Submission to the Victorian Law Reform Commission

Review of Victoria’s Child Protection Legislative Arrangements

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My submission is limited to a consideration of what body should deal with issues between parents or caregivers and the State where the State alleges they are incapable of properly caring for children who are at risk and what processes that body should adopt.

1. Protecting children’s welfare is one of the most important functions of society. The health, happiness and fulfilment of children, their families and society very much depend on the promotion of children’s welfare.

2. The English common law developed the concept of parens patriae, which asserted the power of the state to intervene to protect the welfare of children where the circumstances required it.¹ This principle was applied in court processes concerning children. Although a power of the Crown to intervene in relation to child welfare, the power has been exercised by the courts over centuries.

3. With the creation of the court system in Australia, the parens patriae jurisdiction was vested in the Supreme Courts of the states.

4. Courts continue to play an important role in promoting the welfare of children. Jurisdiction over children of a marriage or those born outside of marriage where the parents or guardians are at issue over matters concerning their welfare is vested in courts – the Family Court of Australia and the Family Court of Western Australia. Ultimately it is a judge of those courts who determines matters that cannot be settled.

5. In the states and territories jurisdiction in criminal matters involving children is vested in a special court – the Children’s Court. For a long period those courts have also exercised welfare jurisdiction in cases where children are seen to be at risk.

6. The involvement of the State in issues concerning the welfare of children can result in it overriding the wishes of parents and family concerning diverse issues relating to children, such as where they are to live, who is to make decisions relating to them, their schooling, health and contact with parents and family. It is often a paternalistic and coercive jurisdiction. In summary, when the requisite circumstances arise, the State can significantly alter the nature of the relationship between parent

and child and make decisions that can have wide-reaching effects for children and their families.

7. While the Children’s Court is involved in many welfare matters at critical stages, the Executive has significant powers in this area.

8. I understand that an option being considered by the Commission is the establishment of a specialist tribunal to deal with applications concerning children at risk.

9. I suggest that the tribunal option is inappropriate for the following reasons:
   a. It sends the wrong message to the community concerning the importance of child welfare matters by removing the jurisdiction from a court and placing it in the hands of a tribunal.
   b. It creates an unfortunate inconsistency between how federal and state jurisdiction over children is exercised.
   c. Tribunals commonly deal with administrative matters and/or with less serious disputes between parties. Tribunals are quasi-judicial in nature and can be seen to be more a part of the Executive than the Judiciary. It is the Executive through its relevant department that removes children seen to be at risk from their parents and that makes application for orders concerning their welfare. As well as the coercive aspects of the role of the Executive in this context there are emotional, psychological and social effects on the children and family involved. It is not proper to have a body that may be perceived to be an instrument of the Executive dealing with matters where there may be significant disputes between it and citizens over such important matters as the welfare of children. These issues should remain the province of the Judiciary, which is independent of the other arms of government and seen to be so by the public.
   d. The perceived advantageous features of a tribunal – such as less formality, the possibility of the use of a multi-disciplinary team – can be and have been established as part of courts.

10. As to paragraph 9(a), in addressing issues concerning how a court is operating in dealing with serious matters, the trend has been to strengthen the status of the court and to improve court procedure rather than to remove the jurisdiction and place it in the hands of a tribunal. Thus, Australian states have reformed Children’s Courts appointing a judge as their president. In many cases, coroner’s courts have been strengthened by reforming their processes and by the appointment of a judge as State Coroner. To deal with children’s matters against this trend by removing them from a court’s jurisdiction and sending them to a tribunal is inconsistent with this trend and would send the wrong message concerning the government’s regard for the importance of the issue. It would create an unfortunate precedent, as it would suggest that even serious matters concerning the relationship between the Executive
and its citizens can be removed from the province of the Judiciary and be
dealt with by administrative tribunals.

11. In any event, it is generally less serious matters or purely administrative
matters that have been removed from courts and placed in the
jurisdiction of a tribunal.

12. To the possible objection that the important issue of mental health is
dealt with by a tribunal so why not children's issues, children's issues and
mental health are distinct. Mental health jurisdiction in part is exercised
by a tribunal and in part by the courts – such as in criminal matters
involving mental health issues. However, courts have historically dealt
with children's issues. Further, children's issues commonly involve the
integrity and wellbeing of a family and its members rather than the health
needs of an individual.

13. As to paragraph 9(b), it would be inconsistent for federal jurisdiction over
the welfare of children to be exercised by a court while state jurisdiction
over the welfare of children was exercised by a tribunal.

14. In relation to paragraph 9(d), some courts already take a less formal,
multi-disciplinary approach to addressing legal problems, including child
welfare matters. For example:
   a. The Family Court of Australia and the Family Court of Western
      Australia have taken a multi-disciplinary approach to children's
      matters involving allegations of abuse, where a registrar and a
counsellor are involved in case management processes. The court
programs are called "Magellan" and "Columbus" respectively. It
is appropriate to note that here there may be an overlap between
issues dealt with in the family law jurisdiction and those
commonly dealt with under state welfare law.
   b. Drug courts use less formal processes and are supported by a
      multi-disciplinary team. They are a good example of the blend of
the therapeutic and justice requirements of a case. Other problem-
solving courts such as mental health courts, family violence courts
and community courts apply these principles to varying degrees.
   c. The coronial jurisdiction is increasingly multi-disciplinary in
      nature, with experts from different disciplines involved in the
work of the court.

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4 See King et al, Non-Adversarial Justice, ch 9 (see para 15 of these submissions).
15. A new approach to the law already facilitates courts taking more therapeutic, less adversarial and a more interdisciplinary approach to the law and court process. This is the field of therapeutic jurisprudence. I refer the Commission to Chapter 2 of the book *Non-Adversarial Justice* by King, Freiberg, Batagol and Hyams (Federation Press, 2009) for an introduction to the concept.

16. The importance of therapeutic jurisprudence to judging can be seen in the fact that the National Judicial College of Australia includes training in therapeutic jurisprudence as part of the national curriculum for judicial training.

17. Moreover, in 2009, the Australasian Institute of Judicial Administration published a bench book to assist judicial officers in applying therapeutic jurisprudence in their courts.5

18. The establishment of a specialist court applying therapeutic jurisprudence is an option that could be considered in promoting a more therapeutic and less adversarial approach to resolving child welfare problems where the intervention of a court is required. In appropriate circumstances cases before the court could be included in a special program where:

   a. The parents/caregivers and (where appropriate) the children involved could work together with a multi-disciplinary court team to formulate a plan for the children’s welfare and for parents or caregivers to address underlying issues affecting their parenting.
   b. Support and treatment services could be provided to assist in the carrying out of the plan.
   c. The case could come before the court for regular review whereby the court could encourage parents and support the process. If problems arose with performance the court could facilitate a problem-solving process.
   d. Rather than taking a paternalistic or coercive approach, the court program would aim at promoting therapeutic values such as voice, validation and respect and participant self-determination and self-efficacy – principles that are seen to be important in promoting positive behavioural change.6
   e. The court could remove cases where there is serious breach of obligations (such as by serious offending by parents) and send them for determination in a defended hearing or by consent.

19. Such an approach has been tried in a small pilot project in Western Australia and was informed in part by the family dependency drug

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6 This approach is explained more fully in the Solution Focused Judging Bench Book, see n 2. See also: King MS, “Should Problem-Solving Courts be Solution-Focused Courts?” (submitted) – a copy of which has already been supplied to the Commission.
treatment courts operating in New York and elsewhere in the United States.\textsuperscript{7}

20. There is evidence that a therapeutic approach by a judicial officer is important in promoting positive outcomes for participants in problem-solving courts.\textsuperscript{8} There is also evidence that drug courts are cost effective and promote reduced recidivism.\textsuperscript{9} These results support the effectiveness of these therapeutic courts.

21. Another option for the Commission to consider is the application of multi-door courthouse theory.\textsuperscript{10} While applied commonly to ADR, it could have a wider application in the Children's Court. When a case commences in court, the court in discussion with the parties could discuss the various options available for resolution – such as mediation, family group conferencing, a problem-solving court program under the supervision of the court or if the matter cannot be resolved in another way, a less adversarial trial (influenced by the approach of the Family Court). In such matters, naturally there should be some provision for the making of interim orders to address urgent matters concerning the welfare of the child or children the subject of the proceedings.

22. The advantages of a multi-door courthouse approach include:
   a. Ensuring each case receives the method of resolution best suited to the circumstances and the parties
   b. The possibility of reducing the number of defended hearings
   c. Empowering participants and making them more committed to implementing outcomes
   d. A potentially more therapeutic and engaging process than a purely adversarial approach
   e. Reducing the cost to the court and the community.

23. In considering the multi-door courthouse concept, the reservations raised by Chief Justice French in his State of the Australia Judicature address\textsuperscript{11} in 2009 should be borne in mind.

24. In formulating its recommendations to the Attorney General, I urge the Commission to not only consider what is seen to be best practice by professionals in the field but also to consider the principles behind how and why people change their behaviour in a positive manner.\textsuperscript{12} In many welfare cases the ideal is to help parents or caregivers of children at risk

\textsuperscript{8} See the Solution-Focused Judging Bench Book, ch 1, n 5 for a more detailed discussion and review of the research.
\textsuperscript{9} See King et al, Non-Adversarial Justice ch 9 for a review.
\textsuperscript{10} Ibid, 113-114.
\textsuperscript{12} See King, Should Problem-Solving Courts be Solution-Focused Courts? above n 6.
to address their dysfunction and to become better parents or caregivers. How do they do this? The literature suggests that in many cases involving substance abuse, change happens due to a combination of these individuals’ own efforts and treatment interventions. It is not simply that the court, the treatment provider or the government agency changes people.\(^{13}\)

25. Thus court and other processes should support the self-determination and self-efficacy of individuals involved (ie, parents), supporting their strengths and helping them to address their weaknesses.\(^{14}\) Simply reproducing a coercive and/or paternalistic approach in a different form is less likely to promote better outcomes for children at risk, their parents and families and the community.\(^{15}\) Thus more collaborative and less adversarial processes are likely to be the more effective approach.\(^{16}\)

\(^{13}\) The literature is discussed in King, “Should Problem-Solving Courts be Solution-Focused Courts?”, above n 6.

\(^{14}\) Naturally in some serious situations, a court must overrule an individual's wishes because other factors to be considered carry greater weight in the circumstances – as happens in drug court at times – but this should be the exception.

\(^{15}\) See Solution-Focused Bench Book, above n 2, ch 1 and 8 and See King, Should Problem-Solving Courts be Solution-Focused Courts? above n 3.