



# Victorian Aboriginal Legal Service Co-operative Ltd.

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## Children Bill

### Comments from the Victorian Aboriginal Legal Service Co-operative Limited

It is difficult to understand why children are taken out of homes, then, perhaps some time later, placed back in the home where the problems began. The problems do not go away. Why not fix the home, [First Nations people] wonder, but there is little or no funding allocated to services for families ... [the community] perception is that government will pay astronomical costs for someone else to give custodial care to their children while they stand by in helpless poverty because someone else controls the money and has the power to make decisions about their children (First Nations Task Force 1993: 49).

VALS supports the policy framework in the White Paper. We support the recognition of the Aboriginal Child Placement Principle, the Aboriginal Family Decision Making Principle and Aboriginal permanency requirements in the Children Bill.

#### **VACCA recommendations**

VALS supports the Victorian Aboriginal Child Care Agency recommendations in relation to self determination, cultural identity and performance standards.

#### *Self determination*

- *we would suggest that the Children Bill should refer to the fundamental principle of self-determination in Sections:*
  - *11 (Chapter 1 Part 2 Division 4) in relation to the rationale behind the ACCP*
  - *100 (Chapter 4, Part 2) in relation to the Minister paying due respect to the principle.*
  - *103 (Chapter 4, Part 3) in relation to the Secretary paying due respect to the principle*

## **2. Defining the best interests of the child**

Definition of **best interests of the child** speaks of

*(ix) the child's social and individual identity including the child's cultural background, the religious faith (if any) in which the child is being raised and the child's age, maturity, sex and sexual identity;*

- Does not give sufficient weight to the Aboriginal cultural identity of the child. Article 30 of the *Convention on the Rights of the Child* explicitly recognizes the right of indigenous children to enjoy their traditional culture, practice their own religion and use their traditional language. From the perspective of Indigenous communities we believe that the child's rights to culture, which acknowledges that protection of culture and identity are in the best interests of the child, should be included in any definition of best interests. It is critical to acknowledge that children's cultural identity is the key facet of their development.
  - We would suggest that there is a separate point in the definition of best interests which recognises the importance of cultural identity with a specific reference to the importance of maintaining cultural identity as being in the best interests of the Aboriginal child.
  - Section 13.3 should not include the phrase "unless this is not in the best interests of the child" because the Aboriginal Child Placement Principle should not be seen as contrary to 'best interests' and to include the phrase in the bill allows for the ACPP to be overlooked
  - We would also suggest that Section 14.4 which concerns children with one Aboriginal and non-Aboriginal parent is strengthened by including a requirement for Aboriginal cultural needs of the child to be addressed in consultation with an Aboriginal agency.
  - To ensure that cultural plans are condition of court orders in the case of Aboriginal children we would suggest another clause which gives effect to this principle in section 198.
  - To ensure that cultural plans are condition of stability plans in the case of Aboriginal children we would suggest another clause which gives effect to this principle in section 102.

### **3. Aboriginal Family Conferencing**

Sections 145-150 should refer to Aboriginal Family Conferencing and state that the conveners of Aboriginal Family Conferences will be Aboriginal and approved by a registered Aboriginal agency.

### **4. Performance standards**

*However, the Children Bill does not mention cultural standards in its definition of **performance standards (Section 55)**. Therefore:*

- *We would welcome the specific inclusion of **Aboriginal cultural competence** in this section to ensure that the Children Bill does what the White Paper suggests.*

We also support recommendations in relation to Human Services (Complex Clients) Act 203 and Aboriginal and Child Family Service - creation of a separate Statutory Office of Aboriginal Guardianship.

*(Extract from VACCA's Submission)*

A number of authors and reviews suggest that social work methods impose alien cultural values of individualism, materialism and empiricism on Native American peoples (Voss et al 1999,

Weaver 1998, Kalyanpur 1998, Awasis Agency 1997, Ricks et al 1990). The Awasis Agency offers a critique of the Cartesian paradigm underlying social work theory, which they state leads to paternalism through the idea that there is one objective truth or reality to a situation, best understood by the 'expert'. Voss, et al, state that social work policy and practice "rigidly reinforce a kind of clinical colonialism" (1999:233 Pg 30 in Libesman, T. (2004).

It is clear from the research above that some social work methods, values and practices maybe problematic when dealing with Aboriginal peoples. This highlights the importance of the VACCA recommendation above re cultural competence. In the section below we argue that effective implementation of cultural competence requires strategy, objectives and funding.

### **Additional concerns that VALS has about the Children Bill and the White Paper**

**There are four main concerns that VALS has about the Children Bill.**

- 1. The critical importance of resources to implement the proposed changes and the priorities which will be used to structure the available funds.**
- 2. The issue of how the accountability of the Department of Human Services (DHS) may be improved**
- 3. The issue of appropriate levels of protection of independence of community based child and family services.**
- 4. Faster permanency and other issues.**

#### **1. Resources**

The DHS cannot guarantee any new resources or where any new resources may be allocated. Our initial comments in this section are premised on there being no new money. Aboriginal people are the most overrepresented group in the Child Protection System. Over half the Aboriginal children in out of home care are in non-Aboriginal homes.

This Children Bill promises faster movement into permanent care. In the absence of significant funding increases and policy implementation the Children Bill will result in more Aboriginal Children in non-Aboriginal placements.

Placement of Aboriginal children in non-Aboriginal households may increase the physical safety of many children. It may also decrease their connection to culture, family, identity and psychological well being.

The level of funding of the Child Welfare System is a critical factor in how legislation is implemented and what outcomes are achieved. A funded commitment to improved cultural competence and Aboriginal design and control of programs are two critical parts of achieving better outcomes for Aboriginal people.

The inclusion of Best Interest Principle 10(x) about stability and continuity and section 102 (ie: about time limits for the preparation of stability plans) and the likely increase of very young children coming into the system will result in significant increases in children placed permanently in out of home care placements.

This has been an objective of the DHS' legislative review process all along and has been expected. The extent of any new funding and the allocation priorities will significantly influence

the extent to which out of home care placements increase and the extent to which permanent care orders are made

VALS is concerned that the DHS has been inhibited about acknowledging the extent of the contribution of inadequate financial resources to the present system's outcomes and in particular Aboriginal overrepresentation. An independent review would have had less inhibitions about highlighting the inadequacy of current levels of funding.

The terms of references of the current Investment Consultancy by Allens do not refer specifically to considering how adequate existing funding levels are. There was also a comment in one consultation meeting by DHS that a significant problem with the effectiveness of the old legislation was that voluntary access to services was ineffective because NGO's didn't target the most vulnerable people. This explanation is quite different to the Kirby Report.

The Kirby Report states that the 1989 Children and Young Person's Act was different to what the Carney Committee had recommended four years previously, that there was no prevention strategy, instead there were productivity cuts. Following the 1992 election of the State Liberal Government there were extensive service cuts and major changes which included, purchaser provider splits, local government restructures and competitive neutrality. (pg 24). There was also the death of Daniel Valerio and the campaign in the media to introduce mandatory reporting. The introduction of which resulted in a huge increase in notifications the vast majority of which did not reach the threshold of being in need of protection. Kirby describes the combined effect of the changes in the nineties as leading to an increasingly fragmented and reactive tertiary focused system.

### ***Ombudsman's Annual Reports (2002, 2003)***

Complaints about Child Protection services remained in the 2003 Ombudsman's Annual Report the most substantial element of complaints about DHS (80.6%). The number of complaints has been rising each year but was not as big an increase in 2003.

In one case involving six siblings and possible sexual abuse, the Ombudsman said:

'it was obvious to me that the region's child protection program was under extreme stress. One of the protection workers interviewed during my investigation commented:

"...the whole infrastructure of our office is, probably was, and still is, completely inadequate... it's been proven that we've been cut to the bone, we've had nothing, we've lacked resources, lacked people on the ground, and we've lacked money to do anything. ... there is no budget, basically we couldn't put things into place – we didn't have the money, and we haven't had it for years, and things haven't changed. And that's why people leave this job, that's why we turn staff over, we just haven't got the resources on the ground... and I just believe that's a true indication of where protective Services in [region] is at. We just run by the seat of our pants and the way things are going I wouldn't be surprised if we had a death" (2002, p 66):

The over representation rate of Aboriginal children in the Child Protection System in 2001 was 13 to 1. Estimates by the Secretariat of National Aboriginal Islander Child Care of the growth of Aboriginal children in Out of Home Care in Victoria between 2001-2010 was for approximately a 50% increase in children. These figures suggest that a significant increase in funding services

is necessary simply to avoid going backwards (eg: to keep up with population increase and existing quality and quantity of service short falls).

If we include in this picture the increasingly complex nature of many child protection cases, the greater emphasis on responding to family violence, greater emphasis on child development needs, and greater recognition of the cost effectiveness of dollars spent on early intervention and recognition that greater Aboriginal control of service delivery is important we have a range of factors which justify and require additional funding.

If significant funds are invested and a substantial proportion are allocated to Aboriginal early intervention services and enhanced access to secondary and tertiary services then the increase in number of children in permanent care will be less than it otherwise would be.

There was no doubt that existing resources were inadequate according to the Kirby Report

*“The challenge is that both prevention and intervention services have to be strengthened” (Pg 26, Kirby 2004)*

The Allens Consulting report on the costs of implementing the new changes has no specific term of reference about establishing existing shortfalls and there have been no priorities given to the consultants (eg: modelling the impact of the changes on specific groups such as Aboriginal people or people with a disability).

### **The cost of developing a culturally competent system**

The quote below is from ‘Child Welfare Approaches for Aboriginal Communities: International Perspectives’ it highlights the multi faceted nature of achieving cultural competence and the resources necessary to achieve it.

For service delivery to be culturally competent it needs to move beyond incorporation of Aboriginal staff in standard delivery programs, to the incorporation of cultural knowledge into the service delivery framework (Tong and Cross 1991). Services need to develop and incorporate locally identified knowledge, skills and values in order to achieve cultural competence.

This includes knowledge of the peoples in the area, their communication systems and culture, and their contemporary realities including local inter and intra community politics, and socio economic situations (Weaver 1999). Many of the values and characteristics of culturally competent programs identified in literature reviewed for this report are directed towards strengthening and healing communities. Where communities are not designing and delivering programs themselves they need to be involved at all stages of program development from initiation of programs and identification of community needs to the evaluation of programs implemented. Conventional criteria whether they are criteria for determining children’s needs or criteria for evaluating programs will often need to be developed (Ricks et al 1990, Awasis Agency 1997). This can be a complex and difficult process which requires considerable resourcing and support. Likewise facilitating the training and retention of Aboriginal staff working on projects requires adequate resourcing, lateral consideration of qualifications, and consideration of shortfalls in current training programs (First Nations Task Force 1993, Durst 1998) Quote taken from Libesman, T. (2004)

Achieving greater cultural competence requires modelling, setting objectives and significant funding provision.

### **Summation**

Child protection is a challenging area of work. Unrealistic funding and unclear entitlements to services adds greater uncertainty and undermines capacity to maintain a quality system. The Department position on guaranteeing services has been that it can't be done and that Government must be free to set its own priorities. Protecting Children should mean that we establish structures which are less vulnerable to the vagaries of politics and better connected to Independent standard setting and cost analysis, evidence, minimum standards and economic modelling.

The Kirby report (pg 41-42) accepts the importance of continuity of care and argues that the imposition of any arbitrary timeframe should be accompanied by some kind of service guarantee. At a broader level there is the issue of ensuring that DHS has enough funds to ensure it can provide adequate child protection services for increasing numbers of children. The Child Welfare system in Ontario has volume sensitive funding and includes benchmarks for service. (Pg 9, King, Leschied, Whitehead, Chiodo and Hurley, 2003).

The Department has the opportunity to articulate some minimum service levels for parents, care givers and children in the Out of Home Care system, cost these and advocate for funding to achieve those goals. This review is an opportunity to introduce volume sensitive funding.

It is unrealistic to claim that protecting children is a highly valued goal and set standards for care but ignore the introduction of any funding formulae or volume sensitive funding arrangements. Spreading Government and non government services increasingly thinly in the hope that it will not impact on the outcomes for children and families is unsustainable. Introducing faster timelines for permanency without costing the ways of ameliorating the impact of this policy on Aboriginal children is unacceptable. Clearly there will always be a need to ration some services. That does not preclude setting minimum standards for service availability or developing a rationale for rationing which is consistent with policy priorities

**We recommend that there be a guarantee of services to parents and children who are subject to out of home care orders included in the legislation and that proposals for funding the implementation of the Children Bill include a budget projection for this.**

**We recommend that there be inclusion of volume sensitive funding principles in the legislation.**

**We recommend that the Allen Consulting Investment report be asked to report on the adequacy of existing funding resources**

**We recommend that Allen Consulting Investment Report model the likely impact of the legislative changes on Aboriginal people and the resources necessary to reduce overrepresentation**

## **2. Accountability of the Department of Human Services- A vital component of Protecting Children**

This section proposes:

- Enhanced access to legal advice and case plan dispute resolution for clients,
- The need for Independent oversight of the Department and;
- The need for independent advice on standard setting and quality assurance systems.

### **Accessible Legal Advice and Dispute Resolution**

The Decision making principles in Section 11 are positive attempts to reflect the importance of fair and effective decision making. Parents are already entitled to seek legal advice but they are not necessarily aware of the critical points that require legal advice and this advice is not necessarily available. If parents are going to be empowered to contribute to child well being they need to have a clear understanding of their rights and obligations and the legal processes available to ensure these occur.

Accessible legal advice needs to be provided prior to agreeing to a voluntary agreement, when child protection are seeking a protection order, when a case plan goal changes from family reunion, when there is a dispute about access and prior to a permanent care order.

It is vital that a faster and more appropriate venue for resolving case plan disputes is available than VCAT. The Children's court should be empowered to adjudicate these disputes using arbitrators or magistrates depending on the seriousness of the matter.

### **Independent Review**

The section above about funding highlighted the need for adequate funding. It also highlighted that at present child protection continues to be enormously vulnerable to political and economic whim.

There are two ways that Child protection could be strengthened and the paradox is that DHS have to give up some power at one level in order to gain power at a different level.

By establishing a genuinely Independent Children's Commissioner there will be enhanced capacity in the system to frankly comment on how the system needs to be improved including the provision of funds. The Department and the minister are constrained in their ability to frankly critique these issues and there will always be the suspicion that their views are not sufficiently objective.

Other jurisdictions have moved further down the path of Independent overview than Victoria has (Eg Qld and NSW). The Kirby Report also recommended independent statutory authority to monitor the welfare of children in care and the inclusion of reference to the Convention on the Rights of the Child in the legislation. We support this and believe that it strengthens the protections for children and their caregivers. Unpalatable though it is for governments or departments to ever cede any powers of review to Independent bodies this is an area of such critical importance to children and families that it should be pursued.

### **Recommendation**

#### **Establish an Independent Children's Commissioner**

## **Independent Standard setting and quality assurance**

The second area of opportunity is in the area of standard setting and quality assurance is constrained. Non Government Organisation and DHS relations may be tested by a range of issues and events. DHS decisions about issues may be made on the basis of available funds however these decisions may lead to unintended consequences and unfeasible service models. Some of the issues involving practice, funding models and service models would be easier to clarify and easier to articulate the value of if the Department utilised an Independent unit for advice. This would help reduce potential conflict between Child protection and NGO's and help advance collaborative working relationships.

The Kirby Report criticised the lack of flexibility allowed to Innovation programs. We are concerned about the potential for unproductive conflict between DHS and NGO's over service levels, service standards and the program requirements to interfere with Non Government and Government cooperation. We are also concerned that the Department has a conflict of interest between funding the service system and establishing quality standards, service pricing and policy implementation processes. There should be a unit Independent of the Department established to set standards and quality assurance guidelines. This would minimise blame shifting, unilateral decision making and provide an independent source of advice about issues which are often complex.

The Department have clearly indicated a need to work more closely with Community agencies it is important that this is not undermined by concerns about the adequacy of standards which are set.

## **Recommendation**

**To avoid conflicts of interest and enhance quality establish a unit which is Independent of DHS to advise on standard setting and quality improvement across DHS and NGOs**

*To genuinely implement family preservation policy and programming requires a paradigm shift in child welfare, from a model based on child rescue and placement to one of family support.*

## **3. The Independence of Community Service Agencies**

Early Intervention strategies are clearly important to reducing the level of out of home care placements and Permanent Care orders. Libesman in 'Child Welfare Approaches for Aboriginal Communities: International Perspectives' says, "Although local solutions will need to be found for different Aboriginal Communities, there is a preference across Aboriginal communities for holistic, multi faceted approaches that heal all sections of the community and address the underlying causes of health and social problems."

There is no mention in legislation of the establishment of Aboriginal early intervention centres. VACCA have previously advocated Aboriginal Family well being committees be established. We believe there should be provision made for wholistic Aboriginal early intervention models and structures.

## **General Comments about alternative Access to Secondary Services**

We support the objective of improving access to secondary services.

Our general concern about the community intake model is that there is considerable room for ambiguity about their role as compared to Child protection.

Community Service and Child protection will:

- share some similar legislative protections re information disclosure
- have similar objects eg child protection needs/significant risk to well being
- have a common function of investigating risk to children

There is ambiguity over the extent to which community intake services will be duplicating the work of Child protection services. In relation to greater permeability between tertiary and secondary, and between secondary and primary services the Kirby report says, “A significant challenge in this approach is to ensure universal service provision is not compromised by a redirection of resources to upper tier functions (eg. Tertiary services) or stigmatised in a way that deters vulnerable families” (pg 28). This is one of the challenges associated with setting up alternative intake mechanisms.

Section 26 of the draft Children Bill states that it is to enable a confidential report to be made about a child if there is a significant concern for the well being of the child. How different is this definition to the definition of a Child in need of protection? People can already make confidential reports to Child protection. If this service is meant to improve access to secondary services why is the objective to enable a confidential report to be made?

The power to disclose information for the purpose of assessing the risk to the child Section 33 (2a) is very similar to what Child Protection and has the potential to blur the boundaries between the two organisations and their respective roles. 33(2b) is in our view an appropriate reason to disclose information but one that could and should occur with the approval of the person who seeks assistance.

Section 27 makes it clear that a person with concerns for a child’s well being can make a report to either the secretary or a community based service. This adds weight to the view that there is ambiguity about the role of each organisation.

Another concern we have about the Children Bill and the provision of information to the department is there is no protection for the community services against the Department requiring greater provision of information as part of a service agreement. Section 33 states that the community based service may consult the Department or another service.

It is important to protect the social capital that community services enjoy. The relationship with Child protection needs to be carefully managed as part of this. In order to protect the different roles of the two organisations there should be an unambiguous statement which precludes the Department from at some later time deciding to introduce a requirement in a service contracts to compel community organisations to provide client details in circumstances outside of child protection concern.

## **Recommendations**

**The Goal of Community services section 26 should be to provide accessible early intervention services.**

(The emphasis on confidential notifications overlaps with Child protection functions and emphasises better surveillance rather than better referral and better access to services.)

**We recommend clarifying the disclosure rules or otherwise ensuring that service contracts with Community services cannot compel provision of client information to DHS.**

**Where a community member wants to make an anonymous report this should be referred to Child Protection.**

**Referrals to Community service agencies should occur with the parents knowledge and further contact with other services should occur only with parents consent.**

#### **4. Faster Permanency Orders and Other Issues**

We support the goal of enhanced stability we don't believe that time limits in out of home care are the most effective way to achieve this. We believe there is a cultural bias in using such an indicator. There is a bias in that some groups are already overrepresented and second it undervalues the value of some out of home care arrangements particularly in some cultural settings.

We strongly oppose any attempt to make the time limits for stability plans in the 0-2 year period even shorter than in the proposed Children Bill. Case planning should drive the decision on how long to pursue permanency. The consultations confirmed that there is no limit on how soon the Department can do a stability plan. There is no requirement to wait until the timeline is reached. The department has virtually unfettered discretion on when it decides to shift to a plan for permanent placement or other stability option.

As the Department already takes some children away as soon as they are born and there is estimated to be increasing number of children in this situation it is likely that the Department will be seeking extremely short time limits on any attempt to achieve reunification.

Under the new Children Bill by the time a matter comes back to Court there may well have been 3-9 months of a case plan involving a permanent care or guardianship plan. We believe this significantly reduced the ability of the court to be assured that family reunification was seriously considered. It will be very difficult for the parents to argue for any change to this case plan when it comes back to Court. This is less of a problem if the parent understood the reasons for the case plan and accepted the change. It still means that effectively it is the Department who are making the decision to give up on family reunification. It may be objected that this is effectively what happens now. The difference in the new Children Bill is the presumption that delay in achieving permanence is damaging to the child and family reunification as an objective is less protected.

Once the case plan objective is no longer for family reunification the parent has effectively lost almost any chance of challenging that plan. Hence our earlier proposal that parents should obtain legal advice prior to agreeing to a case plan which has a goal other than family reunification.

#### **Recommendations**

**Stability planning should be governed by the objects of the Children Bill, case planning principles and policies not arbitrary time lines.**

**Section 102(4) should be amended or removed.**

**When the objective of a case plan changes from family reunification or has a second objective of non family reunification the parent should be provided with legal advice prior to agreeing to this change.**

### **Guardianship Orders**

**We believe Guardianship order should include a provision for access. Failure to include this deprives the child of the possibility of a continuing relationship and support from a parent or parents. It is in conflict with Section 10 (vi).**

### **Power to compel reports**

**We do not support changes to the present arrangements in relation to the availability of Children's Court Clinic reports.**