Response to
Victorian Law Reform Commission’s
Information Paper
on the Review of Victoria’s Child Protection
Legislative Arrangements

March 2010
Introductory Comments

The Centre for Excellence in Child and Family Welfare is the peak body for 96 large, medium and small community service organisations across Victoria that provide services to vulnerable children, young people and families. The Centre was established in 1912, and over the past 98 years has been at the forefront of policy development, research, advocacy, and learning and development activities to support its member organisations across Victoria. This response has been prepared in discussion with members of the Board of the Centre for Excellence, which consists of 12 CEOs or Deputy CEOs of our member organisations.

The Centre is also grateful to the Federation of Community Legal Centres (Vic) for sharing their responses to the Information Paper. Finally we have had discussions with FRSA who have prepared their own brief primarily to assist Victorian members and stakeholders. FRSA are submitting this brief directly to VLRC, and we would endorse their comments around using the experience of the Family Law reform process and outcomes to inform the Child Protection review.

While we welcome the opportunity to provide comments in relation to the Information Paper released by the Victorian Law Reform Commission in February 2010, we are concerned at the very short timeframe available for feedback. Such a pivotal systemic reform would benefit from a longer and more informed consultation and feedback period. Of particular concern is the fact the voices of children and young people – i.e. those who are most directly affected by decisions of the Children’s Court – may not be captured effectively. We acknowledge CREATE’s consultation process, run over previous weeks, where they were able to consult with 14 children and young people. However, if the timeframe for feedback had been extended a much broader set of processes could have been achieved with young people. For example the Centre is hosting a Children’s Summit in June 2010. At the Summit, children and young people will develop a “Children’s Manifesto” highlighting key issues in Out of Home Care and Leaving Care as an advocacy platform leading up to the 2010 Victorian State election. It would have been most beneficial to have asked those young people present to provide their views on Children’s Court processes, how they have been affected by them, and what could be improved. This would have provided further honest “end-user” perspectives to inform CREATE’s recent consultations.

Furthermore we question whether and how the voices of families affected by Children’s Court processes can be incorporated in the current feedback process – there is no “CREATE” to hear and consolidate their views.

Consequently, we strongly support the Federation of CLCs (Vic) in their call for further discussion and consultation time, particularly as this would have potential to more effectively take into account the best interests of children.

Finally the Centre is disappointed that no reference is made to the UN Convention on the Rights of the Child (CRC). If the Information Paper neglects to emphasise the importance of a rights-based approach to child protection, consistent with the principles contained in the CRC, then the question must be asked – what is the driving force
behind considering major reform of the Children's Court? This point is relevant also to the comments made above regarding the haste with which the review and feedback processes are being conducted.

That said, there are several areas that the Centre for Excellence would like to comment on, as follows.

1. When the review of previous legislation was starting to take place, the Family and Children’s Services sector was very keen to incorporate a substantial review of the adversarial nature of Children’s Court proceedings. The Department of Human Services at the time was of the strong view that if this path were followed, then important aspects of the reform, such as Best Interests principles, the recognition of cumulative harm, and the ChildFIRST system, would get subsumed by debates on the legal system. Thus the adversarial system was allowed to remain in place, without review. Now, in 2009 the Victorian Ombudsman made the very comments that were aired many years earlier – that the legal framework surrounding child protection, i.e. the adversarial court system, does not serve the best interests of children and should be questioned and reviewed. The Centre fully supports the need for review, leading to the establishment of a non-adversarial legal system in relation to all but a few child protection cases.

2. Michael King, Senior Lecturer at Monash University’s Law Faculty, together with other notable colleagues, writes and speaks extensively about the concept of therapeutic jurisprudence (see Non-Adversarial Justice, King, Freiberg, Batagol and Hyams, Federation Press 2009). He notes in his submission to the current VLRC review that in some legal systems the notion of a multi-disciplinary approach to the work of courts is effective in ensuring positive outcomes for those involved in the legal system. He advocates for “a new approach to the law [that] facilitates courts taking more therapeutic, less adversarial and a more interdisciplinary approach to the law and court process.” The Centre would strongly support such an approach.

We believe that the “forensic” approach which characterizes the child protection systems in Australia has a particular value for intervention and in fact enhancement in areas such as child sexual abuse. However, in other areas of the system a family-inclusive approach underpinned by a strengths-based system that has a child’s wellbeing needs at the forefront of its approaches is essential.

The advent of Family Group Conferencing within the Children’s Court processes is a means by which the above could be achieved effectively, provided that Best Interests principles remain at the core of these strategies. There is also significant work to be done to ensure adequate training and information on the child rearing practices of Aboriginal families and culturally and linguistically diverse families.

3. If we place more emphasis on family support (thus facilitating placement prevention) and use a strengths-based Best Interest approach to investigating alleged abuse or neglect, we can go some way towards ensuring that only those children who need to, come into the care system. In adopting the concept of “therapeutic jurisprudence” as advocated by Michael King, we can
ensure that for many children affected by Children’s Court decisions, a formal but empowering process whereby their families are assisted in dealing with the issues that led to their child being removed can result in reunification. We know from research and consultations with children and young people that this is the outcome the vast majority of them want to see. The CREATE consultations mentioned earlier were surprised to hear that several of the younger children who took part noted that they actually liked the Children’s Court experience. And why was this? Because it was the only chance they had to see their family. Such a confronting statement cannot go unnoticed and must be acknowledged by facilitating well planned and supported reunification.

In terms of implementation, parallels exist within the current Family Violence Court system, and, a more recent example, the new Placement Prevention Pilots being introduced under the “Directions for Out of Home Care” from the 2009/10 State Budget. In the latter example Placement Prevention Co-ordinators refer a family who are at risk of having their child(ren) removed to a case worker drawn from a multi-disciplinary team. The case worker is responsible for working with the family, commencing with an assessment of risk and need, and ensuring the right suite of therapeutic services and support are in place to assist the family over a period of up to 12 months.

Children’s Court Magistrates could perform such a referral function to a multi-disciplinary case management team. The paramount purpose would be to positively support the family to make improvements and changes in their situation in order to avoid removal of children or ensure reunification. There will of course be some situations where removal remains the only appropriate and safe outcome. Child sexual abuse, as noted above, is an example.

The Centre believes that in such a context, “formal parental responsibility contracts” are not the way to go. A more appropriate strategy is one of formal parental agreements whereby the family agrees to undertake certain actions jointly determined by the Court officers and the family, the court undertakes to support such agreements, and members of the multi-disciplinary team, together with DHS, undertakes to support the family in its endeavours. Thus the family is not the only one with responsibilities – it is incumbent upon a number players to ensure that the best interests of the child are served via the actions agreed to in the formal agreement.

A note of caution does, however, need to be sounded in certain circumstances. Victoria has half the number of children in out of home care compared with NSW. In both national and international comparisons, we are conservative in Victoria about taking children into care. However, 46% of children entering care are re-entries to care. This is a terrible re-entry rate. It points to a ‘rule of optimism’ operating which allows children to return to families where they are re-abused and neglected. This is deeply concerning and suggests that the balance between children staying in care and reunification is not being struck in the best interests of the children involved.

4. Resourcing of the suggested approach is crucial. The reality of under-resourcing throughout the whole secondary and tertiary system remains of great concern. It would be logical to have the function of the multi-disciplinary team located within the 24 ChildFIRST catchments. However, as is already apparent, ChildFIRST and the integrated Family Services system that sits within each
catchment are already massively under-resourced and reaching breaking point.

In its review of the first two years of ChildFIRST operating (Implementing ChildFIRST at the Front Line (Centre for Excellence in Child and Family Welfare 2008), the Centre consulted with a wide range of senior and frontline managers from ChildFIRST catchments and from the Family Services sector. It noted that “[An] impact of the shift of case management to a higher level of complexity is that organisations need to recruit staff with higher levels of skills, but cannot afford to pay them a salary commensurate with more advanced skills and qualifications...The higher level of case management means that staff are working at a level beyond what they are paid for...While Family Services organisations feel pressured to hire more highly skilled and qualified staff, they do not have the funding to recruit at this level. Due to the chronic cases that make up their case loads, staff have little opportunity to work from an ‘early intervention’ perspective or feel their work is making a meaningful difference to families.” (p. 34)

This description is even more of a reality in 2009/10. Thus any reform of the Children’s Court that impacts on other parts of the service system must be supported by adequate funding, and not be seen as a “quick-fix” requiring minimal additional resources. Such reform will not come cheap, and the Victorian Government must recognize that if it is serious in its considerations of a vulnerable child’s best interests, and in supporting vulnerable families, then it must be prepared to allocate commensurate resources.

5. If the Children’s Court is given the responsibility for enshrining a multi-disciplinary approach, incorporating family group conferencing, all of which is inherent in therapeutic jurisprudence, then it is clear that a cultural shift must occur amongst a number of the magistrates that work in the system. This cultural shift revolves around the attitudes apparent amongst some magistrates at present that maintain and foster an adversarial approach without necessarily considering the best interests of children as paramount in any given case. It should be acknowledged that such a fundamental shift will take time – again, if we are serious about true reform, then it is not a “quick fix” that will enable this.

6. The Centre is firmly of the opinion that an independent Children’s Commissioner needs to be established in Victoria. This office must be, and be seen to be, completely independent of the Department and must carry out the role of independent review and oversight recommended by the Victorian Ombudsman (see para 697 of the Own Motion Investigation into the Child Protection Program: “...this limitation [of the current Child Safety Commissioner’s role] should be addressed to ensure that the Child Safety Commissioner can fulfil a strong independent role to advocate for children.”

It is not the view of the Centre that the role of an independent Commissioner should extend any further than that of review and oversight. The development of “guardians for children” or advocates for children, if deemed appropriate, needs to be built into existing systems.

Conclusion

The Centre for Excellence in Child and Family Welfare appreciates the opportunity to provide input to this very important work. We can only reiterate that more time to consider options and more thorough consultation and feedback processes would result
in an effective outcome that will hopefully see much more emphasis on family support in the best interests of Victoria’s children. Building a system that views legal structures and system as an integral component of a wholistic framework for improving outcomes for vulnerable children is clearly the next step forward.

What we know is that “children and young people want to be safe and we know that they want their families to be places where they can be safe. It would be a truism to say that most children and young people wish to remain with their families and to be safe. Indeed, most children who are harmed and neglected want foremost for this harm to stop and typically want their connection to, and relationship with, their parents and families to be reinforced and strengthened.” (Lonne, B, Parton, N, Thomson, J and Harries, S, Reforming Child Protection, Routledge 2009, p. 11). It is this that should drive the development of any new structures.

Comment in relation to 1 April Media Release “Reforms to Provide Better Child Protection Outcomes”

The Centre is most concerned about the apparent parallel focus on Children’s Court operations as indicated by the Media Release. The fact that new Child Protection Resolution Conferences are now to become a key dispute resolution mechanism may represent a move in the right direction, however their announcement today suggests that any consultation processes thus far have been compromised, with a decision already taken regarding a key aspect of the VLRC Review.

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