Submission to Protecting Victoria's Vulnerable Children Inquiry

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Submission

This submission addresses two of the identified terms of reference for the Inquiry:

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

Four key points are presented.

First, I wish to first draw attention to *Children in need of protection.* The *Children, Youth and Families Act 2005* sets out the legislative grounds for the operation of the child protection service by defining when a child is in need of protection, the processes of child protection notification, investigation and the issuing of a protection application, to the making of court orders and the principles for the child protection case planning process. Although there is common acknowledgement that child protection legislation needs to move away from looking for episodes of abuse as isolated events, and legislative attention is given to the effects of cumulative harm (*Children, Youth and Families Act 2005*, s.10), the legislative grounds for a child protection application are still constructed around an event-oriented approach. Child protection workers must demonstrate to the Court incidents of abuse or evidence of behaviours that have caused harm or are likely to harm the child. The emphasis on discrete episodes of maltreatment excludes many child protection cases which, in Victoria, are generally of a more chronic nature and about cumulative harm rather than 'specific dangerous parental behaviours' (Allen Report, 2003, p. 29).

The Victorian Ombudsman, in his 2009 review of the child protection programme, noted that 'the current legal system perversely encourages disputation rather than cooperation in the protection of children' (Office of the Victorian Ombudsman 2009, p.57), when the remit of the child welfare jurisdiction is to respond 'to concerns about child abuse and neglect often in circumstances of acute family disadvantage or marginalisation' (VLRC 2010, p.312) and what is needed to decide these matters is expertise other than legal training (VLRC 2010, p. 364). A further consequence of the law becoming the sole standard by which cases are judged and maltreatment defined, is that this influences child protection practice about thresholds for intervention according to what might or might not be accepted by the court.

Section 162 of the *Children, Youth and Families Act 2005* sets out the grounds on which child protection matters are sought and decided and these remain completely unchanged from previous legislation- the *Children and Young Persons Act 1986* - despite the dominance of notifications about neglect (the combined grounds of emotional abuse and child neglect formed 44 % of the notifications made, in 2000-01, to the Victorian child protection service, a statistic which continues to predominate). The legislation neglects *neglect* as a category of child abuse, and fails to provide the threshold criteria that are pivotal to judicial decision-making in child protection matters, criteria that are present in much of contemporary child welfare legislation in other national jurisdictions. The absence of definitions of key terms, for judicial decisions on risk, harm and safety, in legislation further contributes to tension between the child protection and legal systems with different and distinct sets of explanations and understandings of, and judgements about, the nature and impact of child maltreatment.

A related concern is the lack of legislative provision for children not to be in the same household as a schedule one offender (convicted sex offender), yet this has emerged as a key area of concern in contemporary child protection. Both the *Children Act 1989* and the *Children Scotland Act 1995* protect children in this regard. Section 52 of the *Children Scotland Act* 1995 sets out that a child is in need of care and protection when:

a) a child is beyond the control of any relevant person;
b) that the child is falling into bad associations or is exposed to moral danger;
c) the child is likely (i) to suffer unnecessarily, or (ii) be impaired seriously in their health or develop due to a lack of parental care;

d) that the child who has had offences committed against them (including sexual offences, assault, ill-treatment, neglect, exposure, abandonment, and exposure to serious risk);

e) that the child is, or is likely to become a member of the same household as a child in respect of whom a scheduled offence has been committed;

f) that the child is, or is likely to become a member of the same household as a person who has committed a scheduled offence (any of the offences referred to above, a person commonly known as a Schedule 1 offender);

g) that the child is, or is likely to become a member of the same household as a person who has committed incest;

h) that the child has failed to attend school regularly without a reasonable excuse;

i) that the child has committed an offence;

j) & (k) the child has misused alcohol or any drug (whether or not it is a controlled drug), or has inhaled the vapours of a volatile substance other than for medicinal purposes.

l) the child requires accommodation or is the subject of a parental responsibility order or their behaviour is such that they require supervision, requiring the local authority to act.

Second, the *adversarial paradigm* that operates in the Children's Court in Victoria creates considerable tension between the child protection and legal systems. As noted, the legislative framework set out in the *Children, Youth and Families Act 2005* is at its most effective when responding to specific episodes of child abuse, where facts such as injuries caused by physical or sexual abuse make it straightforward for Magistrates to act decisively when deciding a child's best interests. However, child protection matters brought before the Court are increasingly those where there have been a number of previous notifications to the child protection service about maltreatment, and applications for child protection orders have been unsuccessful. They are cases that generally involve long-term factors impacting on the lives of the children and their families: low income, sole parenthood, parental mental illness, substance abuse and domestic violence. They are cases the Victorian Ombudsman (2009 p. 60) noted can have 'extensive histories…demonstrating serious child protection concerns … (yet the) Act requires that the Children's Court deal with the specific circumstances of each child'. Cases involving such chronic problems, often based on grounds of emotional abuse

and neglect, are more diffuse in terms of facts to support them and do not focus on critical episodes. They typically are more difficult to prove legally, there is little agreement between legal and welfare systems about definition and recognition of emotional maltreatment and neglect, and the child protection service struggles to present the type of evidence of demonstrated behaviour and events that the Court seeks and fits readily into legislative parameters about proof of harm and the need for care and protection.

Child welfare legislation reforms in Victoria have failed to accommodate the kind of multi-disciplinary contributions that are necessary to both make sense of, and effectively respond to, these increasingly complex problems. Child welfare legislation in Australia continues to maintain adversarial and highly legalised processes to deal with child abuse which diminish the significance and utility of welfare contributions. So, whilst, child protection authorities have, as Sammut and O' Brien (2009: 6) comment, broadened their mandate to attempt to protect children from a wider spectrum of acts and behaviours that damage child development, legislation and legal process do not readily support this.

Third, the Victorian Law Reform Commission (2010) suggested *a process be designed that reflects the unique role of the child welfare jurisdiction*, which minimises disputation and works on agreement , as a better way to resolve the child's best interests - especially 'when parties will usually have important ongoing relationships' (2010, p. 209). The VLRC proposed a range of measures be introduced, such as family group conferences, that are agreement focussed and more child centred in their approach (2010, p. 214). This is the case in New Zealand where family participation in decisions affecting children and young people is written into legislation. The VLRC suggested that principles which encourage early resolution of child protection matters - with emphasis on agreement - should be incorporated into legislation. The legal process should be problem solving in its approach and must accommodate the kind of inter-professional contributions decision makers need to decide about a child's development and wellbeing. Given the overlap between mental health, disability, drug and alcohol and domestic violence sectors, the VLRC noted- as have others- that the protection of children needs to the shared responsibility that is evident in other jurisdictions.

It was noted that the legal and statutory approach in England and Wales appears to better provide for this. The incorporation of child welfare guidance for the court and child protection case conferences into statutory processes provides a way to assess the relevant information about a child and family and develop an agreed child protection plan to be put to the Court.

Pre-hearing conferences were introduced into the Children's Court in 1993, following an amendment to the *CYPA 1986,* to provide for the use of mediation and family decision-making principles in disputes between the child protection service and families or young people for whom a child protection order is sought. The convenors who directed the conferences were mostly independent social workers, although legal practitioners have also been appointed. The independent convenors (employed as Governor in Council appointments) brought to the Court and the process considerable knowledge of family functioning and child development as well as skill in conciliation. They are being replaced by convenors attached to the Court, initially Court Registrars, who have developed another model for dispute resolution conferencing.

Fourth, the observation of other national child protection systems suggests that *effective child protection is a shared enterprise.* The more child protection is constructed as the principal conduit for welfare concerns about children, the more closely aligned it is with legal obligation, and children's best interests are predominantly cast in terms of legislative parameters around risk and safety. The demands on such a system are high and resource intensive and distract from a focus on universal, early intervention systems (Humphreys *et al*., 2009). The need for greater collaboration between health, welfare and legal systems is a theme common to both the Ombudsman's 2009 and the VLRC 2010 Reports as well as to other commentators. It is generally acknowledged that families with multiple problems are the primary client group in child protection services, and thus before the Court. A more collaborative and inter-professional approach better addresses the combination of problems these families experience than approaches centred on fault and blame.

The Council of Australian Governments (2009) believes that applying a public health model, rather than focussing solely on legal and rights-based approaches to child protection, may help to reduce the burden on child protection services and deliver better outcomes for children and families. The significance of the public health model is that it offers a service continuum, ranging from primary services available to all families, such as health and education, to having secondary interventions available to families who are seen as at risk of child maltreatment, to tertiary child protection services which are a last resort for families when child abuse and neglect has occurred (Scott 2006: Horsfall, Bromfield and McDonald 2010, p. 4). It is an approach that brings a broader understanding to deciding a child's best interests.

In summary, there is a need for legislative change, in ways outlined above. There is a need to do that within an examination of a more collaborative and multi-disciplinary approach to child protection which is integrated into the legal process, recognising children's best interests are multi-factorial and developmentally anchored as well as founded in family connection.

References

Allen Consulting Group (2003) *Protecting children: The Child Protection Outcomes Project*. Melbourne: Victorian Department of Human Services.

Children, Youth and Families Act 2005, Victoria.

Horsfall, B., Bromfield, L. and McDonald, M. (2010) *Are social marketing campaigns effective in preventing child abuse and neglect?* (Child Abuse Prevention Issues No. 32), Melbourne: Australian Institute of Family Studies, National Child Protection Clearinghouse.

Humphreys, C., Harries, M., Healy, K., Lonne, B., Mendes, P., McHugh, M. and Sheehan, R. (2009) 'Shifting the child protection juggernaut to earlier intervention. *Children Australia 34*, 3, 5-8.

Office of the Victorian Ombudsman (2009) *Own Motion Investigation into the Department of Human Services Child Protection Program.* Melbourne, Victoria.

Sammut J. and O' Brien, T. (2009) *Fatally flawed: The child protection crisis in Australia*. NSW: Centre for Independent Studies.

Scott, D. (2006) 'Towards a public health model of child protection in Australia. *Communities, Children and Families Australia*, 1, 9-16.

The Council of Australian Governments (2009) *Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009–2020* (the National Framework), Annual Report.
http://www.fahcsia.gov.au/sa/families/pubs/Pages/pac_report_to_COAG.aspx

Victorian Law Reform Commission (2010) *Protection Applications in the Children's Court: Final Report.* Melbourne, Victoria.