

# Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse

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## Introduction

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector representing over 19,000 members. The LIV welcomes the Consultation Paper on Institutional Responses to Child Sexual Abuse in Out-of-Home Care (OOHC) (the Consultation paper). The Consultation paper highlights the staggering increase of children in OOHC throughout Australia and the risk of experiencing sexual abuse these children face if their care arrangements are not properly overseen and scrutinised.

## Maximising potential for disclosure of abuse

It is significant that, in Victoria, a great proportion of the evidence heard by this Royal Commission relating to abuse of children in institutional care concerned children who were wards of the State. Upon the making of a Wardship Order, the subject children almost invariably remained wards until eighteen years of age without any opportunity for judicial oversight or review of their care. Wardship Orders did not allow the Court to direct any frequency of contact between the child and their parents, siblings or other significant persons. This left children being lawfully prevented from having any contact with their family. For the great majority of children in care, regular contact with the persons significant to that child maximises the potential of that the child disclosing abuse while in care.

## The Carney Review

It was not until the Carney Review, *The Child Welfare Practice and Legislation Review (1982 – 1984)*, that the legal circumstances for children in state care was significantly improved. The Carney Review was one of the most comprehensive reviews of child welfare law ever conducted in Victoria and resulted in the passing of the *Children and Young Persons Act 1989 (Vic)*. The Carney Review recognised that investing the predecessor child protection agency of the current Department of Health and Human Services (DHHS) with control over children in its care, without adequate oversight, resulted in an environment where inappropriate care and treatment was likely to go undiscovered.

## Legislative framework after the Carney Review but before 1 March, 2016

The legislative framework in child protection cases, prior to March 2016 afforded protection to children for the following:

1. DHHS were required to regularly account to the Children's Court for the treatment of children in its care;
2. The Children's Court was able to order regular contact with the child's biological family or persons significant to them on most orders placing a child out of a parent's care; and
3. The Children's Court could determine the length of the order placing a child out of a parent's care.

This regime maximised opportunities for children to report inappropriate treatment in care through judicial determinations as to contact.

Recent changes in Victoria to the *Children, Youth and Families Act 2005* (Vic) (CYFA) which commenced on 1 March 2016 (the 2016 reforms) have drastically reduced the Children's Court's powers in many respects, creating further vulnerability for Victoria's children. The 2016 reforms significantly reduced transparency and judicial oversight of decisions made about children in OOHC. The LIV is concerned this has contributed to an environment in which the abuse of children in OOHC is more likely to go undetected.

LIV members consider the pre-reform CYFA offered more protection to Victoria's vulnerable children and was more consistent with the recommendations of the Cummins Inquiry (see below) than the post reform regime that has existed since 1 March 2016.

### **The Cummins Inquiry 2012**

In 2012, another comprehensive review of the Victorian child protection system was undertaken; the *Protecting Victoria's Vulnerable Children Inquiry 2012* (the Cummins Inquiry): <http://www.childprotectioninquiry.vic.gov.au>.

The LIV is concerned that significant parts of the *Justice Legislation Amendment (Cancellation of Parole & Other Matters) Act 2013* (Vic) and the 2016 reforms are inconsistent with specific recommendations of the Cummins Inquiry:

1. That all children be legally represented in proceedings before the Children's Court and that the age of legal representation on the basis of direct instructions be 10 years (Recommendation 53, p.278, Chapter 15, Vol 2) (see below); and
2. That the Children's Court retains the power to determine frequency of contact between children and biological family members (Recommendation 53, p.278, Chapter 15, Vol 2).

The LIV believes that the failure to implement these recommendations significantly diminishes the prospect of discovering inappropriate treatment of children in out of home care.

### **Insufficient independent legal representation of children contrary to the Cummins Inquiry**

In 2013, the *Justice Legislation Amendment (Cancellation of Parole & other matters) Act 2013* (Vic) implemented the recommendation of the Cummins Inquiry that children who are 10 years or over be legally represented. The amending Act did not adopt the full ambit of Cummins' recommendation that all children have legal representation and that those under 10 years have a best interests lawyer (Chapter 15, Vol. 2, p.378, Recommendation 53).

In 2014, the Children's Court uncovered a serious case of sexual and physical abuse of two siblings both under the age of 10 years living in residential care. The LIV draws the Commission's attention to following articles:

1. <http://www.abc.net.au/news/2014-07-03/anglicare-negligent-in-treatment-of-abused-children/5567484>; and
2. <http://www.abc.net.au/news/2014-07-02/siblings'-sexual-abuse-highlights-flaws-in-victorian-state-care/5566378>.

In this case, the Magistrate determined that the Victorian child protection agency was in fundamental breach of its duty of care to the two young siblings, given the prolific sexual and physical abuse they suffered in residential care.

The Magistrate found specifically that:

*[these children], who live in the...unit, all gave very clear and disturbing evidence of sexual assaults they experienced in that unit by another young person. The children's evidence was not only believable; it was gut-wrenching. The staff assigned to care for those children did not supervise them adequately and therefore grossly failed in their duty to protect them.*

In this 2014 case, the appointment of an Independent Children's Lawyer for one child, which was done on the basis of 'exceptional circumstances' (pursuant to s.524(4) of the CYFA), was the central reason that the sexual and physical abuse of the children was uncovered. The Independent Children's Lawyer interviewed one of the children at length, subpoenaed all DHHS and agency files including the Critical Incident reports and spent many hours examining such files to uncover the abuse. Such significant work in the 2014 case underlines the importance of every child's access to a lawyer, be it on a direct instructions basis or a 'best interest of the child' basis, in every case before the Children's Court. The LIV submits that an individual lawyer for each child ensures appropriate scrutiny of care arrangements. These lawyers provide an independent, trusted, formal mechanism to deal with reports by a child of sexual abuse in OOHC.

Two provisions in the CYFA at the time were pivotal in the Children's Court ability in this case to act in the best interests of the children. These provisions were:

1. the Children's Court's ability to make an Interim Accommodation Order (see s.262 (5A) of the CYFA); and
2. the requirement that the Children's Court be satisfied in relation to the provision of services by the Victorian child protection agency (s.276 of the CYFA).

As a result of the 2016 reforms, the Children's Court no longer has these powers. The LIV is concerned that the 2016 reforms have significantly reduced judicial oversight of DHHS' decisions about care arrangements for children in state care. If the above case had occurred after the 2016 reforms, DHHS's actions may never have been subject to scrutiny by the Children's Court. The 2016 reforms create a time-frame of one year (two years at the most, depending on the circumstances) calculated cumulatively and retrospectively, during which a child can be out of a parent's care before that child is permanently removed and will be the subject of a Care by Secretary Order. Under the 2016 reforms, this case would not have come before the Children's Court because the two siblings had been out of parental care for more than two years.

### Care by Secretary Orders

The LIV is concerned that the effective default order imposed by the 2016 reforms for the majority of children in out of home care for longer than a year (two years at most), is the new Care by Secretary Order. These Orders were specifically rejected by the Cummins Inquiry in 2012 (Vol 2, p. 402-4). Nevertheless, such orders were a centerpiece of the 2016 legislative reforms. It is concerning that these new Care by Secretary Orders have similar characteristics to Wardship Orders. Like Wardship Orders, Care by Secretary Order run for a mandatory period of two years, full custodial and guardianship rights are conferred on DHHS to the exclusion of all other persons and, most significantly, the Children's Court cannot order any contact for the subject child with his or her family or persons significant to them. These aspects create the same risks identified by the Carney review in relation to Wardship Orders regarding a lack of oversight of inappropriate care and treatment.

The LIV advocates for the reinstatement of the Children's Court powers in accordance with the CYFA prior to the 2016 reforms. It should be the role of the Children's Court to determine the lawfulness of the statutory intervention by the State, and the appropriate order, when a child is found to be in need of protection<sup>1</sup>.

### Long-Term Care Orders

The 2016 reforms replaced a Long-Term Guardianship Order (which could only be made for those children over 12 years) with a Long-Term Care Order (which can be made by the Court in relation to a child of any age who has been out of parental care for one year (two years at the most), until a child attains the age of 18 years without regular judicial review of care arrangements).

The LIV is concerned that the new Long-Term Care orders deny children the opportunity to have their care arrangements reviewed by an independent authority, namely the Children's Court.

### Current Reality of the Victorian Child Protection System

It is encouraging that the Victorian Government has announced the Roadmap for Reform (<http://strongfamiliesafechildren.vic.gov.au>) in relation to the Child Protection system. The Roadmap identifies the failings of the current system and the commitment of many millions of dollars to rectify such failings over two years. It is important that the 2016 reforms be considered in the context of the current reality created by Victoria's child protection system, particularly its residential care system. The LIV draws the attention of the Commissioner to the 2015 "As a Good Parent Would" report of the Victorian Commissioner for Children & Young People (<http://www.ccyp.vic.gov.au/goodparent.htm>) in which the Victorian Commissioner for Children & Young People was critical of Victoria's residential care system operated by DHHS and its agencies.

The Commission's attention is especially drawn to the following specific findings of that Report:

1. "Although the Secretary's duty when placing a child in out-of-home care is to care for them as a good parent would, the present model of residential care does not seem to provide for their physical, intellectual, cultural, emotional and spiritual development and creates an environment where children are at risk of and not protected from sexual abuse" (p.13 Executive summary);
2. "The present Departmental structure works against effective planning and placement of children and hinders appropriate monitoring and oversight of residential care services. ...." (p.17 Findings);
3. "Many children in residential care live in appalling physical conditions..."; (p.13 Executive summary);
4. "Overwhelming evidence exists that fair and appropriate treatment was not given to many children who had been sexually abused in residential care"; (p. 13 Executive summary);

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<sup>1</sup> "Protecting Victoria's Vulnerable Children Inquiry" (2012) (The Cummins Inquiry)

5. “The mix of children in residential care units is sometimes inappropriate. This includes children with disabilities and children as young as five years being placed with older children with known sexually problematic or abusive behaviours.” (p.14 Findings);
6. “The residential care system is not compatible with human rights described in the [Victorian] Charter [of Human Rights and Responsibilities]. We are very concerned about apparent breaches of children’s rights in some of the individual cases reviewed, including placement decisions and the way the children were treated while they were in care. These potential breaches indicate that some people who work in the sector do not understand children’s rights or their own obligations under the Charter” (p.13 Executive Summary).

### **Proposals to Rectify Current Legal Deficits in Victoria’s Child Protection System**

The LIV submits that the diminution of the Children’s Court powers should be remedied through urgent amendment to the CYFA and the adoption of a number of the recommendations of the Cummins Inquiry. Namely, amendments to provide that:

1. the Children’s Court can place conditions for contact for children with persons significant to them, on Care by Secretary Orders when it considers it to be in the best interests of the child to do so. In turn this will ensure children in OOHC who may be victims of sexual abuse have every opportunity to disclose such abuse;
2. the Children’s Court be able to determine the length of a Care by Secretary Order or a Long-Term Care Order, rather than the mandatory two year period for Care by Secretary Order or, for a Long-Term Care Order, the order operating until the child is 18 years regardless of when the order is made. The reinstatement of such powers would ensure the Children’s Court could once again tailor orders in the best interests of each individual child and ensure state intervention to the extent necessary with appropriate and regular judicial review of care arrangements on at least a yearly basis;
3. *all* children be legally represented, not just those 10 years and over.

### **Further Information**

We refer you also to:

- a) the LIV submissions of 2014 (copy attached);
- b) the Victoria Legal and Social Issues parliamentary inquiry into these reforms of 2015:  
<http://www.parliament.vic.gov.au/lisic/inquiries/inquiry/411>.

Please contact Clara Bradley, Lawyer, from Legal Policy Department (03) 9607 9384 or email [cbradley@liv.asn.au](mailto:cbradley@liv.asn.au) if you have any queries or would like any further information.