Children's Court of Victoria

Submission to the Victorian Parliament Standing Committee on Legal and Social Issues

Enquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015

June 2015

Forward

The Children's Court of Victoria welcomes the opportunity to provide this submission to the Inquiry into the Children, Youth and Families Amendment (Restrictions on the making of Protection Orders) Bill 2015 by the Standing Committee on Legal and Social Issues.

The Children's Court of Victoria is created by Section 504(1) of the *Children, Youth and Families Act 2005.* The Court seeks to facilitate the administration of justice by providing a modern, accessible and responsive specialist court focused on the best interests of children and young people.

Overwhelmingly, the work of the Court involves managing and determining child protection applications in its Family Division to resolve the overlapping but often competing interests of the State, parents, carers and children in determining appropriate orders that are in the best interests of the child.

In 2014, the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (the 2014 amendments) abolished a number of existing orders and introduced a suite of new Children's Court orders, including the introduction of mandated timelines to achieve reunification of children placed in out of home care.

The Children's Court made submissions to the government in response to the DHHS change documents provided to it in late 2013/2014. In those submissions, the Court outlined its concerns about the impact of the foreshadowed amendments on the non-adversarial processes developed by the Court over the past five years and the likely increase in litigation in this Court.

The Annexure to this submission outlines the Court's concerns about the anticipated impact of the 2014 amendments on its operations, particularly those aimed at reducing the adversarial nature of child protection proceedings.

One amendment not foreshadowed in earlier DHHS proposals was the abolition of s276(1) by the 2014 amendments. Section 276(1) prohibits the Court from making a protection order in relation to a child unless the Secretary of the DHHS has taken "all reasonable steps" to provide the services necessary in the best interests of the child.

The Court welcomes the *Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015* in restoring s276(1) to allow the Court to consider the supports provided by the State to facilitate the reunification of children with their parents. The requirement to provide services and supports to families assumes greater significance in the context of the strict legislative time-limits imposed on achieving family reunification.

The Court considers the reinstatement of this provision is consistent with the legislative framework of protecting children and young people who are at risk by providing community services and supports to children and their families.

More broadly, the Court is well placed to comment on the anticipated impact of the 2014 amendments in relation to the following;

- the conduct and success rates of less adversarial court processes, including conciliation conferencing and judicial conferencing, such as the intensive directions hearing initiative
- the prospect of a significant increase in contested hearings and consequential delays
- resourcing requirements for the Children's Court,
- the Court's capacity to effectively manage a significant and growing number of child protection matters and the timely, efficient and appropriate disposition of cases involving children and young people.

Finally, in recognition of these matters, the Court welcomes the commitment of the Minister for Families & Children to undertake a review of the 2014 amendments within six months of their commencement.

Judge Amanda Chambers
President
Children's Court of Victoria

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Background

Introduction

The *Children, Youth and Families Act 2005 (Vic)* is the legislation that governs child protection proceedings in Victoria. The Secretary of the Department of Health & Human Services (DHHS) may bring a protection application in the Family Division of the Children's Court if s/he considers a child to be 'in need of protection'. The Children's Court may make a protection order if it finds that at least one of six separate grounds[1] for determining a child is in need of protection exists.

The Children's Court Of Victoria

The CYFA provides for the continuing operation of the Children's Court, comprising a President (who is a Judge of the County Court), magistrates, judicial registrars and registrars.

The Children's Court has four divisions:

- Family Division;
- Criminal Division;
- Koori Court (Criminal Division)
- Neighbourhood Justice Division

The Criminal Division including the specialist Koori Children's Court deal with criminal proceedings involving children and young people.

The Family Division deals with proceedings for the protection of children and young people from birth to 17 years of age. The Court's Family Division also hears applications relating to intervention orders pursuant to the *Family Violence Protection Act 2008* and *Personal Safety Intervention Orders Act 2010* where the "affected family member" (family violence matters) or "affected persons" (personal safety matters) or the respondent is a child.

Approximately 85% of the Court's resources are allocated to managing and determining child protection cases in the Family Division.

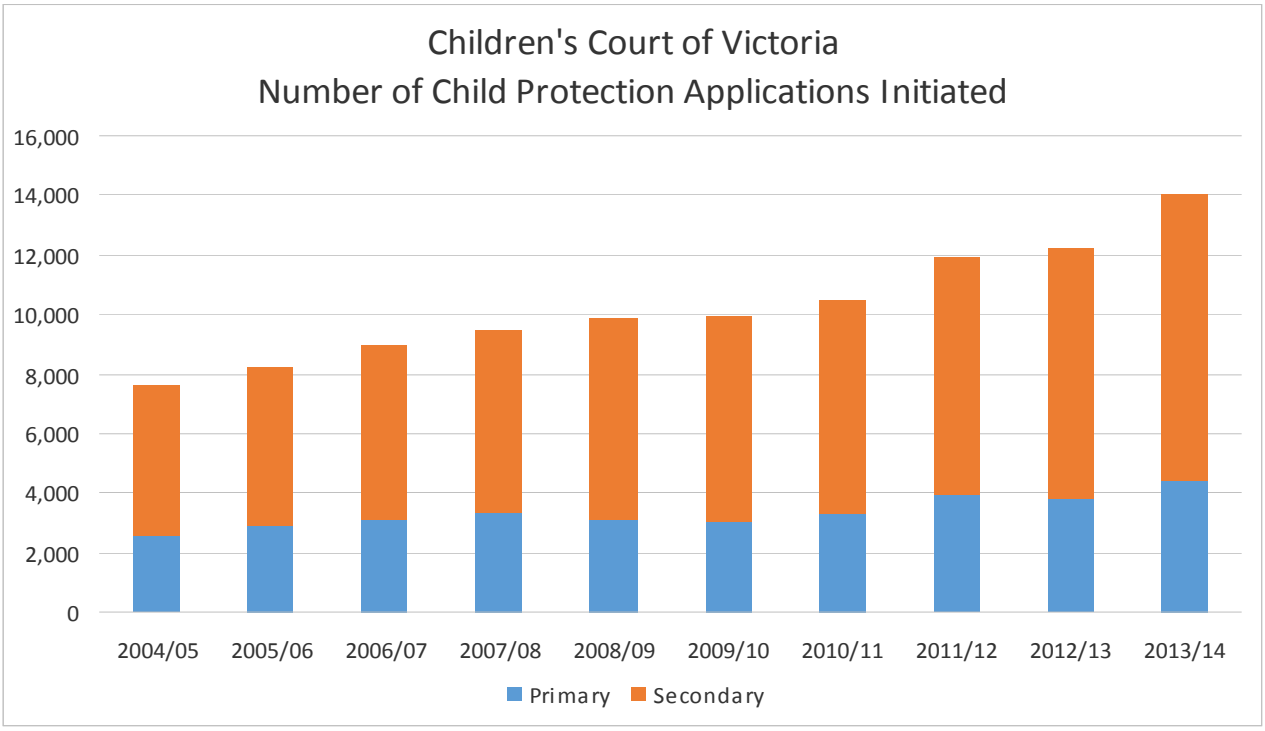
The Court's Family Division has experienced unprecedented growth in caseload[2] and workload[3] over the past five years. Since 2010/11 child protection caseload has risen 25.3 per cent and the associated workload has increased by almost 48 per cent. The number of child protection applications (primary and secondary) initiated across the State has increased by 42%. In 2013/14, there were 13,979 primary and secondary applications initiated compared to 12,207 in the previous year representing a 14.5% increase from one year to the next.

[1] Section 162 of the CYFA

[2] Caseload includes primary and secondary (extensions, variation, revocation applications

[3] Workload is the aggregate total of hours derived from activity volumes

The graph below illustrates the increase in the number of primary and secondary child protection applications made to the Children's Court over the past ten years.



Reviews into Child Protection over the past 5 years

Over the past five years, there have been four major reviews and inquiries into Victoria's child protection system:

- The Ombudsman's Own Motion Investigation into DHS Child Protection (Nov 2009);
- The Victoria Law Reform Commission: Protection Applications in the Children's Court (Nov 2009);
- The Premiers' Child Proceedings Taskforce (2010); and
- Victoria's Vulnerable Children. Protecting Victoria's Vulnerable Children Inquiry (2012) (the PVVCI)

A significant focus of these reviews has been to move towards a less adversarial model to resolve the overlapping but often competing interests of the State, parents and their children in determining outcomes that are in the best interests of children considered to be at risk. It is a model of dispute resolution that is strongly supported by the Court.

VLRC: Protection Applications in the Children's Court (Nov 2009)

In the options canvassed by the VLRC it was proposed that "a graduated range of supported[4], structured and child-centred agreement-making processes should become the principal means of determining the outcome of child protection applications. These processes are designed to minimise disputation in child protection matters while maintaining a focus on the best interests of the child"[5].

The Premier's Child Proceeding Taskforce (2010)

The Child Protection Proceeding Taskforce was established at the request of the then Premier in November, 2009. It was constituted by the President of the Children's Court, the Secretary of the Department of Justice, the Secretary of the (then) Department of Human Services, the Child Safety Commissioner and the Managing Director, Victoria Legal Aid. The Terms of Reference included recommending measures to reduce the adversarial nature of Children's Court processes including options for appropriate dispute resolution and measures to reduce the time that parties spent in the Children's Court.

Critical to the recommendations of the Taskforce was the need for a significant investment to be made in adopting New Child Protection Resolution conferences (New Model conciliation conferences) to occur offsite from Court premises aimed at promoting child-focused agreement making.

PVVCI (2012)

Similarly in 2012, the PVCCI, having received extensive submissions and given detailed consideration to the need to realign court processes to meet the needs of children and young people, recommended that the Court be supported to implement and extend New Model Conferencing:

> ***Recommendation 60***
> *Protection concerns should be resolved as early as possible using a collaborative problem-solving approach with a child-centred focus and minimising where possible, the need for parties to go to court. This means that:*
> *…*
> - *Where a matter is before the Children's Court, parties should, where appropriate, go through a New Model Conference and the Children's Court should be supported to implement this model of conferencing throughout the State.*

[4] The term 'supported' was defined by the VLRC to mean that participants in decision-making processes are provided with professional support and information so that they can participate as equally as possible with each other and with full knowledge of the consequences of any agreement made.

[5] VLRC Final Report, Option 1 – A New System

New Model Conferences (Conciliation Conferences)

In response to these recommendations, there has been considerable investment by government in court reforms to re-focus the resources of the court towards a graduated range of processes aimed at achieving child-centred agreements. It was widely accepted that in child protection matters, an adversarial approach to determining the competing interests of parties was not in the best interests of the State, parents, carers and significantly, children.

Introduced in 2010, conciliation conferences promote improved outcomes for children and families and reduce the length of the court process in Family Division matters. Section 217(2) of the CYFA provides that the purpose of a dispute resolution (conciliation) conference is to give the various parties the opportunity to agree on the action that should be taken in the best interests of the child; it is an exercise in negotiation and joint problem solving.

Conferences are conducted early in child protection cases and have a strong focus on family engagement with the DHHS and with legal representatives to provide parties with an opportunity to agree outcomes without the need for a contested court hearing. Conciliation conferences provide an important opportunity for families to improve their understanding of issues and their capacity to engage effectively in the court process. This results in parties being able to reach meaningful agreements which are better understood by families which in turn improves compliance and procedural fairness.

Funding of the Conciliation Conference Model

The conciliation process was endorsed by the PVVCI and the Court subsequently received a significant injection of funding to implement and deliver the conciliation conference model.

In 2012/13 $2.95 million was expended on the conferencing model. This figure almost doubled in the following financial year with $4.488 million expended in 2013/14 and $5.236 million in 2014/15.

This significant investment was aimed at implementing the recommendations made after four comprehensive reviews of the child protection system in Victoria and was utilised by the Children's Court to extend the model across metropolitan and regional Victoria and significantly, to introduce a Koori appropriate conferencing model.

Conciliation Conference Workload

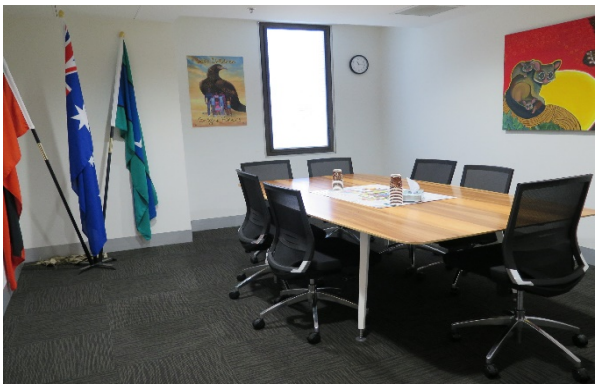
Since 2010, conferencing workload and demand have steadily increased and the program has now been implemented across Melbourne and regional Victoria. In 2012, the Court opened a dedicated Melbourne Conferencing Centre (pictured below) at a cost of $1.32 million[6] to provide

[6] Capital funds expended on the Children's Court Mediation Expansion; $1.256m in 2012/13 and $0.064m in 2013/14.

a safe, calm and comfortable environment conducive to collaborative negotiations which are child focused.

Resource and cost modelling undertaken by the Court supports the efficacy and cost effectiveness of conciliation conferencing. From the program's inception to the completion of the State-wide rollout in 2014, conference outcome indicators have been consistently positive. In 2013/14, qualified and accredited convenors [7] conducted 2500 conciliation conferences across the State. Of these, 48% matters settled outright, 22% settled partially. The remaining 30% proceeded to directions or contested hearings.

CCV Conferencing Centre 436 Lonsdale St



Koori Conference Room

Conciliation Conference in progress

Roll out of Conciliation Conference model to regional Victoria

The growth of child protection applications in regional Victoria has a large impact on the operation of the Court where cases are heard by magistrates sitting in busy regional Courts. The Hume region, in particular, has experienced significant growth in demand.

The success of the conciliation conference model in the regions has been critical in dealing with this increasing demand.

[7] The February 2010, the Report of the Child Protection Proceedings Taskforce recommended that all convenors in the court's new model conference (NMC) be trained and accredited in mediation in accordance with the National Mediator Accreditation Scheme (NMAS).All conference convenors are trained and accredited in mediation in accordance with the NMAS.

The Court has expanded the conciliation conferencing model to the Hume, Grampians, Barwon South West, Gippsland and Loddon Mallee Regions. Its success in assisting parties in regional Victoria to resolve disputed protection matters has been a highlight of the model.

In each of these regions, with the exception of the Hume Region, of the matters referred for conciliation, only between 6.10-13.53% of cases require a contested hearing. In the Hume Region the percentage of matters referred for a contested hearing is presently 22.83%.

Family Drug Treatment Court

Another significant initiative in non-adversarial court proceedings is the Family Drug Treatment Court (FDTC), which was launched in May, 2014. The FDTC is a judicially monitored therapeutic program conducted in a highly supportive non-adversarial environment. The program operates for twelve months and is aimed at providing intensive supports for parents whose children, particularly young children, have been taken into care due to the parent's alcohol or drug abuse issues. The ultimate goal of the program is to assist in the reunification of families with their children.

The FDTC will relocate in 2015 to the new Family Division court complex at Broadmeadows once construction is complete. The FDTC currently sits weekly at the William Cooper Justice Centre, away from the Melbourne Children's Court complex.

Directions Hearings

As part of graduated range of processes to assist the parties to reach agreement, since February, 2015 the Children's Court has instigated an Intensive Directions hearing process prior allocating a contesting hearing. The Directions Hearings are conducted where resolution could not be achieved through the Conciliation Conference process

This initiative has been extremely successful in progressing cases to an earlier resolution and finalising orders as well as reducing the issues in dispute between the parties and thereby shortening contesting hearing times.

Directions hearings, conducted by a Magistrate who will not hear the final contest, involve active intervention by the Court and provides an opportunity for the judicial officer to speak frankly with the parties as part of a 'reality check' about the merits of their contest and their prospects of success.

The Intensive Directions Hearing process has resulted in an increase in the number of cases resolving prior to contested hearing and a significant reduction in how long the parties need to wait for a contested hearing. Reducing the number of contested hearings and, significantly, the delay until hearing is clearly in the best interests of the parties, and importantly, of the child.

Prior to the introduction of this initiative, the court delay in providing the parties with a five day contested hearing was 28 weeks. It is now 10 weeks.

The utility of flexible orders

Critical to the success of the conciliation conference model and the intensive directions hearing is the availability of a suite of orders that are presently available to provide a nuanced response that is in the best interests of the child.

In particular, flexibility in the utilisation of interim orders to test the effectiveness of supports before a final order is made; the ability to make orders that provide certainty around the care arrangements for the child and where it is in the best interests of a child, to provide for contact arrangements and other conditions on final orders.

In the absence of these options, the Children's Court has serious concerns about the impact of the legislation on the effectiveness of less adversarial court processes.

For instance, the supervised custody order under the *CYFA* has been, in the Court's view, a most effective vehicle for settling court cases without the need for an evidence-based contest. The certainty of a fixed non-parental carer is often essential to the resolution of cases by conciliation. The Court is concerned that without the ability to name the carer on the order:

- there will be significantly fewer cases resolved by conciliation; and
- there will be many more contested hearings in the Children's Court with all the negatives that that entails, including delay and lack of "ownership" of the order by parents and/or children; in part this will be because parents and/or children will feel that they have little or "nothing to lose" by contesting the Department's applications.

It is the Court's view that the system of court orders is strengthened by having more flexibility than less because it enables orders to be tailored to a particular child's circumstances.

The Court has already begun to observe an increase in the number of contested hearings as a result of decreased settlement rates at conciliation conferences and also a reduced number of cases where parties are willing to participate in the conferencing process because of the permanency amendments.

Moreover, the mandated time-frames for Family Reunification Orders may impact on the ability of the Court to refer parents to the twelve-month Family Drug Treatment Court, making it suitable only in cases where a child or children have recently been removed from their parents.

Current trends in Intensive Directions hearings

The particular issues that are presently impacting upon the settlement of cases and therefore if translated after March 2016 (the commencement of the 2014 amendments) will likely result in a significant increase in contested hearings and an increase in time taken to reach a hearing date and in the length of hearings are:

- A recent tendency only to resolve matters under short duration orders and a reduction in the number of Custody to Secretary Orders (CTSO) agreed. The parties explanation to the Court is that they are not agreeing to CTSO's which extend beyond March 2016 because after that date the conversion to a Care By Secretary Order would have the effect of removing all existing conditions on the CTSO whether agreed or Court determined.
- The loss of the ability of the Court to impose or the parties to negotiate conditions on an order is a significant impediment to settlement and is likely to result in increased final order contests thus increasing cost and delays.
- That the prospect of an 'automatic' conversion to Care By Secretary Order after 24 months means that parents are not consenting to orders which result in the child being out of their care for even a short period of time, as this time will count for the purposes of the making of a Care By Secretary Order.
- This position is being adopted, in certain cases, by the legal representatives of children over 10 who are able to provide instructions.
- Once the amendments are operative, the parties are advising the Court they will contest cases because "they have nothing to lose" due to the legislative time imperatives.

The Court considers these changes will lead to an increase in the preparedness of parties to contest the actual making of any order rather than merely the conditions associated with it. In other words, contests will become about 'proof' of the protection application itself. In contrast, currently parties will often concede proof or elements of proof sufficient for a protective order to be made because the substance of the order and how it impacts on the family is the real issue. Some input into the conditions on an order, such as the nominated carer, is often the way to achieving resolution. Once there is no prospect of conditions, the incentive for resolution will be removed.

Permanent Care Orders

The experience of the Court is that the effectiveness of conciliation conferencing models and judicial conferencing in finalising upon Permanent Care Order is much more subtle than simply how long the child has been out of the parents care. These orders are often sought in kinship or close family friend placement circumstances. The 2014 amendments are impeding potential settlements during Directions Hearings as the usual matter of dispute is the level of contact, not the actual Permanent Care Order itself.

- Concern has also been evident as to the impact of the alterations to contact conditions associated with Permanent Care Orders.
- Presently the Court has been achieving a number of agreements on Permanent Care Orders as a result of the 'last' opportunity approach to the parties being able to agree upon contact level. This of course will no longer be the case after March 2016.
- Often the parties will agree to monthly (12 times per year) or even fortnightly or in some cases even greater contact conditions. This has progressed the settlement of PCO's rather than obstructed their making.

It is the view of the Court that the inability to provide for greater contact than four contacts per year will result in less likelihood of settlement and a greater number of lengthy contested hearings.

Moreover, during the course of the recent Directions Hearings it has been apparent that there have been delays in the seeking of Permanent Care Orders by the DHHS for a number of reasons. Permanency arrangements have often not been progressed for a number of reasons, including:

- Carers requiring ongoing financial assistance from the DHHS including support services that are not available after a Permanent Care Order is made. i.e. Take Two, Families First or other intervention and support services.
- Occasionally, late developing concerns about the proposed permanent carer and their appropriateness.
- Cases where suitable or available carer cannot be found due to the complex issues associated with the child.

Aboriginal family placement.

There has been an increase in the number of interventions involving Aboriginal Children that are not resolving via the conciliation conference model and are being referred for Directions Hearings.

The value of the Directions Hearing process is that it offers the Court an opportunity to inquire into the steps being taken to develop and progress compliance with Aboriginal Child Placement principals and cultural connection planning particularly in the context of long term orders: currently CTSO's and Permanent Care Orders.

Presently, the Court is able to direct the parties attention to include and address conditions touching these matters. Agreed conditions (or Court ordered conditions) will last for the duration of the care order. This can result in a greater degree of confidence in aboriginal parents that the needs of their children are recognised and a greater preparedness to agree to final orders.
It is unclear how these placement principals will be able to be negotiated or agreed or conditions provided any certainty or longevity in the context of the amendments.

It is the view of the Court that the 2014 amendments will result in a significant increase in contested hearings regarding Permanent Care Orders sought in relation to aboriginal children.

Resourcing requirements for the Children's Court

The 2014 amendments will likely coincide with the full deployment of an extra 111 child protection workers, including 88 additional front line child protection workers to respond to demand for which $65.4M was allocated in the 2015/16 State budget.

The Court received no additional funding although these changes will undoubtedly have a significant impact on the Court's capacity to effectively manage a significant and growing child protection caseload.

The confluence of increased contested hearings and the likely increase in child protection applications will unquestionably have a flow on effect in increased delay in the determination of not just child protection matters, but also in criminal and family violence cases. The protective benefits sought from the additional investment in child protection workers may not be fully realised if the combined effect of the additional resourcing of child protection workers and the 2014 amendments impact upon the capacity of the Court to manage and resolve disputed applications. The Court is particularly concerned to ensure that the significant resources directed towards improving less adversarial court processes are not undermined.

Annexure

Children's Court Submission to the Standing Committee on Legal and Social Issues

Definitions

Act 61/2014	Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014
CYFA	Children, Youth and Families Act 2005 (Vic) [as amended]
CYPA	Children and Young Persons Act 1989 (Vic) [as amended]
DHHS	Department of Health and Human Services [Child protection]
FLAC	Family Law Act 1975 (Cth) [as amended]
PVVCI	Protecting Victoria's Vulnerable Children Inquiry

Introduction

Act 61/2014 abolishes certain protection orders and renames and makes significant changes to certain other protection orders. These amendments are said to be designed to reduce the period of time – said on average to be 5 years – between a child being reported to DHHS and a Permanent Care order being made.

We say at the outset that the Children's Court shares the concern of the PVVCI about the potential for delay to cause instability and uncertainty both for children in out of home care and for their carers. The Court agrees that the requirement in s.10(3)(f) of the *CYFA* for both the Court [s.8(1)] and DHHS [s.8(2)] to consider the desirability of continuity and permanency in a child's care is an important consideration. So too is s.10(3)(fa) which refers to the desirability of making decisions as expeditiously as possible and the possible harmful effect of delay in making a decision or taking an action when considering the best interests of a child.

However, the ultimate aim of any intervention by DHHS into a child's life is to optimize the child's physical and emotional safety. It is clear from s.10(3) of the *CYFA* that in attempting to optimize a child's emotional safety – which also involves optimizing a child's attachment relationships – ss.10(3)(a) & 10(3)(b) are also very important considerations when considering a child's best interests:

a. 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;

b. the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child.

These provisions have clearly been adopted by the Victorian legislature in recognition of Articles 7 & 9.3 of the United Nations Convention on the Rights of the Child:

7 "…"The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents."

9.3 "Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[8]

The Court supports many of the amendments introduced by *Act 61/2014*. However, for reasons set out below, the Court is concerned that the impact of some of the amendments will undermine the stated aim by resulting in a significant increase in contested cases and increased delay. Further, we consider that certain of the amendments do not get the balance quite right between s.10(3)(fa) on the one hand and ss.10(3)(a) & 10(3)(b) on the other hand and may be contrary to the spirit and intent of the United Nations Convention on the Rights of the Child. Moreover, the Court is concerned that some of the amendments removing judicial discretion have the potential to cause significant injustice to particular children, as discussed below.

Sections 276 & 276A

- **Section 276(1)(b):** This sub-section previously prohibited the Court from making a protection order "unless it is satisfied that all reasonable steps have been taken by DHHS to provide the services necessary in the best interests of the child". It has been amended to take away the implied obligation on DHHS to provide services and replaced by the words "unless it is satisfied that the child cannot be sufficiently protected without a protection order". This amendment was not foreshadowed in any of the three proposed change documents which DHHS provided to the Court for comment in late 2014 & early 2015. The amendment appears to have its genesis in a judgment of the Court that highlighted the concerning abuse of two children whilst in the care of DHHS where the Court declined to make a protection order as the appropriate services had not been provided. The Court supports the amending Bill in restoring this provision as a mechanism for judicial oversight in the best interests of children.

- **Section 276(2)(c):** This sub-section previously prohibited the Court from making a protection order that has the effect of removing a child from the care of the child's parent unless the Court considers the making of the order is in the best interests of the child. Although the Court is already under a "best interests" obligation by virtue of ss.8(1) & 10 of the *CYFA*, it considers that reinstating s.276(2)(c) removes any argument that might be generated by its deletion.

- **Sections 276A(2)(d) & 276A(3):** The Court is concerned that the mandatory time limits imposed by these provisions may cause significant injustice to particular children for the reasons set out in our submission on s.287A and amended s.296 below.

Abolition of Interim Protection Order

Section 32 of *Act 61/2014* abolishes interim protection orders. Although in recent years these orders could be made in breach proceedings[9], interim protection orders are more usually made in the early part of a case. They are of a very limited duration – a maximum of 3 months. They can only be made in cases where "it is desirable, before making a protection order, to test the appropriateness of a particular course of action" [s.291(1)(b)].

The Court considers interim protection orders are beneficial orders in facilitating resolution of disputed protection applications and, being of short duration, do not undermine the intent of the amendments to facilitate permanency. The Court is concerned that their abolition will undermine the ability of the parties to reach child-centred agreements that involve testing the appropriateness of a particular course of action.

There is every reason in many cases why the best interests of the subject child require a particular course of action to be tested while the case remains under the overall authority of the Court. Accordingly IPOs are not uncommonly made, as is evident from the Court's statistics.

Year	IPO's Made	Refusal to make protection	Total protection

[9] This was not available under the *CYPA* but has been available under the *CYFA* since 23/04/2007.

		order on IPO expiry	orders
2003/04	887	155	3539
2004/05	943	157	3961
2005/06	997	155	3986
2006/07	973	118	4368
2007/08	891	77	4664
2008/09	893	98	4732
2009/10	795	74	4533
2010/11	871	87	4757
2011/12	881	87	5029
2012/13	920	88	5688
2013/14	**1131**	**134**	**5901**

Although the proportion of interim protection orders to overall protection orders has reduced in recent years, they still comprise 19% of the total. In our view, in appropriate cases it is well worth being able to test out the appropriateness of a particular course of action, especially where the result is a significant number of cases in which either no order or a less intrusive order than a custody or guardianship to Secretary order results.

The Court notes that the PVVCI report did not recommend the abolition of interim protection orders, merely that they be renamed "Temporary Supervision Orders" or "Temporary Care Orders" depending on whether or not the child remains in parental care.[10]

The Court does not consider the removal of judicial discretion consequent on the abolition of interim protection orders will reduce delay or promote a child's stability. Further, the abolition of interim protection orders removes one very useful mechanism by which the Court has been able to resolve cases by conciliation or by judicial conferencing. As the Court submission outlines, the absence of such flexible orders has the real potential to undermine less adversarial court processes with the potential to harm the relationships between the parties. This in turn increases the risk of a negative indirect impact on the subject child.[11]

[10] Volume 2 of PVVCI report at p.402.

[11] This is notwithstanding s.215B of the *CYFA* which – like s.215(1)(d) – appears not to dispense with Court's obligation to accord procedural fairness to all parties: cf. *Weinstein v Medical Practitioners Board of Victoria* [2008] VSCA 193 at [28]-[29] per Maxwell P (with whom Weinberg JA agreed).

Abolition of custody to third party & supervised custody orders

The Court's statistics clearly demonstrate the utility of the extendable supervised custody order which dates from amendments to the *CYFA* introduced on 23/04/2007, in stark contrast to the custody to third party order:

Year	Custody To Third Party Orders Made	Supervised Custody Orders Made	Supervised Custody Orders Extended	Custody To Secretary Orders Made
2003/04	8	11	No power to extend	963
2004/05	9	3	"	1155
2005/06	8	2	"	1096
2006/07	9	29	0	1133
2007/08	8	151	6	1272
2008/09	12	202	52	1288
2009/10	4	233	72	1353
2010/11	4	289	87	1227
2011/12	7	330	107	1332
2012/13	8	453	126	1412
2013/14	**7**	**579**	**194**	**1389**

The PVVCI report recommended that:

- supervised custody orders be retained but modified;
- custody to third party orders be abolished.[12]

Despite this recommendation, the supervised custody order has been abolished by the legislative amendments. The absence of this option is also a matter of concern to the Court in its ability to facilitate resolution of disputed applications.

The Court understands that since 2006/07 many of the supervised custody orders have been administratively changed to supervision orders.[13] The above table demonstrates that less than 35-

[12] Volume 2 of PVVCI report at p.402.
[13] To be renamed family preservation orders.

40% of supervised custody orders were extended in the following year.[14] While some of the children subject to these orders will subsequently have been placed on custody to Secretary orders and a few on guardianship to Secretary orders, the Court anticipates that in a significant number of the 60-65% of orders which have not been extended, the children have either been reunified with a parent on a supervision order or on no order at all. On this basis, the Court considers that such orders are of utility in resolving disputed applications in a manner that does not generate undue delay or instability for most subject children, especially as nearly all children on supervised custody orders are placed with extended family members.

Custody to Third Party Order

The Court supports the abolition of the custody to third party order as it offered limited flexibility and did not feature in the armoury of orders that assisted in the resolution of disputed applications. Moreover, it did not permit any involvement by DHHS, an inherent contradiction in a so-called "protection order". As a consequence, it was hardly ever made.

Supervised Custody Order

The reason earlier given by DHHS for the abolition of supervised custody orders was:
"Supervised custody orders are not required as the intent of protection orders will be clearer and it removes the potential for delay in defining the objective of the intervention."[15]

In its third proposed change document DHHS continued to propose the abolition of supervised custody orders, giving the following reason:
"The Secretary will be able to place a child in the care of a third party under a family reunification or care by Secretary order. A family reunification order will serve the same purpose as the current supervised custody order for the child, as the intent will be to reunify the child with their parents. The care arrangements can be managed through case planning, consistent with the best interests and decision making principles. The Secretary will be able to authorize the carer to make specified decisions and to tailor the level of monitoring of the order as appropriate."[16]

This assumes that parents and children will be prepared to give up the certainty of specific care arrangements inherent in a supervised custody order.

The supervised custody order under the *CYFA* has been, in the Court's view, a most successful order and has provided a potent vehicle for settling court cases without the need for an evidence-based contest. When the *CYFA* came into operation on 23/04/2007, a supervised custody order became much more flexible and much more popular because-

- it became extendable; and
- it could be changed administratively to a supervision order on reunification of the child with a parent.

[14] This is a very rough calculation made on the conservative assumption that the supervised custody orders were made for the maximum period of 12 months. In reality the greater proportion is made for a period of less than 12 months so the figure of 35-40% is likely to be an over-estimate. However, it is the best we can do on the statistics currently available without undertaking an extensive file review which we do not have time to do.

[15] See DHHS' second proposed change document at p.2.

[16] At p.2.

As our submissions attest, the Court considers that the existence of a power to make a supervised custody order and a power to extend it are significant reasons why Conciliation Conferences have proved so successful in recent times and why a combination of Conciliation Conferences and Judicial Conferencing has resulted in the waiting time for a 5 day contested hearing in the Family Division being reduced from 28 weeks to 10 weeks.[17] Central to this is the confidence of parent(s) and child(ren) that the stability of the child(ren)'s care arrangements is ensured. Child, parent and carer are all assured by a supervised custody order that the Department cannot administratively remove the child from the Court-ordered carer unless it decides to reunify the child with the parent.
The certainty of a fixed non-parental carer is often an essential issue in the resolution of cases by conciliation. The concern of the Court is that the abolition of supervised custody orders will result in

- significantly fewer cases resolved by conciliation; and
- many more contested hearings in the Family Division of the Children's Court with all the negatives that that entails, including delay, potential harm to relationships between the parties as well as a lack of "ownership" of the order by parent(s) and/or child(ren); in part this will be because parents and/or children will feel that they have little or nothing to lose by contesting the Department's applications.

The system of Court orders is strengthened by having more flexibility than less because it enables orders to be tailored to a particular child's circumstances. The removal of judicial discretions has the potential to cause significant injustice to particular children. The Court believes that abolition of supervised custody orders constitutes a substantial weakening of the system and we ask that it be reconsidered.

Provided that the time limits in s.287A are able to be over-ridden in circumstances where it is in the best interests of the subject child to do so, the Court's concern about the abolition of supervised custody orders would be removed if the family reunification order was broadened to vest parental responsibility for the child and responsibility for the sole care of the child on either the Secretary or a non-parent as stated in the order, i.e. to combine supervised custody orders and custody to Secretary orders into the one legislative package. This would also accord with DHHS' wish to have "simplified protection orders".

Family Reunification Order (formerly Custody to Secretary Order)

Care by Secretary Order (formerly Guardianship to Secretary Order)

The 'best interests' principle in s.10(3)(a) of the *CYFA* requires the Court to give consideration 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.

The Court's statistics set out below demonstrate that 'minimum intervention' into a child's right to have his or her parent retain guardianship responsibilities has been respected by the Court over many years with the number of guardianship to Secretary orders made each year being between one quarter and one sixth of the number of custody to Secretary orders.

[17] This is the average current delay at Melbourne Children's Court for booking in a 5 day contested final Family Division hearing by evidence. Currently the booking delay for a shorter evidence-based contest is less than 10 weeks. Additionally – and most importantly – the Court is usually able to provide parties with time to run contests by submissions either on the day on which a subject child is placed in emergency care or within a very short time thereafter.

Year	Custody To Secretary Orders	G'ship To Secretary Orders
2003/04	963	277
2004/05	1155	263
2005/06	1096	292
2006/07	1133	302
2007/08	1272	258
2008/09	1288	261
2009/10	1653	225
2010/11	1227	273
2011/12	1332	288
2012/13	1412	239
2013/14	**1389**	**261**

Sections 287A & 296: Section 287A sets mandatory time limits for the period for which a family reunification order may be made. Section 296 sets similar mandatory time limits for the duration of the extension of a family reunification order. The Court is concerned that these mandatory time limits – together with the transitional provisions in s.4(b) of Schedule 5 to *Act 61/2014* – have the greatest potential to cause injustice to particular children and are likely to lead in certain instances to a conflict with the best interests provisions in ss.8 & 10. Why, for instance, should a child with a severe physical disability which makes it impossible for a parent to care for the child on a day to day basis, have his or her parent disenfranchised from making appropriate decisions about major long-term issues if the parent is capable of doing so? Not every child's case fits the new model created by *Act 61/2014*. Retention of judicial discretion would ideally enable an order to over-ride the time limits in ss.287A & 296 in circumstances where it is in the best interests of a particular child to do so.

The Court also notes that delay is often associated with requests made by DHHS to extend orders for 6 months or 12 months "to enable a permanent care assessment to be completed", often in circumstances where the subject child has been with the proposed permanent carer(s) for years. The mandatory time limits in s.287A & 296 do not address this issue. They merely take away important judicial discretions.

Far from reducing it, the Court expects ss.287A & 296 to increase delay. It is the experience of the Court that the ability to include conditions on orders – especially conditions relating to contact between children and their parents – is the single most potent way to resolve Family Division cases without the need for a contested hearing. Given that the Court has no power to include conditions on care by Secretary orders, it is expected that parents, children represented on the 'instructions model'[18] and sometimes children represented by an Independent Children's Lawyer[19] will be much

[18] See ss.524(1)(a), 524(1A) & 524(9) of the *CYFA*.

more inclined to contest cases because they have nothing to lose. Section 287A and the amendments to s.296 have created a situation where they may do better in a contest but they cannot do worse.

For the reasons stated above in relation to the abolition of interim protection orders and of supervised custody orders, the Court is concerned that s.287A and the amendments to s.296 will result in-

- significantly fewer cases resolved by conciliation; and
- many more contested hearings in the Family Division of the Children's Court with concomitant delay, potential harm to parties' relationships and lack of "ownership" of orders.

Finally, the Court notes that-

- s.287A and the amendments to s.296 do not appear to set any periods for an original or extended FRO if the child has already been in out of home care for a cumulative period of 24 months or more under one or more of the orders specified in s.287A(1); and
- the transitional provisions in ss.4 & 7(e) of Schedule 5 do not seem to cover every such eventuality.

Repealed s.297: This section gave the Court power, in determining an application to extend a custody to Secretary order or a guardianship to Secretary order which had been in force for more than 12 months, to extend the order for a shorter period than that provided by s.296 if the Court was satisfied that a permanent care order or similar order made by another child would be in the best interests of the child and that there was no likelihood of re-unification of the child with his or her parent. If the Court exercised that power, it was required by s.297(1)(f) to direct the Secretary to take steps to ensure that at the end of the extended order a person other than the parent applies to a Court for a permanent care or like order.

Given that the amending legislation seeks to reduce delay and increase certainty and stability for children, the Court considers that this provision remains of utility in reducing delay in the permanent care process. Although s.297 was infrequently used, consideration should be given to reinstating it.

Permanent Care Order

The third DHHS' proposed change document included the following two recommendations-

"Conditions will not be able to be attached to a permanent care order. This reflects the fact that permanent carers have parental responsibility for the child and will be making decisions concerning the child."

"Permanent carers will be assessed for commitment to supporting and encouraging the child's continuing relationships and contact with their birth parents, birth siblings and others significant to the child in the child's best interests.[20]

[19] See ss.524(4) & 524(11) of the *CYFA*.

[20] In the second DHHS' proposed change document this was expressed somewhat differently: "The onus is on permanent carers to make arrangements for the child's contact with the birth parents, child's siblings and others significant to the child."

It should be noted that the PVVCI report considered the role of the Children's Court in the context of statutory orders and conditions which attach to those orders. The PVVCI found that it is the proper role of the Children's Court to determine conditions that fundamentally alter the relationship between parents and their children or between children and siblings or other people significant in children's lives. The PVVCI found that conditions relating to child-parent contact were fundamental to the exercise of the Children's Court jurisdiction in this regard.[21]

In an earlier submission to the former Attorney-General, the Court responded to these proposals in the following terms:

"Sections 321(1)(d) & 321(1)(e) of the CYFA presently provide that a permanent care order must include conditions that the Court considers to be in the best interests of the child concerning-
(d) contact by the child's parent; and
(e) contact by the child's siblings and other persons significant to the child.

If ss.321(1)(d) & 321(1)(e) are revoked, there is highly likely to be a negative impact upon the willingness of biological parents either to consent or not to oppose permanent care orders. [The recommendations] are therefore likely to achieve the reverse of what is sought to be achieved, namely creating more contested hearings and slowing the progress of the case rather than expediting it.

There does not appear to be any provision for review of the exercise of a 'moral obligation' by the permanent carer if he or she does not make contact arrangements.

We consider that the absence of specific Court-ordered conditions in relation to contact may also prove to be a disincentive for some permanent carers, for such conditions offer some certainty for carers and children as well as taking away from carers what could be expected to be an often onerous obligation to negotiate contact arrangements for the child.

In its fundamentals, a permanent care order is akin to an adoption order under the Adoption Act 1984 (Vic). Section 59A of that Act provides for conditions to be made relating to the access to the child as specified in the order and also for information to be provided to the biological parent via the Secretary in relation to matters specified by the order, i.e. school progress, health progress, etc.

By contrast with s.59A of the Adoption Act, [the recommended] changes to the CYFA would remove conditions regarding parental and sibling contact. We have serious concerns about the ensuing misalignment. Both Acts provide similar outcomes for children. The proposed changes raise issues of concern similar to those which were addressed by amendments to the Adoption Act some years ago whose purpose was to address issues about adopted children losing biological identity and losing information about birth parents. Biological identity and identification and knowledge of biological relationships are universally recognised as important to a child's wellbeing. The amendments proposed by DHHS are troubling for the removal of certainty as to that knowledge/familiarity.

Further, we believe that [the recommendations] are contrary to the spirit and intent of Article 9.3 of the United Nations Convention on the Rights of the Child: "Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."

[21] Volume 3 of PVVCI report at p.402.

We understand that permanent carers play a vital role in the child protection system and that the Court needs to be mindful not to impose excessively onerous conditions on them. Nevertheless, the Court must have regard to the "best interests" provisions in the CYFA and would need to be satisfied in every case that the best interests of the child would be served by placing the onus to negotiate contact arrangements on the permanent carers alone."

The amendments to s.321 effected by *Act 61/2014* now include provisions that the Court-

"must include a condition that the person caring for the child must, in the best interests of the child and unless the Court otherwise provides, preserve-

(i) the child's identity and connection to the child's culture of origin; and
(ii) the child's relationship with the child's birth family;[22] and

may include conditions that the Court considers in the best interests of the child concerning contact with the child's parent which may provide for contact up to 4 times a year."[23]

The amendments have not affected s.321(1)(e) which gives the Court discretion to include conditions concerning contact with the child's siblings and other persons significant to the child.

However, notwithstanding the inclusion of s.321(1A) – allowing additional parental and/or sibling contact by agreement over and above contact ordered by the Court pursuant to ss.321(1)(d) & 321(1)(e) – the substantial limitation to judicial discretion in ordering contact between a child and a parent imposed by amended s.321(1)(d) is likely to result in-

- significantly fewer cases resolved by conciliation; and
- many more contested hearings in the Family Division of the Children's Court with concomitant delay, potential harm to parties' relationships and lack of "ownership" of orders.

The Court also believes that s.321(1)(d) is attempting to impose a 'one size fits all' legislative package on two very different factual circumstances. It is our experience that in most kinship permanent care orders there is significantly more contact between child and parent than 4 times a year and that it is in the best interests of the subject child that that should occur. For non-kinship permanent care orders the Court understands there are, on average, 4 to 6 contacts per year. It is understandable that this should be so.

In reality, the five considerations to which the Court must have regard set out in new s.321(1B) underpin the orders that the Court has long been making, orders which reflect the fact that the extended family structure under a kinship permanent care order is generally likely to be more inclusive of a parent than under a non-kinship order. The evidence of Ms Beth Allen to the Committee on 19/06/2015 is that "approximately 60% of children who are placed in out of home care are placed in kinship care". The Court asks that consideration be given to removing the limitation on judicial discretion in s.321(1)(d), at least in cases of kinship permanent care orders. In this regard, the Court is particularly concerned about the impact on aboriginal children under permanent care orders of limiting parental contact to a maximum of four times per year.

[22] Added s.321(1)(ca) of the *CYFA*.
[23] Amended s.321(1)(d) of the *CYFA*.