Queensland Law Society

Submission

Queensland Child Protection Commission of Inquiry

A Submission of the
Queensland Law Society

19 October 2012

Contents

* Please note that reference throughout the submission to 'the Department' is a reference to the Department of Communities, Child Safety Services and Disability Services and a reference to the "Act" should be read as a reference to the *Child Protection Act 1999*.

1 Terms of Reference to be addressed

The Society will provide submissions which may relate to a number of terms of reference proposed for the Inquiry. However, the majority of the Society's comments relate to term of reference 3(c)(iii):

> *c. Reviewing the effectiveness of Queensland's current child protection system in the following areas:*
>
> *….*
>
> *iii. tertiary child protection interventions, case management, service standards, decision making frameworks and child protection court and tribunal processes; and*

We will also provide some commentary relating to term of reference 3(b):

> *reviewing Queensland legislation about the protection of children, including the Child Protection Act 1999 and relevant parts of the Commission for Children and Young People and Child Guardian Act 2000.*

There are also matters in this submission which would relate to term of reference 3(c)(iv):

> *c. Reviewing the effectiveness of Queensland's current child protection system in the following areas:*
>
> *…*
>
> *iv. the transition of children through, and exiting the child protection system*

2 Terms of Reference 3(b) – Reviewing Queensland Legislation

The Society has consulted as widely as possible with our members with regard to this Inquiry, particularly in relation to the operation of Queensland child protection legislation. The comments that we provide focus mainly on the practical operation of the *Child Protection Act 1999* ('the Act') and the *Childrens Court Rules 1997.*

a) Child Protection Act 1999

The Society makes the following comments in relation to the Act.

(i) Charter of Rights for a Child in Care

First, the Society is supportive of the Charter of Rights for a Child in Care, contained in Schedule 1, *Child Protection Act 1999.* However, we understand that in practice the Charter is rarely referred to when making decisions.

It should be emphasised that the existence of a Charter of Rights in the Act does not ensure that children are aware of or have access to their rights. Section 74 provides that the chief executive must ensure that all children who are subject to a child protection order are told about the Charter and its effect. Anecdotally, our members have reported that young people often say that they do not know about the existence and effect of the Charter. Conversely, the young person's Child Safety Officer will say that the young person would have been directed to the Charter. It is difficult to resolve this issue as there appears to be no easily accessible Departmental record of when and how Charter information is shared with a young person.

We consider that there is scope for the relevance and meaning of the Charter to be reviewed with young people as part of the case planning process. This will ensure that there is continuous and meaningful dialogue between the Department and the young person in relation to the Charter. The fact that these conversations took place, and where relevant their content, could also be recorded on Departmental case plan review or case plan documents. This would create an easily accessible record for the Child Safety Officer and young person.

In order for a charter to be effective, children need to have the ability to enforce their rights. We consider that the effectiveness of the Charter should be strengthened operationally. In our view, the Inquiry could look at options for creating a right of review arising from non-compliance with the Charter of Rights for a child in care. We note that generally, a case plan is developed or reviewed for a child or young person in care every six months. We suggest that the Inquiry consider whether the development/review of a case plan could be the trigger point for a reviewable decision, with the standard for these case planning decisions being adherence to the rights contained in Charter. The Society recommends the Inquiry investigate this, along with other strategies for strengthening the operation and effectiveness of the Charter.

We note that our comments in relation to the Charter are particularly pertinent to Aboriginal and Torres Strait Islander children.

(ii) Aboriginal and Torres Strait Islander (A & TSI) Recognition in the Child Protection Act 1999

The Charter on the Rights of a Child in Care does not currently contain robust recognition of the particular vulnerability of A & TSI children in the child protection system. In order to resolve this, we consider that equivalent children's rights to s 5C (Additional principles for Aboriginal or Torres Strait Islander children) and s 83 (Additional provisions for placing Aboriginal and Torres Strait Islander children in care) of the Act should be included in the Charter. As we have discussed in Item 2(a)(i) above, we consider that the effectiveness of the Charter should be improved by the creation of rights of review in relation to children and young people's Charter rights.

The inclusion of these matters in the Charter ensures consistency with the Act's principles and is an essential part of recognising the special vulnerability of A & TSI children in the child protection system.

The Society also considers that the use of cultural support plans for A & TSI children should be strengthened. We note that our members have indicated that these support plans should include consideration of issues such as family preservation, family reunification, connection with extended family, connection with the community of the cultural group that the child originates from and access to A & TSI placement support workers and A & TSI support services.

The Society will provide greater detail regarding the overrepresentation of A & TSI children in the child protection system at Item 7 of this submission.

(iii) Non-parties

Under the current Act a person who does not meet the narrow definition of 'parent' used in Part 4 is not a party to the proceedings (s 52). 'Non-parties' do not have the right to be heard in relation to the case and can only do so with the court's leave (s 113*)*. However, a wider definition of 'parent' is used under s 11 of the Act, which operates when the Department is assessing whether a child is in need of protection.

We acknowledge that these definitions can create anomalies, meaning that a person from whose care a child is removed may not be a party to consequent child protection proceedings. For example, in a situation where a grandparent is taking care of a child and that child is removed from the grandparent, it is entirely possible that the grandparent may not meet the definition to be a party to the proceedings. In our view, this prevents extended family members or other people who have played a significant role in a child's life from being able to be joined as parties to proceedings where this might be appropriate. We note that this issue is particularly important with regard to A & TSI children.

In order to address this issue, we consider that there may be some people (who are not 'parents' under the narrower definition) that the court considers should be given the rights of parties. In these instances, our view is that the court should be given the flexibility under the Act to determine that an individual who meets the broader definition of parent, or otherwise is such a significant person in the child's life, should be joined to the matter as a party in the best interests of the child. Therefore, that person would be given the right of appearance and the rights and obligations of a party, in the appropriate circumstances. This would, ensure that in appropriate circumstances, individuals joined as parties can be subject to directions of the court, attend court ordered conferences, list matters for hearing, and cross-examine witnesses.

Further, we consider that s 113 of the Act should be amended to provide greater certainty and direction in matters where non-parties seek to access materials. For example, s 113(3)(d) of the Act states that a non-party can access a document or information if the court is satisfied that 'each person to whom the document or information relates' has been informed and has been given reasonable opportunity to make submissions. We consider that the phrase 'each person to whom the document or information relates' is vague and needs more clarity. Our members report significant variation in the way this section is interpreted and applied. It would also be useful to have an explanation of the mechanisms through which a non-party could use to view documents. In practice, our members report that in some instances courts are relying on general powers to make directions that non-parties be given copies of documents and in other situations non-parties are restricted to viewing the documents as provided for by s 113.

(iv) Disclosure

Under the Act, there is no requirement on the Department to provide full and frank disclosure of all relevant material under its control to the other parties to the application and ultimately to the court. Section 190 of the Act provides a legislative basis for a party to request documents from the Department under the applicable rules. However the *Childrens Court Rules 1997* do not provide for a regime of disclosure between parties in the absence of a subpoena, and so in practice, the Department requires the party to issue a subpoena for the production of the documents, which in many cases involves the expenditure of Legal Aid funds in relation to subpoena conduct money. Our members who represent parents and young people directly have reported that this makes it extremely difficult to provide initial advice as to their prospects of success regarding the application, and later to prepare for either contested interim hearings or a final hearing. It is noted that there is currently an arrangement in place that allows a separate representative to undertake an inspection of the Department's files, but this is not provided for in the Act. Rather this occurs by agreement between Legal Aid Queensland and the Department.

The Society knows of no other litigation involving the State acting as a model litigant that requires a party to the dispute to subpoena the model litigant for disclosure of material that is relevant to the dispute/litigation. It is concerning that an application can be brought against a person, and that person does not have the right to have the full details and supporting documentation. We consider that this brings into question issues of natural justice and procedural fairness in these important matters.

It is our view that there should be a requirement of full and frank disclosure by all parties in proceedings under the Act, determined by the court, so as to ensure that all parties have the ability to present their case to its highest before the court. We consider that disclosure will facilitate early negotiation and settlement of matters.

We also note s 191 of the Act, which allows a person engaged in the administration of the Act to refuse to disclose certain information. In these situations, we suggest that a person refusing to disclose should be required to disclose the complete information to the court and to give notice to all parties to the proceedings that information had not been disclosed. Such a transparent process would allow the parties to consider whether to apply under section 191 of the Act for a direction from the court that the material be disclosed. It would also prevent circumstances such as one matter reported by a member, in which information was withheld by the Department in a proceeding, and it was not until after the matter had been listed for hearing that the parties and the court became aware that differing information had been withheld from each party.

We suggest that a court should also have the option of ordering disclosure in the absence of an application from the parties, if it is consistent with the paramount principle to do so under s 191(2) of the Act.

Related to this issue is that a large number of parents involved in these proceedings require legal aid funding. Under the current guidelines, our members have reported that it is extremely difficult to obtain funding for a final hearing to appear on behalf of a parent. Members are often required to advise Legal Aid Queensland of the strength of the Department's case in the absence of full disclosure, potentially placing the parents at a significant disadvantage if this results in funding being refused. Strengthening disclosure requirements may mean that, in some matters, robust evidence is available to support a parent's application to obtain legal aid for ongoing funding. In others, it may allow our members to give

better informed advice which leads to the earlier resolution of proceedings. The issue of legal aid funding is discussed in more detail in Item 4 of this submission.

(v) Interim guardianship orders

The court has the power to make interim orders on adjournment of a matter, under s 67 of the Act. The Society considers that it may be beneficial to amend this section to include that the court can make orders as to interim guardianship at this stage.

Case example

We consider that this would be appropriate where a child is subject to an application and neither parent can be located, or the parents do not have the required capacity. If the Department's application is for guardianship on a final basis, and the court considers that the child would be at unacceptable risk without guardianship vesting in the Department on an interim basis, the court should be able to make this order.

(vi) Long-term guardianship orders

Long-term guardianship of a child can be granted under s 59(6) of the Act. The Society considers that the grounds for making a long-term guardianship order should place a positive obligation on the Department to demonstrate that they have made reasonable efforts to work with the family to address the child protection issues, where practically possible. In fact, the Department has issued a Practice Resource dealing with 'long-term guardianship – assessment factors'.[1] Among the factors discussed, it is evident that efforts should be made to work with the family to resolve the child's protection and care needs in a timely way. We consider that the Department should demonstrate through the provision of evidence that reasonable efforts have been made to adhere to this Practice Resource. We consider this will discourage circumstances where a lack of robust and appropriately targeted casework means conditions for reunification are not achieved.

It may be prudent to enshrine this obligation in legislation. We consider that this would be particularly relevant in terms of addressing the overrepresentation of A & TSI children in the child protection system.

The Society has also considered whether any applications for child protection orders should be heard by the Childrens Court of Queensland convened by a judge. Given the seriousness and significance of these orders for children and their families, perhaps there would be some benefit in these decisions lying with the higher jurisdiction. We note that a provision allowing for this would be comparable to s 77, *Youth Justice Act 1992* where a Magistrate is to refrain from exercising its jurisdiction to determine an indictable offence unless it is satisfied that the charge can be adequately dealt with summarily by the court. Also s 39, *Federal Magistrates Act 1999* and Rule 8.02, *Federal Magistrates Court Rules 2001* provide for the factors to be considered when transferring a matter from the Federal Magistrates Court to the Federal Court or the Family Court.

[1] Department of Communities, Child Safety Services and Disability Services, Practice Resource, Long-term guardianship-assessment factors, found at: http://www.communities.qld.gov.au/resources/childsafety/practice-manual/practice-resource-ltg-assessment-factors.pdf

We consider that there should be capacity for a Magistrate to determine that a particular application is so complex and serious that it should instead be heard by a judge. This could occur by application of a party to the proceedings, or on the Magistrate's own motion. We note that any legislative provision allowing for this determination may benefit from a non-exhaustive set of criteria to guide the use of this discretion. For example, such a set of criteria might refer to the length and intrusiveness of the application.

RECOMMENDATIONS

The Society recommends the Inquiry investigate legislative options relating to the following aspects of the *Child Protection Act 1999:*

- **Charter of Rights for a Child in Care**
-
- **Aboriginal and Torres Strait Islander (A & TSI) recognition**
- **Non-parties**
- **Disclosure**
- **Interim guardianship orders**
- **Long-term guardianship orders**

b) Childrens Court Rules 1997

(i) Definition of 'conferencing'

Currently there is no definition of 'conferencing' under the *Child Protection Act 1999* or the *Childrens Court Rules 1997.* With growing understanding and use of alternative dispute resolution to resolve legal issues, this absence creates difficulties for participants trying to prepare for a conference, having knowledge of the process to be adopted, and understanding the role of the conference convenor.

We suggest that the Inquiry consider recommending amending either the *Child Protection Act 1999* and or the *Childrens Court Rules 1997* to either:

- include a clear definition of 'conferencing'; or
- use an alternate term, for example 'mediation' and adopt a recognised definition of the term such as is used by the National Alternative Dispute Advisory Council (NADRAC).

(ii) Skills, training and qualifications of a chairperson

The *Childrens Court Rules 1997* provide for the skills and qualifications of the chairperson in a court ordered conference. When compared to the requirements of facilitators of alternative dispute resolution processes under other Queensland and Commonwealth legislation, the requirements appear to be poorly described and seem to accept a lesser minimum standard. For example, in contrast, s 79, *Queensland Civil and Administrative Tribunal Act 2009* states:

Who may be a mediator

(1) A person may be a mediator for a proceeding only if the person is—

(a) a member; or

(b) an adjudicator; or

(c) the principal registrar; or

(d) a mediator under the Dispute Resolution Centres Act 1990; or

(e) a person, including, for example, a registrar or registry staff member, approved by the principal registrar as a mediator for the tribunal.

(2) The principal registrar may approve a person as a mediator for the tribunal only if the principal registrar is satisfied, having regard to the person's qualifications and experience, the person is a suitable person to conduct mediation.

Under the *Family Law Act 1975*, people undertaking family law dispute resolution:

- must satisfy a higher qualification, namely they must have completed the Vocational Graduate Diploma of Family Dispute Resolution (or the higher education provider equivalent), or

- have an appropriate qualification or accreditation under the National Mediation Accreditation Scheme and competency in the six compulsory units from the Vocational Graduate Diploma (or the higher education provider equivalent).

Significantly, the *Family Law Act 1975*, specifically excludes mediation in family law matters where there are issues that constitute child protection and domestic violence issues, which are matters that are considered in child protection conferencing. Therefore, it can be argued that child protection conferencing is more complex and sensitive than mediations under the *Family Law Act 1975*, and therefore requires facilitation by convenors that have a minimum requirement equal to or higher than the requirement under the *Family Law Act 1975*.

Establishing minimum standards for conference convenors would be essential if child protection conferencing was to be provided by private mediators or not for profit organisations (as occurs under the Commonwealth *Family Law Act 1975*).

A failure to have a minimum standard for appointment of conference convenors has the potential to impact on the service that is able to be provided.

These standards could include:

- Impartiality and competency;
- Maintaining a focus on the safety, wellbeing and best interests of the child;
- Upholding the rights of the parties;
- Ensuring parties understand the conference process;
- The timely and considered resolution of matters;
- The importance of arranging for interpreters in conferences;
- Treating parties with respect in a safe environment;
- Importance of review of any agreement made and outstanding items that must be actioned in a timely manner.

Given the context of child protection proceedings, chairpersons must also be aware that the Act does not provide for resolution of matters by 'consent', and any agreement reached by the parties regarding an appropriate resolution will be reviewed by the court. The court must consider and determine the matter in accordance with the relevant law under s 59 of the Act.

Additionally, Rule 19 (c) states that the chairperson must have:

> *"an ability to communicate effectively with a broad range of people."*

In the context of child protection, we consider this should be amended to state the following:

> *"an ability to communicate effectively with a broad range of people* ***but in particular with children and young people."***

It is apparent that the chairperson would need to have the requisite skills and experience working with children and young people in order to appropriately carry out this role.

The Society also considers that a new sub-rule should be added to state that a chairperson must have:

> *"an understanding of child development and the importance of children being consulted about and taking part in making decisions about their life (having regard to the child's age or ability to understand) as required by paragraph (d) in the Charter of Rights for a Child in Care contained in Schedule 1, Child Protection Act 1999."*

In our view, this sub-rule would act as a useful reminder of the responsibilities that chairpersons have when working with children in care. Noting the importance of the role that a chairperson plays in court ordered conferences, we consider that specialist training should be provided to chairpersons.

RECOMMENDATIONS

The Society recommends the Inquiry investigate legislative options relating to the following aspects of the *Childrens Court Rules 1997:*

- **Definition of 'conferencing'**
- **Skills, training and qualifications of a chairperson**

3 Munro Review of Child Protection Report and processes for this Inquiry

The Society has considered the Munro Review of Child Protection, commissioned by the Secretary for Education in the United Kingdom in June 2010.[2] We note that the United Kingdom child protection jurisdiction operates quite differently from Queensland. In the United Kingdom, the statutory responsibility for service provision in the child protection system sits at the local level, with service delivery carried out by local government. This is quite different from the Queensland model, which operates on a state-wide basis.

[2] Materials from the Munro Review of Child Protection can be found here: https://www.education.gov.uk/publications/standard/publicationDetail/Page1/CM%208062

Despite these differences, the Society considers that the process utilised by the Munro Review of Child Protection to provide a holistic and thorough review of the child protection system should be followed here. As a summary of the process, the Munro Review was conducted in the following manner:

1.) The First Report issued by the Review was entitled 'Child Protection: A Systems Analysis'. This report considered the following issues:

> *This report sets out the approach to this important review and the features of the child protection system that need exploring in detail and that will form the focus of subsequent stages of the review.*
>
> *The first aim is to understand why previous well-intentioned reforms have not resulted in the expected level of improvements.*
>
> *This report is purposely analytical. It sets out the systems approach being taking to understand how reforms interact and the effect these interactions are having on practice. It is at the front line where they come together, at present creating an imbalance and distortion of practice priorities.*[3]

The Society considers that a review of past policies, including an examination of why they have not had the desired effect, will assist in making systematic and considered policy reforms for the future.

2.) The Second Report issued by the Review was entitled 'A Child's Journey'. This report considered the following issues:

> *The aim of this report is to set out for discussion the characteristics of an effective child protection system, and the reforms that might help to create such a system.*
>
> *This report is called The Child's Journey, referring to the child's journey from needing to receiving effective protection from abuse and neglect. It covers a number of areas, including work with children and families who have not yet met the threshold for child protection.*[4]

In our view, reviewing the child protection system from the perspective of a child would ensure that any recommendations would be child-centred, and focused on effective service delivery.

3.) The Final Report issued by the Review was entitled 'A Child-Centred System'. This report considered the following issues:

> *This final report sets out proposals for reform which, taken together, are intended to create the conditions that enable professionals to make the best judgments about the help to give children, young people and families. This involves moving from a system that has become over-bureaucratised and focused on compliance to one that values and*

[3] The Munro Review of Child Protection 1st Report - Child Protection: A Systems Analysis found at: https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00548-2010
[4] The Munro Review of Child Protection - Interim Report: The Child's Journey found at: https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00010-2011

develops professional expertise and is focused on the safety and welfare of children and young people.[5]

We note that the Final Report was informed by the consultation and reviews set out in the first two reports.

The Society recommends that the Inquiry consider the child-centred systematic approach which was used in the Munro Review and adopt relevant aspects of this process as appropriate. We consider that viewing the child protection system from different perspectives can be a useful exercise and may enhance the findings of the Inquiry.

RECOMMENDATION

- **The Inquiry consider aspects of the process undertaken by the Munro Review of Child Protection in United Kingdom**

4 Term of Reference 3(c) – reviewing the effectiveness of Queensland's current child protection system

The objective of Queensland's current child protection system is to have governmental and non-governmental entities work together to ensure children are protected from harm. The Society considers the effectiveness of this model can be assessed by looking at a range of factors, including:

- Whether there are transparent processes in place and that they accord with the principles of natural justice;
- Social services funding;
- Legal aid funding;
- Early intervention; and
- Court and tribunal processes

4.1 Transparent processes

The Society considers there is a lack of transparency for Queensland children in the child protection system. For example, the Society notes that while in response to previous requests, a range of documents have been made publicly available, a number of the Department's policies and procedures in relation to children in care remain inaccessible outside the Department. The Society calls for transparency and for policies and procedures to be accessible and to accord with the principles of natural justice.

4.2 Social services funding

The experience of our members has been that there is a lack of services, and funding for those services that exist, in this sector. The result of which is that children and their families cannot get access to these services, particularly in rural and regional areas.

[5] The Munro Review of Child Protection: Final Report - A child-centred system found at: https://www.education.gov.uk/publications/standard/publicationDetail/Page1/CM%208062

Our members' experience is that support/intervention is generally not able to be provided by Departmental officers, either due to the specific expertise/skill required, or their own significant workload. Generally, referrals are made for government or non-government organisation services. Therefore funding of such services is critical to effective casework with children and families.

The Society calls for more funding so that there are more services available and more education and support for the community, staff and workers. In the experience of our members, the use of psychologists and social workers has been a critical and significant part of aiding care decisions and the Society would like to see this continue. The Society also renews calls for more education and counselling services for children and their support networks. We will provide further detail regarding legal representation of children at Item 5 of this submission.

4.3 Availability of legal assistance and Legal Aid Queensland funding

Children are the most vulnerable members of our society and are especially vulnerable in child protection proceedings. There is statutory recognition highlighted in s 108 of the Act and s 43(2)(b)(i), *QCAT Act* which allows a child to be legally represented in the Childrens Court and QCAT respectively. In the experience of our members, however, this legal assistance does not always appear to be accessible to young people when placed in the child protection system and working with the Department. The Society calls for children in the system to have the opportunity to contact and obtain legal assistance.

The Society is concerned with the insufficient levels of legal aid funding from both the perspective of a parent and a child. Our members who are private lawyers working in child protection report that they are only paid a fraction of what it actually costs to run a matter. This has created problems with finding child protection and family law experts to undertake legal aid work in this area, as well as placing a burden on the court.

In the area of child protection, many parents have complex personal difficulties. Whilst they may not meet a means or merits test and thus fail to qualify for a grant of aid, they may have personal issues (for example, significant mental health issues or intellectual disabilities) that make understanding and representing themselves in a proceeding beyond their capacity. Our members report that, when Legal Aid funding is not provided, the costs borne in the other parts of the system are disproportionate to a grant of aid for solicitors to appear at hearings. For example, many court dates are vacated or court appearances extended as unrepresented parents find it difficult to participate in proceedings and follow court procedural directions.

Members also report that where legal aid funding is granted, they expend a significant number of hours on each matter writing submissions for ongoing funding and responding to requests for further information from Legal Aid Queensland . These costs are absorbed by our members and the effect is that less time is available for members to be undertaking meaningful work on the client's substantive matter.

Our members have also reported that it is difficult to obtain funding for briefing counsel and that there is a lack of clarity around how funding decisions are made by Legal Aid Queensland. We consider that solicitors should have access to experienced counsel to undertake complex cases, such as:

- when dealing with children as clients, either as a separate or direct representative. We have received reports that it is quite complex for a direct representative to manage a child as a client,

including taking his or her instructions and running the trial. Equally, when separate representatives are supporting children's participation, additional complexities are likely to arise; or

- when dealing with vulnerable parents, who have issues such as disabilities/impairments, mental health issues, domestic violence experiences, come from non-English speaking backgrounds or A & TSI backgrounds.

The Society understands that the Department generally has an officer and a court coordinator instructing crown counsel in child protection matters. It appears that the reluctance to fund both solicitor and counsel in these matters would place already disadvantaged children and parents at a further disadvantage in comparison to Departmental decision-makers. We consider that this has implications for fairness and balance in these proceedings.

We note two recent Childrens Court of Queensland judgments which highlight the issue of insufficient legal aid funding.

The recent appeal judgment of *KE & SW v Department of Communities (Child Safety Services) [2011]* QChC 2 made the following comments in relation to legal representation at para 6-7:

> *"It is clear, given the above assessments, that both parents were significantly disadvantaged in the court system, and the transcript of proceedings demonstrates that although the magistrate made an effort to explain to them the procedure and its consequences, they were incapable of preparing any real defence in the hearing and unable to question the experts whom were called to give evidence at the hearing. As a consequence, although the parents were trying to contest the application, there was very little offered by way of resistance to this application.*
>
> *In my view it is a sad indictment on our justice system that representation is not available to people with an intellectual disability of the type that KE and SW appear to have. This is particularly so in proceedings of such serious moment as this where the Department is seeking long term guardianship of an only child."*

Another recent appeal decision of *KD v Department of Child Safety and Others [2011]* QChC 8 at page 16 illustrates the effects on parties of legal aid being discontinued late in the proceedings just prior to a final hearing:

> *"The impression given by all of the material before me is that the appellant may have felt she had no option but to consent to the course pursued by the Department, supported as it was by Ms Fox [separate representative]. I accept though that at all times the Department and Ms Fox considered they were acting in the best interests of the child but the impression given by the appellant is that, absent legal aid, it was all over and she didn't have any option but to consent to the Department's application. This impression was, I think, reinforced by the relatively perfunctory way in which the matter was disposed of in court. No consideration was given to the appellant's intellectual disability even accepting it to be mild. Objectively the appellant was likely to have felt overborne by the other side and the absence of any immediate alternatives open to her. She was in a disadvantaged position and was, I consider, given the impression that she had no choice but to acquiesce to the case against her. In effect, once unrepresented, the Department pounced; an opportunity was provided to quickly dispose of an application."*

In light of these comments, we note that the views expressed by the court can be equally applicable to all the categories of 'vulnerable parents' outlined above. We consider that sufficient funding should be available to ensure that all these parties have access to legal representation.

It is the regular experience of our members that the Department appears to pay significantly higher rates for legal representation than what is provided by grants of legal aid for the representation of parents and children in proceedings. It is our understanding that fees on briefs from Crown Law to barristers at the private bar are significantly higher than briefs for legally aided clients. To this end, we consider that the Inquiry should investigate and compare the scales of costs for lawyers representing the Department and representing parents and children. We also note that this situation appears to be the same for the funding of expert reports, and could also be investigated.

The Society also wishes to highlight the importance of LAQ funding at two critical events in the child protection system. First, we consider that there should be funding available for family group meetings regardless of whether court proceedings are on foot. Our members understand that Legal Aid Queensland currently only allows funding for legal representation at one family group meeting per child per year. This is insufficient considering that case plans are reviewed every 3 or 6 months. If legal representation was available at these meetings, matters would be less likely to come back to court. Where matters did return to court, the issues in dispute would be significantly narrowed which would reduce the length of time matters remain before the court as part of an application to extend or revoke and vary orders. Therefore, in the long run we consider that it would be a cost effective measure to allow for funding for all family group meetings, regardless of whether court proceedings are on foot or not.

Second, our members report that there is a lack of funding available for matters after a court ordered conference has been held in a court proceeding. It is important to highlight that in our members' experience, parties are not required to file up to date material with the court in preparation for a court ordered conference. Generally, filing dates are only set when a matter is listed for hearing *after* a conference and dates are often shortly before the hearing itself. Therefore, it appears that when Legal Aid Queensland is considering the merit of funding a party immediately following a court ordered conference, the funding decisions are based on out of date or incomplete material.

Parties do not always have the benefit of legal representation after the conference, due to the constraints of legal aid funding. This may make it very difficult for unrepresented parties to consider additional matters raised on the evidence in the lead up to a final hearing. In our view, if funding was continued after this point, often issues that have been raised during a conference may be further developed and resolutions reached. Further legal advice may in fact resolve contentious matters by consent, instead of proceeding to hearing, especially if there was consideration to having a second conference.

4.4 Early intervention

Empirical studies have shown that early intervention is critical in supporting and fostering vulnerable children and young people. The Society considers that the current model fosters a symptomatic approach rather than a preventive approach, which is seeing more children coming into the statutory system and remaining longer in the system.

In Queensland, the Department is the first port of call when there is a question about the protection of a child. The Department does not provide front line services but instead 'case manages' families to access health and community based services. In our members' experience, there is limited support for pre-

statutory intervention and once a child has entered the child protection system, it is very difficult to progress any case plans that may have been put in place prior to the child entering the system.

The Society therefore considers that there needs to be investment in both early intervention and tertiary intervention. This includes education campaigns and further funding for counselling and other community services. If a child and his or her family has access to these services it will reduce the number of children who enter the system and will also reduce the long term costs.

4.5 Court and tribunal processes

Under section 15.4.2 at page 386, the Victorian Cummins Inquiry Report[6] canvassed a number of suggestions regarding 'court culture' that the Society highlights for the consideration of the Inquiry:

- *Increased and formalised collaborative training to foster professional understanding (Victorian Government 2010a, p. 26; VLRC 2010, p. 235);*
- *The development of a memorandum of understanding between the VLA and DHS (Victorian Government 2010a, p. 12). The Inquiry understands that the development is underway, and that a code of conduct for practitioners is also in development (Inquiry DOJ consultation);*
- *Developing a process for accreditation of lawyers working in the Children's Court (Children's Court submission no. 2, p. 32). The Inquiry notes that this accreditation program is currently in development and supports this positive step taken by the government and the Law Institute of Victoria;*
- *A revised fee structure for private practitioners to provide incentives for lawyers to see children away from court (Victorian Government 2010a, p. 22);*
- *The introduction of accredited training of conference convenors (VLRC 2010, pp. 218-219);*
- *The expansion of the panel of lawyers practising at the Melbourne Children's Court (Children's Court submission no. 2, p. 32); and*
- *Increased training of child protection practitioners in court preparation, privacy and Appropriate or Alternative Dispute Resolution (ADR) processes (Victorian Government 2010a, pp. 33-35).*[7]

We consider that all these options are reasonable and could be effectively adopted in Queensland.

Once a child enters the system, the Society considers there should be clarification regarding the powers of QCAT and the court about his or her care. The Society considers that the decision as to whether a child is to be removed from their parents into the care system is a critical one, and one that ultimately should be made by the court. This is currently the position and we would recommend that decisions around intervention into the family should continue to be made the court.

[6] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012 found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html
[7] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012, page 386 found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html

The Society also highlights Finding 14 of the Victorian Cummins Inquiry Report under section 15.3.4 at page 383:

> *On balance, the Inquiry finds that a specialist Children's Court should continue to have the primary role in determining the lawfulness of a proposed intervention by the State in a child's life. This requires a careful weighing of the rights and interests of the children, as viewed by the State, against the rights and interests of their parents or caregivers. The Inquiry considers that a judicial officer is best qualified to make this determination.*

The Society agrees with this observation. We consider that it is particularly important for the court to remain the decision-maker due to the complexity and intrusion into parental rights which inevitably form part of child protection matters.

Recommendation 56 of the Victorian Cummins Inquiry Report also recommends the adoption of a 'case docket system' so that one judicial officer will oversee one child protection matter from the beginning to end. We consider that the Inquiry should investigate this recommendation for our Queensland system.

The Society is also concerned that as there are a limited number of reviewable decisions allowable by QCAT under the *Child Protection Act 1999* and the *Adoption of Children Act 1964,* there is reduced accountability for persons making decisions about children and young people. The Society notes with concern that there are relatively few applications for review in QCAT. This demonstrates a considerable disparity with the number of children the subject of child protection orders, the number of reviewable decisions being made and the large numbers of complaints that are made to the Commission for Children, Young People and Child Guardian. Our members also anecdotally report that there are very few instances of children participating in QCAT, as compared to the former Children Services Tribunal. We are unaware of why this might be the case and consider that this may be a matter for the Inquiry to investigate.

Further, our members report that there are situations where there has been a QCAT decision made on a matter on foot without the court's knowledge of the situation. The Inquiry may wish to investigate options for children and their families to work with one decision maker at a time. Whilst there is a court proceeding concerning an application for a child protection order on foot, we suggest that applications in QCAT should be transferred to the court to be heard concurrently. If such an approach were to be adopted we also consider that if applications are made in the 'wrong' jurisdiction, there should be no formality needed to transfer this to the appropriate jurisdiction. We are mindful of the need to avoid creating barriers for people, and to ensure that there is a single decision-maker for a single family.

We also note that, under s 107 of the Act , the court has the power appoint an expert to assist it. We suggest that this provides scope for the court to be assisted by persons with the range of professional expertise held by members of QCAT sitting in child protection matters.

RECOMMENDATIONS

The Inquiry investigate the efficiency of the current child protection system in the following areas:

- **Transparent processes;**
- **Social services funding;**

- **Early intervention; and**
- **Court and Tribunal processes**

The Inquiry should also investigate the following matters in relation to legal aid funding:

- **Legal Aid funding for representation of parents and children in child protection matters**
- **The scale of costs**
- **Access to experienced counsel, especially when dealing with represented children and vulnerable parents**
- **Funding for family group meetings and after a court ordered conference has been held**

5 Models of representation for children

The Society supports article 12 of the Convention on the Rights of the Child which states:

> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
>
> *2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*

The Society also considers that representation for children must be consistent and readily available.

Our preferred position is that all children, regardless of age must have the right to be heard in child protection proceedings affecting them. This can be done through direct representation, separate representation, or both in appropriate circumstances.

5.1 Separate and direction representation

The Society notes the Victorian Cummins Inquiry Report recommendations in relation to legal representation of children in child protection proceedings. Chapter 15.3.1 of the Victorian Cummins Inquiry Report considered a child's right to be heard in proceedings, with recommendations 53 and 54 resulting.[8] Generally, the Society finds the exploration in the Report of the issues relating to children's representation useful. Specifically, we support the concept that a child should be a party to the proceeding regardless of age. Further, if an age were to be set in legislation to delineate a rebuttable presumption in favour of or against a child having capacity to directly instruct a lawyer, the Victorian Cummins Inquiry Report approach, that the threshold be the age of 10 years old with guidelines to support the assessment of capacity to instruct in individual circumstances, seems reasonable.

[8] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012 found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html

We note that there are two sections under the current *Child Protection Act 1999* which deal with the representation of children in proceedings, namely s 108 (right of appearance and representation) and s 110 (separate legal representation of child). We support the view that, as a result of this, a child can be represented by both direct and separate representation in the same proceedings. We consider that young people should be supported to access direct representation if and when they express a wish to participate in proceedings this way. The Society specifically notes that if a legislative threshold were adopted in relation to a child's presumed capacity to instruct a lawyer, it would seem appropriate for the court to retain the ability to appoint a separate representative, regardless of a child's capacity to instruct directly, in circumstances where this is appropriate.

5.2 Appointment of separate representatives

We suggest that the Inquiry should investigate the possible legislative implementation of more detailed factors guiding the court's discretion in relation to the appointment of a separate representative. In family law proceedings pursuant to the *Family Law Act 1975 (Cth)*, there is guidance as set out in the case of *Re K* (1994) FLC 92-461 on when the court should consider appointing an Independent Children's Lawyer:

- cases involving allegations of child abuse;
- cases where there appears to be intractable conflict between the parents;
- cases where the child is apparently alienated from both parents;
- where there are real issues of cultural or religious difference affecting the child;
- where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge on the child's welfare;
- where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare;
- where there are issues of significant medical, psychiatric or psychological illness in relation to either party or the child;
- cases where it appears that neither parent is a suitable custodian;
- cases in which a child of mature years is expressing strong views;
- cases where it is proposed to separate the siblings;
- custody cases where none of the parties are legally represented;
- applications relating to the medical treatment of children where the interests of the child are not adequately represented.

These factors are well-known and widely established in family law proceedings.

We consider that the legislative implementation of factors for when a court should consider the appointment of a separate representative will improve consistency and strengthen utilisation of separate representatives in child protection proceedings. It is noted, however, that if Childrens Courts were considering the factors as set out in *Re K*, each child protection matter will satisfy the factor regarding alleged child abuse. The Society suggests the Inquiry consult stakeholders and consider what legislative factors would appropriately guide the appointment of separate representatives.

5.3 Clarity of the role of separate representatives

Further clarity around what is currently expected of a separate representative in carrying out the role would also be useful, for example:

- File inspection and determine whether additional evidence is required in the child's best interest (including but not limited to Social Assessment Reports. It might be that there needs to be other assessment and resulting reports obtained from specialists prior to the commission of a Social Assessment Report);
- Negotiate with the Department and parties about obtaining evidence;
- Subpoena evidence when required;
- Meet regularly with the children;
- Attend family group meetings, court ordered conferences and other court events personally; and
- Act as a party to the litigation.

The tasks that the Society considers that a separate representative should carry out to promote and facilitate children and young people's participation in decision-making include:

- Have contact with children who want to be informed or participate in proceedings. This would avoid situations where the young person ends up instructing a direct representative because of the limited contact with his or her separate representative. We consider that the separate representative model should be flexible enough so that a young person does not have to participate directly in the litigation in order to be informed of what is happening in the court process;
- Meet or consult with the child prior to any substantive event, such as a family group meeting, court ordered conference, final mention or hearing;
- Assist the child in resolving case planning issues collaboratively with the Department;
- Bring an application for review if appropriate, which could occur within proceedings before the Childrens Court if the court was given jurisdiction to hear applications to review decisions, or for the separate representative to assist the child to apply to QCAT where it cannot be dealt with by the court;
- Assist the child to apply for direct representation if appropriate;
- Assist the child to contact the Commission for Children and Young People and Child Guardian regarding any issues they would like to raise that the Commission has responsibility to oversee;
- Refer the child for legal advice and representation in cases of negligence or other issues; and
- Be available to the child for support and referral after the proceedings have ended.

We also consider that it might be prudent for the court to have the power to continue the appointment of a separate representative when making a final order. This would be particularly important where the court has concerns regarding future case planning, and would give the separate representative the status to be able to bring matters back before the court if appropriate. Implementation of this proposal would require consideration of whether current Legal Aid funding is adequate for this purpose.

5.4 Training opportunities

We note that there is a limited availability of practitioners who specialise in directly representing children and young people, particularly outside South-East Queensland. We call on the Inquiry to investigate the most appropriate ways to promote the particular skill and importance of both forms of children's representation in child protection proceedings. Clarifying scope of the role for separate representatives and the circumstances in which they should be appointed would assist with this. We suggest that promoting and resourcing appropriate support and training for all child representatives could also improve the current models of representation that operate in Queensland. Recommendation 58 of the Victorian Cummins Inquiry Report relates to the professional development of lawyers and judicial officers in child protection matters.[9] The Society supports enhanced opportunities for training in this area. The Society has attempted to promote child-inclusive practice through providing members with seminars on areas of children's law and the skills required for effective engagement of child clients. The Society's Children's Law Committee has also explored the possibility of accreditation of children's law specialists; however the prohibitive cost and limited number of practitioners currently focusing on this area of the law are barriers to progressing this goal.

RECOMMENDATIONS

- **All children, regardless of age should have the right to be heard in child protection proceedings. This can be done through direct representation, separate representation or both in appropriate circumstances.**

- **The Inquiry investigate options for strengthening the representation of children in proceedings, including:**
  - **the appropriateness of a rebuttable legislative presumption in favour of a child having some form of legal representation in child protection proceedings, whether it is through a separate or direct representative; or alternatively,**
  - **legislative implementation of a set of factors guiding the Court's discretion in relation to the appointment of a separate representative.**

- **The Inquiry investigate options for providing clarity around the appointment and role of separate representatives.**

- **The Inquiry consider the findings of the Victorian Cummins Inquiry in relation to representation of children and training opportunities.**

6 QCAT jurisdiction

The Society has some reservations regarding the operation of the QCAT jurisdiction with regard to children's matters.

[9] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012 found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html

The experience of our members has been:

- Written notices of reviewable decisions from the Department, which contain information about the right of review to QCAT, are not always provided to parents, even when they have been requested;
- It is sometimes difficult for parents or other members in the child's support network to obtain leave to be legally represented and then obtain appropriate representation, which is of significant concern to our members given the power imbalance between the professional departmental workers and the other parties to a tribunal proceeding;
- It is the experience of our members that generally, the Department will provide lengthy reasons for decision in response to a QCAT application by a parent or child. However, these reasons are often not received until shortly before the compulsory mediation. A delay in obtaining reasons can place vulnerable clients at further disadvantage, as there is a limited amount of time to consider what is often voluminous or complex material. These clients are also expected to be ready to respond to those reasons during a compulsory conference, despite the short time frames;
- Our members' experience is that Compulsory Conferences often yield mixed results, perhaps because of the challenges inherent in managing the power imbalance between the Department and the applicant in an alternative dispute resolution setting, particularly where not all parties are granted legal representation; and
- There are narrow grounds for review of administrative decisions.

The Society considers, as outlined in Item 4 above in this submission that applications for review made while matters are already on foot in Court should be decided by the Court.

The Society also notes that we support the view that the tribunal dealing with an A & TSI family should be constituted by someone who is of A & TSI background or otherwise has appropriate cultural experience. We note with support s 99H of the Act which requires tribunal proceedings involving an A or TSI child to include a member who is A or TSI and s 183(6)(b), *QCAT Act 2009*, which emphasises that there is a need for A & TSI members to be appointed. We also note that the power to appoint an expert is provided for in s 110, *QCAT Act 2009.* We consider that the proportion of A & TSI membership/expertise on the tribunal should appropriately reflect a commitment to reduce the overrepresentation of A & TSI children in the child protection system.

The Society notes that we have recommended in Item 2(a)(iii) of this submission that the Court should be able to join certain people to the proceedings as parties in the appropriate circumstances under the *Child Protection Act 1999.* We note that, if this proposal is agreed to, it would be prudent to consider consistent legislative arrangements for the tribunal to involve such people in any applications for review in QCAT.

RECOMMENDATIONS

- **The Society considers that proceedings in QCAT should be transferred to the Court if matters are already on foot in court.**

- **The Inquiry should consider whether power imbalances between parties' impact on tribunal proceedings, and appropriate strategies for dealing with any concerns identified.**

- **The proportion of A & TSI membership/expertise on the tribunal should reflect the commitment of the government to reduce the overrepresentation of A & TSI children in the child protection system.**

7 Overrepresentation of A & TSI children in the system

The Australian Institute of Health and Welfare reports that A & TSI children are 6.2 times more likely to be the subject of a substantiated report than other children in Queensland.[10]

First, the Society highlights to the Inquiry the importance of consulting with A & TSI families, children and young people who have interacted with the child protection system. We consider that any recommendations for changes to the child protection system must be developed in a collaborative way, and also must involve cultural experts.

The Society considers that changes should be made to legislative, policy and operational provisions in the child protection system to better reflect A & TSI cultures, and address the overrepresentation of A & TSI children and young people. We set out below key areas for consideration:

7.1 Consultation on strategies to reduce overrepresentation on A & TSI children in the system

The Society has had the benefit of reading the submission of Aboriginal and Torres Strait Islander Women's Legal Service to this Inquiry. We endorse the comments made in relation to the importance of consultation with Aboriginal and Torres Strait Islander people (page 4).

7.2 Recognised entities

The requirement for a recognised entity to participate in the decision-making process for an A & TSI child is legislated for under s 6 of the Act. The Society supports the role of recognised entities, and values the contributions that recognised entities make in child protection processes. We consider that ongoing commitment to enhancing the role of recognised entities should be made.

However, some members report that recognised entities are not always properly consulted in child protection processes. Our members have also reported a common anecdotal experience of recognised entities not being informed by the Department when an A & TSI family is being investigated. We consider that improvements need to be made to the child protection framework to ensure that recognised entities are consistently involved in the process, including full disclosure of the evidence upon which the parties' positions in court proceedings are based.

Some of our members have expressed concern about the perceived lack of independence of recognised entities from the Department. The policy development and reporting structures in place contribute to a perception that recognised entities are not able to give cultural advice to the court, Department and parties independently of the Department. This situation, in our members' experience, can sometimes

[10] Child protection and Aboriginal and Torres Strait Islander Children, Australian Institute of Health and Welfare, June 2012 found at: http://www.aifs.gov.au/cfca/pubs/factsheets/a142117/index.html

inhibit the ability of recognised entities to gain the confidence of A & TSI families, the court, and other stakeholders, as a source of robust and independent cultural advice.

We consider that further clarity in relation to the roles of recognised entities, and the mechanisms by which they provide information and advice to the Court would contribute to better outcomes for A & TSI children and their families. The Society suggests that an independent evaluation aimed at enhancing the effectiveness, resourcing and independence of the recognised entities model be considered. We also suggest that the Inquiry should consider what changes, if any, to the reporting and policy development structure for the recognised entity model would alleviate the perceived lack of independence.

7.3 Exclusion from child protection processes

Our members report that key family members are often excluded from or marginalised in child protection processes. This is due to the inability of significant individuals in a child's life to be involved in proceedings. As we discussed in Item 2(a)(iii) of this submission, we consider that providing the court the discretion to join appropriate persons as parties to the proceedings could significantly address this issue.

We also endorse the issue addressed in the submission of Aboriginal and Torres Strait Islander Women's Legal Service to this Inquiry, which highlights that the Department should continue to consult with a child's family regarding cultural considerations, even where the child is subject to a long-term guardianship order (page 11).

7.4 Indigenous Child Placement Principle

Under s 83 of the Act, the Department is required to give consideration to a culturally appropriate placement when placing an A & TSI child or young person in out-of-home care (Indigenous Child Placement Principle). We recognise that in practice, it is not always possible for A & TSI young people to be placed with family, and that this has to be balanced with the paramount principle. However, our members report that greater focus on strategies for developing and maintaining cultural connection is needed in cultural support planning, particularly when placement with family is not possible.

The Society calls on the Inquiry to investigate the policy, systemic and operational barriers to the meaningful implementation of the Indigenous Child Placement Principle which is given effect in s 83 of the Act. We consider that any recommendations should be developed in consultation with appropriate stakeholders, and appropriate resourcing and support should be offered to stakeholders to address this issue. We also consider that the Inquiry should consider the advice of the Commission for Children and Young People and Child Guardian regarding the Department's compliance with the Indigenous Child Protection Placement Principle.

7.5 Lack of cultural experts

Our members identify a lack of culturally competent experts to appropriately inform and advise on cases involving A & TSI children and young people. Our members have reported that sometimes an assumption is made that any A & TSI person is able to provide 'cultural advice' for these matters, however our members acknowledge that cultural knowledge and expertise is more complex. The view of our members is that a best practice approach to briefing any expert should involve consultation with all parties, including parents, and the recognised entity. In order to address this issue, the Society calls on the

Inquiry to investigate the practical and systemic barriers to obtaining suitably qualified cultural experts. This should be done with a view to improving ways in which qualified cultural experts can be identified and the expertise utilised in child protection processes.

We endorse the section of the submission of Aboriginal and Torres Strait Islander Women's Legal Service to this Inquiry which highlights the importance of employing of A & TSI experts and Department managers (page 7).
The Society also supports ongoing cultural competence training for all professionals working in the child protection system.

7.6 Kinship carer assessment process

We suggest that the Inquiry should ensure that any recommendations made regarding the placement of A & TSI children are informed by the central importance of the existing legislative principles relating to A & TSI children and families, including the preference for kinship care outlined in s 83 of the Act, and Indigenous child rearing norms. We consider that the Inquiry should consult widely with A & TSI communities and organisations to develop recommendations in this area.

We also note that our members are aware that inability to obtain a Blue Card is often a significant barrier to A & TSI families providing kin care placements.

RECOMMENDATIONS

- **Recognition of the importance of consultation with A & TSI people to reduce the overrepresentation of A & TSI children in the child protection system.**
- **An independent evaluation aimed at enhancing the effectiveness, resourcing and independence of the recognised entities model be conducted. This could also provide clarity on the roles of recognised entities and the most appropriate reporting structure for the recognised entity model.**
- **The Inquiry to investigate the policy, systemic and operational barriers to the meaningful implementation of the Indigenous Child Placement Principle.**
- **The Inquiry to investigate the practical and systemic barriers to obtaining suitably qualified cultural experts, including improving ways in which cultural experts can be identified and expertise utilised.**
- **The Inquiry consult with A & TSI organisations and communities to understand Indigenous child rearing norms and the difficulties of the kinship carer assessment process for A & TSI families and children.**

8 Case management practices in the court

The Society would like to highlight various court case management issues that our members have concerns with. We support a case management approach to child protection matters that is child-inclusive and provides meaningful and fair opportunities for alternative dispute resolution.

8.1 Case management practice directions

Currently, there is a lack of Childrens Court of Queensland Practice Directions and matter-specific orders. To date, there has only been one practice direction issued by the Childrens Court of Queensland in 2006 regarding 'Digitally Recorded Proceedings: Means of Identifying Proceeding, those Appearing, and Witnesses.' The Society considers that the establishment of a body of practice directions and case management processes to deal with operational issues will assist parents, children, legal practitioners and the Department to ensure timely resolution of matters. In particular, the Society highlights the following issues which could be made the subject of a case management model:

- Early and ongoing legal advice for the Department. As highlighted by the Victorian Cummins Inquiry Report, child safety officers often are tasked with preparing legal documents.[11] We consider that if the appropriate early legal advice and litigation support is obtained this will enhance the quality of documents, resulting in the parties and the court being better informed, child safety officers having more time to devote to casework tasks, and ultimately producing better outcomes for children and young people;
- Early consideration and appropriate directions in relation to the need for legal representation for all parties (parents and children) to avoid delays;
- Early consideration and appropriate directions to ensure that parties and relevant non-parties are identified and located;
- Early identification and joining of related applications (i.e. sibling groups being heard together instead of separately);
- Rules and practice directions facilitating early disclosure, with case-specific filing directions as necessary. Our members have reported that the current disclosure regime is of great concern, as highlighted in Item 2 of this submission. We particularly reiterate the negative impact of late or incomplete disclosure on the effectiveness of court ordered conferences.
- Early consideration, appropriate directions and case management to ensure that any medical, psychiatric, social and other assessments that will usefully inform the court's decision-making are identified, properly briefed and obtained in a timely way; and
- Early consideration, appropriate directions and case management of evidence gathering via disclosure and subpoena regimes.

This list is not exhaustive but demonstrates the positive impact that a case management approach can have on the time and costs involved in child protection matters. The Society supports the inquisitorial role of the Childrens Court, which would underpin such a proactive case management approach.

It is the Society's understanding from discussions with the Chief Magistrate and the President of the Childrens Court of Queensland that they would be open to further discussion regarding the development of practice directions.

8.2 Case management of court ordered conferences

The Society considers that the case management of court ordered conferences can be enhanced. Whilst the *Childrens Court Rules 1997* contains various guidelines, Item 2 of this submission highlights some

[11] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012 found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html

deficiencies of these Rules. In our view, there is a need for a stronger legislative framework to enhance the effectiveness of court ordered conferences:

- Clarity on the model and timing of court ordered conferences in the process;
- Consideration of the need for full and current disclosure of the Department's case prior to the court ordered conference;
- Consideration of an early court ordered conference to identify and narrow the legal issues involved. Early court ordered conferences would provide a useful forum for parties to assist the court by identifying and agreeing where possible on the application of case management issues identified above to the particular case. This could also potentially prepare parties for the interim hearing on contact and custody issues. However, the Inquiry may also wish to consider the impact that this might have on family group meetings; and
- Consideration of a pre-trial court ordered conference, later in the litigation process, to narrow the legal issues prior to the final hearing.

There appears to be scope to develop case management standards by referencing rules developed in other jurisdictions. For example, there may be some benefit in investigating the processes adopted in following jurisdictions:

- The criminal law jurisdiction and the case management processes adopted under the Moynihan reforms;
- *Family Law Rules 2004*;
- *Uniform Civil Procedure Rules 1999*; and
- The Public Law Outline in the United Kingdom.[12]

8.3 Court facilities

The Society also supports recommendation 55 of the Victorian Cummins Inquiry Report, which in part highlights that court facilities should be adapted to suit the needs of children and their families.[13]

8.4 Less adversarial trial model

Further, Recommendation 57 of the Victorian Cummins Inquiry Report recommends a less adversarial approach to child protection matters:

> *The Children's Court should be empowered under the Children, Youth and Families Act 2005 to conduct hearings similar to the Less Adversarial Trial model used by the Family Court under Division 12A of the Commonwealth Family Law Act 1975.*[14]

[12] United Kingdom Ministry of Justice, Practice Direction 12a – Public law proceedings guide to case management: April 2010 found at: http://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12a#IDA4PWKC
[13] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012, found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html
[14] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012, page 385 found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html

The Society has not formed a definitive view at this stage on whether the Less Adversarial Trial model could be adopted for use in the Queensland child protection system. Issues that the Inquiry could consider include:

- Expense and labour intensity for the Department and parties;
- Impact on judicial officers;
- Benefits for family relationships; and
- Potential for supporting improved outcomes in child protection matters.

We also note that Figure 15.4 on page 405 of the Report outlines 'Proposed protective intervention and application processes'. This proposed model contains options for multiple alternative dispute resolution opportunities:

- An initial family group meeting run by the Department to determine child protection concerns;
- An early conference in litigation to develop a case plan; and
- A later conference before trial.

The Society can appreciate the merit in this multi-faceted approach. This approach would allow an opportunity in the early stages to either avoid proceedings through a mediated outcome or resolve proceedings very earlier and then would also allow another opportunity to resolve the matter when all evidence has been filed with the court. As such, the Society recommends consideration of this model to the Inquiry.

8.5 Legal representation of the Department

Section 15.4.3 (at page 388) of the Victorian Cummins Inquiry Report deals with legal representation of the Department.[15] It particularly notes:

- potential conflicts for child safety officers regarding casework with families (a collaborative approach) and litigation (an adversarial approach);
- the current model requires child safety officers to do the work of solicitors, such as drafting affidavits and filing documents; and
- there is sometimes a poor relationship between child safety officers and in-house lawyers.

In order to address these issues, the Report highlighted the following:

> *A clear delineation between DHS staff and their legal representatives in contested proceedings is considered by the Inquiry to be a long-term benefit with respect to strengthening relationships between families and child protection practitioners, the more efficient conduct of a matter at court and to improving the relationships between the legal practitioners who practise in this jurisdiction. However, the Inquiry considers there to be an ongoing role for in-house lawyers from the CPL Office. The in-house lawyers can play a valuable role in representing DHS at the new pre-court*

[15] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012, page 388 found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html

Child Safety Conferences canvassed in section 15.5.1 and in other pre-court negotiations where appropriate.[16]

We consider that the Department would benefit greatly from the provision of early and independent legal advice so that any intervention is evidenced based, litigation is conducted in a manner consistent with model litigant principals and any conflict of interest issues can be resolved.

RECOMMENDATIONS

- **The Society supports a case management approach to child protection matters that is child- inclusive and provides meaningful and fair opportunities for alternative dispute resolution.**
- **The Inquiry investigate a case management approach to child protection processes, through the issuance of practice directions dealing with various issues**
- **The Inquiry investigate options for strengthening the legislative framework for court ordered conferences.**
- **Court facilities should be adapted to suit the needs of children and their families.**
- **The Inquiry consider the Victorian Cummins Inquiry Report findings on the Less Adversarial Trial model and legal representation of the Department.**

9 Term of Reference 3.3.4 - criminalisation of children in care

The issue described below is particularly relevant to term of reference 3(c)(iv) regarding the transition of children through, and exiting the child protection system.

A range of licensed care service providers run a variety of housing options including support programs (residential care facilities) for children and young people subject to child safety orders whose behavioural issues may be viewed as precluding them from being appropriate to place in family based placements. We recognise that it is not uncommon for children and young people who have experienced abuse in their family of origin to exhibit difficult or challenging behaviour and in addition they may have a range of medical issues that further complicate the situation.

Whilst we are supportive of a variety of placement options being available for children and young people in care, we are increasingly concerned about how regularly children and young people are referred to the police for what in our view should be considered more appropriately as discipline or behavioural rather than criminal issues. When lawyers acting for children and young people in this situation advocate on their behalf with the Department and the residential care provider it is often argued by both that this is the policy in place for all behavioural issues without any discretion to be applied. We consider that this results in the unnecessary and damaging entry of children in the care of the Department into the youth justice system through the calling of police as a disciplinary or behaviour management tool.

[16] Report of the Protecting Victoria's Vulnerable Children Inquiry, 2012, page 388 found at: http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html

It is of considerable concern that these highly vulnerable children and young people are often brought into the criminal justice system without a referral to a lawyer for advice or without the presence of an appropriate support person at a police interview. Section 421, *Police Powers and Responsibilities Act 2000* deals with the questioning of children. This provision does not mandate the presence of a lawyer when children and questioned. All that is required is that, "before questioning starts, the police officer has, if practicable, allowed the child to speak to a support person chosen by the child in circumstances in which the conversation will not be overheard." In residential care facilities, the only support person available or known to the child may also be the complainant. We have heard reports that young people are also brought to court and "supported" by residential workers who are responsible for making the initial complaint. On one occasion a young person had made a complaint of assault against one of the complainant youth workers who was still acting in this support role.

Furthermore the issue of bail can be complicated in these instances with children and young people faced with returning to the placement where the allegations arose or being left without a placement option due to what is alleged to have occurred.

Case examples

We provide you with some case examples which illustrate the concerning trend of children in residential care placements being referred into the youth justice system:

a.) [redacted]

Due to the possibility of identifying the subject person, case example (a) has been removed from the public version of this submission at the request of the Queensland Law Society. It has been agreed that this information will remain confidential to the Commission only.

b.) A 14-year old boy was charged with damaging a cup and a plate at a residential care facility. At the request of the Magistrate, the lawyer representing the child wrote to the police prosecutor requesting that the matter not proceed on public interest grounds. This request was rejected by the prosecutor, saying that, because the incident occurred at a residential placement and other children were present, this was considered to be an aggravating factor;

c.) A young girl in a residential care facility was charged with assault for flicking a tea towel in the direction of a residential care worker;

d.) A 14 year old girl was charged with breaking and entering and wilful damage as a result of climbing through a window into another building in the grounds of the residence where she resided, and letting off a fire extinguisher. Her lawyer reported that the behaviour resulting in the charge did not seem to be outside the realm of what would be dealt with by parents in a home environment without the need for Police intervention.

These examples are not exhaustive but serve to highlight the pervasiveness of this problem. It is difficult for our members to accept that if Queensland Police Service (QPS) were called by parents in relation to some of the more minor matters, that charges would be pursued even if the parents wished to make a formal complaint. Rather, if parents were calling QPS with such regularity about these types of matters, the family may instead be referred to Child Safety.

Committee of stakeholders

The Society and other stakeholders raised the issue of criminalisation of children in care with the Department. In late 2011, the Department formed a Committee of Stakeholders to discuss this issue and also to address the broader concerns regarding training needs for residential care workers.

The Society commends efforts by the Department to work collaboratively with stakeholders on this matter. Our members support ongoing efforts to ensure that children and young people will not be inappropriately referred to police, and if they are referred, to ensure that legal representation is available. The Committee had been working on policy and practice documents which would provide guidance for residential care facility workers on appropriate use of QPS and other emergency services. We understand that the Department is still in the process of finalising this framework, and we trust that the Department can provide you with the appropriate information in this regard.

The Committee was disbanded due to the commencement of the Child Protection Inquiry. We consider that this group should be re-formed as our members continue to report that children and young people in care are being inappropriately referred to police, and therefore are inappropriately exposed to the youth justice system. There is a lack of publicly available statistical evidence to highlight this issue, but anecdotally we understand that the problem continues to grow.

The Victorian Department of Human Services has recently released the Youth Parole Board and Youth Residential Board Victoria Annual Report 2011–12.[17] This report at page 12 states the following in relation to involvement of young people across the youth justice and child protection systems:

> ***Involvement with child protection***
>
> *The Boards note that a significant number of young offenders have been (38 per cent) or are currently (18 per cent) involved with the child protection system.*
>
> *The annual survey of young people in detention in October 2011 showed that 60 per cent of young men aged 15–18 years at Melbourne Youth Justice Centre had a previous or current child protection order. At Parkville Youth Residential Centre, 64 per cent of the 10–14 year old boys and 10–20 year old young women were also on a child protection order.*
> *Many young offenders have experienced abuse and/or neglect in their early years, which has had a profound effect on their development. These young people often present with particularly complex challenges for youth justice workers and the parole planning processes.*[18]

The Society would recommend that this Inquiry investigate the situation which exists in Queensland, with a view to mapping out the way forward for all stakeholders involved. We consider that this Inquiry represents an important opportunity to address the problem of the criminalisation of children in care. With regard to the long-term solutions, the Society considers that consistent and adequately resourced training and support for residential care workers would be an appropriate component of any proposal. Training and standards for workers should include clear, publicly available guidelines regarding the Department's expectations.

RECOMMENDATIONS

- **The Inquiry take steps to ensure coordination between the child protection and youth justice systems to urgently address the issue of criminalisation of children in care**
- **The Inquiry investigate and publish statistics and information regarding the frequency with which children in residential care facilities are being referred to police**
- **A working group of all stakeholders be reconvened to address both the short term and long term solutions to ensure that police are not called to residential care facilities in inappropriate situations**
- **The Inquiry consider developing a framework for minimum standards and training needs for residential care workers**

[17] Found at http://www.dhs.vic.gov.au/__data/assets/pdf_file/0004/732928/1_youth_parole_board_and_youth_residential_board_victoria_annual_report_201112.pdf

10 Criminal law system overlap

The interface between the youth justice and child protection systems has been discussed to a great extent in Item 9 above.

In our view, children involved in the child protection system are at a higher risk of becoming involved in the criminal justice system due to exposure to trauma, the lack of stability of care placements, mixing with offending peers and poor management of challenging behaviour. We commend to the Inquiry a research paper published by Judy Cashmore in January 2012 entitled 'The Link Between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents' which goes into further detail regarding the interface between the child protection and criminal justice systems.

Practically, the Society has heard reports from our members that young people in care who are also in contact with the youth justice system are frequently labelled as 'difficult children'. Subsequently, placement options are said to be limited or nil, which results in these young people spending time in the detention centre until a placement can be found. As stated in the paper by Judy Cashmore entitled 'The Link between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents' we consider that:

> *The window for effective intervention, especially in relation to offending behaviours is not closed after early childhood, though it is likely to be more expensive to intervene at later ages. Crucially, state parental responsibility for children and young people in care must not stop once they have offended and become troublesome as well as troubled."*[19]

Further, our members have reported that there are specific factors for young people in care which make them more vulnerable and exposed to criminal activities, such as instability, abuse and homelessness. We commend to the Inquiry the findings of the report entitled 'Juvenile offending trajectories: pathways from child maltreatment to juvenile offending, and police cautioning in Queensland.'[20]

RECOMMENDATIONS

- **Recognition of the interface between the child protection and youth justice system**
- **The Inquiry to investigate steps to ensure that the Department's responsibility for children in care does not stop if they have contact with the youth justice system**

11 Family law system overlap

As an overall observation, people seek to define delineation between child protection, family law and domestic violence issues. Whilst legislation prescribes the considerations in each court that deals with these matters i.e. – Childrens Court, Family/Federal Magistrates Court and Magistrates court, the child protection issues and parent's capacities to protect children from harm are relevant to all.

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[19] The Link Between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents, Judy Cashmore, 2012, page 11

[20] Juvenile offending trajectories: pathways from child maltreatment to juvenile offending, and police cautioning in Queensland, Anna Stewart, Susan Dennison and Emily Hurren, 2005, found at: http://www.criminologyresearchcouncil.gov.au/reports/200304-35.pdf

11.1 The Magellan program

We note the Magellan program which operates in the Family Law Courts to provide a case management program for parenting cases involving allegations of sexual abuse or serious physical abuse. The judge-led case management approach requires early consideration of the matter, allocation of additional resources, and the appointment of an Independent Children's Lawyer in all Magellan matters. We refer to our comments elsewhere in this submission highlighting the need for a more pro-active case management approach in child protection matters. We suggest that the Magellan approach to case management is a model worthy of consideration in this regard.

11.2 Role of the Department in Magellan matters and in family law proceedings generally

Given the nature of the allegations involved in Magellan matters, they all involve the Department in some way. Information and assessments from the Department may be needed to inform the final resolution of Magellan matters. Our members report that 'Magellan reports', summarising relevant details known to the Department, provide useful and structured information for consideration of the parties and the Court in Magellan matters. The availability of an officer within the Department to provide a liaison between the family law proceeding and Departmental caseworkers was also reported by our members as beneficial in Magellan matters. Our members suggested that the provision of a summary report and use of a liaison officer within the Department would benefit all matters being dealt with in the Family Law Courts. We acknowledge that implementation of this proposal would likely require allocation of additional staff and resources within the Department's Court Services unit but emphasise the positive effects on the quality of information shared reported by our members in relation to Magellan matters.

Some of our members have noted experiencing delays in individual matters, in obtaining information, or reluctance on the part of the Department to undertake an assessment of notifications received when family law proceedings are already on foot. Our members have suggested that these issues may arise because it is assumed by the Department that child protection concerns will be addressed in the family law proceedings. We note that the Society supports the view that when a notification is received by the Department, the relevant investigations and assessments should be undertaken, to allow the Department to proactively determine as soon as possible whether to simply provide information for use in family law proceedings or alternatively to commence child protection proceedings.

11.3 Legal Aid Queensland

In relation to Legal Aid Queensland (LAQ), our members report that is difficult to secure funding from LAQ for a parent in family law proceedings when there is a child protection proceeding already on foot or a child protection order in place. This causes difficulties in circumstances where Child Safety will not withdraw child protection proceedings until a parent has obtained appropriate family law orders. This can create delays in proceedings, in circumstances where the Department's child protection concerns would be resolved by appropriate Family Law orders but the parties are unable to obtain legal representation in the Family Law Courts due to there being child protection proceedings or orders in place.

We understand that in practice, the Department is able to provide written confirmation to Legal Aid that appropriate family law orders obtained by a party would in effect resolve the concerns identified in the child protection proceedings, and on that basis Legal Aid funding for a party to commence family law proceedings will be considered. We note that the difficulties reported by our members may suggest the

need for education of all stakeholders about the approach adopted by Legal Aid and the Department in these circumstances.

RECOMMENDATIONS

The Inquiry should investigate options to address:

- **Coordination between the family law and child protection jurisdictions; and**
- **Legal Aid funding for families in family law and child protection proceedings.**

12 Other legal needs of children and young people in care

The Society is aware of some situations where children have a right to commence civil proceedings for damages arising from incidents that have occurred prior to entering care or whilst they were in the care of the State. Our members report that material disclosed by the Department or filed in proceedings not infrequently contains information suggesting a child in care may need advice in relation to victim of crime compensation, negligence claims (including against the Department), and other matters. In our view, there is a lack of adequate mechanisms, or clarity in relation to such mechanisms, to ensure that young people in the care of the State have access to legal advice and information for these kinds of matters. It appears to our members that there is no systematic way within the Department of identifying and flagging these issues as they arise. We acknowledge the complexities involved, particularly where young people may need to obtain advice about a matter many years after the incident occurred. We consider that identifying these matters is an essential obligation of the Department to children in their care. It is crucial to ensure that the Department can obtain legal advice on the situation at the earliest possible opportunity and arrange for independent advice to be obtained on behalf of the child at an appropriate time given the child's age and the nature of the matter. Young people in care traditionally access legal advice from Legal Aid Queensland and community legal centres, but our members report that these organisations are inadequately resourced to respond to these particular legal needs.

We consider that a viable option for addressing this problem would be the development of a legal needs passport for a child in care. This would be similar to the health passport for a child in care which is retained and updated with new matters and details of action taken over the child's time in care, to then be provided to the child upon exiting care along with the appropriate referrals and support for advice. We consider that the Inquiry should investigate this potential option. This may also require collaboration between the Department and legal service providers (Legal Aid Queensland, community legal centres, and private firms) to develop the necessary casework tools and to ensure that Departmental staff are adequately trained and supported to implement this.

RECOMMENDATIONS

- **Departmental officers, as part of their practice, should be mandated to flag any legal issues that arise with a view to obtaining early legal advice**

- **The Inquiry investigate the development of a legal needs passport for a child in care, in consultation with the Department and legal service providers.**

13 Education- school exclusions and suspensions

The issue described below is particularly relevant to term of reference 3(c)(iv) regarding the transition of children through, and exiting the child protection system.

The Society has received a comprehensive submission on education processes and options for case planning for children in care from one of our members. We **attach** this as Appendix 1 to our submission for your reference (Case planning for education, school exclusions and suspensions). We have extracted some information for your consideration here.
For over 15 years, lower educational achievements and work outcomes have been reported for young people leaving care in Australia.[21] Queensland is no exception to this trend. In Queensland, the Commission for Children and Young People 2009 Child Guardian Report analysed Year 12 completion rates for young people in out of home care compared to school completers generally in 2008 found that:

• young people who spent time in out of home care were less likely to undertake further education and were four times more likely than all Year 12 graduates to be neither earning nor learning six months after leaving school;
• 39.7% of young people in out of home care were learning compared to 60.6% of Queensland young people;
• 29.3% of young people in out of home care were earning compared to 32.1% of Queensland young people; and
• 31.0% of young people in out of home care were neither learning nor earning compared to 7.3% of Queensland young people.[22]

The Commission also reported in 2012 that children in out of home care "performed significantly poorer than Queensland Students across all age groups and subject matters," including reading, writing and numeracy National Minimum Standards.[23]

The Commission reported that that in 2010/2011, 13.6% of children in care were suspended or excluded from school.

This accords with the anecdotal experiences of our members, who have reported that young people in care appear to be overrepresented in the suspension and exclusion framework. There also appears to be a correlation with youth justice involvement, with our members practising in youth justice reporting that many youth justice clients describe having been suspended, excluded, or referred to distance education.

As outlined in Appendix 1, the Society would recommend that the Inquiry investigate a case planning approach to suspension and exclusion decisions for children in care, to ensure that these young people are supported to re-engage with education.

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[21] Cashmore, J & Paxman, M (1996) Wards leaving care: A longitudinal study. Sydney: New South Wales Department of Community Services.
[22] Commission for Children and Young People and Child Guardian (2009) Child Guardian Report: Child Protection System 2008-09, found at: http://www.ccypcg.qld.gov.au/resources/publications/childGuardian/childGuardian2007.html
[23] Commission for Children and Young People and Child Guardian (2012) *Queensland Child Guardian Key Outcome Indicators Update, Queensland Child Protection System 2008–2011* found at: http://www.ccypcg.qld.gov.au/reportsCP/best-education-possible/educational-performance.aspx

The Society has concerns regarding the complexity of the appeals processes for exclusion and suspension decisions. Our members report young people in this situation often do not know their rights. Further, due to the frequency with which a young person's child safety officers may change, child safety officers are not always cognisant of review rights that are available for a young person. The Society would encourage improvements to the framework to ensure that the Department is always aware of appeal rights for these decisions in regard to young people in care, and that young people are referred appropriately to obtain legal advice and support. We highlight that there is no grant of Legal Aid to facilitate legal representation in this area, and community legal centres are not adequately resourced to undertake this work across the state. We would recommend that the Inquiry investigate this issue, with a view to ensuring that young people in care are provided with support and legal representation to assist in navigating the education appeals processes.

RECOMMENDATIONS

- **The Inquiry investigate case planning approaches to suspension and education decisions for children in care.**
- **The Inquiry investigate improvements to the framework so that young people in care are provided with support and legal representation to navigate the education appeals processes.**

14 Specialist Childrens Court of Queensland

Queensland Law Society is supportive of the Childrens Court of Queensland. In our view, it would be of considerable benefit to establish a body of judicial expertise in this specialised area. Queensland, as Australia's third most populated state, currently has only 1 specialist Magistrate.

The Society notes that in recent years there has been a marked increase in the number of child protection and youth justice matters coming before the Childrens Court. It is our view that specialist knowledge is required to effectively make decisions in matters involving children and young people.

The appointment of specialist magistrates was a key finding of the 1997 Australian Law Reform Commission Report, 'Seen and heard: priority for children in the legal process.' In particular, the report produced Recommendation 130 which states:

> *"States and Territories should develop a specialist magistracy to exercise federal family law jurisdiction and to handle care and protection and juvenile justice matters. All major population centres should have their own specialist family and children's magistrates, while in more remote areas specialist magistrates should operate on circuit.*
>
> *Implementation. The Attorney-General through SCAG should seek the agreement of the States and Territories to the development of this magistracy."*[24]

[24] Seen and heard: priority for children in the legal process (ALRC Report 84), Chapter 15 at: http://www.alrc.gov.au/publications/15-jurisdictional-arrangements-family-law-and-care-and-protection/specialisation-and-ex

The importance of specialist magistrates was recognised at the introduction of Queensland's *Children's Court Act* in 1992 when the then Minister Anne Warner stated:

> *"Where a specialist Childrens Court magistrate is available in a major centre like Brisbane, preference is to be given to this magistrate hearing the matter. The reason for this preference is that a Childrens Court magistrate has greater specialist knowledge and expertise in the jurisdiction."*[25]

In other states the magistracy contains several specialised Childrens Court magistrates. For example:

- In NSW, there are 13 specialist children's magistrates and 5 children's registrars to assist in administrative matters in the Children's Court[26];
- In Victoria, there are 12 full-time Children's Court magistrates[27];
- In Western Australia, there are 4 full-time Children's Court magistrates and 1 casual magistrate[28];
- In South Australia, there are 2 District Court judges and 2 specialist magistrates[29]; and
- In Tasmania, there is 1 specialist magistrate.[30]

When compared to other jurisdictions, the existing Queensland specialist structure would appear to require expansion in order to respond to the challenges posed by today's level of children's legal matters.

There are a number of decisions which highlight the benefits of a specialist court from Victoria, where specialisation is well established.

In *T v Secretary of Department of Human Services [1999] VSC 42* Beach J, at the conclusion of his judgment, said at [21]:

> *"The Children's Court is a specialist court presided over by Magistrates experienced in matters affecting young children and with ready access to experts in the field of child care. It is beyond doubt that Magistrates at the Court become very skilled in dealing with children and assessing the veracity of evidence given by them in courts and of the complaints they make particularly complaints of sexual abuse. Th[e Supreme] Court should be reluctant to interfere with orders of the Court made in such matters, particularly interim orders which are still subject to further review by the Children's Court itself and should do so only where it is abundantly clear that some significant error has been made."*

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[25] Queensland *Parliamentary Debates* Legislative Assembly 19 June 1992 5929 (A.M. Warner, Minister for Family Services and Aboriginal and Islander Affairs).
[26] Children's Court of NSW website: http://www.childrenscourt.lawlink.nsw.gov.au/childrenscourt/structure.html
[27] 2010/2011 Children's Court of Victoria Annual Report: http://www.childrenscourt.vic.gov.au/CA256902000FE154/Lookup/Annual_Reports.pdf/$file/Annual_Report_2010_2011.pdf
[28] Children's Court of Western Australia website: http://www.childrenscourt.wa.gov.au/A/about_us.aspx?uid=6913-3078-1463-7859.
[29] Children's Court of South Australia website: http://www.courts.sa.gov.au/OurCourts/YouthCourt/Pages/Judicial-Officers.aspx
[30] Tasmania Magistrates Court Annual Report 2010/2011: http://www.magistratescourt.tas.gov.au/__data/assets/pdf_file/0011/192449/2010-2011_Annual_Report_.pdf.

In *DOHS v SM [2006] VSC 129* at [14] Hansen J stated:

> *"[T]he decision of an experienced Magistrate in a specialist court is to be afforded respect and weight in consequence that it is such a decision, but doing so, in the end the decision must nevertheless be regarded in the context of all the relevant facts and circumstances of the case."*

In *DOHS v Sanding [2011] VSC 42* at [28] Bell J said:

> *"This Court recognizes the specialist nature of the jurisdiction of the Children's Court and the expertise which it has developed in the exercise of that jurisdiction. This will be an important consideration in the present case, for the court will be cautious before interfering with decisions made by the Children's Court concerning the procedures to be followed in the exercise of its specialist jurisdiction."*

We consider these comments demonstrate the value that specialist experience and knowledge in this jurisdiction can bring to these matters. The Society also considers that enhancing specialisation will have a number of practical benefits for the operation of this jurisdiction, including:

- Prompt and effective resolution of children's matters;
- Enhancing the standing of the jurisdiction in the legal profession; and
- Promoting the establishment of a body of case law.

It is not the view of the Society that there should be one specialist court house, as in other states. Rather, we support practices that highlight the importance of specialisation in children's law, including child protection. For example, we commend the formation of the Magistracy's Children's chapter, which in our members' view promotes a greater focus on the specialist knowledge and skills magistrates exercise in Childrens Courts. We believe that the importance of and consistency in specialisation would also be promoted in court regions where there are multiple Magistrates by having one Magistrate allocated responsibility for the Childrens Court list. This is consistent with our views regarding a case management approach to having one decision maker for one family.

We note the capacity of the Magistrate to appoint an expert to assist the court under s 107 of the Act. We consider that the court should be resourced to do this in circumstances where Magistrate considers it appropriate. The capacity to be informed by an expert in a particular field or discipline in our view is an essential support for Magistrates determining complex child protection matters with serious and long-term implications for children and their families. The Society supports resourcing of the courts to give effect to this provision in the existing legislation.

RECOMMENDATIONS

- **The Inquiry consider the expansion of the existing Childrens Court of Queensland specialist structure.**

15 Right of review for certain decisions

The Society would like to make some comments regarding the right of review in relation to certain decisions:

- Investigation and assessment, or any other action to be taken by the Department regarding investigation of alleged harm under section 14(1) of the Act; and
- Steps to be taken to ensure the statement of standards are met for a child in care.

Currently, only the Commission for Children and Young People and Child Guardian has the standing (s 369, *Commission for Children and Young People and Child Guardian Act 2000*) to review a decision by the Department in relation to actions required under s 14(1) of the Act; or where the Department has decided to take or not to take a step for the purposes of ensuring a child placed in care is cared for in a way that meets the statement of standards under s 122 of the Act. The Society is not aware of any instance where the Commission has exercised these powers of review.

We do not consider that the lack of review applications necessarily arises because there are no matters appropriate for such review. For example, particularly our members practising in the youth justice system report involvement of young people who are homeless, or otherwise at considerable risk of harm, but who are unsupported by the Department as action has not been taken under section 14 of the Act. Young people are not able to independently seek review by QCAT of any decisions made under section 14. Currently the only mechanism available to young people to review a decision of the Department not to take action in relation to these circumstances is to commence a judicial review. The Society's view is that this is not an accessible or practical review mechanism for such vulnerable young people, and no specific grants of Legal Aid are available.

The Society would like the Inquiry to consider the right to review decisions of this nature, and determine if other people, such as the child or young person, their parents, and or any separate representative appointed, should also have standing to seek a review of decisions of this nature. We note in this context our recommendations in Item 2 of this submission that the Inquiry consider the need for reviewable rights that would strengthen the operation of the Charter of Rights for a child in care. In our view these proposals are very closely linked and may benefit from being considered together.

RECOMMENDATIONS

- **The Inquiry to consider whether children, their parents, and separate representatives should have the right to review decisions in relation to:**
    - **Investigation and assessment, or any other action to be taken by the Department regarding investigation of alleged harm under section 14(1) of the Act; and**
    - **Steps to be taken to ensure the statement of standards are met for a child in care.**

16 Statistics on finalisation

The Society considers that an important step moving forward will be to provide requirements for clear statistical evidence to be available to the general public on matters relating to child protection. In our

view, currently there is a lack of data in the child protection system, particularly with regard to review decisions.

There are a few different sources which provide child protection statistics currently. The Australian Institute of Health and Welfare 2010/2011 Child Protection report contains useful data broken down by each State.[31] For example:

- Table 3.2 on page 23 provides the number of children in each jurisdiction in Australia admitted to child protection orders (Queensland seems to have the highest number of children admitted to orders);
- Table 3.3 on page 26 provides a breakdown of the types of orders by jurisdiction;
- Table 3.4 on page 28 provides details on the Indigenous status of the children; and
- Table 3.5 on page 29 provides a 5-year snap shot across jurisdictions (this appears to show that more children have been admitted to care and protection orders in Queensland year on year than any other jurisdiction).

From the Queensland Court's perspective, the statistics relating to child protection applications are contained in the Magistrate's Court Annual Report. From the 2010/2011 Report, child protection is discussed on page 26 and then in Appendix 4 (starting from page 74).[32]

In terms of applications to review a decision, the QCAT Annual Report provides some statistics.[33] We note that the 2010/2011 Report does not contain specific statistics on child protection, but there are some relevant statistics in relation to the Human Rights Division. In our view, it is important for government agencies, including the courts and QCAT, to provide detailed statistics to the public on child protection matters, particularly in relation to review matters.

From a Departmental perspective, Child Safety Services provide summary statistics on a yearly basis.[34]

Finally, it is noted that another source of data relating to both courts and QCAT is the Child Protection Partnerships Reports that are prepared by the Department, containing information supplied by five key government agencies to provide a comprehensive picture of child protection in Queensland. These other key government agencies are:

- Queensland Police Service
- Department of Justice and Attorney-General
- Queensland Health
- Department of Education and Training
- Department of Community Safety.[35]

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[31] AIHW Child Welfare Series Number 53 Child Protection report found at http://www.aihw.gov.au/publication-detail/?id=10737421016

[32] Magistrate's Court Annual Report 2010/2011 found at: http://www.courts.qld.gov.au/__data/assets/pdf_file/0012/131610/mc-ar-2010-2011.pdf

[33] QCAT Annual Reports found at: http://www.qcat.qld.gov.au/about-qcat/publications

[34] Department of Communities, Child Safety Services and Disability Services website, Summary Statistics found at: http://www.communities.qld.gov.au/childsafety/about-us/our-performance/summary-statistics

[35] Child Protection Partnership Reports found at: http://www.communities.qld.gov.au/childsafety/about-us/our-performance/resources-and-publications

In our consideration of the statistical evidence available, it is difficult to determine issues such as how many children and young people are subject to supervision orders in Queensland. It may be possible to look at the total number of children subject to an order and the number of children living away from home to get a rough idea. However, there is also the prospect that a child is on an Intervention with Parental Agreement order. We consider that the Inquiry should investigate the statistics in relation to this matter.

It appears that an important measure of the health and effectiveness of the out-of-home care system would be the number of children in care whose parents were subject to Departmental intervention as subject children. Our members report that a parental history of being in care may be cited as evidence on behalf of the Department that children are at risk of harm in their family of origin.

Further, it is our view that this data would enhance the Inquiry's ability to consider evidence of the operation of the child protection system, and will also improve public awareness on child protection matters.

RECOMMENDATIONS

- **The Inquiry investigate statistics in relation to the number of children and young people subject to supervision orders.**
- **The Inquiry investigate statistics in relation to child protection matters before QCAT and the courts, particularly with regard to review decisions.**
- **The Inquiry make recommendations as to the recording and publication of statistics in relation to the child protection system going forward.**

17 Statistics on A & TSI Issues, such as kinship and court ordered conferences

The Society considers that there are concerns with accessing detailed statistics on A & TSI issues in the child protection system. For example, our members have reported that they have unsuccessfully tried to obtain statistics regarding how many kinship carer certificates have been granted to A & TSI and non-A & TSI people, and how many have been cancelled. These statistics would be valuable in analysing the assessment processes used. Our members have reported that there are no publicly available statistics on other issues such as how many A & TSI people participate in court ordered conferences, and how many A & TSI children in care are directly represented in child protection proceedings.

We consider that the Inquiry could investigate obtaining statistics on A & TSI issues in the child protection system. These could be helpful in providing an evidence base upon which recommendations can be made.

RECOMMENDATIONS

- **The Inquiry investigate obtaining statistics on A & TSI issues in the child protection system.**

18 Commission for Children and Young People and Child Guardian (CCYPCG)

The Society notes the CCYPCG receives complaints about areas of concern, however there appears to be little publication or reporting in how complaints are resolved. The Society considers that this would be of assistance for both the community and the sector generally and will assist in keeping children out of the system. Publicly accessible information about the resolution of complaints will in our view promote confidence in the effectiveness of the Commission as an oversight mechanism.

The Society would also like to commend the Commission for its advocacy and its repository for factsheets and brochures.

RECOMMENDATIONS

- **The Inquiry investigate publication or reporting of complaints about areas of concern**

19 Training and information sharing

As an overall observation, the Society notes that for some children's matters, the delineation between child protection, domestic violence and family law can seem artificial. Child protection issues and a parent's capacity to protect their child from harm may be relevant to, and informed by, decisions made in each of these other proceedings.

19.1 Information sharing

When children's circumstances are being, or have been, considered in multiple Courts, information needs to be effectively and promptly available in all appropriate forums. For example, expert reports that are prepared for a family law proceeding may be highly relevant to a concurrent or subsequent child protection. We acknowledge that proceedings in different Courts may be considering the same facts but with a different emphasis. However, in the Society's view, clear information sharing processes are essential to ensure that any decisions affecting children's protection from harm are properly informed. Where appropriate, Childrens Court rules, directions, and case management should support this and we note our comments in relation to case management practices at Item 8 of this submission.

We acknowledge the efforts of legal system stakeholders, including the Department, to ensure that information sharing practices support fair and properly informed decision-making in child protection matters. However, we also note that some of our members report concerns in individual matters about the length of time taken and difficulty in obtaining relevant material from other proceedings. The Society requests that the Inquiry review the efficiency and effectiveness of current legislative, policy, and practical approaches to information sharing between jurisdictions.

We also note in this context that our members are aware of a pilot for a unified child protection system being considered in Western Australia. The Inquiry may also wish to investigate the scope and anticipated impact of this pilot in streamlining effective information sharing.

19.2 Joint training across disciplines

Given the significant intersections, between jurisdictions and between professional disciplines, the Society commends efforts to promote multidisciplinary education for stakeholders across jurisdictions, with a specific focus on child protection. We note in this context the recent formation of the Child Protection Practitioners Association of Queensland, which we understand has a multi-disciplinary membership and provides a series of continuing professional development opportunities.

RECOMMENDATIONS

The Inquiry should investigate options for information sharing and joint training across

APPENDIX 1

Case planning for education, exclusions and suspensions

Education related processes, such as case planning for children in care and school disciplinary decisions should be dealt with in accordance with the standards set by the Convention on the Rights of the Child, including:

a) Children have a right to be heard and participate in decisions made that affect their education and career planning;
b) Education should be administered in a manner consistent with a children's human dignity;
c) Education should be directed to development of the child's personality, talents and mental and physical abilities to their fullest potential;
d) Children must be protected against all forms of discrimination in their educational development;
e) Children have the right to freedom of expression and freedom of thought;
f) Children belonging to minority groups have cultural and linguistic rights in education; and
g) The special needs of children with disabilities must be recognized and appropriate access to education must be ensured.

This outline of the human rights framework for children's access to education is not exhaustive, but provides a starting point from which to consider the practical impact of education processes on children in care. There are two important aspects of education for children in care- a casework approach for assisting children in care to access improved education outcomes and recommendations for the exclusion process from schools in Queensland.

a) Educational outcomes for young people in care

For over 15 years, lower educational achievements and work outcomes have been reported for young people leaving care in Australia.[36] Queensland is no exception to this trend. In Queensland, the Commission for Children and Young People 2009 Child Guardian Report analysed Year 12 completion rates for young people in out of home care compared to school completers generally in 2008 found that:

- young people who spent time in out of home care were less likely to undertake further education and were four times more likely than all Year 12 graduates to be neither earning nor learning six months after leaving school;
- 39.7% of young people in out of home care were learning compared to 60.6% of Queensland young people;
- and where 29.3% of young people in out of home care were earning compared to 32.1% of Queensland young people; and
- 31.0% of young people in out of home care were neither learning nor earning compared to 7.3% of Queensland young people.[37]

[36] Cashmore, J & Paxman, M (1996) Wards leaving care: A longitudinal study. Sydney: New South Wales Department of Community Services.
[37] Commission for Children and Young People and Child Guardian (2009) Child Guardian Report: Child Protection System 2008-09, found at: http://www.ccypcg.qld.gov.au/resources/publications/childGuardian/childGuardian2007.html

The Commission also reported in 2012 that children in out of home care "performed significantly poorer than Queensland Students across all age groups and subject matters," including reading, writing and numeracy National Minimum Standards.[38]

Alarmingly, the Commission reported that that in 2010/2011, 13.6% of children in care were suspended or excluded from school.[39]

b) Key factors impacting on education outcomes for children in care

The Create Foundation 'Learning or Earning Discussion Paper' found that the following factors were identified by young people in care as impacting on their educational outcomes:

- Young person's input to decisions about their further education, training or employment;
- Behavioural and emotional issues including learning difficulties and mental health;
- Encouragement and support from carers, workers and school personnel;
- School personnel's understanding of issues affecting young people's participation and attainment in school;
- Safety and stability of care arrangements;
- Transitory lifestyle and homelessness;
- Bullying and harassment - sometimes resulting from stigma of being in care;
- Continuity of school due to changes in placement and school zoning;
- Cost of education fees, uniforms, books and transport - financial support does not move with a young person from one school to another;
- Limited choices of schools and schools have discretion about whether they will accept a young person or not;
- Lack of alternative education models and schools for young people;
- TAFE - costs and limited choices;
- Youth Allowance does not cover all education costs;
- Statutory department and Education department are not working together to support individual young people who need assistance with education plans.[40]

c) Addressing the prevalence of poor educational outcomes among children in care

Recommendations have been made to improve young people's transitions to independence by addressing their education and career development needs. For example, a Report commissioned by the National Youth Affairs Research Scheme made recommendations regarding young people having involvement in decision making, young people leaving care with detailed after-care plans, and leaving

[38] Commission for Children and Young People and Child Guardian (2012) Queensland Child Guardian Key Outcome Indicators Update, Queensland Child Protection System 2008–2011 found at: http://www.ccypcg.qld.gov.au/reportsCP/best-education-possible/educational-performance.aspx
[39] Qld Child Guardian Child Protection System 2008–11 found at: http://www.ccypcg.qld.gov.au/reportsCP/best-education-possible/children-who-were-suspended-or-excluded.aspx
[40] Testro, P., (2010) Create Learn or Earn Discussion Paper: Implications for young people in-care or post-care found at http://www.create.org.au/files/file/Learn_or_Earn_Discussion_Paper_web1.pdf

with relevant documentation.[41] However, it has recently been reported that these recommendations have largely not been implemented.[42]

The report entitled 'The school to work transition for young people in state care: Perspectives from young people, carers and professionals' reported that out of 65 children in care in Queensland interviewed, 48 young people said that there was nil or irregular contact with their departmental caseworker, or there was no discussion with their caseworker about school and future job plans.[43] This particular statistic appears to be a disturbing reflection of the lack of engagement with young people regarding education.

This report also found that departmental caseworkers tend to focus on addressing psychological and behavioural needs, addressing problems as they arise, achieving placement and educational stability and negotiating approvals for expenditure in relation to education support and transition from care. This has been interpreted to be a "backward looking approach" that reacts to current and past problems but sidelines the need for proactive casework to plan future pathways to address the structural barriers, rather than personal barriers, to focus on positive career planning.[44]

Some of the reasons for this were reported as being:

- The nature of child protection casework is often reactionary and often requires attention to the traumatic consequences of maltreatment. This can stifle the capacity to focus on life goals;
- Caseworkers are often qualified in psychology, and accordingly focus on reacting to or responding to behavioural and psychological problems;
- Caseworkers often have limited knowledge of education options and career planning;
- Caseworkers have limitations on their time. The need to respond to crises and problems trumps the need to plan to build on strengths and foster educational outcomes;
- Caseworker time limitations may result in tasks such as such approval for school excursions, extracurricular activities, casual work and arrangements for tax file numbers and birth certificates, and maintaining contact with young people being overlooked.[45]

One of the long-term goals should be to change the way in which casework is conducted, so that future pathways becomes the focus of transitional and exit arrangements.

d) The role of carers

According to the report, 'The school to work transition for young people in state care: Perspectives from young people, carers and professionals', both young people and carers identify carers as being the primary career development influence. It was also found that these carers are supporting the career development process without statutory assistance and largely by default. Carer support includes ensuring school attendance, assisting with homework, subject selection, textbook purchase, resumes, research

[41] Maunders, D., Lideell, M., & Green, S. (1999). Young people leaving care and protection: A report to the National Youth Affairs Research Scheme. Hobart: National Youth Affairs Research Scheme.
[42] Clare Tilbury, Peter Creed, Nicholas Buys and Meegan Crawford (2011) The school to work transition for young people in state care: Perspectives from young people, carers and professionals.
[43] Clare Tilbury, Peter Creed, Nicholas Buys and Meegan Crawford (2011) The school to work transition for young people in state care: Perspectives from young people, carers and professionals.
[44] Clare Tilbury, Peter Creed, Nicholas Buys and Meegan Crawford (2011) The school to work transition for young people in state care: Perspectives from young people, carers and professionals.
[45] Clare Tilbury, Peter Creed, Nicholas Buys and Meegan Crawford (2011) The school to work transition for young people in state care: Perspectives from young people, carers and professionals.

about higher education entry requirements, transport to casual jobs, work experience, extracurricular activities and career expos, attending education support plan meetings and education provider interviews and organising tutoring.

It is also suggested that, more crucially, they are in a position to provide emotional support and encouragement to achieve and raise the often lower than normal aspirations of the young people in their care.

Carers should be provided with appropriate training, resources, caseworker support and statutory support in order to fulfil this role.

e) Effectiveness and utilisation of Education Support Plans

Educational Support Plans are a mechanism to focus caseworker attention on educational needs and encourage them to communicate with school staff and to secure resources such as tutoring, counselling or computer aids.

It has recently been found that "education support plans, introduced to support educational achievement and the transition to work, are not being utilised at all or are being utilised ineffectively."[46] Criticisms of Education Support Plans include that they are focused on behaviour management not educational goals, making them reactive not proactive, and many young people in care are not aware of their existence and have no input into the planning process.

f) Participation by young people in education decisions

Planning for education needs should start early, have a broad focus and be centred on the participation of the young person. This is not presently being achieved. The 2011 Create Foundation Report Card found that approximately 32 per cent of the 605 young people aged 15 to 17 who participated in the research were aware that they had some form of leaving care plan.[47] When young people are engaged in a decision making process they assume greater individual responsibility for the outcomes and the ongoing process. Meaningful participation by young people should be encouraged and provided for in the education area.

g) The need to address career development for young people in care

The Report on 'The school to work transition for young people in state care: Perspectives from young people, carers and professionals' emphasises the importance of self-efficacy, career goals and aspirations and outcome expectations in improving career and educational outcomes for young people in care:

1. The need for "forward looking" career development and education planning by departmental caseworkers;
2. The need for carers to have sufficient knowledge, statutory support and resources;
3. The need for trusting and supportive adult relationships;

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[46] Clare Tilbury, Peter Creed, Nicholas Buys and Meegan Crawford (2011) The school to work transition for young people in state care: Perspectives from young people, carers and professionals.
[47] Hall, A (2012) It's not a transition plan if the young person wasn't involved: Create Opinion Piece found at http://www.create.org.au/files/file/itsnotatransitionplaniftheyoungpersonwasntinvolvedhall2012.pdf

4. Specific career related interventions, such as referral to career advisors, higher education scholarships, career mentoring and specialised career information and skills development forums.[48]

This should be implemented broadly in the child protection system, starting from the early years of high school, and should be tailored to promote positive relationships and varied work related experiences for young people in care.

h) Scholarships and Government support for care leavers

It has been suggested that support be provided to enhance educational opportunities for care leavers by way of incentives to take up or continue in higher education through the total waiving of tertiary and/or TAFE fees, fee discounts, and/or deferral of Higher Education Contribution Scheme (HECS) repayments.

a) School exclusion

(i) The exclusion framework

It is again noted that the Commission for Children and Young People and Child Guardian reported that that in 2010/2011, 13.6% of children in care were suspended or excluded from school. [49] Clearly, this is an issue of concern.

The ALRC Report 84 noted that excluding children from school, on a short or long term basis, can have a serious effect on their education and life chances:

"A child disrupted from school suffers a number of detriments, including disruption to education and a blow to that child's self-esteem. Expulsion is also likely to be felt as a rejection. The language used by students — 'kicked out of school' or 'thrown out' — is an indication that exclusion is seen and felt as a hostile and aggressive act, and many children give up on the education system after being excluded from school." [50]

It also noted that there is strong anecdotal evidence to suggest that a substantial proportion of youth offending starts with exclusion from school:

"While no hard statistical data is available regarding the long-term effects of alienation and exclusion on the lives of young people who leave school before the legal leaving age, there is little doubt that there is a strong correlation between early leaving and criminal activity, poverty, unemployment and homelessness."[51]

The *Education (General Provisions) Act 2006* governs suspensions and exclusions. A student may be suspended or excluded from school by a principal, a principal's supervisor or the chief executive for "disobedience," "misconduct" and "other conduct that is prejudicial to the good order and management of the school or State schools."

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[48] Clare Tilbury, Peter Creed, Nicholas Buys and Meegan Crawford (2011) The school to work transition for young people in state care: Perspectives from young people, carers and professionals.
[49] Qld Child Guardian Child Protection System 2008–11 found at: http://www.ccypcg.qld.gov.au/reportsCP/best-education-possible/children-who-were-suspended-or-excluded.aspx
[50] Australian Law Reform Commission (1997) Seen and heard: priority for children in the legal process (ALRC Report 84).
[51] Australian Law Reform Commission (1997) Seen and heard: priority for children in the legal process (ALRC Report 84).

The enrolment at a State school of a student who is more than compulsory school age may be cancelled on the ground that "the student's behaviour amounts to a refusal to participate in the educational program provided at the school."

The chief executive may also exclude the student from a stated list of schools or all schools in Queensland for "gross misconduct" or if the decision maker assesses that the student would "pose an unacceptable risk to the safety or wellbeing of other students or staff of the schools."

Exclusions may be from all schools in Queensland, or a stated list of schools. It appears that a great degree of discretion as to the length of the suspension or exclusion and the number of applicable schools lies with the decision maker.

(ii) Mechanisms for exclusion

The *Education (General Provisions) Act 2006* is complex, containing a confusing web of mechanisms for exclusion. Students may be excluded by multiple parallel mechanisms at the one time and the appeal process is unduly complicated.

There are inconsistencies in the seriousness of youth justice offences that result in exclusionary action. In many instances, the assessment of risk is not made against a consistent standard and incomplete information is used. Actual risk to the school community is not assessed by someone qualified to assess the risk and advise as to what measures might reduce the risk.

Similarly, internal review processes are complicated and take many months. Each process has different appeal mechanisms and requires written submissions from the young person or an adult on behalf of the young person in order to have the decision reviewed. It is difficult for a legal representative, support person or caseworker to follow the correct appeal process, let alone the young person themselves. The young person may be left without certainty and often without schooling until the internal appeal process is finalised.

While the *Education (General Provisions) Act 2006* provides that principals should provide school work during suspensions, this is often overlooked and rarely effective.

External review is provided through QCAT but is only available to students who are excluded from all schools in Queensland. Giving the young person the option of "schools of distance education" takes away their external appeal option.

The House of Representatives Standing Committee on Employment, Education and Training recommended in 1996 that each State and Territory ensure that:

a) school disciplinary legislation, policy and procedures include a precise and consistent statement of the grounds and procedures for each category of exclusion of students from school, and
b) that clear and accurate information be developed for students and parents, and training materials for schools on procedures for school suspensions, exclusion and expulsion, including mechanisms of appeal.[52]

[52] Report of the Inquiry into Truancy and Exclusion of Children and Young People from School, AGPS Canberra 1996 rec 3.

Further, the ALRC Report 84 "Seen and heard: priority for children in the legal process" recommended that:

a) reviews of serious exclusions, being exclusions for longer than 14 days, repeat exclusions totalling more than 14 days in a year and permanent exclusions, should be heard by a panel of school and community representatives at least one of whom is from outside the particular school community;
b) an advocate for the child should be permitted and encouraged to be involved in the disciplinary process where a serious exclusion is proposed;
c) *exclusion has such a detrimental effect on the educational opportunities of young people that the process should be subject to independent review*.[53]

(iii) Lack of a casework or alternative dispute resolution approach to school discipline

Exclusion from school is often also related to conduct resulting from a child's intellectual, behavioural or learning disability. The formal mechanisms for exclusion in Queensland do not allow for input from stakeholders in the process such as psychologists and doctors who may be able to review medications or modify the behavioural management plan after a decision has been made.

There are no formal mechanisms to review improvements in the child's conduct that may make them again suitable for a classroom setting. There is no therapeutic support offered to a child that may improve their ability to behave appropriately in an education setting.

Between April 1995 and April 1996 community accountability conferencing, modelled on Youth Justice Conferences, was trialled in two education regions of Queensland as a means of dealing with serious incidents. An evaluation of the Queensland trial found that there was a high level of participant satisfaction, that relationships between participants improved, that recidivism was low and that nearly all schools in the trial had changed their thinking about behaviour management as a result of their involvement.[54] The ALRC Report also recommended community accountability conferencing be introduced in all schools.

(iv) Further data necessary

More data is necessary to examine the key factors in achieving educational and career outcomes for young people in care and examining the long and short term effects of school exclusion, and the best methods to promote reengagement with education.

(v) Supporting young people to reengage with school

Practitioners at times are looking for referral options for young people who are involved in the child protection system or youth justice system, and who have disengaged from school.

The Commonwealth government has provided the Youth Connections program to provide youth worker support to young people who have disengaged from education to reengage with education or training. Anecdotally, the youth connection service is running at capacity across Queensland and referrals may be placed on an "unmet needs" list until a caseworker can become available. This capacity issue increases as state funded employment and training programs face funding cuts, leaving more young people

[53] Australian Law Reform Commission (1997) Seen and heard: priority for children in the legal process (ALRC Report 84).
[54] Department of Education Queensland Community Accountability Conferencing: Trial Report unpublished 1996, 1–2.

seeking the assistance of Youth Connections. Further there is no consistent referral pathway to this service and schools will not generally make the referral to the Youth Connections service.

Youth Support Co-ordinators are a State funded mechanism to assist students who are at school to provides counselling to current school students who may be at risk from disengaging from school due to personal, relationship and/or family concerns. Youth Support Co-ordinators role provide a very important service counselling current students who are looking for assistance with such problems. However, young people who have disengaged with school due to school disciplinary measures often need broad support from someone to develop a plan to address behavioural issues, develop a program for future study, advocate on their behalf to be reaccepted into schools or vocational programs and assist to address needs such as accommodation, food and clothing shortages that may be affecting their participation at school. Such support would need to be available after the young person has already been excluded.

The school disciplinary framework should provide that referrals to school reengagement caseworkers available to young people consistently across the state. The process should always provide support to young people to assist them to address the cause of the school disciplinary measures with a view to reengaging in school, provide early intervention in relation to students who are disengaging from school and provide positive career planning based upon the young person's strengths rather than their weaknesses. Such support is crucial to young children in the care of the department but should also be available to young people generally without the need for departmental intervention.