

Scrutiny of Acts and Regulations Committee
c/o Helen Mason
Acting Executive Officer
Parliament House

By email: helen.mason@parliament.vic.gov.au

14 February 2013

Dear Committee Members

Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013

The Victorian Council of Social Service (VCOSS) is writing to express serious concerns about amendments proposed in the *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013*, specifically section 3 of the Bill - amendments relating to the legal representation of children.

The Bill makes amendments to sections 524 and 525 of the *Children, Youth and Families Act 2005* in relation to proceedings in the Family Division of the Children's Court to clarify the circumstances in which:

- (i) a child may be legally represented; and
- (ii) A child is sufficiently mature to give instructions to a legal practitioner.

VCOSS is concerned that:

- the Bill is inconsistent with the rights of children protected by the United Nations *Convention on the Rights of the Child*;
- Clause 10 and 11 of the Bill are inconsistent with the rights of children protected by the *Charter of Human Rights and Responsibilities Act 2006*;
- the *Statement of Compatibility* does not address incompatibility with section 8 of the Charter.

Right to express views in legal proceedings

The proposed amendments limit the rights of children under 10 years of age to participate in legal proceedings. VCOSS supports the current provisions of the *Children, Youth and Families Act 2005* (s524) (CYFA) that set up a statutory regime where children who are mature enough to give instructions (presumed to be at age 7) are represented by lawyers acting on direct instructions.

The construction of “mature enough to give instructions” was decided in the matter of *A & B v Children’s Court of Victoria & Ors [2012] VSC 589* (5 December 2012) as requiring the court to have regard to considerations wider than the child’s age alone. This requires an assessment of the child’s development and capacity to give instructions. This capacity is dependent on whether the child can understand the nature of some or all of the issues in the proceeding and is able to appreciate the consequences which may follow from the instructions that are given, and the decisions made by the Court.

The *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Bill 2013* provides that a child of 10 years or older is considered mature enough to give direct instructions to a legal representative. A child who is less than 10 years will no longer be considered mature enough to give direct instructions to a legal representative and will be represented on a best interests basis by the Department of Human Services. There is no capacity to challenge this presumption except by the Court in ‘exceptional circumstances’ and even then, children cannot provide direct instructions but will be represented by a lawyer on a best interests basis.

This change is a diminution of children rights to be heard in legal proceedings. These rights are protected by Article 12 of the *Convention on the Rights of the Child* which provides that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

In its general comment on article 12, the UN Committee on the Rights of the Child indicates that States are to presume that children have the capacity to form autonomous opinions and that they have a right to express them.¹

¹ General Comment No 12 (2009): *The right of the child to be heard*, UN CRC, 51st sess, UN Doc CRC/C/GC/12, 20 July 2009, [20].
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The Committee also stressed that this right should not be limited due to the age of the child and that it is not necessary for a child to have a comprehensive understanding of all aspects of the matter impacting him or her, but merely needed 'sufficient understanding' to be able to form their own views on it.²

It is also important to note that the Committee has determined that Article 3 of the Convention, which provides that the best interests of the child shall be a primary consideration in all action concerning the child, cannot be applied without allowing the child to be heard.

In the Statement of Compatibility tabled with the Bill on 7 February 2012, The Hon. Andrew McIntosh, Minister for Corrections, states that:

It is not clear that article 12 of the CROC informs the interpretation of charter act section 17(2) -- the Supreme Court in *A and B v. Children's Court* [2012] VSC 589 did not have to decide the point. Even if it does, nothing in the charter act or article 12 of the convention prescribes any particular formula for providing the child with an 'opportunity to be heard' in the context of family division proceedings. The right does not require that a child is separately represented or represented by a lawyer at all, but rather, that the child has an opportunity to participate by having their views ascertained and taken into account -- see *ZN v. YH* (2002) 167 FLR 366 at [112]-[113].

As an international human rights instrument, CROC cannot prescribe the mechanisms by which these rights are to be realised. Victoria has a long standing tradition of providing separate legal representation for children assessed as mature enough to provide instructions and this practice has been recently reaffirmed in the Supreme Court decision in *A&B v Children's Court of Victoria*.

Charter of Human Rights and Responsibilities Act 2006

VCOSS contends that the Bill limits the following rights outlined in the *Charter of Human Rights and Responsibilities Act 2006* (Charter):

1. Fair hearing s.24(1): clauses 10 and 11 of the Bill limit the rights of children aged under 10 years to a fair hearing as they will no longer have a right to legal representation in protection proceedings that affect them (except on a best interest basis in 'exceptional circumstances').
2. Equality before the law s 8(3): the Charter provides that every person is entitled to equal protection of the law without discrimination. The proposed amendments are age discriminatory as they set an arbitrary limitation on the ability of children under ten years of age to participate independently in the legal proceedings rather than

² Ibid [21].

based on maturity as is current practice. It is also of concern that *the Statement of Compatibility* fails to address the limitation to section 8 of the Charter.

3. Protection of Best interests s.17(2): Section 17 of the Charter establishes the right of the child, without discrimination, to protection in his or her best interests. This reflects Article 3 of the *Convention on the Right of the Child*. The Charter requires that decisions be made in the best interests of the child. As outlined above, article 3 of CROC, makes it clear that the best interests of children includes the protection and promotion of their human rights.

Protecting Victoria's Vulnerable Children Inquiry

VCOSS believes assessments should continue to be made on a case by case basis as to whether a child is mature enough to instruct a lawyer, rather than according to an arbitrary age. However, we appreciate that the *Report of the Protecting Victoria's Vulnerable Children Inquiry* (PVVC) made the recommendation that:

53. The *Children, Youth and Families Act 2005* should be amended to provide that:

- A child who is under 10 years of age is presumed not to be capable of providing instructions unless shown otherwise and a child who is 10 years and over is presumed capable of providing instructions unless shown otherwise;
- A child who is not capable of providing instructions should be represented by an independent lawyer on a 'best interests' basis; and
- Other than in exceptional circumstances, a child is not required to attend at any stage of the court process in protection proceedings unless the child has expressed a wish to be present in court and has the capacity to understand the process.

We are supportive of the idea that a child is not required to be present in court where they are assessed as not mature enough to participate in the proceedings or may be harmed by that participation. However, reform must be balanced by the requirements of the CYFA.

Section 10 of the CYFA provides that in determining decisions in the best interest of the child, the court must consider a number of factors including (d) the child's views and wishes, if they can be reasonably ascertained.

Section 522 of the CYFA provides that the Children's Court satisfy procedural guidelines to allow the child to fully participate in proceedings and consider any wishes expressed by the child.

The critical difference between the PVVC recommendation and the Bill under consideration is that the PVVC recommendation allows for independent legal

representation under age 10 on either a best interests basis or a direct instructions basis according to an assessment of maturity.

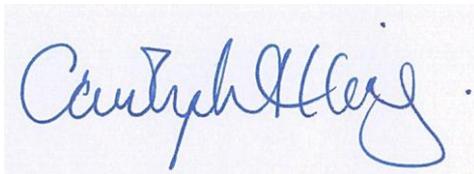
The Court already makes orders based on the best interests of the child taking into account the views expressed by child, the views of the parents and advice from the Department of Human Services, the Children's Court Clinic and any other witnesses. The Best Interests principle is therefore inherently part of the legal process and is diminished without the ability of the child to express their particular views independently.

Conclusion

VCOSS does not support the implementation of the proposed legislation as it limits the capacity of children under 10 to have an independent voice in the proceedings. We hold the view that every child or young person who is a party to a protection application should be separately represented on either a best interests model, if they lack requisite maturity, or an instructions model, where they have requisite maturity.

Please contact Paula Grogan, Senior Policy Advisor, VCOSS t: 9235 1026 for further discussion.

Yours Sincerely



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