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The Alfred Felton Research Program

Promoting Safety and Well-Being for Children, Young People and Families

THE UNIVERSITY OF MELBOURNE

PROTECTING VICTORIA'S VULNERABLE CHILDREN INQUIRY

SUBMISSION

ISSUE: PROTECTING CHILDREN THROUGH THE CHILDREN'S COURT

RELEVANT TERMS OF REFERENCE:

6. Possible changes to the processes of the courts referencing the recent work of and options put forward by the Victorian Law Reform Commission.

*4. The interaction of departments and agencies, **the courts** and service providers and how they can better work together to support at-risk families and children.*

INTRODUCTION:

While the Felton Research Program at the University of Melbourne has not been actively researching Children's Court matters, in its pursuit of other child and family research it has frequently encountered serious concern about the functioning of the Children's Court and the relationship between the Court and the Child Protection service. In this submission we briefly draw attention to the most salient concerns, and make a brief response to the Final Report of the Victorian Law Reform Commission *Protection Applications in the Children's Court* (2010.)

KEY PRINCIPLES:

This submission supports most of the principles for reform proposed by the Victorian Law Reform Commission in *Protection Applications in the Children's Court Final Report* (p.16):

- The processes should actively encourage early resolution by agreement whenever possible.
- The processes should be child-centred.
- The processes should actively encourage inter-professional collaboration so that decision makers have access to the best information on child development and wellbeing.
- The processes should actively promote outcomes that involve the least amount of compulsory intervention in the life of the family as required by the circumstances.

- The court should be an inquisitorial and problem-oriented decision maker.

We are more cautious about the wording of the fifth principle, which receives modified support: "When an agreed outcome is not possible, a court should determine whether a child is in need of protection and the intervention required in order to promote the child's wellbeing." Our concern is that "the intervention required" is too broad a phrase, potentially encompassing a wide range of case planning and case management decisions best made by those working with the child and family, and open the way for micromanagement of the case by the Court .

Our underlying assumption is that both the Children's Court and the Child Protection Service should work in the best interests of the child.

MAJOR RECOMMENDATIONS:

- That the Inquiry give substantial attention to the problematic relationship between the Children's Court and the Child Protection Service.
- That the Inquiry consider recommending a substantial investment in cross-disciplinary training for all professionals involved in Child Protection matters in the Children's Court.
- That the Victoria Law Reform Commission's report *Protection Applications in the Children's Court* (2010) be revisited with a view to clarifying consensus and implementation issues.

ISSUES RELATING TO THE CHILDREN'S COURT

The Court and the Child Protection and Family Services

The goals of the Court and the goals of child protection and family services workers are not dissimilar. Victoria has a comparatively low rate internationally and nationally of children coming into out of home care. There are many factors which contribute to this low rate, and certainly a Children's Court which is more than a 'rubber stamp' to child protection decision making is one of those factors. It is to be valued given the vulnerability of the parents and children involved in Children's Court proceedings. The structure of the child protection system in Victoria with the development of Child FIRST and the role of community sector organisations is also a contributing factor, with workers also dedicated to keeping as many children living with their families as possible. The data from the Courts would suggest that child protection workers are not bringing cases unnecessarily into the court arena. Even so, the Ombudsman (2009) has expressed concern at the disproportionate amount of time and resources of the Child Protection service that are consumed by Court activity. Workers speak frequently of delays in finalising cases and repeated re-appearances at Court and wasted 'down time' waiting at Court, as well as the energy consumed by the adversarial culture and the erosion of Child' Protection's professional case planning and case management functions through attempts to micro-manage cases from Court.

Excessive adversarialism

In many jurisdictions there is general agreement between case managers, social workers, lawyers, magistrates and judges that children and young people are not always best served by entrenched court battles, but in the Victorian Children's Court

to date the necessary shift in culture which would require different professionals to work together is not well established. Few people speak well when under attack. Child protection and family services workers are no exception. When the Court cites that at least 90 percent of applications are resolved before a final contest then the process of getting to this point seems unnecessarily adversarial. Much of the detail of the orders which are fought out in the court need not be part of the adversarial process. Issues such as the level of child contact, the case planning to support reunification, the support services required to address issues of substance use, mental health, and family violence are issues which could be addressed in a less adversarial process (with or without oversight from a magistrate depending upon the model used).

A factor operating against a culture of negotiation is the distorting influence of the package of payment for the VLA lawyers which has seen some recent change but still does not go far enough to support early settlement processes. There has also been the development of a culture which is derisory and disrespectful of DHS workers. It is a process which 'perversely encourages disputation rather than cooperation in the protection of children' (Ombudsman Report, 2009, p.57). Magistrates, with some exceptions are not noted for intervening to establish a different, more respectful culture.

It is now well known that DHS workers are leaving in large numbers. A frequently cited issue is poor or 'bullying' treatment in the Children's Court as a reason for leaving. This is not happening in other states and countries in the world. It is certainly not cited as a major factor in the retention literature on statutory child protection work elsewhere. A recently completed PhD based in an exploration of retention of child protection workers in Victoria again cited the Children' Court experience as a major cause for leaving. Every interviewee mentioned this issue (Kennet, G. 2010). A functional Children's Court will always, at times, require the adversarial process to be invoked. However this does not have to be a court culture in which denigration of child protection workers is part of the process. Such a culture is distorting the process of protecting children.

Child Sexual Abuse Cases: evidentiary barriers to child protection

Few cases of child sexual abuse are coming before the Children's Court, and it appears that this is in part because workers and their managers in DHS have come to believe that it is almost impossible to gain protection for children experiencing child sexual abuse under the current way in which evidence is heard by the Children's Court and the way in which the case law being cited demands evidence beyond that of 'the balance of probabilities'. Until recently, child protection workers had virtually stopped substantiating child sexual abuse and only putting cases forward on the basis of emotional abuse or physical abuse. There have been fewer and fewer substantiations of child sexual abuse with the latest Victorian data in the AIHW (2011 Table A1.3) showing only 522 cases (8.2%) of substantiated cases in Victoria – this is extremely concerning for children who are being sexually abused in Victoria.

The meta-analysis of prevalence data from seven studies of child sexual abuse in Australia suggests it is not due to declining rates of child sexual abuse. Adjusted prevalence of child sexual abuse estimate in males 5.1% Females 27.5% in the population.

- Much of the sexual abuse is very serious with rates of penetrative abuse at two-thirds of the overall prevalence rate (3.6% in males and 17.9% in females).
- Onset of abuse occurs at a mean age of 10 years, with most starting before age 12.
- The abuser is a family member in about 40% of cases, and is known to the child in 75% of cases.

(Gavin Andrews, Bronwyn Gould and Justine Corry 2002 Child Sexual Abuse Revisited *Medical Journal Australia* 176 (10) 458-459)

All parts of the child protection system need to take responsibility for the distressingly low rate of substantiation of child sexual abuse in Victoria including the Children's Court. The new DHS-Police multi-disciplinary units have made some inroads into this by working more closely with non-offending parents to provide protection. More cases have been substantiated by child protection workers in the pilot project and only a small number of cases in the pilot project have needed to go to the Children's Court. However, sexual abusers frequently wait until 'the crisis' is over and gradually move their way back into the family when the intensive support for the mother has diminished. Many children may then need the Children's Court for protection. These cases need to be able to be heard in ways which allow sexually abused children to be protected. There is a case to be made for a specialist court list and magistrate with specialist training to overcome the problems associated with hearing the evidence and protecting children where there are allegations of child sexual abuse.

The concept of cumulative harm: the need for improved Child Protection and Court responses

The data on substantiation of neglect is similarly extremely low. More children die of neglect than any other child abuse issue (Jonson-Reid et al, 2007; Berkowitz, 2001). The concept of cumulative harm in the *Children, Youth and Families Act, 2005* arose out of the need to provide stronger attention to children with a cumulative history of harm, much (though not exclusively) due to parental neglect. Again the data provided by the AIHW (2011) shows that Victoria has very low substantiation rates in this critical area with only 7.2% (459 children) of substantiated child abuse in this category, whereas in several other states between 27.8-50.1% of substantiations fall into this category (AIHW, 2011, Table A1.3).

A lower rate would be expected in Victoria due to the presence of Child FIRST and family support services, however the seriousness of neglect and cumulative harm suggests that there remain a substantial number of cases which should be at the most serious end of the child protection system, and which cannot be dealt with in community sector Family Services. We do not have access to the Court data, but anecdotally we believe that this is another area where Child Protection staff members have come to expect that cumulative harm cases will not be well received by the Court and have learnt not to bring these cases to Court. It is an area in which further exploration of the issues involved in this serious child abuse issue need to be explored including minor changes to the legislation. There may be training needs both within the Child Protection and within the Court.

Court ordered high frequency contact for infants: the Court as inappropriate case manager

The issue of court ordered high frequency contact for infants in out of home case remains a point of serious contention between magistrates, lawyers for the parents who support such orders, and foster carers, infant specialists, child protection workers and foster care managers who do not experience these orders as being in the best interests of the infants involved. It was the subject of a research project and report from Alfred Felton Research Program (Humphreys and Kiraly, 2009). The balance between the need for the infant to attune to a new carer and to continue contact with their parent is not being struck with high frequency contact which involves transportation and handling by multiple workers. An infant coming into out of home care is in crisis at a critical time in their attachment and neurological development. Multiple attachments are possible for infants but within a hierarchy of attachment in which the person with 24 hour care needs to be established rapidly as a new attachment figure for the period of time when the infant is in care (Dozier et al, 2002). This is essential for their on-going development. This position is not necessarily accepted by the lawyers for the parents or many of the magistrates. Contact with parents is clearly essential. It is the high frequency (4-7 times per week) which is in contention. Other problematic issues about high frequency arrangements include:

* a very limited number of foster carers who are prepared to support high frequency contact due to the distress they perceive in infants and the inability to settle highly disrupted infants;
* many parents are unable to comply with the high frequency contact regime and are being set up to fail or setting themselves up to fail with the assistance of their lawyers;
* high quality but more limited contact is potentially a much better pathway for all concerned and may do more to promote reunification than high frequency;
* the level of contact being ordered by the court has a very high impact on the workloads of child protection workers and DHS and with little positive effect and potentially negative impacts on the most vulnerable infants in Victoria.
* there are very few appropriate venues for supervised contact in Victoria.

In summary, there appear to be some long-standing difficulties (Campbell et al 2003) in the relationship between the Children's Court and the Child Protection Service, requiring substantial changes to options, systems and culture. Any changes that flow from this review process will require a substantial investment in cross-disciplinary training and staff development (e.g. between social workers, lawyers and psychologists) to clarify roles and perceptions.

RESPONSES TO THE VICTORIAN LAW REFORM COMMISSION'S FINAL REPORT: PROTECTION APPLICATIONS IN THE CHILDREN'S COURT

In addition to the areas of concern named above, we draw attention to aspects of the Report of the Victorian Law Reform Commission to which we give support, or about which we raise some cautions. We believe that this Report must be revisited, with judicious attention to those of its recommendations which might improve the Children's Court and Child Protection system in Victoria. There is still much to debate in that report, and detailed attention will be needed.

Proposals supported

- The greater reliance on alternative dispute resolution, in recognition of the large proportion of cases that end up settling by agreement. This includes the recommendation that use of Family Group Conferences prior to filing a Protection Application should be standard, though *we also support the provision to waive the FGC in exceptional circumstances, including inappropriateness, the need for emergency action, or unwillingness (and perhaps lack) of family members to participate.*
- The addition of a 'no fault' ground for finding a child is in need of protection
- The overall goal of fewer court events per case.
- The power to give guardianship and custody of a child to one parent to the exclusion of the other when necessary to meet the needs of the child .(*We note that this may be necessary and appropriate in cases of family violence and child sexual abuse where ongoing protection from the perpetrator is an issue.*)
- Under Option 2, we support in principle the suggestion for some specialisation within the judicial offices in cases involving Koori families, infant cases, drug and alcohol treatment and sexual abuse (VLRC 2010 p313).
- Option 5: A broader role and more independence from the Child Protection and Care system for the Child Safety Commissioner.

Areas for caution

Under Options 1 &2:

Costs and Role of FDM:

It must be noted that for Family Group Conferences in particular, a large part of their success lies in the thoroughness of preparation of all parties by skilled social work and welfare practitioners. This must be factored into the costing. It also needs to be stated that Family Group Conferences are family decision making forums and do not have a primary role of dispute resolution. This is secondary and may corrupt the family decision-making process if dispute resolution is imposed on this process as a primary driver.

FDM and ADR training requirements:

We caution that an additional investment in Family Group Conferencing and other forms of alternative dispute resolution will require a substantial; investment in training and a widening the pool of convenors. It is important that these roles be filled by people with appropriate knowledge of child development and protection, and skills in problem solving and group facilitation. The pool is not at present large, and skilled convenorship is crucial to success. If the intention is not to be misdirected, these roles should not be filled by lawyers steeped in adversarial methods of practice, or even, as with some current appointments to 'the new case conferencing model' with people whose primary experience has been court administration.

Protection for the vulnerable:

We particularly stress the need to assess the risk of intimidation or covert coercion that might corrupt family group conferencing of dispute resolution in cases involving family violence and severe abuse, including sexual abuse. Not all cases are appropriate for these dispute resolution procedures.

Greater court specialisation
Though some specialisation (Koori, infants, drug and alcohol etc) is in principle desirable, we note that many cases proceeding to court will in fact have one or more of these issues in interaction, and it may be that such specialisation could lead to fragmentation. We would also advise further refinement of what is meant by 'intensive problem-oriented case management' in this context, bearing in mind the different uses of the term case management in the court and child protection systems.

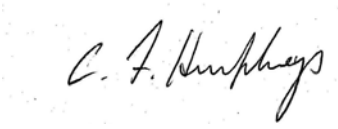
Under Option 3:
Office of the Children and Youth Advocate. We would suggest that some of these functions can sit squarely with the Office of the Child Safety Commissioner, and that to create another body both diminishes the OCSC and the very purpose and role of the Child Protection Service, which is fundamentally charged with advancing the best interests of the child.

CONCLUSION:

It would appear that there is room for much greater alternative dispute resolution processes to operate if parties were not pitted against each other in the early stages of the Court process. Lawyers, magistrates, child protection workers, police, child psychologists and family services' workers would need to be committed to alternative dispute resolution and the development of case planning and case conferencing processes as an agreed way forward. Significant training would be required. There would remain cases for which Court deliberation and decision making would be crucial, though these processes may be inquisitorial rather than adversarial in nature.

The work of the Victorian Law Reform commission has been substantial, but leaves areas of dispute and unanswered questions, which should receive high priority attention if Victoria is to tackle its problematic relationship between the Children's Court and the Child Protection Service.

Signed



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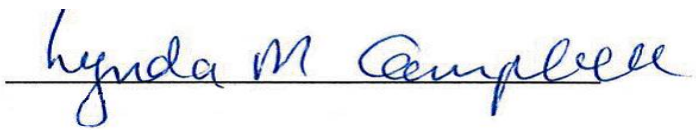

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Endorsed by:

Centre for Excellence in Child and Family Welfare

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