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MONASH University

Response to Review of Victoria's Child Protection Legislative Arrangements

Submission to the Victorian Law Reform
Commission from the Australian Childhood
Foundation and Child Abuse Prevention Research
Australia.

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Introduction

The reference by the Victorian Auditor General to the Victorian Law Reform Commission to review those aspects of Victoria's child protection system that concern the Children's Court is of crucial importance to the effective protection of children. However, the impetus for the review which emphasises the need to minimise disputation and delays in the court process belies the complexity of factors with the child protection system as a whole that contribute to a range of problems highlighted in the Victorian Ombudsman's recent report.

The submission from the Australian Childhood Foundation and Child Abuse Prevention Research Australia, Monash University argues in favour of a system overhaul that is underpinned by the implementation of

- independent structures of accountability which enables continuous transparent review of and improvement to the child protection system;
- revised governing legislation which clarifies and emphasises the right of all children to be protected from abuse, violence and neglect;
- greater integration between child protection and the criminal justice system which ensures that abuse, neglect and violence towards children and young people are clearly treated as crimes;
- policy framework that commits all parts of the child protection system (including the Children's Court) to timely and decisive actions which promote protection and stability for children and young people who have experienced abuse, violence and neglect; and,
- decision making practices that prioritise the developments in the knowledge base about the neurobiology of trauma.

Each of the four key options for reform as identified by the VLRC are analysed in greater detail in the following sections.

Option 1. New processes that may assist the resolution of child protection matters by agreement rather than by adjudication.

The very wording of this option demonstrates the broad definitional tension reflected throughout key areas of the Children, Youth and Families Act 2005 between a children's rights paradigm and a family welfare paradigm (Goddard and Tucci, 2008).

According to Goddard (1996):

"...Every development in knowledge of the problem of child abuse has been accompanied by disagreements about definitions to be used, the incidence of the problem, theoretical approaches to causation, the perpetrators of abuse, the effects on victims, efficient approaches to practice, the adequacy of child protection policies, and the appropriateness of methodologies chosen to ascertain the 'truth' about all of the above...(p. 9)"

The welfare paradigm explains child abuse and neglect as an outcome of societal structures of inequity that cause stress and hardship to families. As such, parents need support and resources to better care for their children. The principles of the legislation emphasise the preservation of children with their families and a focus on reunification where a child has been removed. It declares a preference for decision making by consensus and collaboration.

It is in this context that the concept of dispute resolution is realised. Child protection intervention itself is positioned as causing the dispute which is then supposed to be resolved through facilitated decision making. In addition, the inadequacy of resources made available to the Children's Court further establishes the need for dispute resolution as a way of reducing court waiting times.

However, the welfare paradigm provides only a partial framework for organising intervention to protect children from abuse. For example, it is unable to explain the causes of child sexual abuse. It is also limited in its capacity to explain the chronic neglect of children (Flaherty and Goddard, 2008). It also has little relevance to understanding the cycle of intimate partner violence within families (Bedi and Goddard, 2007). Finally, it only partially explains the causes of psychological (Tucci, 2004) and physical abuse of children.

If the paradigm and therefore the wording of the Act was more consistent with a children's rights framework, then it would integrate and legitimise the use of the words: abuse, neglect or violence. Children would be considered to have been abused or neglected not subject to harm. Parents/guardians would not only be described passively as being unable to protect children from harm as they are in the current Act, but they would also be positioned as actively responsible for causing such abuse or neglect.

A review of the principles of the Act is required in order to ensure that it more clearly articulates its core objective to protect children from abuse, neglect and violence at the hands of their parents/guardians or adults with the responsibility to care for them.

This revised and clarified frame would strengthen the responsibility of the Family Division of the Children's Court to make a determination to prove an application that a child is in need of protection from abuse and neglect. The determination itself acts as a record in law which confirms the experiences of trauma, disruption and violence experienced by the child. The clarity of the determination defines and communicates the mandate of the State to intervene in the child and family's life. Having made this determination, it must then consider the recommendations made by a protective intervener about the most effective way to ensure the protection of the child. Its role is to make Orders available in the Act and set out processes for review where appropriate.

The focus of the Court in making Orders should be on ensuring that the Orders it makes achieves the following:

- children and young people are not subject to any further abuse, neglect or violence;
- parents are clear, through the use of contracts, about the expected changes they are required to make before a child is considered safe enough to live in their care without statutory supervision or a child who has been removed for his/her own protection is returned to the care of their parents;
- the matter has been or will be referred to the Police for investigation if evidence is provided to the Court that a crime against a child has or is likely to have been committed; and,
- children and young people are provided with opportunities for reparative intervention that leads to a reduction in trauma based stress and be supported to achieve normative developmental milestones (Tucci, Mitchell and Goddard, 2010).

In this system, there is no place for any alternative dispute resolution procedure. Collaborative decision making would occur for all cases in the lead up to the recommendation to the Court and later as part of the case planning process.

At they very least, it is strongly recommended that Alternative Dispute Resolution procedures should **not be used** in matters that involve physical abuse and/or sexual abuse of children.

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.

As noted in the previous analysis, the existing grounds for finding that “a child is in need of protection” are inadequate. It is recommended that the wording of the grounds be revised so that they refer more directly to abuse, violence and neglect. The clauses in this section should be clarified so that parents or primary carers are more directly positioned as responsible for causing the abuse or neglect as well as maintaining the current wording that parents are unwilling or incapable of protecting a child from such harm.

In addition, it is recommended that Section 83 of the Children, Youth and Families Act 2005 which requires the Secretary to report allegations of sexual or physical abuse of children in out of home care be extended so that the Secretary is required to report all allegations of sexual or physical abuse of children and young people to the Police.

It is also recommended that a new ground be added to Section 162 that defines the need for protection for children where “grave concerns” are held for the child’s safety, wellbeing and development. This new ground allows for circumstances where children are likely to have been abused or neglected but it is not possible to identify an individual as responsible for the abuse. This will enable intervention in situations where abuse is suspected but not able to be confirmed. It will enable the recording of information that can be used in subsequent protective assessments to identify patterns of victimisation of children that can lead to more substantial intervention.

Earlier mandated involvement that introduces statutory intervention and supervision, along with parental contracts, would strengthen the capacity of the child protection system to reset the threshold for protective action. This is an issue which alarmed the Victorian Ombudsman (2009):

“...the degree of tolerance of risk to children, referred to as the ‘threshold’, varies across the State according to the local department’s ability to respond. I located many examples of cases where I consider that the risk of harm to children was unacceptable... (p.10)”.

The introduction of a mechanism for mandated involvement that focuses on parental change to reduce the likelihood of abuse or neglect occurring will serve to rebalance the system towards a children’s rights paradigm. It will validate the State’s role in preventing abuse and neglect, whilst expanding the options available to child protection workers and community service organisations to use to effect real change in the lives of vulnerable children and young people, especially in those circumstances where parents are unwilling to engage voluntarily with forms of intervention aimed at strengthening their capacity to protect and care for their children.

It is not recommended that the centrality of the role of the Children’s Court be diluted in any way by establishing processes involving non-judicial personnel. The Children’s Court is at the heart of formal decision making in child protection and should remain so.

However, it should be given clearer direction within the legislation to prioritise the rights and needs of children over all other considerations. These rights and needs include: protection from abuse, violence and neglect; accountability of adults who hurt their children; stability and continuity of planning; and establishing reparative environments that resource the recovery of children from the trauma associated with their experiences of abuse, violence and neglect.

It is also not the role of the Children’s Court to involve itself in the administration of Orders or resulting case planning decisions for children and young people. As noted already in this submission, a key function of the Court is to act as an independent review mechanism for the decision making of the Secretary. If the Court becomes involved in administration of the Orders, then it can no longer fulfil this role.

Finally, it is recommended that children always be separately represented by suitably qualified and independent legal practitioners. The legal practitioners should have access to specialist psychological resources to consult with in relation to contextualising the instructions provided by a child or young person. The Guardian ad Litem system in England has a number of positive elements which should be incorporated into the Victorian child protection which results in a more integrated approach to legal representation of children and young people in court processes.

Under no circumstances is it acceptable for children to be represented by the same legal practitioner who is representing the parent/guardian or primary carer.

The adversarial nature of the Children's Court will not be reduced by introducing procedural reform. The experience of participants in the Court processes will be less adversarial if the focus of the Court is clarified on protecting children from abuse. Whilst it continues to attempt to balance the wishes and rights of parents with the needs of children who have been abused or neglected, it will be forced into adversarial tests of evidence. A greater emphasis on protecting children within a children's rights paradigm will sharpen the Court's remit and scope of evidence that it will consider.

Option 3. The creation of an independent statutory commissioner who would have some of the functions currently performed by the Department of Human Services.

Overall, the Department of Human Services is too complex to be able to effectively meet its responsibilities in protecting children from abuse and neglect. As such, it is recommended that a separate Department for Child Protection with its own Secretary be established to implement all of the functions set down in the Act.

A separate statutory commissioner should not be established to perform functions that are delegated to the responsible Minister and Secretary. This will only serve to dilute lines of accountability, a major cause for concern already highlighted by the Victorian Ombudsman (2009):

"...Despite ...media attention, it is clear that most child protection cases receive limited if any external scrutiny. My investigation revealed instances where children have died, been seriously injured or allegedly assaulted by their carers... Yet, these cases have attracted little or no external scrutiny....(p.14)".

The only reason to introduce a statutory commissioner is to deliver transparent and truly independent systems of review and accountability. As we have noted elsewhere (Goddard, 2010; Goddard and Tucci, 2009), Victoria's current Child Safety Commissioner role and the severely limited nature of its child death review system is totally inadequate. As such we have previously recommended (Goddard and Tucci, 2008) the establishment of an independent Child Protection Inspectorate to regularly inspect, audit and review the effectiveness of all state run children's services, child protection systems and out-of-home-care. We make the same recommendation again.

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.

As already noted, it is not recommended that the centrality of the role of the Children's Court be diluted in any way by establishing processes involving non-judicial personnel.

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Professor Chris Goddard has worked extensively in social services in the UK and child protection in Australia. His research career started in the child protection team at the Royal Children's Hospital, Melbourne where he undertook some of the earliest work connecting child abuse and other forms of family violence. His research into child deaths led to an Age series and a Four Corners ABC TV investigation into child protection in Victoria. He was Head of the School of Social Work at Monash University from 1998-2007. He established Child Abuse Prevention Research Australia, a joint initiative with the Australian Childhood Foundation and Monash University, and is now its full-time Director. His published books include *In the Firing Line* (Wiley, UK) with Janet Stanley published in 2002 and *The Truth is Longer than a Lie* with Neerosh Mudaly published in 2006. His latest book, with Linda Briskman and Susie Latham, *Human Rights Overboard: Seeking Asylum in Australia*, (Scribe, 2008) has won the Australian Human Rights Literature Non-Fiction Award. He can be contacted by email at Chris.Goddard@med.monash.edu.au.