection, the Magistrate may dismiss the indictment or adjourn the proceedings for 15 days. This allows for assessment by the Office of Children, Youth and Family Support
and the consideration of any action proposed or taken regarding the care and protection of the child or young person.

The Public Advocate is advised by the court and provided with a statement of reasons for the decision to dismiss or adjourn proceedings. The Chief executive of the OCYFS must furnish a report to the court and PA ACT on the outcome of the assessment. The Public Advocate reviews the outcome of the assessment and can attend court if not satisfied that the rights and best interests of the child or young person are being upheld.

74K Proceedings dismissed or adjourned for care and protection reasons
(1) If, when hearing an indictment against a child or young person, the court is satisfied that the child or young person is in need of care and protection, the court may—
(a) dismiss the indictment; or
(b) adjourn the proceeding for up to 15 days.
Note Indictment includes information (see Legislation Act, dict, pt 1).
(2) If a court acts under subsection (1), the court must, as soon as practicable but not later than 2 working days after the day it acts, give a statement of the reasons for the action to—
(a) the chief executive; and
(b) the public advocate.

Case studies
Case studies below illustrating PA ACT best interests advocacy in the Children’s Court.

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<th>Case study 1: Advocacy as a result of decision making delays</th>
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<td><strong>Child under one year of age</strong></td>
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Child removed at birth due to mother’s ongoing mental health and substance abuse issues. The child was placed in foster care upon discharge from hospital. Extended family members were deemed not suitable as kinship carers. The PA ACT was appointed as Guardian for the mother for legal issues only. The child was having regular contact with her maternal grandparents and extended family who resided in the ACT.

The PA ACT worked closely with the child’s legal representative and care and protection services to ensure the best interests of the child were upheld. There were delays in the final decision regarding the future care of the child. The kinship carers, initially deemed unsuitable, were being re-considered for long term care although the rationale for this change in decision was not clear to parties.

Utilising section 879 of the Children and Young People Act 2008, which allows the public advocate to ask an ACT child welfare service to provide information etc, the PA ACT sought evidence supporting the change in case direction. Assessment reports were received by the PA ACT and reviewed. The PA ACT prepared a report for the ACT Children’s Court Magistrate. Further meetings were held with Care and Protection. Care and Protection conducted an internal review of the case and decided to preserve the stability of the child’s current foster placement and the developing attachment.
Case study 2: Young person named as respondent in Domestic Violence Protection Order Application

The applicants in this matter were the young person’s parents. They made application for a two year Protection Order. Young person was deemed to have a legal disability being 14 years of age. The young person’s behaviour had escalated over a six month period. The parents had requested assistance from care and protection services and had been referred to a number of services, but the interventions had not been effective mainly due to the young person’s non-engagement.

The PA ACT acted as Litigation Guardian as required in a situation where a respondent has a legal disability, that is under the age of 18 years. The PA ACT advocated before the Magistrate on behalf of the young person. An Interim Order was granted and the matter adjourned so that a mental health assessment could be undertaken and other services linked to support the family.

Following another incident of violence perpetrated against family members, the young person was remanded in custody. The PA ACT visited the young person in detention to facilitate further assessment. A forensic mental health assessment was conducted and the young person was diagnosed with Asperger’s Syndrome and prescribed medication. The criminal matters were dismissed on the basis of mental dysfunction as was the Domestic Violence Protection Order. Care and protection placed the young person in an intensive residential placement, integrated the young person into school, and assisted him to pursue his recreational interests, particularly playing the saxophone. The young person returned home to reside with his family within a 12-month period.

Case study 3: Advocacy as a result of a request from the Children’s Court Magistrate

Restoration of two children aged 8 and 6 to their mother’s care was proposed. The children had been in a kinship placement for two years. The extended family were opposed to the restoration on the basis that although a restoration plan had been developed it had not been implemented. As result the children were placed back with their mother without having spent any time with their mother without another family member being present.

As the initial Care Order was for a 2 year period only, an application was made to the Children’s Court to extend the Order. During the court process the Magistrate specifically sought the views of the children from the children’s appointed legal representative. The legal representative was unable to provide this information. The extended family then applied to the Children’s Court to become a party to the proceedings due to concerns regarding the lack of transparency in decision making and the absence of any independent assessment. This occurred despite Care and Protection engaging an intensive family support service to support the mother and children.

The Children's Court Magistrate requested the Public Advocate provide an independent opinion of the children’s best interests and their individual wishes. Through a number of home visits the children clearly expressed an opinion they wished to remain with their mother. An independent report was provided to the Magistrate. This form of advocacy is not routinely undertaken by the PA ACT but on this occasion was considered necessary to ensure the best interests of the children were paramount in the decision making.
Conclusion

Case studies presented demonstrate the benefit of monitoring care and protection matters before the Children’s Court and the links between this function and individual advocacy.

The model of public advocacy in the ACT, where systemic and individual advocacy is provided for children and young people, is unique and not present in any other jurisdiction in this country. The capacity to undertake both these forms of advocacy for matters before the Children’s Court further distinguishes the model.

Due to statutory monitoring responsibilities for child protection services, the PA ACT is able to review all care matters that come before the Children’s Court, prioritising cases for representation and the provision of best interests advocacy in the court. This role is significant to the overall child protection system in the ACT as an independent voice upholds and protects the rights and best interests of children and young people.

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