Protecting Victoria's Vulnerable Children Inquiry

To: The Victorian Government

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Introduction

The Law Institute of Victoria (LIV) has a strong commitment to promoting the rights of children and young people in Victoria and we welcome the opportunity to comment on the State Government's *Protecting Victoria's Vulnerable Children Inquiry*.

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 15,000 members. Many of our members provide legal services to children and young people in both Criminal and Family Divisions of the Children's Court and the Family Law Courts. Our members also provide legal services to parents and family members involved in these cases. This submission is based on the experiences of those practitioners.

In September 2005 the LIV provided comments to DHS on the *Draft Children's Bill 2005 (VIC)*. In that submission the LIV strongly supported the provision that created an obligation on the State (the Secretary) to assist young people who have left the care of the State (Secretary) in making the transition to independent living and supported the principle of early intervention and prevention services for children and families. In particular, we welcomed the fact that the draft Bill recognized that the welfare and interests of the child are paramount.

On 1 April 2010 the LIV provided comments to the Victorian Law Reform Commission (VLRC) on the *Review of Victoria's Child Protection Legislative Arrangements*. In that submission the LIV strongly advocated for new processes that may assist the resolution of child protection matters by agreement rather than by adjudication and supported the creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services (DHS). Moreover, the submission advocated changing the nature of the body which decides whether there should be State intervention in the care of a child so that it includes non-judicial as well as judicial matters. The LIV also urged the Commission to have regards to the *Charter of Human Rights and Responsibilities (Victoria*) and the *Convention on the Right of the Child* in providing its recommendations. The LIV's submission to VLRC is attached to this submission and the inquiry is strongly encouraged to take note of that submission in compiling its report to the Minister for Community Services.

In December 2010 the LIV welcomed the review of the *Commonwealth Commissioner for Children and Young Peoples Bill 2010.* In this submission the LIV raised concerns with particular aspects of the Bill, namely that the Commissioner may intervene in legal cases involving the rights of children and young person and asked how this would operate in practice. Overall, the LIV believed that the Bill and the appointment of a Commonwealth Commissioner would be a welcome addition in promoting the welfare and rights of vulnerable children and young persons at risk and we look forward to further input as the consultation proceeds.

The key messages from these previous LIV submissions center on the need to prioritize the best interests of the child and the need to monitor the quality of services administered by DHS while promoting for increased accountability within relevant departments, agencies and service providers.

In this submission we have addressed only those questions posed in the Terms of Reference paper that are within the experience and expertise of our members. For ease of reference we have maintained the same numbering pattern as contained in the Terms of Reference paper.

3.5 What are the strengths and weaknesses of the range of our current out of home care services (including respite foster care, foster care of varying durations, kinship care, permanent care and residential care), as well as the supports offered to children and young people leaving care?

The LIV believes that a current weakness in one of the out of home care services provided, namely foster care is as foster carers are only able to have a limited number of children placed in their care, siblings are often separated which is clearly not in the child's best interests. Dr Sara's Wise of Anglicare Victoria has suggested that a sibling can soften a child's grief associated with parental separation and provide an important source of support during care and through life.[1]

The LIV notes the 2010 Anglicare Victoria Brothers and Sisters in Care (BASIC) survey which found that only 16 per cent of the children in the survey were placed with all their siblings, 84.1 per cent were separated from at least some of their siblings, and 42.6 per cent were separated from all of their siblings. This survey suggests that many siblings were separated on placement in foster care and that the larger the number of children in a family the more likely that those children will be separated into two or more foster care placements.

The LIV is concerned that the best interest's principles set out in the *Children, Youth and Families Act 2005* (CYFA) are not being adhered to. The CYFA states at S.10 (3)(b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child. The LIV is of the view that a sibling is a significant person in a child's life and hence it is in the child's best interest that the relationship between siblings is strengthened and maintained, and this is best achieved by caring for siblings jointly once they enter foster care.

Further, the *Convention on the Rights of the Child (1989)* allows the child the right to be placed together with siblings and to maintain regular contact with their families and other key people in their lives.[2]

[1] Dr. Sarah Wise, (2011), '*All Together Now – Research examining the separation of siblings in out-of-home care'*, Policy, Research and Innovation Unit, Anglicare Victoria.
[2] U.N. Convention on the Rights of the Child (1989). UN General Assembly Document Article 12.

The LIV recommends that in order to increase the number of foster carers who are willing and able to care for siblings that these carers receive adequate compensation and support in providing this additional care. The LIV believes that most carers are unable to care for more than one child from a family at a time this is largely because of limited reimbursement rates. Current reimbursement rates for foster carers are based on the care for individual children in that the care giver is reimbursed for the care of each child based on the rate per child. This reimbursement rate varies depending on the age of the child. It is the experience of our members that this rate is insufficient to meet the needs of a child especially if the child has special needs and although the Department of Human Services may "in exceptional circumstances"[3] increase this reimbursement rate the LIV believes that this occurs only occasionally. The LIV believes that although the benefits available to the carer via the public health system, and services available to children and young people with Health Care Cards are utilised by carers it is unreasonable to assume that this will cover the costs of caring for a child and it is the experience of members that often it does not, especially as noted above if the child has special needs.

The LIV therefore recommends increasing the reimbursement rate for those foster carers choosing to care for siblings to meet the additional costs involved in caring for those siblings. Additionally, an increase in reimbursement rate would provide an incentive and encouragement for foster carers to care for siblings.

The LIV suggests that this inquiry have regard to the *Salvation Army Victorian Election Statements 2010 Report* which calls for increase funding to home based care services in Victoria and an increase in investment and training for volunteer carers to improve the retention rates of carers.

The LIV recognises that additional funded support (training, limited counselling) is routinely provided to foster families through foster care agencies. However, this kind of extra support is available only on a case by case basis. Research has identified a number of areas where foster carers find it difficult to access and/or fund professional help who are knowledgeable about the specialised needs of the children in their care.[4] There is therefore a strong need for services that can assist foster carers to access personal and professional support to help them to nurture the child or children in their care.

[3] FCAV/PPSS INFO SHEET: *Caregiver Reimbursement Rates Kinship Care & Permanent Care*, March 2010
[4] Post Placement Support Services (Victoria) Inc, *Proposed Post Placement Support Centre Building strong families in kinship care, permanent care, foster care and special needs adoption*, 2010.

Furthermore, the LIV does not believe residential care is the best option for the provision of out-of-home care services for children and young people needing care. Residential care groups together a variety of children with different needs and circumstances which can lead to numerous issues. The almost inevitable outcome is that children exhibiting the most problematic behaviors influence the others in placement. It is the experience of our members that issues of bullying, alcohol and drug use by co-residents under these arrangements is rife and threatens the safety and security of children in residential care.

3.5.4 How can the views of children and young people best inform decisions about their care? How can the views of those caring for children best inform decisions affecting the wellbeing of children in their care?

The LIV is a strong supporter of the need for a child to have their opinion heard and due weight and consideration to be placed on that opinion. It is the experience of our members that protective workers do not always consult with older children who are mature enough to articulate a view regarding their care. The LIV believes these children should be given the opportunity to speak directly with their legal representative and that this should not be done through departmental staff and youth workers where their view may be misinterpreted when relayed to the Court. The LIV believe has consistently recommended that children should be present in decision making meetings about their care and to attend court proceedings if they choose to.

Article 12 of the *Convention on the Rights of the Child* states that when adults are making decisions that affect children, children have the right to say what they think should happen and have their opinions taken into account. This Convention encourages adults to listen to the opinions of children and involve them in decision-making. Article 12 however does not interfere with parents' right and responsibility to express their views on matters affecting their children. Moreover, the Convention recognizes that the level of a child's participation in decisions must be appropriate to the child's level of maturity. Children's ability to form and express their opinions develops with age and most adults will naturally give the views of teenager's greater weight than those of a pre-schooler, whether in family, legal or administrative decisions.[5] The LIV believes that the effect of this provision in the Convention is to empower the child to express their opinion as to what is in their best interests.

[5] U.N. Convention on the Rights of the Child (1989). UN General Assembly Document Article 12.

3.5.6 How might children who cannot return home and who are eligible for permanent care, achieve this in a way that is timely? What are the post-placement supports required to enhance the success of permanent care placement?

The LIV believes there should be a greater provision of training, skills development and support directed towards carers. The LIV is supportive of the work carried out by the Post Placement Support Service (Vic) Inc (PPSS) which is an early intervention support and training service which serves anyone who has a personal or professional connection with long term foster care. PPSS places particular emphasis on offering services to children and young people (under 18 years) who have moved from one family to another, permanent parents/carers of children who were born to other parents, and the professionals who serve these individuals and families.

The LIV suggests that information services in terms of newsletters, telephone helplines training programs and information sessions, support groups and programs should be provided to all foster carers and young people the subject of a permanent care order.

3.5.7 What are the strengths and weakness of the current Victorian adoption legislation framework and practice for children who cannot return to the family home? Should Victorian legislation and practice reflect that in other jurisdictions?

The LIV has consistently opposed discrimination and inequality on the basis of gender and sexual orientation. The LIV's formulated a policy on the "removal of discrimination against people on the basis of gender identity or sexual orientation" which is attached your reference.

The LIV suggests that the current weakness of the *Adoption Act (1984) (VIC) ("the Act")* is that it is limited to relationships between a man and a women or heterosexual de-facto couples. s10 (A) of the *Act* states same-sex couples are denied adoption rights. The LIV considers that this inquiry have regard to the *Adoption Act (2001)* (NSW) and the *Adoption Act 1994 (WA)* which allow same-sex couples to adopt in accordance with criteria that assesses the suitability of couples and individuals to be parents, regardless of sexual orientation. Further, the *Adoption Act 1993 (ACT)* was amended to allow for adoption orders to be made in favor of "…two people" provided they meet requirements set out under Division 3.2 s13 and s14 of the

Act namely that they have lived in a relationship for a minimum period of 3 years and that they are able to satisfy the court that their relationship is stable and both people are committed to fostering the wellbeing of this domestic partnership and its ability to provide a supportive adoptive home for a child.

The LIV maintains that the *Adoption Act (1984) (VIC*) be brought into line with legislation in other states but suggests however that the selection of adoptive parents still remain subject to the rigorous and extensive approval process that is contained in the *Act.*

The LIV notes that under Part 4.10 s319 of the CYFA same-sex couples are allowed to obtain permanent care orders. For the purposes of such orders same-sex couples are afforded the same rights and privileges and are required to follow the same procedures as any other party or parties applying for a permanent care order. The LIV believes that the *Act* should be amended to mirror the requirements set out in the CYFA where discriminatory grounds are removed in terms of who may apply for a right to adopt.

Similarly, the *Family Law Act* 1975 does not limit persons who may apply for a parenting order and therefore same sex couples and de facto partners may apply for such an order.

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?

The LIV believes a frequent difficulty in achieving timely appropriate outcomes for children is the apparent inability of the Department of Human Services (DHS) to access resources provided by other government agencies. Most frequently this relates to lack of accommodation for families, but also includes specialist counseling, psychiatric and psychological services and medical services. The LIV recommends extending the powers of the judiciary to afford a greater level of control over those who work directly with children.

5. The appropriate roles and responsibilities of government and non-government organizations in relation to Victoria's child protection policy and systems.

The LIV has some concerns regarding the provision of out of home care by non-governmental organizations (NGO's). Under the current arrangement DHS provides funding to NGO's. However, DHS does not have the power to direct NGO's in relation to how they carry out their work. This is concerning as these NGO's are responsible for much of the service provision regarding caring for vulnerable children. This lack of direction results in the Children's Court being unable to achieve optimum outcomes for children because it is unable to make Orders which bind NGO's. The LIV suggests that it is the child's best interest that Court orders that bind DHS should also bind third parties such as the NGO's. The LIV believes there is not enough judicial oversight in the work performed by NGO's and the powers of the court need to be expanded to allow for court orders to bind on NGO's.

6.1.1 What changes should be considered to enhance the likelihood that legal processes work in the best interests of vulnerable children and in a timely way?

It is the view of our members that there is an emergence of an ill founded premise that the Court process contributes significantly to demonstrable deficits in the child protection system. The LIV has full confidence in the judiciary working towards a favourable outcome for the child, but would recommend the expansion of Children's Court Clinic service to strengthen these favorable outcomes.

The Children's Court Clinic is an independent organisation which conducts psychological and psychiatric assessments of children and families for the Children's Court. The Clinic also conducts assessments relating to the impact of drug use on a young person and may make recommendations about appropriate treatment. The reports provided by the Clinic are used to assist the judge/magistrates in making decisions in both Family Division and Criminal Division cases of the Children's Court. The Children's Court Clinic is established by s.37 (1) of the *Children and Young Persons Act 1989* (Vic) [No.56/1989] ('the CYPA') and continued in operation by s. 546(1) of the *Children, Youth and Families Act 2005* (Vic.) [No. 96/2005] ("the CYFA"). This service has proven to be very effective in dealing

with children and youth issues. Clinic involvement is initiated by the Court making a referral requesting the Clinic:

- in Family Division cases: to prepare an additional report pursuant to s.560(b) or another type of report pursuant to s.546(2)(b); or
- in Criminal Division cases: to prepare a pre-sentence report pursuant to ss.571 & 572(b) or another type of report pursuant to s.546(2)(b); or
- in cases in either Division: to provide clinical services to children and their families pursuant to s.546(2)(c) of the CYFA.

The LIV believes the Clinic provides vital support to children and families accessing the family law jurisdiction. It is pivotal that this Government continue supporting the operation of the Clinic through increased funding and in-kind support.

Court orders are often referred to the Clinic, where the court is able to oversee its work and the implementation of those orders. This process improves efficiency and speeds up the court process for everyone involved. The LIV would recommend entertaining the possibility that the DHS be tasked with the obligation to source funding for the Clinic and oversee the expansion and maintenance of the Clinic.

6.1.2 Are specific legislative changes necessary? For example, in relation to a Protection Application by Safe Custody (where children are brought into care and immediate orders from the Children's Court are sought in relation to a child's placement), should the current 24 hour time limit be exhausted and if so, what should be the maximum time limit?

Protecting Victoria's Children, Child Protection Practice Manual states that the *Magistrates' Court Act* and the *CYFA* authorise bail justices to hear out of hours applications for Individual Accommodation Orders (IAOs) following a child being taken into safe custody.[6] Where a child is taken into safe custody, they must be brought before the court within 24 hours of being taken into safe custody.[7] Where this is not possible, the child must be taken before a bail justice as soon as possible within the 24 hour period for

[6] Protecting Victoria's Children, Child Protection Practice Manual, State Government of Victoria, Department of Human Services (DHS), 2009, Accessed at: <http://www.dhs.vic.gov.au/office-for-children/cpmanual/index.htm>
[7] Protecting Victoria's Children, *Op.Cit*. Accessed at: <http://www.dhs.vic.gov.au/office-for-children/cpmanual/index.htm>

the hearing of an application for an interim accommodation order. The only exception is for a child of 'tender years'. The CYFA does not define 'tender years'. However, the Children's Court website indicates that it is the President's opinion that a child who is under the age of five years is a child of 'tender years'. In circumstances involving a child of tender years, a hearing before a bail justice must still be held, however the child need not be produced before the bail justice. The LIV believes that the current 24 hour time limit is of great significance to children and should remain unchanged. If this time limit was altered it has the potential to cause unnecessary psychological harm to children as they are placed in care with strangers for prolonged period of time unnecessarily. The LIV believes that any expansion of the 24 hour time limit to 72 hours is clearly not in the best interests of the child.

It is the experience of our members that it is very common for the Court to overturn initial decisions to remove children from their families. Thus the extension of the 24 hour limit would very likely result in many children spending more time in care than is presently the case.

The LIV is grateful for the opportunity to provide comment and we would appreciate the opportunity for further input as the consultation proceeds.

1 April 2010

Victorian Law Reform Commission
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By email to: law.reform@lawreform.vic.gov.au

Dear Sir/Madam

Review of Victoria's Child Protection Legislative Arrangements

The Law Institute of Victoria (LIV) welcomes the opportunity to provide input to the Review of Victoria's Child Protection Legislative Arrangements.

Our submission is attached.

If you would like to discuss any of the matters raised in the submission, please contact Laura Muccitelli, Lawyer, Family Law Section on (03) 9607 9375 or by email lmuccitelli@liv.asn.au

Yours sincerely,

Steven Stevens
President
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Introduction

The Law Institute of Victoria (LIV) has a strong commitment to promoting the rights of children and young people in Victoria and we welcome the opportunity to comment on the Review of Victoria's Child Protection Legislative Arrangements Information Paper (Review).

Many of our members provide legal services to children and young people in both the Criminal and Family Divisions of the Children's Court. Our members also provide legal services to parents and family members involved in these cases. This submission is based on the experiences of those practitioners.

In September 2005 the LIV provided comments to the Department of Human Services ("DHS") on the Draft *Children's Bill 2005 (VIC).* In that submission the LIV strongly supported the provisions that supported the creation of an obligation on the State (the Secretary) to assist young people who have left the care of the State (Secretary) in making the transition to independent living and supported the principle of early intervention and prevention services for children and families. In particular, we welcomed the fact that the draft Bill recognised that the welfare and interests of the child are paramount.

Many of the points which we raise in this submission were previously raised in the LIV submission to the Department of Human Services in their review 'Protecting children: Ten priorities for children's wellbeing and safety in Victoria – Technical options paper' (DHS Options paper submission 2004).

The main key messages from these submissions is the strengthening of the rights of children and young people through the establishment of a Independent Statutory Commissioner to monitor the quality of services administered and delivered by DHS and to make recommendations for change.

Due to the short timeframe, the LIV is unable to provide comments on all of the questions raised in the Information Paper however we will provide comment on the main features of the options presented in the Paper.

Charter of Human Rights and Responsibilities

Under the terms of reference, the VLRC is required to have regard to the rights enshrined in Victoria's *Charter of Human Rights and Responsibilities* 2006 ("the Charter").

The Charter recognises the fundamental role of families in our society and that families and children have the right to be protected by the State (s17). Section 17(2) recognises that every child has the right, "without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child". The "best interests of the child" principle is based on Article 3 of *Convention on the Rights of the Child* 1989 ("CROC"), which Australia has ratified. Section 13 of the Charter is also relevant, which protects the right of every person not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

We note for the benefit of the VLRC that the Department of Justice has made the following recommendations in relation to ss13 and 17 of the Charter:

- If you are reviewing legislation or developing a policy or program that provides for the removal of a person (including a child) from a family unit by a public authority, you will need to carefully consider ss. 7, 13 and 17 of the Charter. You should seek to ensure that a removal of a person from a family unit is not arbitrary or unlawful.
- Where the policy or legislation involves children, consider whether it adequately takes into account the best interests of the child as an important consideration.
- Where legislation provides for children to be subject to differential treatment compared to adults (for example, where an Act expressly excludes children from its operation), examine the purpose of the provision. Ensure that the provisions are to protect the child and do not interfere with children's rights under the Charter.

- Ensure that processes that will have a significant impact on children and families are fair and transparent and that there is scope within the processes for a child's interests to be represented.[1]

Convention on the Rights of the Child

The LIV considers that the VLRC must also have regard to *Convention on the Rights of the Child* 1989 ("CROC"). The LIV reiterates its recommendations to DHS in 2004 and 2005 during previous legislative overhaul of child protection, that a Children & Young Person's Commissioner should be established to strengthen the rights of children and young people and that CROC should be incorporated in legislative arrangements by way of scheduling.[2]

CROC recognises that children are particularly vulnerable and have particular rights, recognising their special need for protection. CROC establishes a human rights based framework for all government actions concerning children, "whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies" (article 3(1)). CROC is relevant to the review of Victoria's child protection legislative arrangements, to statutory interpretation of the current arrangements (under s32 (2) of the Charter) and for the operation of child protection by DHS as a public authority (s38 of the Charter).

The Committee on the Rights of the Child ("the Committee") has identified that participation of the child (article 12) and the primary consideration of the best interests of the child (article 3) are two of the four fundamental general principles which are relevant to the interpretation and implementation of CROC (General Comment 12 at [2]).

Article 9 of CROC is particularly relevant for review and interpretation of Victoria's child protection legislative arrangements. Article 9 provides that:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

In addition, article 12 specifically provides for participation of a child in any judicial or administrative proceedings affecting the child, where the child is capable of forming his or her own views and that those views be given due weight in accordance with the age and maturity of the child. The effect of article 12 means that the State must recognise the right of all children to be heard and taken seriously in child protection proceedings.

The LIV urges the VLRC to have regard to CROC and the Charter in its consideration of Options 1-4, as set out in the Information Paper.

[1] Department of Justice *Charter of Human Rights and Responsibilities Guidelines for Legislation and Policy Officers in Victoria*, p112.
[2] See LIV submissions, *Protecting children: Ten priorities for children's wellbeing and safety in Victoria - Technical options paper*, 29 October 2004; *Development of a Charter of Rights for Children and Young People in Care - Discussion Paper*, 10 August 2005; and *Exposure Draft Children's Bill,* 7 September 2005, available at http://www.liv.asn.au/Membership/Practice-Sections/Submissions

Option 1

New processes that may assist the resolution of child protection matters by agreement rather than by adjudication.

The LIV believes that the current Alternative or Appropriate Dispute Resolution ("ADR") processes which operate in the Family Division of the Children's Court are effective. *Section 217* of the *Children and Youth and Families Act 2005* ("the Act") allows the court to convene a dispute resolution conference in child protection cases. These conferences are attended by a member of the Children's Court, Department of Human Services (DHS), family members and legal representatives. The aim is to provide an opportunity for parties to agree on the issues in dispute rather than proceeding to a contested hearing.

This current process can be improved by the Court holding a greater number of Judicial Resolution Conferences (JRC) instead of dispute resolution conferences. These JRC's are convened by the President and or Magistrates and are held for the purposes of negotiating a settlement. They are attended by the child's parent and the Secretary and the Court may order that a relative of the child attend or in the case of an Aboriginal child, a member of the child's Aboriginal community as agreed to by the child or if the child's parent has a disability, an advocate for the parent; the parents of the child or their the legal representative (by S*. 222* of the Act).

The LIV believes that some child protection matters are not amenable to the ADR process. We submit that ADR processes are unlikely to be productive where the issue in dispute is whether children should live at home or be removed by the State. Furthermore, cases involving allegations of sexual abuse by a parent are never suitable for ADR as this requires a finding of fact. The LIV notes the Children's Court lists most matters for a dispute resolution conference and that this process is only bypassed if ADR is unlikely to resolve or narrow the issues in the case. [3]

The LIV suggests that ADR is also appropriate pre court provided the parties have access to legal advice particularly where the removal of a child from the family home is sought. The LIV believes that it is essential that lawyers are present in any pre court ADR process.

Lawyers in the ADR process perform various duties such as advising clients before the ADR process and encouraging client's to participate directly in the process if they are able to. Lawyers also speak for their clients and clarify any issues that may arise and overall ensure that the clients are not prevailed upon to agree to outcomes which are antithetical to their interests. The LIV recommends that the role of lawyers in the Children's Court's ADR process should remain to ensure that those who participate in this process are protected.

The parties that respond to protection applications in court are frequently our most vulnerable members of society. These parties are particularly ill-suited to participate effectively when unrepresented in ADR as they often suffer from factors including intellectual disability, psychiatric illness, and lack of education and substance abuse issues. The LIV is concerned that the reduction or removal of lawyers from the ADR process would strengthen what is already a considerable power imbalance in favour of the State. Furthermore, it is common for parents to decline to speak during the existing ADR process at the Court even when they are represented and thus supported by their lawyer.

Protective workers become expert in participating in ADR, at least because they do so regularly. The LIV believes that it is unrealistic to expect that an impartial member of the Children's Court (the convener) would be able to overcome this imbalance to make the process fair if the parties are unrepresented.

Furthermore, the LIV is concerned that the reduction of lawyers in the Children's Court will cause delays in the court system and therefore delay the reunification of parents with their children. Lawyers and the function that lawyers play in the Children's Court must not change.

[3] Magistrate Peter Power for the Children's Court of Victoria, "Family Division – General" 3rd February 2010 at paragraph 4.9.3

The LIV agrees that the dispute resolution conference could be held at a venue other than at the Children's Court however it is our view that logistically, the venue needs to be close to the court to enable all parties to attend without too much inconvenience.

Sections 226 (1) and (2) of the Act provides that evidence of anything said or done or admissions made at a dispute resolution conference is only admissible in a proceeding before a court if the court grants leave or all the parties to the dispute resolution conference consent. A court may only grant leave under subsection (1) if satisfied that it is necessary to do so to ensure the safety and wellbeing of the child.

The Act also allows for a fine to be imposed if a person who attends a dispute resolution conference discloses any statement made at, or information provided to, the conference without the leave of the Court or the consent of all the parties to the dispute resolution conference. The LIV submits that this process is working well and provides adequate protection to the children and parties involved.

Option 2

New grounds upon which state intervention in the care of a child may be authorised and reform of the procedures followed by the Children's Court when deciding whether to provide this authorisation.

New grounds

The LIV submits that the grounds for finding that a "child is in need of protection" contained in *s 162* of the *Children and Youth and Families Act 2005* are adequate. The existing ground of *s 162* has been refined in previous years due to the recommendations made to the two DHS reviews in 2004 and 2005, which overcame what were previously identified as deficits in the previous legislation. For example a previous ground of "being exposed" was often used as a vehicle to achieve DHS involvement where assistance was perceived as possibly helpful but specific harm or risk of harm could not be established. The undesirability of this resulted in the current more confined grounds. Inclusion of the proposed ground of "needs assistance" is not warranted as it is incapable of definition and would be returning to a situation previously recognised as inappropriate.

A category that that is not addressed in s 162 is where there is an out of control young person and the parents have done everything they can to protect that young person. The LIV supports the expansion of s 162 to include this type of category only where the removal of the young person is not necessary but where some assistance by the State is appropriate. The expansion of s 162 in this way is intended to address the young person's behaviour which is not attributed to the parent's failure to behaviour protectively.

Specific court processes

The LIV believes that although the Court is clearly not a child friendly environment, this disadvantage needs to be balanced against children being given the opportunity to exercise the right to participate directly in proceedings which can have a profound effect on their lives. If children are not present at Court the Court would be deprived of an essential component of the information necessary to make an appropriate decision about the child's future.

Ideally children should not be required to attend Court at later stages, provided they have been able to give instructions before the relevant hearing. This would require the Department of Human Services (DHS) to provide their report in good time and to enable appropriate arrangements for the children to meet with their lawyer. Children should be permitted to attend court if they wish.

Division 12A of Part VII of the *Family Law Act 1975* relates to child related proceedings and the use of a less adversarial approach to hearing cases involving children. The Less Adversarial Trials (LATS) in the Family Court focuses on the needs of the child and their future. The proceedings are case managed by one judge and are conducted without undue delay and with as little formality as possible. The LATS also allow the parties to speak directly to the judge to inform him/her of their wishes.

The LATS process is working well in the Family Court and the LIV suggests that the positives from the Family Court experience should be adopted by the Children's Court.

Option 3

The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services

Sections 15 and 16 of the Act detail the functions and responsibilities of the Secretary. The main functions are to promote the prevention of child abuse and neglect and to assist children who have suffered abuse and neglect and to provide services to them and their families to prevent further abuse and neglect from occurring.

The LIV supports the appointment of an independent statutory commissioner with a function equivalent to the Office of Public Prosecutions ("OPP") in criminal cases, namely to prosecute DHS applications before the Children's Court. Currently protection applications are conducted by DHS. This would greatly assist in the Court being more efficient and less adversarial and allow DHS to concentrate on acting in the child's best interests.

The LIV believes that the creation of a CYPC would assist in any conflict between families and the DHS. If the CYPC had a function equivalent to the OPP, the CYPC would reduce the conflicting nature evident in the role currently held by DHS, that being that DHS is responsible for assisting *and* prosecuting in child protection matters. If the CYPC had responsibility for prosecutions in child related matters, this would provide DHS with the opportunity to focus its attentions to promoting the best interest of the child.

Option 4

Changing the nature of the body which decides whether there should be State intervention in the care of a child so that it includes non-judicial as well as judicial members

The function of deciding whether 'a child is in need of protection' is the exercise of judicial power.

The LIV is not in favour of changing the current composition of the court. Decisions that are made by the Children's Court about whether children are placed in State care or how much contact that they may have with their parents or where there have been allegations of abuse are extremely difficult. Those decisions often cover a wide range of sometimes conflicting issues and these decision should not be made by persons that are not legally trained.

Adoption of a system similar to the Scottish model where a children's panel is convened which consists of a group of people (most are non lawyers) from the community that sit on hearings and make decisions regarding children, may constitute a fundamental derogation of the rights of children to have matters heard by a judicial officer under CROC.

Furthermore, there is considerable advantage in the current system that allows matters to be heard expeditiously. One example of this is the processes available in the Children's Court to provide for an urgent hearing of a matter on the same day as the child is apprehended. The LIV believes that if the current composition of the court changes it would allow for protracted hearings and inconsistent decisions that would ultimately see children suffer.

Decisions that are made by the Children's Court about whether children are placed in State care or how much contact that they may have with their parents are far too important to be made by persons that are not legally trained.

The LIV believes that the people that are best placed to make decisions about these issues are lawyers. The LIV would therefore oppose the establishment of a tribunal or panel to hear Children's Court family division cases and believes that strong judicial management is imperative to serve the best interests of the child.

Aboriginal and Torres Strait Islander Children and Young Persons

The LIV recognises that the options presented in the information paper do not specifically refer to a review of child protection services specifically relating to Aboriginal and Torres Strait Islander (ATSI) children and young persons.

Section 13 of the *Children, Youth and Families Act* 2005 (CYFA)·requires that an Aboriginal agency be consulted and involved in decision making regarding out of home care decisions and arrangements for Aboriginal children. Given the over-representation of ATSI children in our Court systems, the LIV is concerned that there has been inadequate consultation with the Koori community. It is the view of our members that the power imbalance between ATSI families and DHS is significant and that this gives rise to potential for breaches of human rights to occur.

It is the view of the LIV that all stakeholders involved in child protection and Children's Court matters should have ongoing cultural awareness training and specific training on legislative provisions and processes for ATSI children.

Conclusion

The LIV believes that neither extensive legislative change, nor extensive change to the current child protection processes under the Children's Court is required to improve the system, although some legislative change is desirable such as the creation of an Independent Statutory Commissioner. In addition to the matters raised in this submission, the system can be transformed through an injection of government resources, improved DHS policy and practices, enhanced services for people in the system and increased training and support for Children's Court staff and other professionals in the system.

Law Institute Victoria

LIV Policy Statement

Removal of Discrimination against People on the Basis of Gender Identity or Sexual Orientation

A policy statement developed by the Administrative Law & Human Rights Section of the Law Institute of Victoria in conjunction with the Young Lawyers' Section

Date 21 June 2007

Queries regarding this policy statement should be directed to:

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1 Background

a) Laws prohibiting all forms of discrimination, including discrimination on the basis of gender identity and sexual orientation, have been enacted worldwide.[1]

b) Despite positive developments in the enactment of laws prohibiting discrimination, some Australian laws continue to discriminate against gay, lesbian, bisexual, transgender and intersex (GLBTI or LGBTI) people.[2]

c) The Law Institute of Victoria (LIV) has consistently opposed discrimination in all its forms, including against GLBTI people on the basis of their gender identity or sexual orientation, in Australian legislation at the federal, state and territory level.[3] Examples include the LIV's calls for a relationship registration scheme at the federal and Victorian levels open to both same-sex and mixed-sex couples.

2 Objective

a) This policy statement:

- outlines the LIV's support for laws that do not discriminate against LGBTI people on the basis of their gender identity or sexual orientation; and
- provides a framework for the LIV to lobby Australian governments for the removal of laws that discriminate on the basis of gender identity or sexual orientation.

b) The LIV aims to see the removal of all discrimination on the basis of gender identity or sexual orientation from laws at the state, territory and federal level and to encourage the adoption of non-discriminatory laws worldwide.

3 Policy

a) The LIV is fundamentally opposed to discrimination and inequality before the law in any circumstances, including discrimination on the basis of gender identity or sexual orientation.

b) Equality before the law is a fundamental principle which means that the legal profession has a particular responsibility to redress discrimination and inequality experienced by all people, including GLBTI people.

c) The LIV will continue to work with other law reform and relevant community bodies to identify and remove discrimination on the basis of gender identity or sexual orientation in laws at the local, state, territory and federal level.

d) The LIV will continue to lobby the state, territory and federal Parliaments of Australia to ensure that laws do not discriminate on the basis of gender identity or sexual orientation.

e) The LIV does not, for the purposes of this policy statement, subscribe to any particular terminology. In referring to "LGBTI" or "GLBTI" people, the LIV is referring generally to people who are gay, lesbian, bisexual, transgender (e.g. where gender identity does not match assigned identity) or intersex (e.g. where chromosomal sex does not match phenotypic sex). In referring to "gender identity or sexual orientation", it is referring generally to the concepts defined in s4 of the *Equal Opportunity Act* 1995 (Vic).

[1] The 1966 *International Covenant on Civil and Political Rights* is one of several international instruments that prohibit discrimination. In Australia, laws prohibit various forms of discrimination at the federal, state and territory level. Victoria's enactment of the *Charter of Human Rights and Responsibilities* signals a parliamentary commitment to stamping out discriminatory laws and discriminatory public decision-making in Victoria.

[2] At the federal level, examples of laws that discriminate against GLBTI people on the basis of their gender or sexual orientation include laws that deny workplace and financial entitlements to GLBTI spouses (see further HREOC Inquiry http://www.hreoc.gov.au/samesex/). In Victoria, laws such as Part IX of the *Property Law Act* 1958 (Vic) and the *Administration and Probate Act* 1958 (Vic) were valuably reformed in 2001 to recognise same sex couples, but still fail to implement in full the entitlements that are available to heterosexual spouses.

[3] Examples include the LIV's work in respect of: proposed federal legislation on sexuality discrimination (*Sexuality Discrimination Bill* 2006); same sex entitlements in respect of federal financial and work-related benefits (HREOC, 2006); lobbying for formal recognition of same sex relationships in Victoria (Hulls, 2005); lobbying for federal legislation to allow same sex couples access to the rights and responsibilities enjoyed by married couples (Ruddock, 2005); proposed changes to Victorian legislation related to assisted reproductive technology and adoption (VLRC, 2004); opposing changes to the federal definition of "marriage" that restricted it to a union between a man and a woman (Senate Legal and Constitutional Committee, 2004); and proposed Victorian legislation on same sex relationships (Media Release, 2001).