Children's Court
Victoria

SUBMISSION ON CERTAIN RECOMMENDATIONS MADE IN THE REPORT OF THE PROTECTING VICTORIA'S VULNERABLE CHILDREN INQUIRY

Response to recommendation 55 - Decentralisation

The court agrees with the Inquiry assessment that improving the environment of the Melbourne Children's Court should be a priority reform for the Victorian government.

The Inquiry identifies decentralisation as a way of alleviating the current overcrowding that exists at the Melbourne Court and making the Children's Court more accessible for families and protection workers.

However, such a strategy would require significant additional government investment in existing suburban and regional court infrastructure. No current suburban courts have the capacity or facilities to enable them to hear Family Division cases. Country courts are also unable to offer more sittings days without considerable investment in refurbishing the courthouses. Indeed, some country courts, for example, Shepparton, Wangaratta and Bendigo, struggle to meet the current needs of children and their families.

The magnitude of current court infrastructure constraints should not be underestimated. A full audit of all courts should be undertaken to determine which courts, if any, could handle Family Division cases and the expense of re-building and refurbishing the courts to meet the needs of children, families and the Department of Human Services (DHS).

Decentralising Family Division work has obvious benefits to court users but is a less efficient use of court resources. One advantage of hearing all metropolitan child protection cases at Melbourne is that it enables efficient use of judicial and registry resources. If the Inquiry proposal is adopted the reverse will apply. Additional administrative and judicial resources will therefore be required to support decentralisation; there will be a need for the appointment of more magistrates and a need to employ more registry staff.[1]

Finally, the Report proposes that all children subject to an application become parties to proceedings. The court strongly supports this proposal. However, the implementation of the proposal will add to the cost of a decentralised system. There

[1] This is also relevant to the proposal to offer more sitting days at country courts.

will need to be a sufficient number of qualified lawyers at the decentralised courts to represent children (and parents and DHS).

Response to recommendation 60 - Conferencing

The Inquiry report identifies[2] two types of "pre-court" conferencing processes - Family Group Conferences and Child Safety Conferences. This response will focus on Child Safety Conferences.

The court accepts the importance of pre-court conferencing and understands why such a conference would be beneficial prior to the issue of process. Child Safety Conferences as envisaged by the Inquiry would clearly be appropriate, for example, in those cases that now come to court as Applications by Notice. In these cases, the child is still at home. It makes sense to refer such cases to a conference **before the issue of process.**

In the discussion at page 391, the Inquiry goes further and suggests that in cases of emergency removal, the matter should be diverted away from court and into a Child Safety Conference. The proposal is for DHS to have responsibility for this form of conference.[3]

The court submits that there is a fundamental difficulty with this proposal.

Emergency removal of a child from his/her family will result in the initiation of proceedings in the court. Indeed, the matter must come before the court within 24 hours for the determination of the issue of the child's placement pending the eventual disposition of the matter by the court. Emergency removal activates the jurisdiction of the court and **provides the court with the responsibility at law** to manage the case to its proper conclusion. It would be inappropriate for the court to effectively adjourn a matter out of its jurisdiction and allow another body that is not accountable to the court (and has moreover initiated the process in the court) to assume responsibility for managing the case.[4]

This is why the court maintains its position that, once an application is before the court, the court's conferencing unit must be the body that conducts the conference.

Response to recommendation 64 - VCAT

The Victorian Law Reform Commission (VLRC) in its report proposed consolidating within the Children's Court of Victoria decision-making in child protection. It did not support a fragmented approach and recommended expanding the Children's Court jurisdiction to enable it to have concurrent jurisdiction in relation to case plan reviews. This was desirable for "reasons of both efficiency and accessibility for participants".[5]

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[2] See page 331.
[3] Which would be jointly convened by DHS and VLA.
[4] The Report speaks highly of the Western Australian "Signs of Safety Conference" model. Practice Direction 1 of 2012 (Children's Court of Western Australia), requires Signs of Safety pre-hearing conferences to be presided over by convenors **appointed by the President of the Court**. (See paragraph 5.1 of the Practice Direction.)
[5] See VLRC report at page 344.

The court submits that such a proposal was sensible and appropriate.

The court does not agree with the suggestion that it should be restricted in the conditions it may impose on Custody to Secretary Orders (CTSO) or Supervised Custody Orders (SCO). Nor does the court support DHS playing a greater role in setting conditions on these two orders and then being subject to administrative review in a 'specialist list' in VCAT. The court makes the following three points:

1. Section 286 of the *Children, Youth and Families Act* 2005 allows the Secretary to return a child to the custody of a parent during the currency of an SCO and, if that occurs, the SCO is deemed to become a Supervision Order. If the court is prohibited from making conditions on an SCO but is responsible for making conditions on a Supervision Order, DHS will have to bring a matter to court when it wishes to place a child with its parents and convert an SCO to a Supervision Order.

2. The Inquiry endorsed the court's 'New Model Conference' (NMC) process and proposed its expansion throughout the state.[6] If an NMC is to be an important step in a process of less adversarial determination, independent convenors must be able to discuss all the significant matters that are relevant to the case. To exclude discussion about the conditions on a particular type of order would compromise the process and lead to an increase in the number of contested cases.

3. At the end of a contested hearing, the court delivers a decision (based on an analysis of the evidence) on whether the application has been proved and, if so, which order should be made in the best interests of the child. It makes good sense to allow the court, as part of that process, to determine the appropriate conditions on the order. On the other hand, prohibiting the court from making certain conditions for two particular orders and endorsing administrative review in VCAT, adds a further layer of complexity, additional expense[7] and potential duplication to the adjudication process.

Response to recommendation 65 – Court of record

The obligation to provide transcripts of all Children's Court hearings (suitably de-identified) will be onerous and expensive. The court considers that the Inquiry has underestimated the magnitude and expense of such a task.

On any given day in Victoria there may be as many as 10 Family Division courts sitting (seven in Melbourne, two at Moorabbin and one in the country) and four Criminal Division courts sitting (two at Melbourne, one in the suburbs and one in the country). The preparation of de-identified transcript of every hearing will be a herculean task.

It is also unclear what the benefit would be in providing de-identified transcript in every case, given the costs involved in implementing such a proposal. The court

[6] Currently, the NMC process is funded to operate in cases from the North West and Eastern DHS metropolitan regions.

[7] VCAT will need funding to develop and run a 'specialist list' and VLA will need funding to enable it to provide legal representation at the hearings.

submits that its proposal to the Inquiry to continue the current policy of publishing judgments that are determined on a point of principle is sensible, appropriate and consistent with the approach now adopted by the Court of Appeal. [8]

It is also worth confirming that all Children's Court proceedings are recorded and copies of the recording of the proceedings are made available to parties on the payment of a fee.

Response to recommendations 74 and 75 – Children's Court Clinic

The Children's Court Clinic has provided a valuable service to the Children's Court over many years.

In its discussion of court clinical services, the Inquiry acknowledged the importance of the court having recourse to independent sources of expert advice in order to determine what is in the best interests of the child. The court endorses those comments.

The Inquiry did not support a model that had the Department of Justice (DoJ) providing clinical services to the court. The problems with the current clinical model identified in the 'Acton Report' and a plan for the use of clinical services at an earlier pre-court stage were influential in persuading the Inquiry to this view.

The court submits that these factors do not require the abolition of the clinic or its location in the Department of Health (Health).

The Inquiry relied heavily on the development of a new role for clinical services as justifying the placement in Health.[9] Yet the 'Acton Report' envisaged a properly governed and resourced clinic performing that new role and performing it within DoJ. The court agrees with that assessment.

The proposal for abolition of the clinic is surprising because one of the significant problems identified in the 'Acton Report' (and recognised by the Inquiry) - namely governance –was already being addressed within DoJ, whilst other significant problems were acknowledged to require significant government investment before they could be solved. On this latter point, matters such as better services to country Victoria, higher rates of remuneration for clinicians, assessing children at venues away from the court and moving the clinic out of the court building, can only occur when funds are provided to enable them to happen. The failure properly to fund such matters in the past is not an argument for closing the clinic and moving it out of DoJ. It is an argument for increased investment to enable these and other suggested developments to take place.

The best way to provide sound governance for the clinic is to build a better governance structure within DoJ. Indeed the 'Acton Report' proposed such a course. As the Inquiry acknowledged, DoJ had been working on a proposal "to remove the

[8] See the comments of the Court of Appeal in *R V Smith* [2011] VSCA 185 at [32] to [33].
[9] The Inquiry recognized that using clinical services 'pre-court' would need to be subject to appropriate safeguards. The court agrees. 'Informed consent' would be required before children or families could participate in such a process.

clinic from the Courts Administration Division of the department and amalgamate the clinic with two other business units under a new Forensic Health Services Unit." The proposal would have seen the establishment of a new unit comprising "the current Clinic, the current Justice Health Unit and the National Coronial Information System." The court submits that such an approach is highly desirable.

It makes sense to maintain a clinic that provides comprehensive expert reports in a timely manner[10] within DoJ. Justice has a close relationship with courts at an operational level. Justice understands how courts operate, the particular needs of courts and how best to support those needs.

Experience shows that other government departments do not support courts as effectively as DoJ does. One example will establish the point. The Magistrates' Court, supported by DoJ, has had intensive bail support programs for many years, including a program to support 18 to 21 year olds. However, the Children's Court, supported by Youth Justice (DHS) has only recently been able to access such a program,[11] despite this having been identified as a priority for many years.[12] The court has no doubt that had DoJ been responsible for supporting the Criminal Division of the Children's Court, the court would have had intensive bail support years ago.

The argument, put simply is that the clinic has provided a valuable service to the community and the court for many years. Providing increased funding will enable the provision of broader services. Proper governance should be addressed under a structure within DoJ and this will guarantee a service that is effective and accountable.

Response to recommendation 43 – Standard of proof in Family Division cases

The court supports the recommendation that the standard of proof when considering evidence in the Family Division should be the balance of probabilities, subject to one qualification.

The court is concerned that applying a simple balance of probabilities test in cases where the allegations involve a future risk of harm may have the unintended consequence of importing a more stringent test than currently applies when deciding the likelihood of future harm. The DHS representatives on the court's Sexual Assault Advisory Committee share this concern.

The court submits that the standard of proof test for likelihood of future harm should remain as stated by the House of Lords in the decision of *In re H. & Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC[13] where Lord Nicholls of Birkenhead said at page 585 -

[10] For example, in criminal cases, if a young person is in custody, the clinic provides a report within three weeks. In the Family Division, the clinic files reports within six weeks.
[11] It is only currently available to young people in metropolitan Melbourne.
[12] See the recommendations of the VLRC Report on Bail in 2007 and the last three Annual Reports of the Children's Court of Victoria.
[13] This case required the House of Lords to review a provision in the English legislation that is very similar to s.162(1) of the *Children, Youth and Families Act* 2005.

> "In this context parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not. Strictly, if this was the correct meaning of the Act, a care or supervision order would not be available even in a case where the risk of significant harm is as likely as not. Nothing would suffice short of proof that the child will probably suffer significant harm."

An example will make the application of the principle from the above case clearer. It is alleged that A has suffered significant physical harm. A protection application is brought on behalf of A's sibling B, who although unharmed physically, is alleged to be at risk based on "likelihood" of significant physical harm.

The fact used as a basis for the prediction that B is likely to suffer significant harm is that A has suffered significant physical harm. A court will need to be satisfied on the balance of probabilities that A has suffered such harm. Whether B is likely to suffer significant physical harm does not require the court to be satisfied that B will, more likely than not, suffer such harm in the future. It is enough that it is a real possibility.

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