



**Submission to the Legal and Social Issues Committee,
Inquiry into the Children, Youth and Families
Amendment (Restrictions on the Making of Protection
Orders) Bill 2015**

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Family, Youth and Children's Law Service – Victoria Legal Aid

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About Victoria Legal Aid

Victoria Legal Aid (VLA) is an independent statutory authority set up to provide legal aid in the most effective, economic and efficient manner.

VLA is one of the biggest legal services in the country, providing legal information, education and advice for all Victorians.

We fund legal representation for people who meet eligibility criteria based on their financial situation, the nature and seriousness of their problem and their individual circumstances. We provide lawyers on duty in most courts and tribunals in Victoria.

Our clients are often people who are socially and economically isolated from society; people with a disability or mental illness, children, the elderly, people from culturally and linguistically diverse backgrounds and those who live in remote areas. VLA can help people with legal problems about criminal matters, family separation, child protection and family violence, immigration, social security, mental health, discrimination, guardianship and administration, tenancy and debt.

We provide:

- Free legal information through our website, our Legal Help line, community legal education, publications and other resources
- Legal advice through our Legal Help line and free clinics on specific legal issues
- Minor assistance to help clients negotiate, write letters, draft documents or prepare to represent themselves in court
- Grants of legal aid to pay for legal representation by a lawyer in private practice or a VLA staff lawyer
- A family mediation service for disadvantaged separated families
- Funding to 40 community legal centres and support for the operation of the community legal sector.

VLA's Family Youth and Children's Law Program

VLA's Family, Youth and Children's Law Program aims to help people resolve family disputes and achieve safe, workable and enduring care arrangements for children. This also involves helping parents to build the capacity to resolve future disputes without legal assistance.

The Program's core function is to provide:

- Duty lawyer, legal advice, representation and information services including in family law financial matters (formerly child support), parenting disputes and family violence matters
- Lawyer-assisted and child-inclusive family dispute resolution to help settle disputes without going to court
- Independent children's lawyers who promote the interests of children at risk and help judicial officers make good decisions;
- Duty lawyer, legal advice, representation and information services to children and parents in the Children's and Magistrates' Courts of Victoria, including in child protection and family violence matters; and
- Legal advice and education in the community.

Summary of recommendations

The Legal and Social Issues Committee:

- Support the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015
- Consider further amendments to enable section 276 to be enlivened as intended at key points on a child's trajectory through the child protection system
- Propose further amendments to the *Children, Youth and Families Act 2005* to:
 - Reinstate the use of interim protection orders as an option available to the Court when the Department of Health and Human Services (DHHS) has not taken reasonable steps.
 - Provide court discretion to extend a Family Reunification Order after a child has been in out of home care for two years
 - Reintroduce the requirement to name the carer on the order when a child is placed on a Family Reunification Order or a Care by Secretary Order
 - Reintroduce the Court's power to include conditions on Care by Secretary Orders and Permanent Care Orders for ongoing contact arrangements between the child and the birth parent(s).

Introduction

Victoria Legal Aid (VLA) thanks the Legal and Social Issues Committee for this opportunity to provide comments on the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015.

VLA's Child Protection Sub-Program assists children, young people and parents responding to child protection applications by the state by helping to ensure that any legal intervention is limited to that which is necessary to promote the child's or young person's health, safety and wellbeing. We arrange legal representation to almost every child and parent in child protection legal proceedings in Victoria as well as providing legal information, advice, representation and community legal education designed to help protect and promote the rights. In 2013-14, VLA provided 6,193 grants of assistance – delivered by the VLA staff practice, private practitioners and in some cases community legal centres – for child protection matters.

The comments and recommendations in this submission are informed by this extensive practice experience.

The submission includes de-identified case studies which tell the stories of VLA clients. Case scenarios are also used. These are composite examples, which illustrate the story of many VLA clients but do not refer to a particular individual.

The Bill

In 2014, the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* ('the 2014 amendments') introduced a new suite of Children's Court orders and a two year timeline to achieve reunification of children placed in out of home care.

Once a child is in out of home care beyond two years, there is no discretion under the new provisions of the amended *Children, Youth and Families Act 2005* for the Children's Court to order the return of a child to the birth parent(s) where protective concerns have been addressed or place a child on a Family Reunification Order where reunification remains a chance but more time is needed to address the issues of concern.

Of particular concern to VLA were changes brought about through the 2014 amendments that would allow for the placement of a child in out of home care – with time accumulating under the two years maximum in timed care – without Court consideration of the steps taken by the DHHS to support the family so that the child can remain safely in the care of his or her parent(s) or to ensure there is clear plan in place to address the protective concerns so that the child can return to the family home.

Prior to the 2014 amendments, this requirement was given effect by section 276(1)(b) of the *Children, Youth and Families Act 2005*:

...the Court must not make an order unless...it is satisfied that all reasonable steps have been taken by the Secretary [of DHHS] to provide the services necessary in the best interests of the child.

Section 276(2)(b) furthermore states:

The Court must not make a protection order that has the effect of removing a child from the custody of his or her parents unless...the Court is satisfied by a

statement contained in a disposition report...that all reasonable steps have been taken by the Secretary [of DHHS] to provide the services necessary to enable the child to remain in the custody of his or her parents.

Our practice experience shows that section 276 is integral to the child protection legislative framework. State intervention is appropriate if the child is subject to neglect, harm and / or abuse. However, the removal of a child from the family is one of the most serious actions that the State can take. The *Children, Youth and Families Act 2005* makes clear that the legislation provides a framework not only for protecting children but providing community services to support children and families.¹

It is a fundamental principle of the *Children, Youth and Families Act 2005* that:

In determining what decision to make or action to take in the best interests of the child, consideration must be given to...the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child.²

Thus, the DHHS has an integral role to play in supporting parents to address protective concerns so that a child can remain safely with his or her birth parents. We appreciate that this is a difficult task for the DHHS and also requires adequate resourcing and availability of relevant support services. However, in many current cases VLA is assisting parents and children in protection applications brought by the DHHS where the DHHS has not provided adequate supports to the family so the child need not be removed from the family home or so that the child can promptly and safely returned to the home.

Section 276 is an important tool available to the Court to ensure the DHHS is providing families with the necessary supports. In our experience, there is good will on the part of many parents to address protective concerns but they require assistance and supports to do so.

Case Study

Abigail* is an eighteen year old Aboriginal woman who had recently become a mother. Abigail had been subject to (then) DHS interventions since the age of two. She is estranged from her own mother and was subject to physical abuse by her father throughout her childhood.

Whilst transitioning out of a DHS residential care facility and into hostel accommodation after her eighteen birthday, Abigail became pregnant. A month after the baby was born, the DHS removed the child from her care and placed the baby into foster care.

This was an extremely difficult time for Abigail. Her accommodation placement subsequently broke down, rendering her homeless.

VLA assisted Abigail who sought to reunify with her baby. Abigail wanted to be a mum and care for her child. Like many of VLA's clients, however, she had substantial obstacles to overcome including undiagnosed mental health issues impacted further by the trauma of her

¹ *Children, Youth and Families Act 2005* (Vic), s1.

² *Children, Youth and Families Act 2005* (Vic), s10(3)(a).

childhood, lack of stable accommodation, unemployment, minimal education and training, a possible cognitive impairment, and underdeveloped parenting skills.

In the five months prior to receiving legal assistance from VLA, the DHS had not provided Abigail with any supports and little to no contact was being facilitated by the DHS between Abigail and her baby. Abigail was understandably extremely distressed.

Abigail instructed her VLA lawyer that she opposed the placement of her baby in out of home care. She wanted reunification, but needed adequate support to find stable accommodation, address her mental health issues, and learn the necessary parenting skills.

In VLA's experience, it is rare for a parent in Abigail's situation to be able to address these issues unassisted. If section 276 is not reintroduced into the legislative framework, the Court is not required to consider the absence of DHS supports and would effectively be required to place the child in out of home care, despite the good will of a mother in a similar situation as Abigail, to address with DHS support the protective concerns identified.

**Not her real name*

The Court's role in ensuring child protection decisions are consistent with the legislative framework's intent to minimise the need for state intervention and to ensure DHHS is adequately supporting families has been inappropriately limited by the removal of section 276 through the 2014 amendments.

We support the reintroduction of section 276³ and commend the Government for introducing the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015 in order to do so.

Giving Full Effect to Section 276

We are concerned, though, that the benefits of reintroducing section 276 will be limited when read in conjunction with other 2014 amendments to the *Children, Youth and Families Act 2005*.

When a protection order is first being made, the Court will be able to consider section 276. However, for section 276 to be fully enlivened, the Court must be able to make an interim accommodation order rather than a final order if it is in the best interests of the child to do so. This will not be possible due to section 13 of *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* which inserted section 262 (5A) into the *Children, Youth and Families Act 2005*. It states:

An interim accommodation order must not be made in respect of a child if the Court is satisfied that:

- (a) a protection order could be made in respect of the child under Part 4.9 or
- (b) a permanent care order could be made in respect of the child under section 319.

³ Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015 (Vic), s3.

The full effect of section 276 is further constrained after the point at which an order is first made. For example, if a child is placed on a Family Reunification Order for twelve months, there are limitations on when the Court may extend the order for a further 12 months. Section 294A, a new provision introduced by the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*, states:

The Court must not extend a family reunification order unless it is satisfied that:

- (a) There is compelling evidence that it is likely that a parent of the child will permanently resume care of the child during the period of the extension; and
- (b) The extension will not have the effect that a child will be placed in out of home care for a cumulative period that exceeds 24 months, calculated in accordance with section 287A.

In practice, we believe section 294A will prevent the Court from making an extension even if the Court is not satisfied of the section 276 requirement that all reasonable steps have been taken to provide supports to the family. This is because section 294A will be read in a manner which is consistent with the overarching permanency objective introduced by the 2014 amendments.

We are of the view that further amendments should be considered to enable section 276 to be enlivened as intended at key points on a child's trajectory through the child protection system; in particular when the Court is considering whether to make an interim accommodation order and when a decision is being made to extend an order into the second and final year in which reunification remains an option.

The ongoing importance of section 276 in a child's path through the child protection system is informed by VLA's practice experience. Children are often placed on out of home care orders that include reunification as the objective, but the case plan prepared by the DHHS and the services provided fall short of supporting the family to achieve that reunification objective.

Case Study

A 16 month old child was removed from the mother, Rebecca's,* care despite Rebecca demonstrating love for the child and a concerted effort to parent, but her finding it difficult to do so due to an intellectual disability.

Rebecca's child was placed on a Supervised Custody Order (SCO). At that time, the Magistrate determined that the ultimate objective of reunification of the child with the mother was in the best interests of the child and that there were sufficient prospects that, with support, reunification was achievable.

The Magistrate outlined seven matters that needed addressing, with input from (then) DHS, to assist Rebecca with reunification.

Instead of providing supports to Rebecca to address the needs identified by the Magistrate, the DHS decided that reunification was not viable. DHS determined that it was more

appropriate to plan for a permanent care placement with a carer (not the mother). This was contrary to the Court order. Despite that, the DHS continued on its preferred basis.

It was 15 months later that the DHS filed an application to revoke the first Court order and seek an order that was consistent with its preferred option of a permanent care order.

Throughout this 15 month period, Rebecca did not receive supports to assist her to reunify with her child.

VLA assisted Rebecca to contest the DHS application, but the contested hearing was not listed for another six months.

At the contested hearing, the Court made further orders that required the DHS to facilitate and fund the provision of a parenting development and skills assessment. The hearing was adjourned for the DHS to make the necessary referral. The assessments suggested that Rebecca had a number of parenting skills difficulties complicated by her intellectual disability.

Almost two years had passed from when the seven matters were first identified to when the DHS referred Rebecca to the parenting assessment. During that period no assessment of the supports needed was ascertained and thus no supports provided.

Over that period, contact between the child and the mother decreased significantly. As a result the child formed strong bonds with the carers in place of, and to the detriment of, the bond the child may have had with her birth mother.

The child was ultimately placed on a permanent care order with the carers.

Ultimately, Rebecca may not have been able to overcome the personal challenges that prevented her from providing a safe placement option for the child.

However, the failure by DHS to provide Rebecca with the opportunity to overcome her parenting difficulties – through the provision of appropriate supports – meant that Rebecca lost her chance to bond with and care for her own child. This was a significant factor in the Court's final decision, with the Court noting the impact that DHS' conduct had on Rebecca and her child.

**Not her real name*

The Court should, therefore, have an ongoing oversight role throughout the two year period to ensure the DHHS remains accountable in its role providing supports to parents wanting to address protective concerns.

This is particularly important under the 2014 amendments which result in serious and irreversible consequences: the lost opportunity to provide stability and permanency for the child with the birth parent(s). A child and the relationship between child and parent should not be penalised where the DHHS falls short in fulfilling its role supporting parents to address the protective concerns which led to the removal of the child from the home.

Further Amendments

The public policy rationale underpinning the reintroduction of section 276, in our view, is twofold. First it recognises the important role of the Court in providing an independent accountability mechanism in the child protection system. Second, families in the child protection system are particularly vulnerable members of the Victorian community and state intervention in a family is a serious action. Thus it is inherently unjust to start time accumulating against family reunification without providing adequate supports to assist with stability and permanency for a child through reunification.

Further, current evidence indicates that placing children in out of home care does not necessarily lead to good outcomes for those children, particularly if children are not able to be placed in stable long term out of home care arrangements with another family. The 2014 amendments, while fast tracking permanent orders, did not address the difficulties of then finding suitable long term placements for those children especially children with complex needs. This highlights the importance of independent Court oversight to ensure that families are first supported to stay together if this is possible and appropriate and of ongoing mechanisms of accountability in DHHS administrative decision making for vulnerable children in out of home care.

To fully deliver on these public policy objectives, further reforms are needed to redress a number of the 2014 amendments that are inconsistent with these policy objectives.

Reinstate use of Interim Protection Orders

While the reintroduction of section 276 enables the Court to consider whether the DHHS has taken all reasonable steps to provide appropriate supports to the family before placing a child in out of home care, the options available to the Court when the DHHS has not taken reasonable steps have been limited by abolishing interim protection orders and limiting the circumstances in which an interim accommodation order can be made.

In our view, interim protection orders are useful in certain circumstances. For example, an interim protection order avoids the arbitrary making of a final order when the identified protective concerns can be addressed during the three month period of an interim protection order. In this common scenario, the crisis situation settles and the necessary supports to address the protective concerns are put in place.

Another common scenario is when the DHHS is concerned that a mother will be unable to care for a new baby (the mother, for example, has had DHHS involvement with previous children) but the mother wishes to continue to parent the child. The interim protection order provides a period for the mother to demonstrate her parenting capacity without the need to make a final order.

An interim protection order is also a useful tool for testing the appropriateness of supports before a final order is made.

Case Study

A child, Hannah*, first presented at the Children's Court in response to a family violence intervention order application against her. Hannah's lawyer requested a referral to the Children's Court Clinic. Before a Clinic report could be prepared, the (then) DHS became concerned for Hannah's wellbeing. There were indications Hannah was experiencing depression and a report

of self-harming to the point of needing surgery, drug use, engaging in relationships with older men and physical abuse towards her mother.

An interim accommodation order to a secure welfare placement was made so that the DHS could complete its assessments and so that a Clinic report could be prepared.

When the matter returned to court, the DHS sought an interim protection order. It became apparent, though, to the VLA lawyer that the DHS assessments had not been completed and the DHS had not arranged for the Clinic report to be prepared.

Ultimately an interim accommodation order with a short adjournment period was agreed to so that the appropriate assessments could be completed by the DHS and the Court could then respond on the basis of further evidence about Hannah's best interests.

Under the 2014 amendments, an interim protection order would not be available and additional restrictions on the use of interim accommodation orders may prevent this approach from being adopted. This would now require the DHS to progress Hannah's matter by seeking a final order without providing a suitable period of time for the situation to settle, supports to be identified and protective concerns to be addressed. It is likely that DHS would not yet have had enough time to be satisfied that a Family Preservation Order was appropriate but it would also be unclear whether a Family Reunification Order was necessary.

**Not her real name*

Enable Court discretion to extend a Family Reunification Order after a child has been in out of home care for two years

As noted above, section 276 is about providing a child with the best chance to secure permanency and stability with their parent(s) through reunification.

As a result of the 2014 amendments, a Family Reunification Order is not available once a child has been in out of home care for two or more years. For some parents, though, our practice experience shows there is a good chance of reunification but two years is an insufficient period of time to comprehensively address the issues of concern, particularly when the DHHS may not have provided supports in a timely manner.

Case Scenario

Louise and Finn have been in a high conflict relationship for a number of years. Their two children were born into this relationship, and were impacted by the family violence. Louise started to use alcohol and drugs to ease the pain caused by Finn's violence.

The DHHS became involved when the school reported concerns about the children's home situation. The children were removed from Louise and Finn's care.

This was a watershed moment for them both. Finn told the DHHS that he was committed to changing his behaviour. Louise was also scared that she would not regain care of the children if she did not address her alcohol and drug use.

The DHHS suggested to Finn that he attend a men's behaviour change program. He was eager to do so but there was no follow up by DHHS and Finn was unsure about how to access such a program. The DHHS referred Louise to an alcohol and drug rehabilitation program.

Louise called the phone number but they said she was in the wrong catchment area for that program and needed to call a different phone number. Louise felt like she was on the merry-go-round of referrals.

Four months after the children were removed from the family home, Louise and Finn attended a conciliation conference with the DHHS. Both re-affirmed their commitment to improve the situation at home but expressed frustration that they had not yet been able to receive assistance. Unassisted the pattern of family violence and alcohol and drug use had continued.

The DHHS arranged for Finn to participate in a men's behaviour change program but there was a 12 month waiting list for a place. In the meantime, the DHHS completed assessments of Finn and Louise to identify additional supports that may assist Finn and Louise to resolve the protective concerns identified. The assessments took a number of months to complete.

Three months later, Finn started seeing a councillor who identified a previously undiagnosed mental health issue that was, in part, exacerbated by his own childhood experience in the child protection system.

The unearthing of these issues led to ongoing tension in his relationship with Louise. So, Louise who was also engaged with a drug and alcohol councillor reverted in and out of drug use as a coping mechanism.

As Finn and Louise continued to engage with the supports, the situation at home started to slowly improve. There was regular supervised contact with the children.

The children continued on a Family Reunification Order for another 12 months.

Almost 16 months after the DHHS first proposing a men's behaviour change, a place finally became available to Finn. He started to attend the program, which he found beneficial and Louise reported fewer and fewer incidents of controlling behaviour.

Twenty months after the children were removed from their care, unexpectedly Finn lost his job. This was a stressful time for him, as they were no longer able to afford to pay rent and needed to find a new place to live. This created anxiety for Louise also. Both reverted back into the behaviour that had led to the removal of the children from their care.

While a setback, both remained committed to staying on track and both felt supported to do so. Their contact with their children, while still supervised, was regular and positive.

In the lead up to the two year mark, their respective counsellors and support workers provided positive reports to the DHHS, but it was agreed that both required more time to build the confidence and maintain the stability needed for the children to be returned to their care. However, everybody was confident that Finn and Louise were on track.

At that point, though, the children had been out of Finn and Louise's care for two years and the Court would not have jurisdiction to order the children be returned to their care.

The legislative framework should provide Court discretion, in situations such as these, to extend a Family Reunification Order.

Reintroduce the requirement to name the carer on the Protection Order

We are concerned that the 2014 amendments remove the requirement to name the out of home carer on the order when a child is placed on a Family Reunification Order or a Care by Secretary Order. We

believe this is essential if the care arrangement breaks down or a decision is taken by the DHHS to change a child's placement.

Reintroducing section 276 will not address this concern as the provision returns the Court's oversight of decisions to order placement but not the *appropriateness* of out of home care placements.

Case Scenario

Tommy is a five year old Aboriginal boy. His mother has a history of drug use and has been unable to care for him. The DHHS placed Tommy with his maternal grandparents, consistent with the Aboriginal child placement principle. Tommy developed a close relationship with his grandparents. The Care to Secretary Order listed the grandparents as the carers for Tommy.

VLA's Legal Help received a call from Tommy's grandmother. The DHHS had advised her that they would be removing Tommy from the grandparents' home and moving Tommy to a foster care arrangement. There had been no issue in the placement and the grandmother was confused about the DHHS decision, and unsure about her rights to request Tommy's return to her. She was worried that Tommy would be afraid with his new carers who were not known to him or part of his Aboriginal community.

The Legal Help lawyer advised the grandmother that she could seek internal review of the DHHS decision to move Tommy. If unsuccessful, the grandparents would not have standing at VCAT to appeal the administrative decision.

This requirement is particularly important for children with complex needs. These children have limited prospects of permanency in out of home care. In our practice experience, placement will regularly break down, requiring a change in placement. Given the vulnerability of children with complex needs, it is important that there is continued Court oversight once in out of home care.

Case Scenario

Michael was 12 years old when he was removed from his parent's care. His parents were unable to care for him due to alcohol and drug dependence.

Michael was placed in a foster care arrangement, but the care arrangement quickly broke down. While in the placement, it became evident that Michael had severe learning difficulties and behavioural issues. He was acting out at school and there was concern that he may have started using cannabis.

He was placed with another foster care family who he liked a bit more than the previous family but after a few months the carers were reluctant to continue with the placement. They were concerned Michael's behaviour was negatively impacting on their other children.

Michael was then placed in a residential care facility. He disliked the facility and felt alone, isolated and unsupported. He started spending time with some older kids who had stopped going to school and regularly used drugs. The placement quickly broke down due to Michael's challenging behaviours and he was moved to another residential care facility.

Consistent with the principle of maintaining a high level of independent accountability of DHHS decisions, the parties (which it should be noted include the child) should be required to return to court

and agree on the next best option if a placement breaks down or the DHHS is proposing to change a placement. It also ensures that the child or young person has a voice in decision-making about where he or she is to live.

Reintroduce the Court's ability to include conditions on orders

Similar to our recommendation to reintroduce the requirement to name the carer on the court order, we believe it is important to reintroduce the Court's ability to include conditions on Care by Secretary Orders and Permanent Care Orders for ongoing contact arrangements between the child and the birth parent(s). We note that the Court retains the power, after the 2014 amendments, to include conditions on contact with siblings.

This is relevant in cases such as Rebecca's above. Under the amended *Children, Youth and Families Act*, the Court would not be able to order ongoing contact arrangements between mother and child which are tailored to the needs, and in the best interests, of Rebecca's child. In Rebecca's case, this would be despite a collective acknowledgment that Rebecca loves her child and that there is a strong relationship between the child and her (alongside the child's bond with the carers), even though her intellectual disability means she is not able to provide full time residence of her child. In Rebecca's case, the relationship between her and the carer has subsequently become strained, and thus Rebecca was finding it difficult to continue contact with the child. This is not in the best interest of the child, but under the amended *Children, Youth and Families Act*, the Court would not have held any power to order tailored contact conditions.

This will not be addressed by the reintroduction of section 276, as it will not return the Court's oversight of this aspect of court orders.