LAW INSTITUTE VICTORIA

LIV Submission to the Standing Committee on Legal and Social Issues

Children, Youth and Families (Restrictions on Making Protection Orders) Bill 2015

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Contact:
Sarah Bright, Lawyer, Legal Policy and Practice
Ph: (03) 9607 9374
Email: sbright@liv.asn.au

www.liv.asn.au

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INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 18,000 members. This submission has been prepared by the LIV's Family Law Section to respond to the request by the Victorian Parliament's Standing Committee on Legal and Social Issues for input into the inquiry on the Children, Youth and Families (Restrictions on Making Protection Orders) Bill 2015 ("the 2015 Bill").

The 2015 Bill seeks to amend one section of the *Children, Youth and Families Act (Permanent Care and Other Matters) Amendment Act 2014* ("the 2014 Amendment Act"). The 2014 Amendment Act will significantly amend the *Children Youth & Families Act 2005* ("the original Act") and is due to come into effect on 1 March 2016 or an earlier date by proclamation.

In particular, the 2015 Bill will reinstate section 276 of the original Act, which was repealed by the 2014 Amendment Act.

The LIV supports the 2015 Bill and the reinstatement of section 276 of the original Act. Furthermore, the LIV believes that further legislative amendments are required to ensure that the Children's Court of Victoria ("the Court") retains jurisdiction and power to effectively oversee the decision making of the Department of Health and Human Services ("DHHS") in respect of its care of Victoria's most vulnerable children.

Specifically, the LIV is concerned that, if not amended, the 2014 Amendment Act, will:

1. Remove the jurisdiction of the Court to make orders to reunify families after a child has been in care for two years;

2. Remove the power of the Court to make orders regulating the proceeding before it, including making orders with conditions and orders to adjourn a proceeding; and

3. Significantly limit the power of the Court to make orders in the best interests of children.

Based on the experience of our members, the LIV considers that these changes will have the following effects:

1. Diminish the ability of the Court to review decision making of DHHS;

2. Restrict the ability of the Court (as the specialist court in Victoria dealing with children's matters) to decide care arrangements for children in the Victorian Child Protection System

while increasing the ability of DHHS to assume parental rights and permanently remove such children from their parents; and

3. Increasing the number of children that the DHHS could place up for adoption.

In respect of the third concern, the LIV notes recent correspondence from the Minister, which advised that under the 2014 Amendment Act:

- the DHHS will be responsible for preparing and reviewing case plans for children;
- when there is disagreement about a change to arrangements a more senior departmental officer can review the arrangement; and
- the policy of DHHS with respect to adoption will not change as a result of the 2014 Amendment Act.

The LIV acknowledges and thanks the Minister for this correspondence, but notes that the Act, as amended by the 2014 Amendment Act, would enable a future Minister to approach the legislation with a different intention.

The LIV advocates for the full repeal of the 2014 Amendment Act, thereby restoring the jurisdiction and the powers of the Court in accordance with the original Act. The LIV submits that, as the State court of specialist jurisdiction[1] dealing specifically with matters relating to children, the Court should have the power to ultimately decide on the care arrangements for children and be able to hold DHHS accountable by reviewing the decisions made by DHHS and imposing conditions where required to ensure the best interests of children in care are met.

[1] Secretary to the Department of Human Services v Sanding [2011] VSC 42

RECOMMENDATIONS

The LIV recommends that the 2015 Bill be amended to include the following amendments to the 2014 Amendment Act:

1. **Reinstate the Children's Court power to:**

    a. **Determine contact and impose conditions for contact between a child and their family when a child is the subject of a Care by Secretary Order;**

    b. **Adjourn proceedings, including by making an Interim Accommodation Order (IAO) subject to the conditions the Court considers appropriate in circumstances when the Court is not satisfied on the evidence that a permanent order should be made;**

    c. **Make Interim Protection Orders;**

    d. **Decide, without time restriction, whether or not orders (including Family Reunification (FRO) and protection orders) should be made; and**

    e. **Determine contact frequency on a Permanent Care Order without capping the frequency that can be ordered by the Court;**

2. **Improve transparency by removing the ability of DHHS to apply *ex parte* for an FRO by reinstating the requirement for DHHS to serve the parent or a child over the 10 years old with any application to the Children's Court to vary or reduce contact conditions on FRO's.**

3. **Improve accountability by reinstating section 297 so that the Court can:**

    a. **Limit DHHS custody/guardianship powers where there is no certainty about where a child should be placed;**

    b. **Limit the extension of a Care by Secretary Order if there is a long term placement available by directing DHHS to support that carer in obtaining parenting orders for the child in the federal family courts; and**

c. **Direct DHHS to bring an application for permanent care or to support a long-term carer by applying to the federal family courts for parenting orders.**

4. **Remove the default to a Care by Secretary Order when:**

   a. **A permanent carer dies; or**

   b. **A FRO can not be made;**

   and provide that, in such circumstances, the matter must return to Court for a determination afresh of care arrangements for the child.

5. **Remove the ability for DHHS to place children who are subject to Care by Secretary Orders up for adoption.**

6. **Amend the permanency objectives so that adoption appears as the last of the five objectives after Family Reunification, Family Preservation, Long Term Out of Home Care and Permanent Care. The LIV agrees that children who are subject to Long Term Care Orders should remain eligible for adoption to facilitate those children being placed in a stable permanent environment.**

SUMMARY

Importance of Judicial Oversight when making orders affecting Victoria' most vulnerable children

The power to remove a child from their family is one of the most serious of any powers held by any state agency. Historically, this power has been used by the State to achieve outcomes that are not regarded by today's values as being in the best interests of the child or society. The children of the Stolen Generation and those whose parents were forced into placing them up for adoption are but some examples.

Submissions made, and evidence presented to, the inquiries that produced the Betrayal of Trust Report (Victoria Parliament 2014), the Forgotten Australians Report (Commonwealth Parliament 2004) and now to the *Royal Commission Into Institutional Responses to Child Sexual Abuse*, demonstrate that the mistreatment and abuse of children in Victoria's child protection system is not an historical issue.

In 1984, the Victorian Labor Government commissioned *The Child Welfare Practice and Legislation Review* ("Carney Review") which, amongst other things, examined the operation of wardship orders which:

- Granted the State full parental rights over the child;
- Usually operated until the child was 18 years; and
- Did not include conditions for contact with parents or siblings.

In effect, there was no regular judicial oversight of the care received by children subject of these orders.

The Carney Review found that children who had been the subject of wardship orders often experienced mistreatment, abuse, lack of appropriate service provision and support and, for many, homelessness. One of the most important aspects of the Carney Review recommendations was the recommendation to enshrine in legislation the following decision-making principle for both the Children's Court and the then Department of Community Welfare Services:

> *Determining the best interests of the child must include, inter alia, that the level of intervention by the state in the lives of vulnerable children* ***must only be to the extent necessary****.*
>
> (emphasis added)

Whether intervention is only to the extent necessary is not a matter that can be left to the persons intervening in the lives of vulnerable children. Judicial oversight of state agencies is still required to ensure accountability.

It is the role of the Court to determine the lawfulness of the statutory intervention by the State and the appropriate order when a child is found to be in need of protection[2]. The LIV considers that the ability of the Court to fulfil this role and hold DHHS accountable will be significantly curtailed and diminished when the 2014 Amendment Act comes into effect.

Dangers of Reducing Judicial Oversight

The dangers of reducing judicial oversight for DHHS decisions are illustrated in the following case examples reported by our members. Each case involved DHHS making a decision based on what it viewed as the best interests of the children concerned; however, review by the Court revealed that DHHS had either breached its duty of care to the children or that DHHS had not made a decision in the best interests of the children. What is in the best interests of a child is a difficult question, which must not be sacrificed to efficiency or administrative convenience.

In the first case, two children (both aged under 10) were removed from their mother following allegations that she physically abused them. The children were placed in separate units where both were allegedly raped by older children. Both children also witnessed physical and sexual abuse of other children. The ABC reported[3] that, in an interim ruling on who should have custody of the children, the Court criticised the carers (and DHHS) for failing to pass on information about the abuse suffered by the girl and boy in residential care facilities and found that DHHS had breached its duty of care to each of the children due to the heinous sexual and physical abuse experienced by each of them. The ABC reported that following the criticism by the Court, then Minister for Community Services, Mary Wooldridge told ABC that the children's abuse was "devastating" and "unacceptable" and that lessons had been learned from those events[4]. Members are doubtful whether the same "lessons would be learned" if the decisions made by DHHS were not reviewed by the Court.

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[2] "Protecting Victoria's Vulnerable Children Inquiry" (2012) (The Cummins Inquiry)

[3] http://www.abc.net.au/news/2014-07-23/public-servant-found-to-have-breached-duty-of-care-to-children/5618722

[4] http://www.abc.net.au/news/2014-07-02/siblings-sexual-abuse-highlights-flaws-in-victorian-state-care/5566378

Members report another case which involved four children all subject to a Guardianship to Secretary Order (which will be replaced by Care by Secretary Orders). In 2007, the children were removed from their parents and placed with a foster carer mother by way of an endorsed foster care placement by DHHS. The children lived with their foster carer mother from 2007 until 2011, when they were removed without any warning by DHHS to the children or the foster carer and placed in a residential unit with rotating staff. The central reason for the removal was that DHHS did not agree with the foster carer's views in relation to their schooling. Nine months after the removal, DHHS applied to the Court to extend the Guardianship to Secretary Order.

The Court in the second case example found that:

1. The DHHS had not acted in the children's best interests when it removed the children from their foster carer mother, the person the children considered after four years in her care to be their effective mother;

2. The separation of the children by the DHHS from their long-term foster carer had caused the children psychological harm; and

3. The strong and consistent wishes of the children to be reunified with their foster mother (as expressed to DHHS, various professionals, and to their lawyer) had not been given appropriate weight by the DHHS in refusing to reunify the children with their foster carer mother.

The Court ordered pursuant to section 297 of the original Act an extension to the Guardianship to Secretary Order subject to the condition that DHHS bring an application for a permanent care order in favour of the foster carer within a specified time.

After 1 March 2016, when the 2014 Amendment Act commences, the Court will not have power to make such an order. The effect would be that DHHS would remain the final arbiter of the residence of the children and that they may remain separated from their foster carer mother.

The LIV advocates for the reinstatement of the Children's Court power in accordance with the original Act.

EXPLANATORY COMMENTS

Effect of 2014 Amendment Act

In effect, the original Act distributes responsibility to make decisions about the care arrangements for vulnerable children between the Court and DHHS. The Court makes the original decisions about removing a child and DHHS is then given administrative responsibility for making day-to-day decisions about the care of the child, subject always to oversight by the Court.

The 2014 Amendment Act drastically reduces or removes the oversight role of the Court, leaving DHHS as the final decision-maker of the best interests of a child.

For example, under the 2014 Amendment Act, the Court will no longer have the power to:

1. **Determine if reunification is viable** between a child and their parent (or other carer) after 12 or 24 months (depending on the circumstances of the child); or

2. **Make orders tailored to the needs of children, in their best interests,** including the ability to make orders with conditions for:

    a. Children to spend time with their parents or siblings (this applies to children the subject of Care by Secretary and Permanent Care Orders, noting that, pursuant to the 2014 Amendment Act, the Court is limited to ordering a child subject to a Permanent Care Order to spend time with their parent for a maximum of four times per year);

    b. The length of Care by Secretary Orders (under the 2014 Amendment Act, they run automatically for two years, even where they were made before 1 March 2016 for a period of less than two years);

    c. Parents or care givers to attend counselling or other therapeutic services;

    d. DHHS to support a carer obtain parenting orders in the Family Court or Federal Circuit Court of Australia to create stability for the child.

Reunification

Under the original Act, the final orders which contemplate reunification (Supervised Custody Orders) provide for a child to live with a specifically named carer (often a relative of the child) while

the parents retain parental responsibility (guardianship) of the child. The Court can make a Supervised Custody Order when it determines that reunification is viable, regardless of how long a child has been in out-of-home care.

Under the 2014 Amendment Act, Supervised Custody Orders automatically convert to Family Reunification Orders ("FRO's") which:

- Give DHHS full parental rights;
- Remove the ability of the Court to specify with whom the child is living (adding to uncertainty for the child); and
- Allow DHHS to relocate children subject to such an order at any time (this could potentially create further instability for the child).

If making a FRO would result in a child being removed from their parent's care for either a 12 or 24 month period[5], then under the 2014 Amendment Act:

1. The Court has no choice but to make a Care by Secretary Order;
2. Such orders run automatically for two years (the Court has no power to vary the length of the order); and
3. The Court has no power to make the orders subject to conditions, including a condition that DHHS facilitate a child spending time with their parent or significant other person.

The LIV is particularly concerned with the Court's inability under the 2014 Amendment Act to make a FRO once the 12 or 24 month period expires. These changes will effectively close the door for thousands of Victorian children to be reunified with their families. The only way for families to be reunified is for parents to successfully apply for a Care by Secretary Order to be set aside, which is a significantly higher threshold than applying for an FRO.

[5] The original 12 month period may be extended for a further 12 months when the Court is satisfied that there is 'compelling evidence that a parent will resume the care of a child permanently' within that further 12 month period.

Based on their experience, LIV members report that the following are likely to be disproportionately impacted due to their over-representation in the Victoria's child protection system, i.e. families and children who:

1. Identify as Aboriginal or Torres Strait Islander;
2. Live in remote, regional or rural areas (with limited or no access to services such as housing, family violence support, rehabilitation);
3. Live with a disability;
4. Are victims of family violence;
5. Experience mental health difficulties or disorders;
6. Have difficulties with housing or homelessness;
7. Do not speak English as their first language;
8. Came to Australia as refugees (and who may be struggling to care for their children as well as deal with their own trauma, isolation, language barriers, foreign social norms and laws);
9. Have substance abuse issues; or
10. Have complex needs

If left in its current form, the 2014 Amending Act will have a significant impact on Aboriginal and Torres Strait Islander children, noting that:

- As at 30 June 2012, there were 6,147 children in out of home care, of which 1,028 identified as being of Aboriginal or Torres Strait Islander background (that is, 19% of the total number of Aboriginal children in Victoria, compared to 0.5% of the total non-Aboriginal children in Victoria who were in out of home care[6]).

[6] http://www.ccyp.vic.gov.au/downloads/submissions/submission-issues-paper04-preventing-child-abuse-in-out-of-home-care.pdf

- Children and young people under 18 years of age represented 42% of the Aboriginal and Torres Strait Islander population in Victoria.[7]

- The number of Aboriginal children in out of home care, and substantiated reports of abuse, neglect or harm among Aboriginal children, is on the rise.[8]

The concerns of the Aboriginal and Torres Strait Islander communities about the 2014 Amendment Act have attracted significant media coverage and LIV members report that there is a perception in the wider community that the 2014 Amendment Act will result in another generation of "stolen children"[9].

The LIV recommends that the 2014 Amendment Act be amended to:

1. Reinstate the power of the Court to make family reunification orders irrespective of the length of time that has passed (i.e. remove the 12 or 24 month time restriction imposed by the 2014 Amendment Act);

2. If a time limit is imposed, ensure that:

    a. The time a child spends away from their parent's care under an IAO; or

    b. Any period of time when a protective worker is not actively engaged with the family not be included in the calculation of the time limit. (Under the 2014 Amendment Act, the provision of services will be taken into account when calculating time. It is not fair to children if they are unable to reunified with their parents due to lack of resources or waiting lists for their parents to access services.)

    c. The 12 or 24 month time periods is continuous, not cumulative.

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[7] Ibid

[8] http://www.ccyp.vic.gov.au/downloads/submissions/submission-letter-5-year-plans-out-of-home-care.pdf

[9] http://mobile.abc.net.au/news/2015-05-12/child-protection-laws-could-create-new-stolen-generation/6463650

http://m.theage.com.au/victoria/law-reforms-on-children-in-care-could-create-stolen-generation-20150512-ggznet.html

3. Enable the Court to make orders subject to conditions it considers appropriate; and

4. Require DHHS to serve the child (if over 10 years old) and parents with an application to vary or revoke a FRO. The DHHS is required to serve when it applies to vary or revoke conditions for Supervised Custody Orders and the LIV considers this should equally apply for FRO's.

LIV members consider that these recommendations will enable the Court to determine whether reunification is viable on a case by case basis, taking into account the complexities and factors that affect that child and their family.

Loss of power to make orders subject to conditions

The LIV considers the loss of the Court power to make orders subject to conditions is one of the most significant matters before this Inquiry. For example, under the original Act, the Court has the power to:

Regarding Protection Orders:

- Make an Interim Accommodation Order ("IAO") when the hearing of a proceeding in the Family Division is adjourned.

- Include any conditions on the IAO it considers is in the best interest of the child (e.g. direct DHHS to support a carer or for a child to spend time with a parent, sibling or significant other person);

- Adjourn a proceeding when it is in the best interests of the child to do so, or if there is some other cogent or substantial reason to do so;

- Make a Custody to Secretary Order for an initial period of 1 year and thereafter extended for up to 2 years at a time.

Regarding Care by Secretary and Permanent Care Orders:

- Determine the length of Custody to Secretary Orders as well as include conditions for the child to spend time with their parent, sibling or other significant person; and

- Impose conditions on a Permanent Care Order for the child to spend time with their parent, sibling or other significant person.

The 2014 Amendment Act removes the ability of the Court to make any such conditions.

Without the ability to impose such conditions, the Court is unable to effectively oversee the decisions made by DHHS and ensure DHHS acts in the best interests of children in state care.

Increasing the number of children that could put up for adoption

Under the original Act, the children who can be placed for adoption are limited to children subject to a Guardianship Order. Under the 2014 Amendment Act, these orders will be converted to Long-Term Care Orders as of 1 March 2016. Children subject to Long-Term Care Orders will remain available for adoption.

Furthermore, under the 2014 Amendment Act, DHHS will also be able to place for adoption children who are subject to Care by Secretary Orders. This will significantly (and arbitrarily) increase the number of children who *could* be adopted. Again, we note the Minister's correspondence that this is not the Government's intention. However, we also note that future governments may prioritise adoption more highly than the current government. The 2014 Amendment Act will not prevent such a future Government making children on Care by Secretary Orders available for adoption.

The LIV's concern is derived, in part, by the inclusion of adoption as third in a list of five permanency objectives, after Family Preservation and Family Reunification but before Permanent Care and Long-Term Out of Home Care: see section 167 of the Amending Act.

The LIV agrees that it is in the best interest of children to provide them with stability by achieving a permanent outcome. However, to rank Adoption over and above Permanent Care or Long-Term Out of Home Care ignores the recommendations of the state and federal forced adoption inquiries and is inconsistent with the principles of the original Act, which focus on protecting the family as the fundamental group unit of society[10]. Adoption should be the last resort.

The LIV recommends that the 2014 Amendment Act be amended so that:

1. Children currently subject to Care by Secretary Orders are not automatically eligible to be placed for adoption; and

[10] Section 10 of the original Act

2. The permanency objectives place adoption last of the five objectives after Family Reunification, Family Preservation, Long Term Out of Home Care and Permanent Care

Lack of Consultation for the 2014 Amendment Act

The LIV has raised concerns about the lack of community consultation that resulted in the 2014 Amendment Act. In doing so, the LIV notes and is aware that the 2014 Amendment Act was introduced by the former Coalition Government and passed by a previous Parliament.

The LIV is aware that a case study of 1,000 children in out of home care entitled "Stability Planning and Permanent Care Project Report" was compiled by DHHS in 2013 and used as the basis for the 2014 Amendment Act. In particular, this case study has been used to justify the amendments to the original Act which prevent the Court from making an order contemplating reunification after a child has been out of a parents' care for 12 months or more, calculated cumulatively and retrospectively.

To date, this case study has not been made publicly available (or available to the LIV) despite repeated requests from the LIV that the case study be provided so there can be scrutiny of the methodology of its analysis and findings. The extensive evidence on which the Cummins Inquiry recommendations were based lie in sharp contrast to the limited consultation which gave rise to the 2014 Amendment Act.

The LIV requests that the case study be made available. The LIV welcomes the opportunity for further open and transparent debate on Victoria's child protection laws.

CONCLUSION

The LIV supports the 2015 Bill but believes that the amendments do not go far enough in protecting vulnerable children. The LIV continues to strongly advocate for further amendments to be introduced to the 2014 Amending Act to restore the Court's power and jurisdiction to make orders in the best interests of children and to oversee the exercise of significant powers by DHHS in respect of vulnerable children.

This position is consistent with the Cummins Report which, in Chapter 15, found (as a key finding) that:

> *"Conditions relating to the long-term placement of a child with the Department of Human Services or a third party should be determined by the department, with the exception of a child's contact with parents and others who are significant in the life of the child.* ***Such contact should be determined by a court.***[11] *[emphasis added].*
>
> *Accordingly, the role of the Children's Court is to determine:*
>
> - *Whether a child is in need of protection;*
> - *The appropriate remedy or order to enable the State to intervene in the child's best interest;*
> - *The length of the order is appropriate to the type of order sought); and*
> - *Conditions relating to child parent contact of contact with siblings and other persons who are significant in the child's life (if appropriate to the type of order sought) and conditions that intrude on individual rights, namely the exclusion of individuals from a child's life and drug and alcohol screening."*

Without reform, the LIV is concerned that the 2014 Amendment Act will contemporaneously:

- Reduce the power of the Children's Court to ultimately decide which care arrangements are in a child's best interest; while

[11] Key findings, Chapter 15, Cummins

- Increasing the power of the DHHS to unilaterally assume parental responsibilities and make decisions about children's care arrangements; and

- Remove the ability of the Court to effectively review such decisions and hold the DHHS accountable.

It is essential that the jurisdiction of the Children's Court is fully restored to ensure that there is proper judicial oversight of the decision-making of the DHHS.

The power to remove children from their families is a significant power and must, at all times, be the subject of judicial oversight to ensure the best interests of the child are maintained[12].

[12] The full text of LIV's submissions regarding the 2014 Amendment Act is available at http://www.liv.asn.au/For-Lawyers/Sections-Groups-Associations/Practice-Sections/Family-Law/Submissions/Submission-Children--Youth-and-Families-Amendment-.aspx?rep=1&glist=0&sdiag=0&h2=1&h1=0.