C O R R E C T E D V E R S I O N

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Inquiry into the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill 2015

Melbourne — 24 June 2015

Members

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Witnesses

Ms Fleur Ward, chair, children and youth issues committee, and
Mr Andrew McGregor, committee member,
Mr Joe Gorman, committee member, and
Ms Sarah Bright, policy lawyer, Law Institute of Victoria.

The CHAIR — I declare open this public hearing of the Legislative Council legal and social issues committee. This hearing is in relation to the inquiry into the children, youth and families amendment bill. I welcome the Law Institute of Victoria, in particular Ms Sarah Bright, Ms Fleur Ward, Mr Joe Gorman and Mr Andrew McGregor. The committee thanks you very much for making yourselves available at this time of the day and at short notice.

I caution you that all evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and further subject to the provisions of the Legislative Council standing orders. Therefore the information you give today is protected by law. However, any comment repeated outside this hearing may not be protected. All evidence is being recorded, and you will be provided with proof versions of the transcript in the next couple of days.

We have allowed half an hour for your session with us tonight. We thank you for your attendance this evening. I would ask you to make a brief presentation, and thereafter members of the committee will have questions for you.

Ms WARD — We thank you for the opportunity to present evidence to this committee, and we sit before you not only as representatives of the law institute but also as lawyers who are specialists in child welfare law. By way of introduction, Mr Joe Gorman is the longest practicing child welfare lawyer in Victoria, starting in 1975, and Mr Andrew McGregor has practiced almost as long as Joe — for some 28 years.

It is the job of the Children's Court and the lawyers before it to ensure that there is just, fair and proper treatment of vulnerable children and their families by the state, namely, the Department of Health and Human Services. We have spent our careers fighting to ensure that such treatment occurs. None of the 10 substantive public inquiries in the last 10 years, including most recently the Cummins inquiry of 2012, have ever endorsed fettering the Children's Court's discretion and reducing its powers in the way that we see in the 2014 legislative amendments.

We have represented thousands of children and families across our careers. We have witnessed the worst cases of abuse in care and the most appalling examples of mismanagement by the department. Unless you are part of the court process, it is difficult to appreciate just how much is at stake every day for these children and their families, just what has to be managed and how serious the impact of every single legislative provision is upon families and their children. We ask that you would consider yourselves how you would like to be treated if it was you and your child before the Children's Court.

It is undeniable that the 2014 reforms dramatically reduce the powers of the Children's Court, and we say that this is very dangerous when vulnerable children are involved. Any decision-maker in this area must be cognisant, as we are, of the pre-Carney era where children in state care were subject to wardship orders. Given the lack of judicial oversight of care arrangements, many of those wards of the state were abused, perversely mistreated, and often ended up homeless.

You will no doubt be aware that a lot of the evidence before the current royal commission into child sex abuse is being given by the wards of the state. With some of the provisions in the 2014 amendments we are resorting back to draconian wardship-type orders, namely, the new 'care by secretary' orders. Therefore we are imploring you to make a number of simple amendments to the 2014 legislative reforms to ensure there is a return of the essential powers of the court to protect children and ensure that the court remains the final arbiter of the best interests of children. It is not an exaggeration to say, in our opinion, that if you do not act and reinstate some of the court's powers, the outcomes for Victoria's children and their families will be catastrophic.

As to the lack of consultation, we say there was an abject lack of consultation. The law institute was invited to a single meeting with the department in June 2014. Joe and I attended personally. We were given a slide show presentation of what was coming and we were told to keep it in confidence. To say that that is consultation is certainly extending the definition.

We refer you to our submissions and our previous submissions to the last government as to the specific amendments we seek, but tonight we just want to talk about family reunification orders and care by secretary orders.

Amendments to those orders would ensure that the catastrophic consequences for children and families that we envisage could be avoided. The issue of the reinstatement of the court's ability to make conditions for contact on the care by secretary orders and the court's ability to determine the length of care by secretary orders is of profound importance to us as children's lawyers. Articles 8 and 9 of the United Nations Convention on the Rights of the Child demand that there is a preservation of the child's identity and regular contact for a child with their parents and siblings if they are removed from a parent's care.

Furthermore, I implore you to read chapters 9 and 15 of the Cummins inquiry. Cummins rejected outright the DHS request for DHS themselves to determine the frequency of contact. Cummins said, 'No. It is only for the court to determine that issue', but then we see this power removed in the 2014 legislative reforms.

Court-sanctioned contact — that is, contact that is protected by the court — is fundamentally important for these vulnerable children. It ensures the maintenance of their identity. The children before our court have difficult enough lives, but often the strength of their attachments and relationships is positive. And to ensure their sense of self we must allow the court to determine what frequency of contact there must be. It is also important for these children that they have contact with people they trust, people they really do feel safe with in disclosing and confiding if there is any maltreatment and abuse. This was part of the problem with the wardship orders.

As to the length of orders, making it a compulsory two-year period without our court's ability to determine the length of that order is akin to mandatory sentencing, and we say that is unacceptable. I had a matter recently with a child in DHS care who spent no more than two consecutive nights in one placement over a period of six weeks, and in that time the department was unable to comply with the access conditions with her parents and her siblings because the child was shipped around the state.

The system is in crisis. The 2014 legislative reforms only serve to create a mask over the problems that are existing in the system at the moment. We are thrilled that the 2015 bill reinstates section 276. We are thrilled about that, but we implore this committee to endorse the amendments that we seek, because there is much more of the court's powers that needs to be reinstated.

The issue of stability has been raised again and again, and the department has sold these reforms as creating stability. Unfortunately we say that is not what is going to be accomplished by this legislation. Cummins, if you read chapter 9, said that from the date of reunification to the date of making a permanent care order a five-year lag is too long. That is absolutely true, but Cummins did not then recommend this profound interference with the court's powers. Rather, Cummins said, 'Look at the barriers to permanent care' — whether there is support of permanent carers, whether the department reviews for children their stability time frames that are already in the legislation. At no time did Cummins say that there should be orders akin to family reunification orders.

We understand that, according to the department, the family reunification orders are based on this permanency and stability project of 2013. But we now know as a result of this inquiry that the project is not finalised. On this basis and on the basis of the grossly unjust outcomes we predict will occur, we seek that you amend the family reunification orders as follows: to remove — —

The CHAIR — If I could just interrupt for a second.

Ms WARD — Yes, of course.

The CHAIR — I just want to bring you back to our terms of reference. Whilst we have the ability to examine this bill that is before the house at the moment with regard to the legislation that sits behind us, we are examining the Children, Youth and Families Amendment (Restrictions on the Making of Protection Orders) Bill. That is the bill before this committee. That is the bill before this Parliament. I appreciate the LIV has a range of other issues they wish to prosecute. While they may be relevant to elements of the bill that are before us, I would ask you to address your comments to the bill that is before the Parliament and the committee.

Ms WARD — The terms of reference, as I understand them, also include this bill along with the current legislation insofar as it goes to protect vulnerable children, and there is a symbiotic relationship with the effectiveness of 276 and the 2014 legislative reforms. So I cannot address you on the effectiveness in terms of protecting Victoria's vulnerable children with 276 being reinstated if I cannot make reference to the 2014 legislative reforms.

The CHAIR — I appreciate that, but I would ask you to make the primary part of your presentation relating to the legislation that is before the Parliament.

Ms WARD — Yes. Then in terms of the family reunification orders, we seek that there be amendment to those orders so that 276 can be effective. We say if you do not amend the family reunification orders in the manner that we seek, it will not permit any effective application of 276 by the court. Everybody in this room would be aware that the waiting lists for services are profound and horrific, particularly for clients, families, children in regional areas. We are of the view that with family reunification orders, unless the court can take into account the lack of provision of services by the department, which we often see, or the huge waiting lists, then the reinstatement of 276 is utterly ineffectual.

In our experience, waiting lists for services can vary from three weeks to six months, depending on the region. The Cummins inquiry looked at this in 2012 and made recommendations, but as recently as the May 2015 Victorian Auditor-General's report we see the department is found to be failing in the provision of their family-based services, which are Child FIRST and integrated family services. So there is much evidence in the community, apart from the experience that we have as practitioners every day, that there are not services that are readily available; and these new provisions — the family reunification orders — do not permit the court to take that into account. Therefore doors to reunification are being shut without the court being able to take that into account.

The CHAIR — Thank you for your presentation. Have you concluded?

Ms WARD — If I could say one more thing.

The CHAIR — If you could conclude quickly, that would be great.

Ms WARD — Family reunification will have a disproportionate impact on those who are the subject of family violence, those who are Indigenous, those who struggle with homelessness, those who have mental health issues.

Ms SYMES — You do not have to rush. It is okay.

Ms WARD — Thank you. I appreciate that. I am very cognisant of having only half an hour.

Ms SYMES — With respect, Chair, you did interrupt Ms Ward's flow. Take a breather and recompose.

Ms WARD — Thank you; I very much appreciate that.

The CHAIR — Ms Ward, I would ask that you conclude your remarks in the next minute or two.

Ms WARD — Yes, I will.

The CHAIR — We want sufficient time to ask questions.

Ms WARD — Thank you very much. The only thing we would say in finality is that the six-month review that is proposed is utterly inadequate in terms of the operation of the 2014 reforms but also how 276 will then be of benefit to the community. We say it is inadequate because we will not know how many children are being mistreated, how many children are not seeing their parents or siblings regularly, how many placements have changed and how many families are denied the opportunity to work on reunification. These legislative reforms serve to be nothing less than opaque glass.

The CHAIR — Thank you for your presentation. If I could just ask the first question. Going to your point about resourcing and waiting lists, your submission is that the current resourcing of the current waiting lists is unacceptable.

Ms WARD — Yes.

The CHAIR — Would you like to elaborate and provide further information?

Ms WARD — Yes, I can give a number of examples if that would be of assistance. It does depend on the area. We understand, for example, with the Queen Elizabeth Centre, which is the principal parenting analysis

residential stay tool used by the department regularly, for those in the metropolitan area it is one to two beds on a fortnightly rotating basis, whereas for regional areas it is four to eight beds a year.

Mr MELHEM — Can you slow down a bit? I am having a problem following you. Notwithstanding what the Chair said, I would rather you take your time and explain that. The Queen Elizabeth Centre was — —

Ms WARD — It is a residential house.

Mr MELHEM — It was the waiting tool.

Ms WARD — Yes, that is right. It is where the parents and their children will go and the quality of their parenting is under scrutiny and there is a report at the end. For those in the metropolitan region, there is one to two beds every fortnight on a rotating basis that the department can access. But for those in a rural area, there are four to eight beds a year. In terms of improving parenting for those who are struggling, and they are many of the people before our court — not bad parents, just those who are struggling; there are some who — —

Perhaps we do not need to go into that, but most of the people before our court are struggling. There is a lack of services in relation to parenting. I have already addressed you on the Victorian Auditor-General's report where they say it is failing. Child FIRST — one of the department's principal services for parenting support — and integrated family services, are failing. That is the conclusion of the report. Then I can give you anecdotal evidence about my clients who wait for significant periods in relation to drug and alcohol counselling, family violence counselling and for assessments in relation to their mental health. But certainly between three weeks and six months — it is that range.

Ms SPRINGLE — You have touched on the criticisms of the department by various quarters and in successive reports that have been publicly available. I am keen to unpack the ramifications of scaling back the Children's Court's jurisdiction over DHHS and what practically that will mean on the ground for families. Could you address that for me?

Ms WARD — Yes. If you have the power to remove children, there must be proper oversight. So if the court is not able to examine regularly what is happening in terms of care arrangements, because children on care by secretary orders are automatically in for two years and there is no review, certainly within the one-year period that we were used to seeing, or if you have children who were able to see their parents on a regular basis which now that decision will vest solely with the department, we will not know with what frequency of contact the department will then avail those children for contact. They are the sorts of matters we feel will be amounting to things which are not in those children's best interests. We have had this specialist court being able to determine these matters and suddenly all that decision-making power is relegated to an administrative body with a vested interest.

Mr GORMAN — We see on a daily basis disputes between what the department of human services proposes is an appropriate regime of contact for children with biological family. The court almost invariably in our experience considers that the department's constraints — budgetary are often cited — are not in the best interests of children and regularly orders that the children should have more contact with their biological family than the department of human services proposes. We anticipate with the care by secretary orders and no role for the court in determining that, that those vulnerable children will be deprived of an appropriate level of contact.

Mr McGREGOR — We are being told that the six-month review has no allocation of any particular budgetary amounts to tell us of what level of detail it will entail. We are also being told that the purpose of these reforms is to achieve stability promptly. But who knows when we will be assured about the accuracy of those predictions? Our concern is that where the department currently argues that it does not have resources to facilitate a level of contact, this is simply going to deprive an outside decision-maker of a mechanism for ensuring that that connection between biological parent and child will at some level be maintained.

In the court the description is often given, 'Is it identity contact or is it reunification contact?'. Whichever way it is, the court is in a position to make determinations. If you take that away from external scrutiny, we have a joint opinion that there is a likelihood that that level of contact will reduce markedly. I think we all would have read recently in the newspaper the importance of sibling contact — a third of children in care having no contact with siblings. These are resourcing issues, and there is no reassurance that if you take from the court you will give to

the sector. We are here to argue for a client group. They do not have the capacity to coordinate and come here and argue on their own behalf.

Ms WARD — Just in terms of a very important example if I can give it in terms of, say, a woman with domestic violence and homelessness and the issue of ice. Our court sees the intersection of all of the most significant social matters currently alive. If I have a client who is the victim of domestic violence because her partner went berserk on ice, and ultimately those children are removed from her because they do not think that she can protect them— the house is in his name, she becomes homeless. The waiting list for public housing is over 10 years, and many of our clients cannot get their children back if they do not have housing and they cannot get housing if they do not have children. With these new family reunification orders, if the period is 12 months and my client has the child out of her care for that time given the ice and the family violence and the homelessness, the court can only extend that period if there is compelling evidence that she would resume care. But if she is still on the waiting list for housing, then that door to reunification for that child and their parent is shut and that is it. Then the court can make a care by secretary order for two years, which is basically a guardianship order. It is inappropriate that the legislation will be structured in that way.

Ms SYMES — I concur. Thank you so much for your presentation. We had some hearings last week, but I am very glad that you guys have come along today because I wanted to ask about a situation that is much more easy for lawyers to answer I think. Noting your support of the bill that is currently before the house — the 2015 bill — we are all aware of the highly publicised case last year in the Children's Court of the two siblings who were tragically sexually abused whilst in care. My understanding is that that court's decision rested on section 276. If the 2014 amendments to section 276 remain unchanged — that is, the current bill before the house does not get through the Parliament — would the court have been able to make the order that it did?

Ms WARD — The answer is categorically no. I felt that I wanted to address you on other things, because obviously that was in our submissions. It was very much in the shadow minister's mind last year when she was debating against the 2014 reforms. Our point is this, there is a reinstatement of 276, but the court's ability to make an IAO — an interim order — on an unfettered basis is not being restored. I say one feeds into the other.

Why any Parliament would want to interfere with a court's ability to make a temporary order to manage its proceedings to conduct them in the best interests of children, particularly when you have other orders which are then limiting time frames, is just, we say, an unnecessary and unjustifiable interference in judicial power.

Mr McGREGOR — Could I just add to that issue that highlighting the significance of that case, the publicity for it and the fact that the now minister is remedying that issue, which we all applaud — highlighting that case was demonstrating that when we were presented with the draft documents telling us about the reform of this jurisdiction, there was no inclusion of that particular problem because the draft had been prepared before that case emerged. The department identified it as a problem, we surmise, in terms of being castigated by the magistrate, and added it to the wish list. So we come to you saying that over a period of years there have been many reform attempts, and the drumbeat throughout them has been an outcome by which the department would be free of the scrutiny that the court currently provides.

Ms PATTEN — I am not sure that I have much to offer, but I appreciate that you are saying that the reinstatement of section 276, while it is applaudable — am I right that you are saying that it will have absolutely no benefit without further repeals on family reunification orders?

Mr McGREGOR — It might be that that is a strong expression to say that. We applaud this amendment, but in terms of the totality of the jurisdiction, it represents a fraction of the changes that are crashing over the court like a tsunami.

Ms WARD — And you only have to look at the way in which the family reunification orders are drafted this is, to say the court must not make the order if it has the effect of removing the child. You only have to look at the expression, the language and the prohibitions and the fettering of the court's discretion and then really contrast with what 276 could do. If you compare and contrast and start to unpack how they will actually work in reality, there will be no benefit from the reinstatement of 276 unless there is a concomitant rectification, if you like, or amendment to family reunification orders.

Mr MELHEM — Just a quick question. This is my first go at this; I missed the last meeting. In my understanding the reason in 2014 the secretary made the decision — the department, you know, driven by

efficiency and trying to make decisions reasonably quickly and so forth, where you are coming from, which I agree with — it is the side effect is removing the court oversight. That is now going to be reinstated. Talking about resources, what do you think the court resources will be like and how quickly the court will be able to deal with these cases? Will that kind of slow down the process, or are we talking about a bit of both — the department does what it does but the court now reinstates its powers to oversee the process? I just want to understand it in my mind. I do not want to end up with the department resources and now they are doing a quick decision that might not be in the interests of the child but then ending up fully with the court and then the case is delayed. What is your comment on that?

Ms WARD — It is certainly true that there are waiting periods to get before a magistrate for a final determination. It is problematic with the family reunification orders that even that is not being able to be taken into account. Up in the regional areas I understand there is a six-month wait for a final contest, a final determination of whether the department have made out their case against that parent and the family. So, yes, that in and of itself, if I have understood your question correctly, is a very serious issue, but the bigger problem is the department. Regularly there is not an allocation of a worker. For some families the cases are unallocated for months at a time. Then there is the issue that the department is not making the referrals quickly. And then there is the waiting lists themselves.

Mrs PEULICH — Thank you. It is a strong presentation. A quick question. So you are anticipating that under the current legislation — or the 2014 legislation — that there are fewer contacts between children and parents. You are obviously suggesting that this is motivated by lack of resourcing of the department. Are there instances where the department is making those decisions because it is actually in the best interests of children? What proportion of parents would be such bad parents that perhaps it would be in the best interests of the child to make that permanent order more quickly?

Mr McGREGOR — It is a terrific question. In my practice I have recently had a matter in which there was a judicial determination that there would be no further contact with the father — in very extreme circumstances. That is the only instance I have had. As I mentioned, in terms of the aims of contact, whether it is to work to reunification or whether it is to maintain an identity, I think it is the centre for excellence that cited the figure that we will make orders that keep children away from parents where we consider them to be harmful but we find that at the time at which they are old enough to vote with their feet 20 per cent of them gravitate back to the parent. We sometimes have the idea, based on the advice of the social sciences, that unless they have a level of contact with the parent, they will fantasise about that idealised parent and seek them out to their detriment. But in terms of how you calibrate those processes, the reason we have the misgiving about the idea that decisions will be made on the basis of resourcing — how do you have a contact centre funded? How do you have someone to do the transporting? — is because we encounter those arguments when we have a newborn child temporarily away from a parent awaiting a placement in Queen Elizabeth and the department says, 'We do not have workers on a weekend. Is there a family member who can help out?'.

Ms WARD — Even if the child is breastfeeding.

Mr McGREGOR — So this is why we say it is not that we are cynical or that we treat the department as some organisation that we have a paranoid view about. It is on the basis of experience and practice and argument in court where magistrates say, 'I will not tolerate an outcome where there is not daily contact with this newborn child'.

Mr GORMAN — There is potentially a more concerning reason why in certain circumstances contact might not be allowed, and that is if children are being treated inappropriately — abused — in care. Obviously there will be a huge temptation for whichever is the care organisation charged with the responsibility of looking after the children and arranging the contact to make sure that the child does not have contact with the family so that they can report their abuse. That is a great concern to us.

Ms WARD — The court itself, when it determines the frequency of contact — I mean, they are often hotly contested matters. The court is very cautious, and it considers matters. The magistrates are trained experts in child welfare law, social sciences, and often we use the Children's Court clinic — psychologists and psychiatrists who are specialists in their field, peri-natal specialists — to give that evidence. So the court takes all of that into account when determining frequency. It is a very significant matter for a child, and many of the contested hearings before our court are about that. It is not done capriciously. It is just that often the department

is seeking far less for whatever reason, but the court decides — sometimes it decides with them but often it decides that it is more in that child's best interests.

Mrs PEULICH — Thank you for the answer, but just the question: what proportion of parents would be such bad parents that contact is curtailed?

Mr McGREGOR — O. J. Simpson had visits in prison. It is a rarity for a court to make a decision that there will be a prohibition on contact, and it is for the reasons that I say. But it may be that it is rationed for appropriate reasons.

Ms WARD — And supervised so that it is safe for the child.

Mr McGREGOR — Yes. But I am sorry, I do not have an actual figure I could offer you.

Mr MULINO — A brief two-part question. Firstly, given that the focus of this inquiry is the 2015 bill, thank you for clarifying that you support that particular amendment. Having said that, you also acknowledge that there are some interdependencies in the act. Given that you have raised concerns about the consultation process that was undertaken last year and the complicated nature of the provisions, would it not be appropriate for the government to take some time to consult with stakeholders such as yourself, the community sector and the court in determining whether the totality of the previous bill was reaching the right balance but that we pass this strengthening provision in the meantime, notwithstanding that there is a set of issues to resolve?

Mr GORMAN — That would certainly be an excellent outcome if it is at all possible.

Mr MULINO — The second question is: a number of people have raised resourcing issues, which no doubt is an issue in this sector. Would you say that the increase of funding of around 17 per cent in this year's budget would assist in that, even though it is undoubtedly not a panacea?

Ms WARD — It will assist, and it is fantastic news. Our clients need a huge injection of those funds, they absolutely do. But it still does not mean that the court should not be able to properly determine the best interests of the child, and being hamstrung in those matters is just inappropriate for kids.

Mr McGREGOR — I think so, to cut across. Our other concern is that we are swimming in opposite directions at the same time, whether it is to do with federal funding or the community sector and its resourcing. If we say to parents, 'Once you've had the domestic violence counselling, you can reunite. You're on a waiting list. It will take you six months for a referral to be accepted', the clock is ticking. It has been ticking under the present legislation, but it achieves a very different urgency under these reforms.

Mr GORMAN — Could I just make one last comment. For Beth Allen to have described the departures between the 2014 legislation and the Cummins recommendations as slight variations was just breathtaking. It is extraordinary. In a number of respects the 2014 legislation goes quite directly against very specific recommendations in Cummins. To say that is a slight variation is just astonishing.

The CHAIR — Our purpose is to elicit the different views on this issue, and I think we are achieving that. With that, I would like to thank the Law Institute of Victoria for your presentation and again for your preparedness to appear before us at short notice at this time of the evening. Thank you very much.

Mr GORMAN — Thank you for the opportunity.

Witnesses withdrew.