Submission

Victorian Legal and Social Issues Committee Inquiry

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

July 2015

For further information in relation to this submission contact:

Julian Pocock
Director Public Policy and Practice Development
[redacted]

Introduction

Berry Street appreciates the opportunity to provide a written submission to the Parliamentary Legal and Social issues committee inquiry into *the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015*.

As we understand the terms of reference for the inquiry the committee is seeking views on

- *the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015* which if passed will overturn the legislative amendment passed in 2014 to section 276(b) the Children, Youth and Families Act 2005. Under section 276(b) the Children's Court must not make a child protection order that has the effect of removing a child from the custody of his or her parents unless the Court is satisfied by a statement contained in a disposition report that all reasonable steps have been taken by the Secretary to provide services necessary to enable the child to remain in the custody of his or her parent. This provision was removed from the 2005 Children, Youth and Families Act in 2014 by the Children, Youth and Families amendment (Permanent care and other matters) bill with effect from March 2016, and
- the extent to which *the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015* along with current legislation will protect vulnerable children

Response to terms of reference

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

Berry Street supports the *Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015* and believes it is in the best interests of children that the legislation is passed.

We support independent judicial decision making through the Children's Court to determine;

- the best interests of children in need of protection
- the appropriate care and protection orders to apply to families and children where children are in need of protection
- the conditions and time periods for those orders including periodic review
- the extent to which the rights of children and young people are being upheld within the child protection and OOHC systems

It is in the best interests of children for there to be strong and independent oversight and monitoring of the child protection and Out-of-Home Care (OOHC) systems. This should include:

- Oversight and periodic review by the Children's Court of the circumstances of children in need of protection to determine their best interests, ensure their rights, including those conveyed through the UN Convention on the Rights of the Child, are upheld and to provide an appropriate legal framework for decision making
- Independent regulatory oversight, review and compliance auditing of the service standards within child protection and OOHC with the scope extending to all registered Community Service Organisations and to the Department of Health and Human Services to ensure that all OOHC placements are within scope
- Independent complaints handling mechanisms for children and young people in child protection and OOHC to ensure that children and young people can make complaints regarding their safety and well-being to an authorised person with no conflicting interest in OOHC service provision or placements

As recently as June 29th and 30th the Royal Commission into Institutional Responses to Child Sexual Abuse heard evidence for their Case Study on the current OOHC system from young people who are in or have just left care, from the Alliance for Forgotten Australians, representing former wards of the State, and from advocacy and support groups.

A dominant theme running through the hearings has been the lack of access children and young people in care have to an independent person or agency through which to make complaints or raise concerns.

> TASH: *I think for a lot of young people - for me, I was afraid to say anything. I didn't want I didn't have anybody to talk to where it wasn't going to go to somebody that I didn't want to know. I had my youth worker, who was a part of my leaving care service. She was the first person I spoke to. I trusted her because she wasn't a part of the government, like DCP, she was an individual and she didn't - she wasn't biased. She took my side - well, as best as she could.*[1]

In Victoria children in care still have no independent person they can raise concerns with about what's happening to them within the care system. While the Victorian Commissioner for Children and Young People has own motion powers to inquire into aspects of the OOHC system they have no specific powers, functions or resources to receive complaints from children and young people in care and act on those complaints.

Restoring the power of the Children's Court through reinstating sections 267(b) is a necessary, **but not sufficient measure**, to ensure there is appropriate independent monitoring and decision making to protect the interests of vulnerable children and families.

Extent to which the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015 along with current legislation will protect vulnerable children

As noted above Berry Street supports the reinstatement of section 276(b) of the 2005 Children Youth and Families Act. However that alone will not restore the level of protection that children and young people previously enjoy(ed) under the 2005 Children, Youth and Families Act.

Further even if all the amendments made to the 2005 Children, Youth and Families Act in 2014 through *the Children, Youth and Families amendment (Permanent care and other matters) bill* were rescinded, some significant deficiencies present in the 2005 CYF Act would remain.

There are a number of areas where child protection and OOHC legislative provisions remain deficient. These areas include:

- The Best Interest Principles and the Rights of Siblings in Child Protection and OOC
- Over representation of Aboriginal children in care
- Impediments to Permanent Care
- Legal representation of children and young people
- Support and assistance for care leavers

The Best Interest Principles and the Rights of Siblings in Child Protection and OOHC

The 2005 Children, Youth and Families Act and the *Children, Youth and Families amendment (Permanent care and other matters) bill* were opportunities to bring some long-needed strategic coherence about how best interests are defined for children in out-of-home care or the subject of child protection proceedings; and to recognise, formally and at law, siblings as family, with rights to affiliation and co-placement.

[1] See http://www.childabuseroyalcommission.gov.au/case-study/cde18d1b-fade-43f4-83f4-46e9af48b543/case-study-24,-march-2015,-sydney. Transcript Day 142, June 29th

The 2005 Act as originally passed and as amended in 2014 dispenses with the rights of siblings when their parents' rights are terminated or suspended via child protection orders.

The amended 2005 Children, Youth and Families Act still contains no caveats about the separation of siblings in care, nor, remarkably, no additional provisions across all the revised set of child protection orders to provide for;

- mandated co-placement of siblings
- requirements to incorporate the preservation of sibling relationships and reunification of siblings as a central components of family preservation and family reunification orders, policy and practice
- access to and contact with each other for separated siblings
- coordinated and integrated case planning for siblings in child protection and OOHC

This is diametrically opposed to legislative developments of the past decade in the USA and UK highlighting that Victorian child protection legislation has fallen behind significant developments in other jurisdictions.

New York legislatures in particular have specified that resources cannot be a reason to justify the separation of siblings in care while other states have mandated a Child Placement Bill of Rights which "…makes the maintenance of sibling contact a responsibility…it is not an option."

In the United Kingdom legislative reforms in 2014 included within the amended UK Children's Act mandate that all care plans where siblings have been separated in care must include sibling reunification plans and that when siblings cannot live together access and contact is to be maintained, no matter where the children live geographically.

Regrettably the original drafting of the 2005 Children, Youth and Families Act and the most recent amendments to the Act have ignored the plethora of research which maintains that placement stability in out-of-home care is greatest when siblings are co-placed and that attachment to carers is greatest in co-placed siblings. Conversely research suggests that siblings separated in care report enduring grief and loss reactions, worry about siblings and a longing to be together. Importantly research by Australians Tarren-Sweeney and Hazell (2005) with thousands of children and young people in out-of-home care found that the worst mental health outcomes were for siblings placed apart, in particular sisters.

As originally drafted and now amended Section 10 of the 2005 Children, Youth and Families Act *Best Interests Principles* does not adequately describe what these best principles are nor in 10 (2) or any other part of the Act describe what children's rights are that must be protected.

Section 10 (2) states that;

> *When determining whether a decision or action is in the best interests of a child, the need to protect the child from harm,* ***to protect his or her rights*** *and to promote his or her development must always be considered*

Berry Street believes that the Act needs to provide some definition and guidance on what constitutes a child's rights in order for decision makers to take the protection of those rights into account in their decision making. This definition should:

- specifically reference and support the United Nations Convention on the Rights of the Child
- take account of the United Nations Guidelines for the Alternative Care of Children (see UN General Assembly resolution A/RES/64/142)
- referr specifically to the rights of siblings to be co-placed and have their sibling relationships developed, supported and maintained.

Currently Section 10 Best Interests Principles (3) (q) states;

> *The desirability of siblings being placed together when they are placed in out-of-home care*

This wording has proven insufficient to ensure siblings are co-placed in all but exceptional circumstances and is inconsistent with international legislative changes to ensure that it is a (rebuttable in exceptions) presumption that it is always in children's best interests to be co-placed with their siblings.

The use of the term "desirable" is at odds with section 10 *Best Interests Principles* and the protection of their rights to be with family whenever possible.

There are a number of other aspects of *the Children, Youth and Families amendment (Permanent care and other matters) bill* which were deficient and inadequate in relation to supporting siblings in care. These include the following;

- Section 289 Care by Secretary Order does not compel sibling co-placement or contact/access arrangements
- Section 290 Long term care order does not compel sibling co-placement or contact/access arrangements
- Section 319 (1) (e) Permanent Care orders "***may*** *include conditions that the Court considers in the best interests of the child concerning contact with the child's siblings…"*

The use of the term "may" is inconsistent with best interests, it should be a presumption that sibling contact is in children's best interests unless definitively proven otherwise.

The wording of section 321 (1) (1B) clearly notes that the Court before acting under Section 319 to place a condition on a permanent care order relating to sibling contact the Court must have regard to the primacy of the child's relationship with the child's permanent care family. This is clearly privileging the child's relationship with a permanent carer over their relationship with their siblings, noting that sibling relationships are the longest relationship of most people's lives. Berry Street contends that it is wrong for child welfare legislation to prescribe that relationships with carers are to be privileged over relationships between siblings.

The Best Interest Principles should be further strengthened by specifically including siblings, as indicated in bold, in the wording of Sections 10(3)(b*) strengthening and promoting family relationships* ***including with siblings;*** 10(3)(h) *if a child is to be removed consideration is to be given first to the child being placed with an appropriate family members* ***and to the co-placement of siblings*** and 10 (3)(i*) the desirability when a child is removed from his or her parent, to plan the reunification of the child with his or her parent* ***and siblings***

In our submission to the Protecting Victoria's Vulnerable Children Inquiry (the Cummins Inquiry) Berry Street made ten recommendations in relation to the reform of the 2005 Children, Youth and Families Act, copy attached as appendix one.

Specifically in response to the alarming and ongoing concerns relating to the sexual exploitation and other forms of harm that children can be exposed to in residential care services Berry Street proposed an amendment to the Best Interest Principles.

This proposed amendment was to ensure that prior to the placement of a child or young person into residential care, any potential harmful impact on children already in that residential care service, would be assessed to determine if proceeding with the placement was in the Best Interests of all the children not just the additional child being moved into the residential service. Inappropriate co-placement of children in residential care, particularly where a child or young person with problem sexual behaviours is placed with children, is of increasing concern to Berry Street.

Committee members heard evidence for this inquiry from the Commissioner for Children and Young People, Mr Bernie Geary, on his own motion inquiry into sexual exploitation and sexual abuse of children in residential care. The Royal Commission into Institutional Responses to Child Sexual Abuse has also examined these issues.

Berry considers that an additional clause should be added to Section 10 as follows:

> *that in applying the best interests principles to decisions relating to children and young people the Secretary must consider the impact of a decision on the best interests of other children on Child Protection orders or in OOHC; including children currently placed by the Secretary in a residential care unit in which the Secretary is seeking to place another child or young person*

Over representation of Aboriginal children in care

It is well documented that Aboriginal and Torres Strait lslander children are over-represented in Child Protection and Out-of-Home Care. Factors include inter-generational trauma and family poverty.

Overlaying these structural inequities are significantly higher birth rates, significantly lower life expectancy and the legacy of past practices of child removal and family separation. Part of that legacy is a diminished level of child rearing knowledge and parenting experience.

Berry Street's view is that the most important area of reform relating to Aboriginal and Torres Strait Islander children is to support and accelerate the development of Aboriginal and Torres Strait Islander agencies and approaches to provide culturally based services for children and families. It is not sufficient to merely transfer existing OOHC and other child welfare programs and services from State and Territory Departments and from mainstream agencies (such as Berry Street) to Aboriginal agencies, though this is important. It is necessary to transform OOHC and other child welfare program to models of practice and service delivery that are consistent with Aboriginal and Torres Strait Islander child rearing practices, family and kinship systems and the particular circumstances of urban, rural and remote communities.

In November 2013 Aboriginal agencies in Victoria in partnership with non-Indigenous OOHC services and the Victorian Commission for Children and Young People provided a submission to the Victorian Government in support of a five year plan for Aboriginal children in OOHC. An updated submission was provided in October 2014 and as yet the Victorian government is yet to finalise and release a plan.

The 2013 submission notes the following[2]:

> *...At current levels, the rate of Aboriginal child removal in Victoria exceeds levels seen at any time since white settlement. This demands an immediate 'call for action' from the Victorian Government.*
> *The data suggests further deterioration in this trend with more increases expected in Aboriginal child removal in Victoria over the coming years. The Victorian rate of Aboriginal children in Out-of-Home Care is now amongst the highest in Australia and significantly higher than comparable international jurisdictions.*
>
> *For those Aboriginal children currently in longer term Out-of-Home Care placements, recent data indicates clear non-compliance with statutory requirements. An audit[2] completed in August 2013 of 194 Aboriginal children in Out-of-Home Care and subject to cultural support planning legislative requirements found that only 15 children (eight per cent) had a completed Cultural Support Plan...*

Presently the Victorian Department of Health and Human Services is the largest and Berry Street the second largest provider of OOHC placements for Aboriginal and Torres Strait Islander children in Victoria. While we willing and readily do all we can to care for Aboriginal children we know that ideally Aboriginal children should be cared for through local Aboriginal agencies that have the cultural knowledge and relationships with Aboriginal families and communities to ensure these children grow with a strong and positive sense of their cultural identity.

In 2014 agencies provided an updated submission to the Department of Human Services, Community Services Minister and Shadow Minister for Community Services. That submission includes preliminary results from *Taskforce 1000* an audit of the situation of all 1000+ Aboriginal children currently in care in Victoria. Taskforce 1000 is convened by the Aboriginal Commissioner for Children and Young People and the Secretary of the Victorian Department of Human Services.

Themes emerging from the taskforce area panels and case discussions confirm that in order to improve outcomes for Aboriginal children and young people in Out-of-Home Care there is a need take a more holistic look at their lives and

[2] *Koorie Kids: Growing Strong in their Culture*: FIVE YEAR PLAN FOR ABORIGINAL CHILDREN IN OUT OF HOME CARE. Submission from Victorian Aboriginal Community Controlled Organisations and Community Service Organisations. Page 3. November 2013. Available at: http://www.ccyp.vic.gov.au/downloads/submissions/submission-koorie-kids-growing-strong-in-their-culture-nov13.pdf

the family, service and community environment around children.

Preliminary findings from Taskforce 1000 included in the October 2014 update of *Koorie Kids: Growing Strong in their Culture* included[3]:

- *Intergenerational trauma driven by one or both parents and forebears association with child protection and Out-of-Home Care*
- *Past or present incarceration of one or both parents*
- *Family Violence and Alcohol and Drug misuse as a primary driver of children entering care*
- *Issues with separation from siblings, family and community for many years and a lack of coordination of sibling groups*
- *Wellbeing of parents and limited support to enable them to parent in the future (including support for family violence, alcohol and drugs, intergenerational trauma, mental health, sexual abuse, incarceration)*
- *Lack of wrap around approach and services to the vulnerable child and family needs in many areas*
- *Poor engagement of families and kin in decision making for their child through regular and systematic discussions*
- *Limited involvement of Aboriginal workers in assisting with decision making and planning for Aboriginal children and the absence of an Aboriginal workforce in child protection*
- *Impact of the selection of carers, limited placement options identified; lack of support for kinship carers and inadequate cultural training to non-Aboriginal carers*
- *Lack of training and knowledge of cultural support plans and best practice, lack of and inadequate cultural support plans and cultural connectedness strategies*
- *Adhoc approach to ensuring children have access to cultural connections and building relationships with other Aboriginal children.*
- *Barriers to permanent care*
- *The lack of awareness by carers of children's entitlements*
- *Limited response and opportunity for healing where there is high incidence of trauma experienced by children; including family violence, intergenerational sexual abuse, abuse and neglect*
- *Barriers to reunification not sufficiently addressed; including housing, trauma, intergenerational involvement with child protection, family conflict and grief through death*
- *Not enough consistent focus on children's development, support for children with a disability, programs to assist children with learning difficulties and education plans and outcomes*
- *Concerns with decisions of the children's court, as well as many children progressing to youth justice*
- *Where there is strong connections to kin and community, a good working relationship between the local ACCO and department; there is better exchange of information, more response to family and child needs and better quality of outcomes for children…. (Koorie Kids: Growing Strong in their Culture.* Nov 2014 update page 5.*)*

The Koorie Kids submission also notes that;

> *…While the sad, shameful legacy of the Stolen Generation is well documented, there is now a clear risk of an emerging Second Stolen Generation of Victorian Aboriginal children and young people through placement decisions that do not take into account all potential Aboriginal kin and by the low priority given to the development and monitoring of plans to ensure that the culture and heritage of Aboriginal children in Out-of-Home Care is recognised and nurtured. An Aboriginal child denied this is a victim of cultural abuse in care. For Aboriginal people identity and connection to family, community and culture through*

[3] October 2014 Update Koorie Kids: Growing Strong in their Culture: PLAN FOR ABORIGINAL CHILDREN IN OUT OF HOME CARE. Submission from Victorian Aboriginal Community Controlled Organisations and Community Service Organisations Page 3. October 2013. Available at: http://www.ccyp.vic.gov.au/downloads/submissions/submission-koorie-kids-growing-strong-in-their-culture-oct2014.pdff

> *meaningful relationships and experiences is fundamental to well being… (Koorie Kids: Growing Strong in their Culture.* Nov 2014 update page 3.*)*

And in commenting on the approach to reform highlights the need for strong partnerships and self-determination;

> *…Any response to be effective and long lasting must be built on strong partnerships between the whole of government, service sector and the community to a range of issues impacting upon reasons for children entering care, placement of children in care, plans for children whilst in care and leaving care, support of carers, healing of families, creating a strong self- determining sector response and keeping children safe, well and culturally strong…(Koorie Kids: Growing Strong in their Culture.* Nov 2014 update page 6.*)*

There are a number of areas of Child Protection and OOHC policy and practice that need to change if we are to do better for Aboriginal and Torres Strait lslander children. These include:

- Insufficient adherence to the Aboriginal Child Placement Principles,
- a failure to adequately recognize, evaluate and 'take to scale' Aboriginal service and program innovations and pilots that have made a significant positive impact,
- limited progress amongst non-Indigenous community agencies in developing and resourcing partnerships with local Aboriginal agencies, in pursuing cultural competence and training non-Aboriginal carers and in keeping Aboriginal children connected to their Indigenous family, community, culture and Country
- the failure by governments, over a number of decades, to fully support and fast track the development of Aboriginal child and family welfare services, programs and practice interventions,
- a lack of transparency across the Child Protection and OOHC systems in relation to the resources specifically directed to benefit Aboriginal children,
- a lack of full accountability towards outcomes achieved, including those relating to supporting children's family connections and cultural identity.

Berry Street has consistently advocated for stronger commitments by Governments and all other stakeholders to reduce the over-representation of Aboriginal and Torres Strait lslander children within the OOHC system and to support, assist and resource the management of OOHC placements for Aboriginal children by Aboriginal agencies. Clearly the task in Victoria is pressing and requires sustained commitment from all stakeholders.

In our submission to the Cummins Inquiry Berry Street recommended that a specific objective be added to the 2005 Children, Youth and Families Act focused on eliminating the over-representation of Aboriginal and Torres Strait Islander children in child protection and OOHC and an objective to halve the gap in developmental outcomes from Victoria's most disadvantaged communities by 2016.

The addition of these objectives to the Act would significantly improve the legislative framework for the healthy development, care and protection of Victoria's Aboriginal Children.

Impediments to Permanent Care

Central to this inquiry has been broadly shared concerns regarding the need to improve placement stability, improve the quality of care experienced by children and young people and improve permanent care arrangements for children and young people including more timely permanent care.

Berry Street shares all those concerns. Our analysis of *the Children, Youth and Families amendment (Permanent care and other matters) bill* is that it will not in and of itself significantly improve permanent care arrangements for children in need of protection, and that this package of amendments contains many poorly conceived amendments which are not in the best interests of vulnerable children.

In relation to permanent care it is a mistake to conclude that by establishing in legislation fixed timeframes by which a family preservation or a family reunification order can no longer be applied that this will drive a sustained increase in permanent care. Nor is it to be assumed that such fixed timeframes are always or

generally in the best interests of children in need of protection. All that these timeframes do is limit and prevent further case work directed towards family preservation or restoration.

Berry Street has strong reservations about the use of fixed timeframes as imposed by the new set of child protection orders contained in the *Children, Youth and Families amendment (Permanent care and other matters) 2014 bill.*

There are many case examples of children and young people being successfully and permanently reunified with their families well beyond the two year timeframes imposed through the 2014 legislation. This is particularly the case for Aboriginal children and Berry Street would refer the committee to the work of the Victorian Aboriginal Child Care Agency (VACCA) through their 'Guardianship Project' where VACCA has managed the guardianship of children and had success in restoring children to family who had been drifting in care or on permanent care or long term guardianship to Secretary orders.

The *2014 Children, Youth and Families (Permanent Care and other matters)* does retain appropriate restrictions on the making of a permanent care order in relation to Aboriginal children. Specifically section 323; Berry Street supports these restrictions that require that the Court must not make a permanent care order in respect of an Aboriginal child unless it has received a report from an Aboriginal Agency recommending the making of the order.

Berry Street recommends that an additional provision be added to section 65 (1) *Variation or Revocation of permanent care order*. This section lists the parties that can make an application to the Court to vary or revoke a permanent care order. Berry Street believes that given that a permanent care order for an Aboriginal child must have the consent of an Aboriginal agency then that Agency (or its replacement) should be able to apply to the Court to have the order varied or revoked. This would provide some additional assurance and oversight in relation to the appropriate care of Aboriginal children in permanent care placements.

The work of Commissioner Jackomos and Taskforce 1000 has also highlighted that up to 70% of Aboriginal children in need of care are not being placed with Aboriginal family as the practice of DHHS in identifying and engaging with extended Aboriginal family is extremely poor.

Fixed timelines for the consideration of permanent care orders, care to secretary orders and long term care orders given the circumstances described above may do little more than fast tracking Aboriginal children to a poor outcome where they are permanently disconnected from their family, community and culture.

Legislators need be mindful that permanent carers are volunteers and there are very substantial impediments to people, be they existing foster carers, extended family or others, volunteering to take on the permanent care of vulnerable children and young people. These impediments have been known and yet not addressed for some years.

Berry Street and other agencies canvassed these impediments to improving permanent care in submissions to the Cummins Inquiry, they persist and they include

- Granting of a Permanent Care Order results in the reduction in care allowance to the minimum – general placement rate. The DHHS funding arrangements for permanent care include that where foster carers 'convert' to a permanent care arrangement for children in their care, the payable care allowance drops to the lowest level of foster care allowance. This is despite the fact that their existing care allowance may be at the intensive or complex level in recognition of the care needs of the children. However logically, when the placement is converted from a foster placement the child's need don't suddenly lessen.
- DHHS withdrawal of placement support and direct assistance to carers. Community Service Organisations (CS0's) are contracted to provide support and supervision to foster carers including regular home visits, 24 hour on-call support, systemic advocacy, mentoring and advice on providing a home environment that will support children to heal and develop. Under current DHS arrangements all of this support and assistance from CSOs is withdrawn once a foster or kinship placement is converted to a permanent care placement.
- Management of contact arrangements with birth families. Under permanent care arrangements carers are expected to directly engage with birth families (in practice this is interpreted to mean birth parents), organise, facilitate and manage contact and access. Given the highly fractious and complex issues involved in the permanent removal of children from their families expecting carers to directly manage this interaction with no support is unreasonable.
- Inadequate carer allowances and a declining pool of available carers. Across the range of age related foster care allowances Victoria has the lowest foster care allowances of all States and Territories. Berry Street and the

> Foster Care Association of Victoria have publicly highlighted that the ongoing decline in foster care is having disastrous consequences for an increasing number of children. The most recent report from the Australian Institute of Health and Welfare (AIHW) Child Protection Australia 2013-14 released this year, revealed that in the last year over 610 foster carer households left Victoria's system while only 400 could be recruited. Victoria now has less than half the number of foster carers as NSW and this is the fourth year in a row that more carers have left Victoria's system than have been recruited. This decline is unmatched by any other State or Territory.

Berry Street emphasises the point that permanent carers are volunteers and legislative change will not in and of itself encourage more Victorians to volunteer to be permanent carers.

Berry Street shares the concerns expressed by the Law Institute of Victoria to this inquiry in relation to lack of review timelines and conditions being placed on Care to Secretary Orders and Long Term Care Orders. This is of grave concern given that for the majority of children and young people in OOHC no permanent care options are available and these children who require ongoing protection will be placed on child protection orders with no conditions, no periodic review by the Children's Court with the orders to remain in place until they either marry or reach the age of 18.

For very young children entering OOHC for whom a permanent care option is not available they face the prospect of spending most of their childhood and adolescence on child protection orders which are not scrutinized or reviewed by anyone other than the Secretary of DHHS. Given the ongoing concerns regarding the Departments capacity to allocate cases and case plan effectively for children Berry Street is concerned that the set of legislative arrangements and child protection orders contained in the 2014 bill may exacerbate drift in care.

In the context of the lack of an independent complaints mechanism for children and young people in OOHC this lack of regular oversight of orders by the Children's Court is particular concerning.

On balance Berry Street does not consider that the passage of the *2014 Children, Youth and Families (Permanent Care and other matters) Bill* will create the necessary improvements in placement stability, the quality of life they experience in OOHC or in permanency that children and young people need.

Legal representation of children

In 2013 the rights of children in need of care and protection to independent legal representation were unnecessarily restricted. The State Parliament passed *the 2013 Justice Legislation Amendment (Cancellation of Parole and other matters) bill*.

This legislation was developed in response to community outrage at the re-offending of violent adult offenders while on parole and the legislation was well received and supported. One of the 'other matters' contained within the bill which was not broadly canvassed was a series of amendments to the 2005 Children, Youth and Families Act, including to Section 524 Legal Representation, which removed the right of children under the age of 10 to be separately legally represented in the Family Division of the Children's Court.

As was the case with the *2014 Children, Youth and Families (Permanent Care and other matters) Bill* this approach to legislating in relation to vulnerable children lacks transparency and a commitment to open debate and discussion regarding what is in the best interests of vulnerable children.

Berry Street did not and does not support this restriction on the rights of children to independent legal representation. Prior to the amendments under section 524(2) the Court was empowered to make a judgment regarding the maturity of a child under the age of 10 and their capacity to give instructions to their legal counsel.

Berry Street refers to the Committee to a Children's Court case from 2007 [DOHS vs Mr & Mrs B; 2007 VcHC 1 Hearing date 03-06/12/2007, Presiding Magistrate Peter T Power].

In this case, transcript available from Children's Court website, a seven year old child, the oldest of three siblings clearly gave effective and clear directions to her counsel and articulated very effectively her needs and those of her siblings including for appropriate contact arrangements with their parents and each other.

> *In the afternoon of the third day he (legal counsel) had spoken to AB (seven year old girl and eldest of 3 children all in care) in his chambers. In response to questions about residence and access AB said that:*

> *She would like to see her father once each school holiday. She said I don't like Mum when she scares me. She wants to decide when she sees her parents. She does not want to live with Mum, Dad or Grandma.*
> *She knew that she could not live long-term with her current carer and seemed to accept that without apparent sadness.* ***She wants to live with CB & MB (her siblings) and whoever their carer would be****. She does not want to live with the paternal aunt and if CB stays with her she would like to see CB every Sunday when they don't have anything on. She would also like to see her maternal grandmother.*
>
> *AB also said to counsel that she did not care who signed consent forms for excursions and the like: I don't care who signs them. Dad or the carer can sign them - it doesn't matter.*

A reading of the transcript illuminates a number of things that are directly relevant to this inquiry.

It is clear that this seven year old child is able to give effective instructions to her legal counsel and that she was well placed to communicate her siblings needs and advocate for them. In contrast to her parents testimony she is able to reflect on and consider the needs of others. She comments that she wants to be placed with her siblings and that this is more important than who their carer might be.

The case considered the need and options for permanent care for the children and the presiding magistrate had this to say.

> *I agree with counsel for AB that it is unfortunate that the girls placement is not a permanent one. I also agree with him that it is not the fault of the Department. Nor is it the fault of the carers who " feel they are too old to provide a permanent placement". However the carers are not seeking to have the girls placed elsewhere immediately and for their part the girls are not wanting to return to their parents care even though they are aware that the carers are not able to provide care indefinitely*

This case highlights well that common impediments to permanent care are not related to legislation but the complexity of child protection work and the limited care options. It highlights that children under the age of 10 can and should have the right to separate legal representation and that siblings commonly place more importance on being placed together rather than with whom they are placed.

If this case were to proceed to the Children's Court under the legislative changes that take effect from March 2016 the Magistrate would never hear the important evidence of AB and would not be able to issue a permanent care order as no permanent carers are available. Nothing would be improved for these children by the amended legislation. The magistrate could either put them on a Care to Secretary Order or a Long Term Care Order until they were 18, they would likely remain with the same ageing carers and their case would never be reviewed by the Children's Court again.

Surely all children have the right to separate legal representation in what is after all called the Children's Court.

The provisions of the *2013 Justice Legislation Amendment (Cancellation of Parole and other matters) bill* that removed the right of children under the age of 10 to separate legal representation should be repealed.

Assistance for Care Leavers

> *"Yeah that's always baffled me like once the child turns 17 or 18....if they haven't got a unit or place to go to.....what happens to these kids.....homeless..... yeah that's what .....I used to think that I was just being stupid for thinking that's what happened.....that they were booted out into the gutter.....surely this isn't what happens.....but it is what happens to these kids....now I realise that is what happens.....if they haven't got a place to go to they've got nothing..... and that's not really going to help them." (Berry Street Residential care staff)*

The lack of systemic support for young people leaving care has dire consequences for their immediate and long-term well being, particularly young people leaving residential care. We know that many young people leave care

having not completed year 12, many leaving residential care have not completed year 10. Many young care leavers have no secure independent financial capacity, very tenuous links to the labour market, significant health issues and few, if any, adults that they can depend on for long term support.

The circumstances of young people leaving care, particularly those exiting from residential care, should be amongst the highest priorities for Government to address. It is an area where the resources of government agencies and departments beyond DHHS have a fundamental role. We must ensure that young people leaving care are amongst the highest priorities for remedial and ongoing support and assistance in relation to their education, employment, housing and health needs.

Berry Street notes that the *2014 Children, Youth and Families (Permanent Care and other matters) bill* amended the responsibilities of the Secretary under Section 16(g) which outlines the assistance that can be provided to a care leaver. The amendments were technical and consequential amendments inserting the term; the Secretary has had parental responsibility for into relevant clauses.

Had the development of the *2014 Children, Youth and Families (Permanent Care and other matters) bill* included an exposure draft it would have been possible to highlight the needs of care leavers and the need for legislative reform to ensure **all care leavers** receive the support envisaged under section16(g).

A simple amendment to Section 16(g) which currently reads *"to provide or arrange for the provision of services to assist in supporting a person under the age of 21 years of age to gain the capacity to make the transition to independent living"* to read "*to provide or arrange for the provision of services to assist in supporting **all persons** under the age of 21 years of age to gain the capacity to make the transition to independent living"*

Summary and Conclusion

As noted above Berry Street supports the *Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015* and believes it is in the best interests of children that the legislation is passed.

The terms of reference also invite comment and responses on the extent to which current legislation will protect vulnerable children. Berry Street has summarized our concerns in relation to the current legislation focusing in particular on the *2014 Children, Youth and Families (Permanent Care and other matters) bill;* and providing some comments on provisions of *the 2005 Children, Youth and Families Act*.

In summary Berry Street does not consider that the passage of the *2014 Children, Youth and Families (Permanent Care and other matters) Bill* will create the necessary improvements that children and young people need in OOHC need in relation to placement stability and permanency or in the quality of life they experience in OOHC.

Consultations in relation to the 2014 Children, Youth and Families (Permanent Care and other matters) were unnecessarily restricted, secretive and disingenuous in that they did not provide stakeholders with specific details on the legislation. Berry Street's view is that such fundamental reform of our child protection laws should have included the development of a discussion paper and exposure draft legislation prior to the finalization of a bill to introduce into Parliament.

In relation to the proposed review of the provisions of the 2014 Children, Youth and Families (Permanent Care and other matters) bill which take effect from March next year Berry Street recommends that the review be broad, cover all the provisions of the 2005 CYF Act relating to child protection and OOHC and commence immediately. There are many matters about which the 2014 bill was silent that require review and reform; and there are already a substantial number of areas of the 2014 bill that have been identified as problematic and deficient, such as the lack of provisions for the co-placement of siblings. As we have also noted the rights of children under 10 to independent legal representation in the Family Division of the Children's Court should be reinstated as soon as possible. Amendments to support the co-placement of siblings and to reinstate the rights of children need not wait until a review scheduled for the second half of 2016.

Berry Street appreciates the opportunity to contribute to the work of the Legal and Social Issues committee and looks forward to receiving the Committee's final report.

Appendix One: Berry Street recommendations to 2010/11 Cummins Inquiry on legislative reform

Children, Youth and Families Act (2005)

4.1 That 2005 Children, Youth and Families Act be amended as follows:

1. objects and principles be amended and broadened as outlined in the combined community sector agency submission,
2. a specific objective be included to halve the gap in developmental outcomes, as measured by the AEDI, for children from Victoria's most disadvantaged communities by 2016,
3. the inclusion of an objective to eliminate the over representation of Aboriginal children in the Child Protection system and OOHC,
4. provision be made for care protective applications and protection orders to be made or remain in force in relation to young people up until the age of 18, rather than 17 as it currently stands,
5. section in relation to Best Interests Principles to be amended to specifically include;
    a. that in applying the principles to decisions relating to children and young people the Secretary must consider the impact of a decision on the Best Interests of other children on Child Protection orders or in OOHC; including children currently in a residential care unit in which the Secretary is seeking to place another child or young person, and that
    b. being supported to safely maintain contact, connection and relationships with siblings is fundamental to the lifelong Best Interests of children and young people and must be provided for in any care and protection order or OOHC placement.
6. a provision that all permanent care orders include a condition that contact be maintained between siblings
7. a provision requiring that financial and other forms of assistance must be provided at a minimum until age 21 for the care, support, accommodation and development of children and young people that are or have been in the custody of, or under the guardianship of, the Secretary, and where in the best interests of children and young people can continue up to age 25
8. the inclusion of a section detailing outcomes for children and young people in OOHC consistent with the National Standards for OOHC as agreed by all states and territories
9. a provision for the establishment of an Independent Commissioner for Children and Young People, and an Aboriginal Children's Commissioner, with combined their functions and powers to include but not be limited to;
    a. establishing an outcomes based regulatory framework for monitoring the performance of registered community based services and the Department of Human Services in their provision of OOHC services, Child Protection functions and other activities under the Children, Youth and Families Act
    b. reporting to Parliament on matters including but not limited to;
        i. the outcomes being attained for children and young people in OOHC,
        ii. the extent to which children and young people in OOHC enjoy their rights as detailed in the Charter of Rights for Children and Young People in OOHC

iii. the application in practice of the Best Interests Principles and how the principles and their application can be improved

iv. the application in practice, and in all decisions relating to Aboriginal children in need of care and protection, of the Aboriginal Child Placement Principle and how the principle and its application can be improved

10. a provision that Commissioners for Children and Young People conduct an independent public review of the act by the end of 2014 and table in parliament every two years thereafter a report on the status of vulnerable children and young people including any recommended amendments to the act or other legislation; and a provision
11. to transfer responsibility for the issuing and review of Child Protection orders from the Children's Court to Child Protection Panels as detailed in the combined community sector submission