Legislative Council of Victoria

Inquiry into the *Children Youth & Families*
(Restrictions on the Making of Protection Orders) Bill 2015

Submission to the Legislative Council
Legal and Social Issues Committee

Preamble

We welcome the opportunity to make a submission in respect to the *Children Youth & Families (Restrictions on the Making of Protection Orders) Bill 2015* ('the Bill') proposing to reinstate s.276 of the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* ('the Act').

We note that the terms of reference specify that the inquiry examine the extent to which the Bill will protect vulnerable children 'along with current legislation'.

Accordingly we present this submission in two sections, beginning with submissions concerning the Act introduced by the Napthine government in September 2014. We then turn to the *Children Youth & Families (Restrictions on the making of protection orders) Bill 2015* (proposing to reinstate s.276 of the Act.

A. Submission re. the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014

While the Act which comes fully into effect on 1 March 2016, made a number of long overdue and positive changes, it is also deeply problematic for reasons spelled out below.

1. Firstly while the Napthine government claimed the legislation simply implemented the recommendations of the *Protecting Victoria's Vulnerable Children Inquiry Report* (2012), there are significant inconsistencies between the 2012 report and the Act.

2. The 2014 Act is problematic because it enhances the power of the DHS while reducing judicial accountability to the Children's Court, especially in respect of legal and human rights criteria.

This is move is also dangerous given DHHS's long history of running a largely dysfunctional system that it has shown it cannot manage or change. The Act realigns the separation of powers in favour of the Executive.

Fundamental to the rule of law is that the courts mediate disputes between citizens, and between the citizen and the state. A significant function of the judiciary is to review executive action. Judicial review covers various decisions made by government officials, including ministers. The doctrine of the separation of powers requires that the legislature makes thelaws, the executive puts the laws into operation and the judiciary interpret the laws. Unlike the executive and the legislature, which may heed other logics and rationalities including political ones, Warren CJ argues the judiciary is governed by legal and ethical obligations:

> Judges decide cases in an impartial and independent way. The courts operate openly and judges give reasons for their decisions. The provision of reasons is fundamental to the judicial method.

The rule of law also means that every citizen and government 'is bound by the decisions of the courts. Citizens and governments respect the courts andabide by their decisions. This is because the societyin which we live is governed under the rule of law *'applied by the courts'*. Accordingly it is a requirement that 'our judiciary [be] separate and independent from the government of the day' so the judiciary can be impartial and determine cases according to law and that outcomes are legally driven'. This vital role has been compromised by the new legislation.

3. DHHS will assume significant decision-making power in three of the four new orders and can do so without significant judicial oversight. The significant reduction of judicial oversight breaks faith with the United Nations Convention on the Rights of the Child article 9 (i) which stipulates that: …

> States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities *subject to judicial review determine*, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. (our stress).

4. The Act acceded to DHHS's call for a more 'efficient' system. The Act cedes to DHHS's calls for a simpler, more efficient system of orders. This is the burden of Section 16 of the Act which repeals five orders, replacingthem with four new orders. These include a Family Reunification Order, a Family Preservation Order, a Care to Secretary Order and a Long term Care Order. DHS now assumes decision-making power in three of the four new orders in the legislation and can do so without significant judicial oversight.

5. The 2012 *Vulnerable Children's Inquiry* agreed with DHS that simpler orders would be desirable, but proposed that the Children's Court should continue to be involved in cases where an order fundamentally alters the relationship between parents and their children or between children and siblings or other people significant in children's lives.

6. The new Family Reunification order is problematic.
Section 175C of the Act replaces the old Supervised Custody Order (which secured the placement of a child with a third party by order of the Court and directed the parties to take all appropriate steps to enable the reunification of the child with his or her parent (s 285(4)). The new Act s 175(c)(2) states:

> the Secretary must, to the fullest extent possible, work with and engage any parent with whom the child is intended to be reunified in making case planning decisions for the child.

The reference to 'working with and engaging' is weaker than the previous s 285(4) in obligating the DHS to do certain things. Granted that there was little provision for judicial oversight in the previous legislation, it is important to note that this Act weakens even that low level of review by allowing a change in the order, for example, from a family preservation order to a family reunification order, without the need for this to go before a court.

7. The new Care by Secretary Order is likewise problematic. The Act confers parental responsibility for the child on the DHS to the exclusion of all other persons and is in place for two years. After twelve months, its operation will be reviewed by DHS, and it can convert this by direction to a Family Preservation Order without having to go back to a court. There are no conditions on the Care by Secretary Order, so there is no guarantee that children and parents will see each other.
This contrasts with the previous Custody to Secretary Orders which initially ran for up to twelve months and could then be extended at the behest of Children's Court (subject to s 297). There were also conditions on previous Custody to Secretary Orders which gave certainty to children in out of home care about when and where they could see their parents, and enshrined reunification contact if appropriate. A Custody to Secretary Order needed to be listed before the Court upon its expiration. Furthermore, the previous Custody to Secretary Orders granted sole custody of the child to the Secretary, but did not affect the guardianship/ parental responsibility of the child. DHS now

has a measure of control over proceedings which is not subject to judicial review.

8. The new long-term care order is also problematic. This replaces both Guardianship Orders and Long- term Guardianship orders and confers sole parental responsibility on the DHS and remains in force until the child turn 18 years. It is similar to the Long-term Guardianship order in so far as the Court has to be satisfied prior to making the order that, *inter alia*, pursuant to proposed s 290, that 'there is person or persons available with whom the child will continue to live for the duration of the order'

The previous Guardianship to Secretary Order Orders could not remain in force for longer than two years. However they were only subject to court review if DHS requested such a review. The new Long Term Care Order is now only reviewed by the Secretary by direction of the Court every twelve months, andif the Secretary decides that the order should end, itwill notify the court (new ss 291(3), (4), (5) and (6). These amendments build on changes to s 13 of the new Act which reduces the power of the Children's Courtto make an Interim Accommodation Order. These interim Accommodation orders were a fundamentalpart of the Children's Court's procedures. An interim accommodation order ('IAO') determined who would care for the child and on what conditions. The power to make an IAO, enabled the Children's Court to determine the placement of children, often on an urgent basis, and ensured that the Court was able to act in the best interests of the child which was and is the paramount consideration as set out in section 10 (1) of the old Act.

9. Section 13 of the Act inserts a new provision (s 262(5)) which ensures that '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 s 319.
This section was a response to widely publicized case run in June-July 2014, when the Children's Court found it:

> was not satisfied that all reasonable steps had been takenby the Department of Human Services to provide the services necessary in the best interests of these children... The children have been placed in out-of-home caresince that time. Many services have been provided to the children. Those services have not prevented further abuse from occurring to these children whilst in care. In particular, sexual abuse has occurred to both children in their respective units'. Whatever the contractual responsibilities of the agencies are between the agencies and the Secretary; it is clear that from the terrible things that have happened to X and Y in care that the Secretary is in fundamental breach of her duty of care to each of them.

In this case, the protection order that DHS sought (a Guardianship to Secretary Order) was refused. An Interim Accommodation Order was made, to which the Court could attach any conditions. The new Act circumvents the ability of the Children's Court to do this where a protection order could have been made albeit in circumstances where a child may have been worse off due to it.

10. The Act weakens the best interests of the child principle fundamental to UNCROC. Apart from reducing the scope of judicial accountability, amendments to the 'best interests principles' — suchas when the Act amends s 10(3)(e) replacing 'the desirability of continuing and stability in the child's care' with 'the desirability of continuing and permanency in the child's care' and associated measures — are designed to speed-up the process to grant permanent care. This means the Children's Court is required to proceed quickly in acting to grant permanent care to someone other than the child's parent. A child can now be permanently removed from their parent's care because the parent/s cannot overcome the problems they face (such as family violence or illness) within a specified timeframe. Previously the Children's Court had exercised its power to adjourn proceedings and use its powers to make a number of orders in the best interests of the child. While it is important that children are not left in limbo while their parents struggle to address their health or other issues, it is also important we have unrushed and fair decision-making about such matters.

This change also comes at the cost of circumventing procedural fairness based on the idea that a 'fair and public hearing' be afforded. In particular there ought to be concern about the requirement that if a family has not addressed the protective issues inside the timeframe, then Permanent Care becomes the next and mandatory step. In cases involving family violence, abuse or serious health issues, permanency should not be the initial or fundamental emphasis. It may also not be in the interest of the child.

11. The drive to reduce judicial accountability is also evident in s 17(1) of the Act which amends s 276(1)(b). This repeals the requirement for the Court 'to be satisfied that all reasonable steps have been taken by the Secretary to provide the services necessary in the best interestsof the child'. This was the legislative basis on which the Children's Court refused to make the order sought by the DHS in the case discussed above. This requirement is now repealed by s 17(1). Under the new Act the Court need only be satisfied that 'the child cannot be sufficiently protected without a protection order'. This places no obligation on the government to assist families in anyway before their intervention is finalized. The Government needs to ensure that DHHS is held accountable for delivering services is is required to supply.

B. Submission re. the Children Youth & Families (Restrictions on the making of protection orders) Bill 2015 (proposing to reinstate s.276 of the Children, Youth & Families Act 2005)

The critical part of this amendment is that it intends to retain the existing requirements of section 276 of the *Children, Youth and Families Act* 2005 when the Act comes into effect on 1 March 2016.

> 'Section 276 will continue to require the Children's Court to be satisfied that reasonable steps have been taken by the Secretary of the Department of Health and Human Services to provide services in the best interests of a child before the court can make a protection order.'

While we support this proposed amendment, our concern is that this Bill does not go far enough to make the full range of changes necessary to give effect to the 'the best interests of the child'.

A key objective is said to be secure the timely and tighter timelines for making a decision about future permanent care arrangements for children in out-of-home care so as to stop 'the drift' and prevent children and young people from 'ageing out in care'.

While it is important that children are not left in limbo and 'ageing out of care' as their parents struggle to address the issues that prevent them from caring for their child, it is also imperative that decisions about a child are unrushed and a fair decision-making.

We submit that the following further amendments are also required:

a) Allow the Children's Court to fix conditions on Care by Secretary Orders for contact, and get the prohibition on contact frequency on Permanent Care Orders' lifted altogether. This is critical for lifting the cap of 4 in the first year.

   This is an arbitrary number which we have been told by DHHS was derived at as a research carried out by DHHS 'Stability and Planning Permanent Care project'.

   Our concerns is the claim of reducing the child's contact with their birth parent/s will someone help them 'loosen' their connection with those parent/s and thereby strengthen the bond with their new

There is no evidence on the public record to support claims that four visits is in the child's best interest. We were told by DHHS that many of the recommendation made in the amendments to the Act (2014) were informed by a 'major research project' produced by the DHS Stability and Planning Permanent Care project'. However when we asked for a copy of this report our request was rejected.

b) Amend Family Reunification Orders so that the Children's Court can have the ultimate say about when reunification can occur.

c) Change Care by Secretary Orders so that they don't run for t years automatically. This will allow the Court to decide the length of time;

d) Remove interference with the court's ability to make an Interim Accommodation Order (i.e. new provision says court must not make an IAO if it could make a (final) protection order). Such unnecessary interference will adversely effect the court's ability to conduct proceedings.

e) change the order adoption is placed in the permanency objectives, i.e. relegate to the bottom so it is not mandated that adoption is not always the first port of call;

f) leave the provisions that ensure that only children who are subject to guardianship orders (to be called long-term care orders) can be put up for adoption, not adding care by secretary orders.

Conclusion

We are mindful of the lack of resources currently devoted to child protection and respectfully suggest that attention be given to ensuring there is adequate funding and oversight of the inter- and intra-government arrangements and cultures of these agencies to secure the well being of children who come to the attention of the states child protection system.

We acknowledge and commend the Andrew Labor's 2015-16 Budget committed to fund more than 110 new child protection workers and provide $93.3 million to improve out-of-home care, but suggest that further resources and a major change in the sector and particular in the out of home care sector is needed to address the policy problems we currently face.

We are concerned that increasing levels of poverty and inequality on out community will mean that a disproportionate number of families from low-SES backgrounds will be adversely effected by these changes. We say this due to the link between poverty, unemployment, family stress and child protection.

Our concern is that this may lead to future class action against the state and relevant agencies- like that currently taking place in a number of overseas jurisdictions

The Andrews Labor government and its Minister for Families, Children and Youth Affairs has made a good start in addressing the problems created by its predecessor and now has the opportunity to fix things. The Andrews government says it is committed to policies and legal frameworks that will protect vulnerable children from harm and support struggling families. Labor's 2015-16 Budget committed to additional funds to improve out-of-home care. The Minister is attempting to reinstate the power of the Children's Court to be satisfied that reasonable steps have been taken by the Secretary of the DHHS to provide services needed before a protection order that permanently removes the child from their birth parent/s is made. As mentioned above this is a positive move in the right direction but further steps need to be taken in the ways indicated above.

The new Andrews Labor government and its Minister for Families, Children and Youth Affairs has the opportunity to fix some highly problematic aspects of legislation introduced in haste by the previous Liberal government.

We would like the opportunity to meet with Committee members to further discuss this submission.

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16 June 2015.