Submission in response to inquiry into implementation of the *Children's, Youth and Families Amendment (Permanent Care and other matters) Act 2014*

Prepared by Women's Legal Service Victoria for the Victorian Commission for Children and Young People

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INTRODUCTION

We thank you for the opportunity to comment on the impact of the permanency of care amendments (**amendments**) made to the *Children, Youth and Families Act 2005* (the **Act**) by the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*, which came into effect in March 2016.

We support the purposes of the amendments to promote timely decision-making by both the Victorian Child Protection Service and the Children's Court, enabling timely intervention where protective intervention is required. The term "permanency" within the child protection scheme "refers to an ongoing care arrangement that keeps a child safe and gives them a sense of certainty about their future."[i] The underlying policy purpose of the amendments is to find vulnerable children permanent and safe living arrangements as quickly as possible.

However, in our experience, the amendments have not had the desired effect. Overall, we have found that:

- The Department of Health & Human Services (**DHHS**) has significant control over children's living arrangements without the accountability mechanism of Children's Court oversight. This has resulted in non-transparent decision-making by DHHS, and decisions that cannot be or are difficult to challenge when they are made contrary to the best interests of the child.

- The simplification of court orders has in practice created a set of inflexible and at times inappropriate order options for the Court. As a result, the orders made by the Court have at times been a square peg in a round hole – they have been an inappropriate fit for the child and her or his family circumstances (see, for example, Case Study 5 below).

- The permanency amendments have in many cases undermined ongoing and safe contact between children and their parents, in this way eroding an important aspect of "permanency" for children in the child protection system.

Our submission will focus on the following three key areas that have a significant impact on the lives of women and their children:

- Case planning (consultation question 1): Early, well-resourced and effective case planning is supported, and a clear and rigorous case plan review process is encouraged.

- Amendments to Court orders (consultation questions 2-4): We support the reinstatement of Court discretion to tailor court orders to the particular circumstances and needs of a child and her or his family.

- Further practical barriers to permanency (consultation question 5).

WOMEN'S LEGAL SERVICE VICTORIA

Women's Legal Service Victoria (WLSV) is a state-wide community legal centre (CLC) that has been providing free legal services to women for over 30 years. We specialise in issues arising from relationship breakdown and violence against women. WLSV provides free and confidential legal information, advice, referral and representation to women in Victoria.

Our principal areas of work are crimes compensation, family violence (principally family violence intervention orders), family law and child protection. Relevantly, WLSV operates a daily child protection duty lawyer service at the Moorabbin Children's Court.

WLSV contributes to the development of law and policy by challenging laws that unfairly impact on women experiencing violence and relationship breakdown and informing and advancing policy initiatives that promote the rights of women.

We also deliver training programs and share our expertise with other professionals regarding effective responses to violence and relationship breakdown.

SUMMARY OF RECOMMENDATIONS

Recommendation 1: That the Victorian Government review the case planning process in order to make it more timely and transparent.

Recommendation 2: That the Victorian Government considers a clear process for case plan reviews that provides oversight of the process to the Children's Court, including:

- A required timeframe for response, for example 30 days.
- Where a case plan review is not provided, the applicant for review could apply for an order to the Children's Court for a review to be completed by a particular date.

Recommendation 3: That the Victorian Government consider how case planning processes, including the Child Protection Manual, could be amended to encourage a more inclusive and transparent case planning process. This should allow support people such as lawyers to be included in the process, when appropriate.

Recommendation 4: We support the reinstatement of the ability of the Children's Court to tailor final orders to the individual needs and circumstances of each child and her or his family.

Recommendation 5: We endorse the Law Institute of Victoria's recommendation in relation to Family Reunification Orders (**FROs**) as follows:

- FROs should not confer parental responsibility for the child on the Secretary of the DHHS but rather parental responsibility should be retained by the parent/s or is conferred on the person as specified as caring for the child during the life-time of that FRO save for if the child is reunified with a parent.
- The Children's Court should be able to specify who is caring for the child during the life-time of the FROs unless the child is placed in Out of Home Care, and is in the care of the Secretary.
- Amendment be made to FROs to provide that DHHS must notify the Children's Court within three working days if the matter is unallocated

Recommendation 6: That amendment be made to FROs and other ancillary case planning provisions that there be no mandated period permitted under a FRO during which a child can be placed in out of home care. Rather, we recommend that the Children's Court be provided the discretion to determine this period taking into consideration the best interests of the child.

Recommendation 7: We endorse the Law Institute of Victoria's recommendation in relation to Permanent Care Orders (**PCOs**) as follows:

- That an amendment by made to PCOs to reinstate the power of the Children's Court to order contact between a child and their parent at a frequency that it determines fit.

Recommendation 8: We endorse the Law Institute of Victoria's recommendation in relation to Care by Secretary Orders (**CBSOs**) as follows:

- Amendment be made to CBSOs to allow the Children's Court to include a condition for the child to have contact with a parent or other person significant to the child (including siblings or other extended family members) that the Court considers to be in the best interests of the child.

- Amendment be made to CBSOs to allow the Children's Court to determine the period during which the CBSO remains in force to a maximum of 2 years, rather CBSOs automatically being in force for two years.

Recommendation 9: That the Victorian Government provide additional funding to services, and particularly Aboriginal-controlled services such as VACCA, which input into, and so support, the timely operation of the child protection system.

Recommendation 10: That the Victorian Government commence a further inquiry into the efficacy of child protection system, including the efficacy of the amendments and any subsequent amendments, in or about March 2018.

1 – DELAYS & LACK OF TRANSPARENCY IN CASE PLANNING PROCESSES

Support for timely and transparent case planning

Case planning is a key aspect of the child protection process. Its timely and effective completion is important so as to prevent downstream delay in the litigation process, as well as to limit uncertainty for the child and her family. We understand that the permanency amendments were designed to encourage timelier case planning and to place a greater emphasis on permanency in the case planning phase.

Our case experience suggests that the amendments have not achieved these purposes. Rather, our experience (as exemplified by Case Studies 1 and 2 below) has been that:

- there continue to be significant delays in case planning
- there is inflexibility and non-transparency in the case planning process, for example:
    - it is at times difficult for parents to be involved in the case planning process
    - where clients requests that their WLSV lawyer attends a case plan review meeting as a support person, this request has been denied by DHHS
- case planning decisions that are not in the best interests of the child continue to be made
- these poor decisions are subject to limited Court oversight and so are difficult to challenge
- case planning review decisions by DHHS are often delayed, there is no mandated timeframe for review response, and the VCAT external review process is cumbersome

Recommendation 1: That the Victorian Government review the case planning process in order to make it more timely and transparent.

Need for appropriate case planning review mechanism

We are further concerned that where case planning decisions are made that are arguably not in the best interests of the child, as in Case Study 1, there is no Court oversight over that process, and it is difficult to review these decisions in a timely fashion.

Case Study 1 – Case review delay and unnecessarily limited contact with parent

Our client, Emily, had a six month old child who was placed on a Family Reunification Order for 12 months. During the life of the order, the child lived with an external family member and the mother complied with a number of court conditions, including directed and supervised urine screens, counselling and attended regular supervised contact with the child. Having complied with the conditions, Emily expected reunification to occur.

In the last 3-4 months of the order, reunification was to occur on two separate occasions (December 2015 and January 2016). However, Emily was notified that the Protective Worker was no longer managing the file and the case then remained unallocated from approximately January to April 2016.

At a case plan meeting in February 2016, Emily was advised by the Department that the case plan had changed from reunification to non-reunification. Emily had not had input into this decision, was distressed by it, and requested an immediate and urgent review. No decision on the review was provided to her, and she was repeatedly advised by DHHS that her matter was unallocated.

In April 2016, DHHS sought a 6 month extension to the Family Reunification Order. On this day, Emily engaged our services and we formally requested a case plan review. DHHS then proceeded to file an application for a Care by Secretary Order on the basis of their non-reunification case plan. Again we requested a case plan review.

In June/July, Emily completed a parenting course at the request of DHHS, to assist in their case planning. The report from the parenting course was favourable to Emily and recommended immediate reunification. The Magistrate agreed to weekly overnight contact.

In August 2016, we again requested a case plan review in writing to DHHS. A number of directions hearings took place and the matter was eventually set down for a final contested hearing. DHHS again requested that Emily attend another parenting course.

A final hearing is to commence in November 2016. We are yet to receive a review of the case plan despite Emily's first request being in February 2016, and our formal request in April 2016. We note a formal response to the request is required in order then to proceed to an internal review of the decision.

As Case Study 1 demonstrates, the process to request review of case planning decisions is ineffective and contributes to delay in effective case planning. The external review process as provided through the Victorian Civil & Administrative Tribunal (**VCAT**) is inaccessible and inappropriate for the following reasons:

- It involves another fee, and requires another grant of Legal Aid.
- It involves a new process, and new decision-maker, who must hear the matter - arguably a poor use of Tribunal resources, when the Children's Court Magistrate has a knowledge of the matter and could make a case management order for a case review.

Recommendation 2: That the Victorian Government considers a clear process for case plan reviews that provides oversight of the process to the Children's Court, including:

- A required timeframe for response, for example 30 days.

- Where a case plan review is not provided within the specified timeframe that the applicant for review can apply for an order to the Children's Court for a review to be completed by a particular date.

Appropriate involvement of parents and support people in case planning

Finally, we support an open and transparent process of case planning where possible, and note that the *Child Protection Manual* policy that "the child, parents, carers and relevant professionals are to be involved in the development of case plans."[1]

Our case experience, as described in Case Study 2, is that in some cases DHHS limits parents' ability to participate in case planning, or to be appropriately supported through that process. Particularly in cases involving clients with an intergenerational history of DHHS involvement, parents are not unsurprisingly hesitant to attend case planning meetings without a support person, due to a real and/or perceived power imbalance between the parent and DHHS.

Case Study 2 – Non-inclusive case planning process

Kate's family has an extensive and intergenerational history with child protection involvement. In early March 2016, Kate's 1 year old child was apprehended by Child Protection for a number of reasons. The main protective concerns related to Kate's intellectual disability and the father's intellectual disability and sex offender's register status (in relation to one offence committed 20 years ago).

The child was placed in out of home care, and both parents had weekly supervised contact with the baby at DHHS' office.

In July 2016, and after a number of hearings, the Magistrate returned the child to Kate's with a number of strict conditions. In October 2016, DHHS contacted Kate and demanded that she attend the office to discuss the case plan. She was given no notice and expected to attend the office at the requested time. She was afraid that the child would be apprehended a second time, was nervous to attend the meeting alone and requested that her WLSV lawyer attend the meeting with her, either face to face or on the phone.

At this point in the proceeding, Kate had already engaged with 3 different workers, read 4 different DHHS reports that made a number of allegations against her, and felt uncomfortable with meeting the protective worker alone. Her request for a lawyer to attend the meeting was denied with no reasons provided. Our client instructed us that at the meeting she felt immense pressure. We are further instructed that at the meeting DHHS gave Kate an ultimatum, that she either leave the father permanently or have the baby placed in out of home care again. There was no mention of court proceedings or referral to legal advice.

[1] http://www.cpmanual.vic.gov.au/policies-and-procedures/case-planning/case-planning-policy

Where case planning meetings are held in a non-transparent manner, and parents' input into case planning occurs without proper advice, this arguably increases the likelihood of challenge to case plans and orders that flow from them.

Recommendation 3: That the Victorian Government consider how case planning processes, including the Child Protection Manual, could be amended to encourage a more inclusive and transparent case planning process. This should allow support people such as lawyers to be included in the process, when appropriate.

2 – NEW LIMITATIONS ON COURT ORDERS CONTRARY TO PERMANENCY

Court should have discretion to tailor orders to the particular case

Child protection cases inevitably involve families with complex needs. Therefore, it is important that courts making decisions in relation to these families have flexibility and discretion to make orders that are appropriate to the particular circumstances of each case.

Our case experience, as exemplified by Case Studies 3, 4, and 5 below, has been that the new set of protection orders introduced by the amendments have limited the ability of the Children's Court to make orders that are appropriate to the circumstances of a child and her or his family.

Recommendation 4: We support the reinstatement of the ability of the Children's Court to tailor final orders to the individual needs and circumstances of each child and her or his family.

Family Reunification Orders (**FROs**)

As set out in Case Study 3 below, the conferral of parental responsibility under a FRO to DHHS has resulted in non-transparent decision-making in relation to children's placement. This has resulted in unintended consequences, including parental distress causing arguably unnecessary litigation and so unnecessary expense to parents, DHHS and services such as WLSV. In cases such as Case Study 3 it has also undermined the permanency objective.

Case Study 3: Changes in placement without parents' approval, increase of litigation, and lack of court oversight

Eve and her partner arrived in Australia in 2005 and live very religious lives. Her youngest daughter is 15 years old and expressed strong views that she no longer wanted to follow a strict religious upbringing, which involved home-schooling and adhering to strict clothing traditions. The young person absconded from the family and DHHS sought an order that the young person be placed on an Interim Accommodation Order to a family friend (with similar religious beliefs). Between the first hearing date and the conciliation conference (some 2 months), the parents were notified that the young person had changed placement 4 times, and now was living in a residential unit. These changes had been made under a respite condition in the order.

The change in placement occurred without the mother's approval or knowledge, and was very distressing for the mother to comprehend. Lawyers for both parents asked why DHHS did not bring the matter to the court's attention and seek a new interim accommodation order. DHHS suggested that under the respite condition, they did not require the parents' consent nor the court's approval.

At the conciliation conference, the parties received the DHHS addendum report which recommended a Family Reunification Order (**FRO**). Eve did not consent to such an order, wanting DHHS to provide answers regarding the young person's change of placement. Eve wanted the

young person to be placed with the family friend, who was first named in the Interim Accommodation Order. The FRO does not name a carer and Eve's distrust of DHHS led to additional litigation.

Recommendation 5: We endorse the Law Institute of Victoria's recommendation in relation to FROs as follows:

- FROs should not confer parental responsibility for the child on the Secretary of the DHHS but rather parental responsibility should be retained by the parent/s or is conferred on the person as specified as caring for the child during the life-time of that FRO save for if the child is reunified with a parent.
- The Children's Court should be able to specify who is caring for the child during the life-time of the FROs unless the child is placed in Out of Home Care, and is in the care of the Secretary.
- Amendment be made to FROs to provide that DHHS must notify the Children's Court within three working days if the matter is unallocated.

Timeframes imposed on family reunification

Under the new FRO regime, there are restrictions on the period during which a child is in out-of-home care prior to reunification. These unnecessarily the Court's flexibility to make orders that allow for a child to be reunified with its family within an appropriate timeframe.

These restrictions fail to recognize that delays, including litigation, case planning and third-party delays, may limit the time within which a family will have to address protective concerns to one that is inappropriate. This flows from a broader failure to recognize that children within the child protection system often come from families with complex needs, which may be experiencing or recovering from mental health illness, drug and alcohol use, and/or family violence. Management of, or rehabilitation and recovery from these factors is different for each individual and each family.

Recommendation 6: That amendment be made to FROs and other ancillary case planning provisions that there be no mandated period permitted under a FRO during which a child can be placed in out of home care. Rather, we recommend that the Children's Court be provided the discretion to determine this period taking into consideration the best interests of the child.

Permanent Care Orders (**PCOs**)

The amendments resulted a change in PCOs, such that a condition about contact between a child and their birth parents is now limited to four court-ordered contacts per year. More contact may be arranged during the order, by agreement with DHHS, and the child's birth parents will need to seek the leave of the Court to apply to vary or revoke the order.

As exemplified in Case Study 4 below, this amendment has resulted in arbitrary orders being made, which reduce safe and continuous contact between children and parents, that both undermines that aspect of permanency and is arguably contrary to the best interests of the child. Again, we reiterate that safe contact between child and family can contribute to a sense of belonging and wellbeing of the child, and that stability of this contact does in many cases form part of permanency.

Case Study 4 – Limited ability to tailor orders to circumstances

Prior to March 2016, the 6 year old child was on a Custody to Secretary Order which then transitioned to a Care by Secretary Order.

The Custody to Secretary Order had 12 conditions attached, which allowed the mother contact for a minimum 3 times per week supervised by DHHS. However, as a result of the new legislation, the conditions lapsed, and for a period the child was under a Care by Secretary Order with no conditions. DHHS then proceeded to apply for a Permanent Care Order, whereby the mother's contact would revert to 4 times a year.

The mother suffers from significant mental illness and is not in a position to have the full time care of the child. The mother supports the current placement and enjoys her visit with the child, where they play with dolls, sing and dance to the radio and draw pictures. The mother saw her child every week for 6 years, and an important bond had formed.

The mother was unaware of the changes in her contact schedule and attended the DHHSs office for her regular weekly contact. She was told that she was no longer entitled to weekly contact, and that her contact was to occur 4 times a year.

The client's mental health worker contacted us and eventually, the client engaged our services. We made a number of enquiries with the Department about what notice was provided to the mother.

A 5 page letter dated December 2015 was posted to our client's address. The letter was very comprehensive, used small font and riddled with legal jargon. The client does not recall receiving the letter, and if she did receive the letter would not be in a position to read the correspondence given the complexity. The mother was very distressed, and did not understand why she was not told about the changes after one of the visits at the DHHS office.

The mother is finding it difficult to adjust to the new contact arrangement especially given the drastic change from 3 times a week to 4 times a year. Our client has instructed, in relation to her daughter, "she will forget who I am. She's only six years old".

The judiciary is not in a position to attach conditions to the Care by Secretary Order despite it clearly being in the best interest of this child to spend regular contact with the mother.

Recommendation 7: We endorse the Law Institute of Victoria's recommendation in relation to PCOs as follows:

- That an amendment by made to PCOs to reinstate the power of the Children's Court to order contact between a child and their parent at a frequency that it determines fit.

Care by Secretary Orders (CBSOs)

Recommendation 8: We endorse the Law Institute of Victoria's recommendation in relation to CBSOs as follows:

- Amendment be made to CBSOs to allow the Children's Court to include a condition for the child to have contact with a parent or other person significant to the child (including siblings or other extended family members) that the Court considers to be in the best interests of the child.

- Amendment be made to CBSOs to allow the Children's Court to determine the period during which the CBSO remains in force to a maximum of 2 years, rather CBSOs automatically being in force for two years.

3 – REMAINING PRACTICAL BARRIERS TO TIMELY, PERMANENT OUTCOMES

Further funding of ancillary support services required

As exemplified in Case Study 5 below, community services such as Aboriginal-controlled services supporting the child protection system have stretched resources that at times result in delays with inputting into the child protection system. This causes delay in case planning and legal processes and so a lack of permanency for both child and family. In order to facilitate more timely outcomes, we support increased funding to support services, and particularly Aboriginal-controlled services, to enable them to support more timely case planning outcomes.

Case Study 5 – Under-funded services risk contributing to delay in permanent placements

In November 2015, DHHS filed an application for a Permanent Care Order of a 5 year old child.

The child was removed shortly after birth, and placed in the care of maternal grandparents. The child's mother, Lucinda, suffers from an intellectual and cognitive disability and agreed that the maternal grandparents should care for the child on a long term basis.

Since the date of the application, the parties have attended 3 mention hearings to finalise the Permanent Care Order. At each hearing, DHHS notified the parties that Victorian Aboriginal Child Care Agency Co (**VACCA**) needed additional time to endorse the placement, and that the parties needed to wait an additional 6- 12 weeks.

The next mention hearing is scheduled for late November 2016. Court proceedings have been on foot for over 12 months, with no resolution despite all parties agreeing to the Permanent Care Order. The delays has caused uncertainty and instability for the child and family in question. Decision making by relevant bodies are slow producing unintended harm to vulnerable families.

Recommendation 9: That the Victorian Government provide additional funding to services, and particularly Aboriginal-controlled services such as VACCA, which input into, and so support, the timely operation of the child protection system.

Support for further review

We support this Inquiry and, more broadly, a human-centred design approach to the reform of the child protection system – the iterative design of a system in close consultation with the users of that system. We therefore strongly support a further inquiry into the efficacy of child protection system after a further 12 months after the outcome of this Inquiry, being in March 2018.

This is for two key reasons. Firstly, we recognise that this Inquiry has occurred only 6 months after the amendments came into force – a very short time services to gather conclusive data about the efficacy of a change.

Secondly, reform in this area is likely to be difficult, and require a collaborative approach and a long-term view of reform. One reason for this is the difficult job that the child protection system has – to work with families with complex needs and vulnerable children to achieve the best outcome out of what may at times be a series of imperfect options.

Recommendation 10: That the Victorian Government commence a further inquiry into the efficacy of child protection system, including the efficacy of the amendments and any subsequent amendments, in or about March 2018.

CONCLUSION

We wish you well in finalising your Inquiry, and are able to contribute further to the public inquiry process as required.

If you have any questions, please do not hesitate to contact:

[Contact details removed for internet publication.]

[i] http://www.dhs.vic.gov.au/__data/assets/word_doc/0008/961622/Permanency-for-children-fact-sheet.doc