

Scrutiny of Acts and Regulations Committee  
Parliament House  
Spring Street  
East Melbourne VIC 3002

14<sup>th</sup> February 2013

By email: [helen.mason@parliament.vic.gov.au](mailto:helen.mason@parliament.vic.gov.au)

Dear Committee Members,

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

Youthlaw is writing to express our grave concerns regarding amendments proposed in clauses 10 and 11 of Part 3 of the *Justice Legislation (Cancellation of Parole and Other Matters) Amendment Bill 2013* (Bill) to sections 524 and 522 of the *Children, Youth and Families Act 2005* (CYFA) relating to the legal representation of children.

Youthlaw is extremely concerned that:

1. Clause 10 and 11 of the Bill are inconsistent with several fundamental human rights of children protected by the *Charter of Human Rights and Responsibilities Act 2006* (Charter);
2. the Statement of Compatibility is inadequate and fails to address the Bills incompatibility with sections 8, 17(2) and 24 of the Charter, and
3. the amendments proposed to the *Children, Youth and Families Act 2005* impose unreasonable limits on these rights.

**1. Infringement of Charter rights**

Youthlaw is concerned that the Bill limits the following Charter rights of young people in protection proceedings:

- the right to legal representation inherent to their right to a fair hearing in section 24 of the Charter,
- equality before the law under section 8 of the Charter, and
- protection of their best interest under section 17(2) of the Charter.

**Section 24 – fair hearing**

Youthlaw is concerned that clauses 10 and 11 of the Bill limits the rights of young people to legal representation in child protection proceedings, protected by section 24(1) of the Charter, the right to a fair hearing. A basic and well established element of this right to a fair hearing consists of the right to legal advice and representation.

The proposed changes to section 524 of CYFA by the Bill clearly limit the rights of children aged 7 – 9 years of age, who will lose their right to legal representation in protection proceedings that affect them.

**Section 8 – equality before the law**

Under section 8(3) of the Charter everyone (including children) is equal before the law, and entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. Pursuant to this section, there is an immediate obligation on the government and public authorities to ensure that legislation, policies and programs prohibit discrimination and are themselves non-discriminatory.

We contend that clauses 10 and 11 of the Bill's are discriminatory on the basis of age, by setting an arbitrary age limit so that children aged between 7 and 10 can no longer chose the nature of their participation in the legal proceedings or instruct their own lawyer.

The bill creates an absolute presumption that children under the age of 10 years are not mature enough to provide legal instructions in child protection matters. Until now, all children aged 7 and older were assessed as to their level of maturity to give instructions in child protection proceedings. The age of 7 was just a presumption, however the determination of

maturity was made on a case by case basis. This practice was in line with accepted international human rights law as highlighted by the 2012 Supreme Court decision in [A&B v Children's Court of Victoria](#)<sup>1</sup>.

### **Section 17(2) - best interest of the child**

Section 17 of the Charter also establishes the right of the child, without discrimination, to protection in his or her best interests. This provision is modelled on art 24(1) of the *ICCPR*, and picks up the best interest principle set out in Article 3 of the Convention on the Right of the Child (*CROC*).

The Charter does not accompany best interest with any formulation on how the principle should be applied. Neither has the the Committee on the Rights of the Child specified exactly how the best interests of the child should be determined. However the Committee has affirmed that the other three *CROC* general principles (i.e. non-discrimination, the right to survival and development and the right to participation) and other articles of *CROC* must be relevant to the determination of the best interests of the child in specific situations. Therefore the right of a child not to be discriminated against (described above) and their right to participate in the making of decisions are themselves part of the best interests of the child.

The right to participation is set out in Article 12(1) of the Convention on the Rights of the Child:

*"where a child person is capable of forming his/ her own views, that they can be expressed freely and be given due weight, especially in judicial/ administrative proceedings affecting the child / young person"*.

It would be at least inconsistent with and arguably a breach of these rights to appoint a best interest representative to a child under 10 years, capable of instructing, and for the representative to advocate something different than the express wishes of the child to the decision maker.

## **2. Inadequacies of Statement of Compatibility**

### **Right to legal representation**

According to the Statement of Compatibility the Bill does not limit the section 24 right. However the Bill explicitly excludes the operation of these changes to the children who won the right to legal representation in *A&B v Children's Court of Victoria*. Indirectly this clause acknowledges that the amendments in the Bill limit children's right to representation. This limitation should be addressed in the Statement of Compatibility.

### **Age discrimination**

The Statement of Compatibility fails to address or justify the limitations to a child's right to equality before the law contained in section 8 of the Charter, as described above.

This is despite the fact the Statement clearly identifies that the bill limits this right, where it says:

*"That age-based distinction replaces the existing distinction of whether the child is mature enough to give instructions.*

And goes on to state:

*"It is generally accepted that at around 11 years of age, a child is better able to use logic and reason in abstract decision making, such as is required in the giving of legal instructions on sometimes complex issues. Prior to this age, abstract decision making is limited."*

Although children are viewed equally persons before the law, and should receive the protection of the law without discrimination, under this Bill even if children have the capacity and maturity to instruct a lawyer they are barred from this model of representation accessed by adults, simply because they are aged under 10 years.

Currently when a protection application is issued in the Children's Court of Victoria, all interested parties including children, deemed capable of giving instructions are allocated a lawyer who advocates their wishes. All adults are represented on this direct instruction model including adults with intellectually disabilities or who are limited in their ability to make considered

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<sup>1</sup> <http://www.austlii.edu.au/au/cases/vic/VSC/2012/589.html>

decisions by other personal circumstances and the very emotional nature of proceedings. The Bill proposes a different and higher standard is being unfairly applied to children than adults.

For a child to be assessed as having capacity to instruct it is not necessary for the purposes of the current sections 524(2) and (4) of CYFA that the child be mature enough in the opinion of the Court to give instructions to a legal practitioner *on all issues*. It is sufficient that the child be mature enough to give instructions on one or more issues that arise or may arise in the hearing or proceeding.<sup>2</sup> What is required in assessing capacity in practice is the lawyer inquiring whether the child has an understanding of the reason for the Court case, the role of the Court and what it can do, the role of the lawyer; and a desire to express an opinion.

This limitation should be addressed in the Statement of Compatibility.

### **Best interest**

The Statement of Compatibility also overlooks this potential limitation of the child's right to protection of their best interest. By being dismissive of children's (under 10 years) capacity to give direct instructions & wishes to a lawyer, the Statement paternalistically denies these children's having their views heard and given full weight, which is counter to their best interests.

Since the Magistrate at Court makes their decision based on the best interests of the child, there is no reason to intervene and remove the right of representation from the child. All relevant information concerning the best interests of the child, in addition to the views expressed by child, is available to the Magistrate from other avenues: Department of Human Services who are expressly tasked in this role, Children's Court Clinic, the views of the parents, as well as the powers of the Court to call witnesses on its own behalf and to order reports to be prepared addressing particular questions.

The paramount aim of best interests can be met whilst fulfilling the child's civil rights to participate in proceedings and the right to be heard. There is thus no need t under the guise of fulfilling the paramount aim of realizing the best interests of the child, limit or compromise the right to be heard.

### **3. Unreasonable limitations**

Whether raised in the Statement of not, the limitations on these rights are not reasonable or demonstrably justified, as required by section 7 of the Charter. Rather the amendments appear to be politically expedient and cost saving measures.

The Statement says:

*"... the amendments avoid protection proceedings being stayed or delayed indefinitely because separate representation cannot be arranged, by providing that the court may resume an adjourned hearing whether or not the child has obtained separate legal representation"*

We have not seen evidence to suggest the need to address any related proceedings delays overrides Government's obligation to protect children's rights in these proceedings.

Our contention is that Government is also supporting these legislative amendments to align the legislation with cost savings decisions of Victoria Legal Aid involving changes to their eligibility guidelines so they no longer provide legal assistance to a child under 11 years of age.

As the Committee is well aware under section 7 of the Charter such cost saving purposes do not reasonably justify such a serious incursion into children's rights.

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<sup>2</sup> Justice Garden *A&B v Children's Court*, <http://www.austlii.edu.au/au/cases/vic/VSC/2012/589.html> para 106

We respectfully submit that the amendments in clauses 10 and 11 of the Bill be abandoned and all children aged 7 and older continue to be assessed as to their level of maturity to give instructions in child protection proceedings.

In the alternate we submit that there are less restrictive measures open to Government that would make any amendments far less incursive into children's Charter rights. The Government previously stated it was passing this bill to put into practice recommendations made in 2011's [Protecting Victoria's Vulnerable Children Inquiry](#). In [recommendation 53](#), the Inquiry said that the CYFA 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; and  
A child who is not capable of providing instructions should be represented by an independent lawyer on a 'best interests' basis.*

Adopting these recommendations the 10 years of age standard would be a rebuttable presumption and not a strict arbitrary age limit as proposed in the Bill.

Please contact Tiffany Overall, Advocacy and Human Rights Officer on 03 9611 2422 if you have any queries regarding this submission.

Yours sincerely



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