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Sunday, June 21, 2015

INQUIRY INTO THE CHILDREN YOUTH & FAMILIES (RESTRICTIONS ON THE MAKING OF PROTECTION ORDERS) BILL 2015

I write this letter, rather than a formal submission, given that I am too distant in time and local knowledge. However, I write to you with the benefit of many years of experience in the area of child protection policy and welfare and I wish to provide you the benefit of that experience and warn against adopting certain courses of action that as I understand are imminent pursuant to the 2014 amendments to the Children Youth & Families Act 2005 (Vic).

As you would already know, I chaired the *Child Welfare Practice and Legislation Review* (1982 – 1984) ("the Carney Review"), a comprehensive review of the child protection system in Victoria. Having become aware of the contours of the recent changes made by the former Government's *Children Youth & Families (Permanent Care & other Matters) Amendment Act 2014* ("the Amending Act") to the *Children, Youth and Families Act (2005) ("CYFA")*, I wrote to the Minister in early April, 2015 to raise some general concerns about apparent departures from some of the fundamental principles laid down in the Carney Review (then enshrined in the predecessor to the *CYFA*, the *Children & Young Person Act (1989)*).

The Carney Review found that countless children in Victoria who had been subject to wardship orders experienced serious denial of their rights to appropriate quality of care and due process in institutional care, now understood as 'out of home care'. This treatment often went undiscovered given a lack of regular judicial review of care arrangements and because of the lack of court-sanctioned conditions for the child to have contact with their families. Contact for children who are subject to care arrangements serves to preserve the child's identity and also can provide an important safeguard against mistreatment in care arrangements as it is more likely to be discovered.

Among the fundamental principles of the Carney Review were:

(a) *that prior to 1984, children were too readily removed from their parents and there was little, if no, emphasis on family preservation and hence it was important to formulate clear legislative criteria for the removal of children and to also place an onus on the state to do all things necessary to support family reunification;*

(b) that ultimately, the intervention of the state into the lives of children must only be to the extent necessary.

I have therefore been concerned to learn that the 2014 legislative amendments to the CYFA increase the level of state intervention into a child's life, reduce judicial scrutiny of care arrangements and remove the Children's Court of Victoria's ability to determine contact arrangements.

As a community, we must be extremely careful to balance the need for the state to intervene to ensure the safety of children and adequate flexibility for professional service delivery by the Department on the one hand, with the rights of children and their families and the need for oversight and accountability of state care, on the other. It is indeed an invidious burden for any decision maker in this sphere. In my letter to the Minister I suggested that '[w]hile reasonable minds will of course differ about the optimal way of implementing those objectives [enunciated in the Carney Review]', I believed that it remains important that these fundamental principles continue to be reflected in the CYFA to ensure the wellbeing of Victoria's children.

I raised with the Minister, and I raise with this Inquiry the following issues, in 'rough order of significance' and upon which I expand in this letter:

a) *Removal of 'graded' levels of intervention*: The current provisions in the CYFA (not including the Amendments) provide a range of orders for children, from minimum to maximum intervention, as recommended by the Carney Review. Minimum intervention of the state is a principle which is absolutely fundamental to enabling the Children's Court to adequately tailor its orders to reflect the best interests of a child in light of the needs and capacity of the child and family before the Court and the capacity of the Department to meet those needs. The range of orders were designed to enshrine the principle that the least interventionist option be available to ensure the safety and welfare of a child. For example, even if a child is removed from a parent's care given deficits in parenting, parents can retain guardianship rights so that the intervention to the family, the fundamental group unit, is to the extent necessary and the child can retain their identity and link to their family. The legislative embodiment of this scenario lies in the current Custody to Secretary Orders. Many thousands of Victorian children are subject to such orders, and pursuant to those orders, those children have the court sanctioned right to see their parents, siblings or other persons significant to them, at a frequency and in a manner that the court has deemed to be in their best interests. I am aware that if such orders have been in place for two years or more, they will *automatically* convert on 1 March, 2016 to a Care by Secretary Order, removing parental rights from parents unnecessarily and all conditions for contact for a child will cease, lapse, only to be determined by the Department. I believe complete conferral of parental rights to the state must be the absolute matter of last resort and it is fundamental to the rights of children and their well-being that they have court sanctioned contact with their parents, siblings or other persons significant to them. I believe the 2015 Bill should include amendment to the 2014 legislation to ensure that the Court can order contact on Care by Secretary Orders;

b) *Lack of emphasis on family reunification.* In relation to the new Family Reunification Order created by the Amending Act, if policy dictates timeliness of resolution of the status of a child, there are other ways of ensuring this, without removing the graded intervention measures and the Children's Court's ability to ultimately determine when reunification can occur. I am aware that the Bill currently before parliament seeks to reinstate an important cornerstone in child welfare law, that the court be satisfied as to the provision of services by the Department prior to making a final interventionist order (s.276). However, I am also of the belief that the reinstatement of s.276 will be rendered ineffectual in ensuring the protection of vulnerable children unless the Children's Court retains a wider ultimate discretion in relation to the time-frame for family reunification and in particular, that the Court can take into account any delay in the provision of services by DoHHS or lack of availability in the community generally;

c) *Removal of the powers to 'shape' orders giving care of a child to the Secretary: the new Care by Secretary Orders*: Further to the above, the ability of the Court to make conditions about contact pursued important goals about preserving, where appropriate, contact between parent and child even if the child was in state care. This is an especially important principle for vulnerable children and their families where additional support may be needed to ensure that children in those families have the same chance of successful family reunification, or preservation of family and kinship ties, as other less resource demanding cases. If a high frequency of contact is felt by the Department to undermine placement options, there are other mechanisms which might be contemplated to ensure stability of placement such as training and support, rather than the removal of the child's legally protected right to see his or her parent or sibling. I am also concerned that the Care by Secretary Orders run for 2 years without the Children's Court able to decide otherwise;

d) *A risk of undue escalation of levels of intervention due to inclusion of an option of assuming parental powers in Care by Secretary orders and Family Reunification Orders*: Allied with the previous point is a concern that the new Care by the Secretary orders and also the new Family Reunification orders create unnecessary escalation of the degree of intervention of the state in the workings of a natural family relationship that may be capable of being restored to health in removing parental rights generally. Furthermore, on Family Reunification orders, which replace Supervised Custody Orders, the Children's Court will no longer be able to specify whom is entrusted with the care of the child. While I welcome what I understand is the possible restoration of the power for the Court to consider whether adequate family reunification services and resources have been provided before the most intrusive protective orders are made through s.276, I believe further consideration should be given to reinstating parental rights and reinstating the power of the court to name the carer in Family Reunification Orders;

e) *Insufficient regularity of judicial scrutiny of some orders*: The history of the pre-Carney Report blanket 'wardship' orders, which ran until a child turned 18 years old with no regular judicial scrutiny of the (often rather poor) quality of State care received by that child — appears to have an echo in

some of the recent amendments which appear to have the effect of reducing the potential degree of oversight of such orders able to be provided by the Children's Court. This is a concern which I believe warrants clarification when considering corrective amendments;

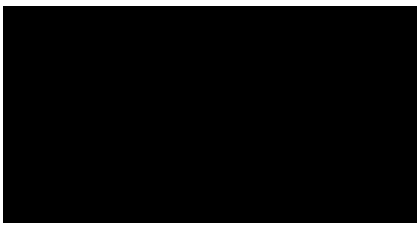
f) *The oddly drafted amendment apparently precluding the Children's Court making temporary orders (Interim Accommodation Orders) when a protection order (final order) could be made:* This last concern may not have been intended by the previous Government. It appears to me that it may have been a drafting excess in designing a provision or form of words designed to pursue a legitimate objective (timeliness of resolution of status) but which now has the unintended effect of tying the hands of the Children's Court by appearing to preclude it from making an interim order that is in the best interests of the child. This too warrants further consideration in my opinion.

I concluded my letter to the Minister by writing that:

> The lessons of the past which influenced the Carney Report in the enunciation of guiding principles about child welfare, family reunification, stable environments for the upbringing of children and adequate external oversight of interventions, remain important when considering necessary amendments to keep the framework in tune with contemporary conditions. Recent revelations about abuses in out-of-home care in Victoria reinforce the importance of ensuring that the legislation remains well grounded in such basic principles, and that the Children's Court is able to continue to provide appropriate oversight of the system. Such oversight ensures that the system continues to respect the civil and legal rights of all children and their families who are subject to statutory intervention by the State.

I continue to stand by the above observations, and the order of importance represented in that listing.

While the Government's amending Bill is a very welcome step towards restoration of conformity to overarching guiding principles as originally proposed by the Carney Review with the reinstatement of s.276, I believe further amendments by way of reinstatement and rectification of the powers of the Children's Court are required to achieve a sound balance in this part of the law and to protect Victoria's vulnerable children.



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