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House of Assembly Select Committee on Child Protection
Parliament House
HOBART TAS 7000
Sent by email only

Dear Sirs

SUBMISSION

I am a barrister who frequently appears in the Magistrates Court as Separate Representative for children who are the subject of care and protection orders. I have been undertaking this role for about 7 years. I have represented mothers and fathers in child protection matters for about 15 years.

I have never appeared as Counsel in an application for the Secretary. I did work for about a year as a Policy Officer in Youth Justice (DHHS) in 2000-2001. I worked as a lawyer in private practice, and then at the Legal Aid Commission from 2001 to 2009.

In this submission I have been advised and assisted by the co-signatory to this submission Mr Pat Fitzgerald, Senior In - House Counsel at the Legal Aid Commission of Tasmania. Mr Fitzgerald is a senior barrister and solicitor with extensive experience in the Child Protection and Family Law jurisdictions.

Paragraph (b) and (c) of the Terms of Reference

In referring to subparagraph (b) I am assuming that the Court, as part of the Department of Justice, is an "Agency."

There is no doubt that a specific Children's Court is long overdue for the following reasons:

1. Shell-shocked and emotional parents are having to attend a criminal court and have their matter slotted in between criminal matters. The Magistrate had an inquest interrupted for our child protection matter the other day. It means little to us lawyers but the parents have heightened perceptions at times like this. One of the major hurdles to parties consenting to an order is an unsurprising inability to agree to an order putting one's child in "welfare." People feel like failures and criminals. Having them appear in a criminal court hardly militates against this.

2. Optimally there would be far more active case management of matters by Magistrates. They simply don't have time and also have no chance of recalling a matter between each appearance, given the sheer number of criminal matters they see every week. Magistrates could be having compliance check dates to see parties are doing what they said they'd do. It would help if the Magistrate determined a check list of actions each party must attend to, especially during assessment periods, prior to the next Court date, in order to settle everyone's expectations and keep matters on track. Traditionally, Magistrates appear loathe to tell the Secretary to do anything as it may appear to impinge on funding discretions. I think this can be handled. I often notice how parents really notice and respond well when the Magistrate seems across the material and is more actively case managing than simply relying on the lawyers to push the matter through the system.

3. Magistrates ought to be empowered to hold pre trial conferences and have more control and direction over what evidence is being presented and in what form. There is nothing like a judicial officer voicing prima facie views along the way to assist the parties.
4. The selection of judicial officers can then be more focussed to suit the appointment and jurisdiction, as occurs in the Federal Courts. It would also assist in the development of consistent practice and philosophical approach by the Court.
5. Magistrates ought to be specifically empowered by the Act (rather than by inference) to determine access arrangements and initial reunification plans (although these must be a work in progress as circumstances invariably change. Most parents agree to an order being made but don't agree to the access being offered, which is often woefully inadequate for both child and parent's mental health as a direct result of funding restrictions. Sorting out access arrangements for children and parents is considered so important by Australian society that we have a Family Court and a Federal Magistrates Court well funded to deal with such questions. There is a huge body of case law and social science research on the effect of various access arrangements on the future well being of children. Yet for these vulnerable children, this all-important question is administratively shunted off to an overwhelmed case worker who is being told there is insufficient funding for anything but two supervised hours a fortnight. Some Magistrates take the attitude that they are "not there to micromanage the Department" when asked to deal with access issues, yet access is one of the major concerns of the judicial officers of our mammoth Family Court and Federal Magistrates Court system.

6. The judicial case management inherent in the less adversarial process adopted by the Federal Courts (the Family Court in particular) is recommended to the Committee, not for adoption but to determine best practice in a well-funded Court dealing with families. In particular the principles enunciated at section 69ZN of the *Family Law Act* 1975.

Paragraph (b) of the Terms of Reference

I strongly agree with the idea that matters are not closed until there has been recent home visits and recent meetings with the child's teacher or day carer. This often happens but it should be mandatory. Also, if "linked in to support networks" is a reason for discharge (and it often is) then some agreement about reporting back by those support networks if the family drops out needs to occur.

Paragraph (d) of the Terms of Reference

DRUG TESTING

In my experience, most applications in recent years come about because of violence, neglect, and/or poverty directly caused by drug use. This is invariably so when an application is made subsequent to an unborn baby alert.

One of the main challenges for child protection is providing reliable evidence to the Court, based as matters often are on notifications. Drug testing is a tremendously good tool for getting good reliable evidence before a Court. And whilst it is often performed, it is performed not nearly enough.

So often I am told that funding for drug testing will be sought, and this can take weeks. And if and when some limited testing money does come through, the clients (almost all of whom live north of Creek Road) are told that they must find their own way to Sandy Bay Pathology for testing immediately (as the testing has to be done on the same day). If they do not attend it is assumed they would have failed the test.

Clearly this is not optimal. More testing should be funded, especially in the assessment period, and it should happen far more often (e.g. once a week or once a fortnight). It is the most cost-effective way of sorting out if there really is a drug problem or not. Parents should be able to access other pathologies apart from one of the few suburbs from which I have never had a child protection family live. It has reached the stage where on at least two occasions I have asked the Legal Aid Commission to pay for the drug testing. This cost-shifting from the applicant to the Child Representative is not appropriate.

KINSHIP PLACEMENTS

It is my perception based on my experience over years that kinship placements are best. They keep the child in a family that already loves that child and with whom the child is attached. The kinship carer usually has a bigger investment in the child than a foster carer. The alarming issues of attachment disruption and grief and mental damage through loss that invariably accompanies foster care placements arise less often and less significantly. Parents also are less traumatised and more reasonable when children are with their family. They are far less likely to complain about the standard of care the child is receiving. It is also consistent with the objects of the Act.

Child Protection is good at many things, but in my experience they are prepared on many occasions to risk compromising the short and long term emotional and psychological wellbeing of a child in order to ensure his or her physical safety, by placing it with a succession of strangers. This grief and trauma can surface years later and be the subject of compensation claims and mangled lives.

Is some but not all cases, identifying appropriate kinship placements is left to the parents, by which time the children have been in foster care for weeks or months. The usual Police checks and assessments can take days or can take weeks.

I have had more than one case of babies being removed from drug-using mothers at birth and placed with several carers in the first months of life. The bonding/attachment damage to mother and child may be horrific and irreversible but given the risk to an infant who cannot self-protect, it is an understandable response.

The Secretary's check list should force workers to identify and assess any kinship placements prior to taking children unless it is an absolute emergency and even then, an assessment and police check can be done in hours. It is simply not good enough to use foster carers because they are easier. If this were done more often I believe many applications would progress far less contentiously. The other point is that possible kinship placements tend to pop up during the life of the application so it needs to be an ongoing commitment and process.

SCHOOL CHANGES

It is not uncommon for a child's foster placement or school to be changed without any reference to the Child Representative, who is not even advised after the event on many occasions. Presumably, this is because it is seen as an administrative/case management decision and not part of the judicial determination of whether a child is at risk.

This completely fails to appreciate that a child can be at risk of mental health damage if it is taken away from both its school and its family. In my view, although it is a case management matter it ought be flagged and a collaborative approach sought in order to minimise angst during proceedings.

WARRANTS

Warrants ought not be executed at schools unless the Secretary can demonstrate that it is the only safe manner of proceeding. I have had this occur when in my view it was not necessary. Once can only imagine the effect of being taken by Police and Child Protection in front of one's peers.

VIDEOS

Once children are taken, parents usually have no case worker and no support unless they locate it themselves. The Child's Case Worker does his or her best but they are not there for the parents. The support workers who supervise access do their best, as they are often targeted by anxious parents, as does the Child Rep, but this is not their role. The situation has been exacerbated by Legal Aid funding restrictions which mean most parents do not get aid if there is a Child Rep. Parents have many questions and in any event, are usually incapable of listening to the answers, for various reasons.

I see no reason why instructional videos cannot be offered and also placed on the internet that answers common questions parents have in a format they can understand. For example, a role play showing a bad access visit compared to a good one; what you can expect from Court; what the consequences are of failing to show up to appointments or follow reasonable directions; what the usual reunification process looks like.

More funding ought to be given to Legal Aid. Lawyers play a vital role in talking people through the process and helping them realise that a cooperative approach invariably results in getting one's children back more quickly. Another option would be to fund a "support package" around each family who has their children taken away from them, which would include the parent being allocated a community support worker who would be the liaison officer and supporter for that parent. Usually what happens is a child is taken, the parent is in a daze, and then they are told to identify and link to to a myriad of support networks such as Housing, Drug & Alcohol, Counselling, parenting skills, and the like. Sorting this out can be a full-time job and it is not the case worker's job, although they try to help.

WEEKEND ACCESS

Unless the child is in a kinship placement, weekend access does not occur. When one has school age children and working parents one can see the difficulty in this. I appreciate the funding constraints but access is a major bone of contention which often precludes settlement.

Paragraph (b) of the Terms of Reference

Usually, when people have their children taken from them, they lose their Centrelink benefits and then lose their accommodation. They go from being settled to being homeless very quickly, and certainly not in a condition to take the children back any time soon.

Quite often this is warranted, as the parents have been given every warning and every chance to provide a safe environment before the child's removal. At other times it is an unfortunate and unhelpful consequence of the removal.

Some sort of moratorium on rent or rent reduction for a very limited period (say four months) for public housing recipients would assist. This may disadvantage private renters or home owners. It is a difficult issue but one worth mentioning for discussion between Housing, Colony 47 and the Secretary.

CHILDREN'S COMMISSIONER

The Commissioner for Children ought to be empowered to intervene in current proceedings by invitation by the Court (much as the Federal Court can invite the Secretary to intervene in Family Law matters) in exceptional circumstances or when there is a serious policy issue being aired. So many interesting policy matters are raised in proceedings which, when the proceedings are finalised, just fade away from the lawyers' minds as they turn to the next case, and never communicated to the Commissioner. It would improve his or her ability to discern appropriate policy recommendations. The public would also have more faith in the system given his independent role. It would in appropriate circumstances provide a check/balance on an applicant who is really in an extremely powerful position – he is the one who doles out access, and if you disagree with the Secretary a court hearing might be many months away, during which time he is in total control.

Thank you for this opportunity to participate in this inquiry.

Yours faithfully

PAT FITZGERALD

KATE MOONEY