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FAXED

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By Fax: 9228 3935

Dear Ms D'Adam

Re Implementation of Wood Special Commission of Inquiry recommendations

I thank you for the opportunity to respond to the recommendations contained in Justice Wood's report and for the invitations for representatives of the Law Society to participate in the stakeholder forum and consultation meeting held recently.

This submission, which focuses on Chapters 11, 12, 13 and 15, has been prepared by members of the Law Society's Family Issues Committee who have considerable knowledge and expertise in care and protection matters and its interaction with family law.

Some of the recommendations contained in those Chapters are supported, however the following comments are submitted for your consideration.

Chapter 11: Statutory basis of child protection

- 11.1. v The Committee did not agree that section 28 should be proclaimed.
- 11.1.vii This recommendation is not supported as it is considered disclosure of the reporter's details to a law enforcement agency would deter people from reporting. This will adversely impact on the aim of the legislation which is to protect children.
- 11.1.viii The Committee considers section 71 is wide enough already and it is dangerous to amend it in such a way so it would be unlimited.



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- 11.1.x The Committee opposes the recommendation to limit Children's Court's power to make contact orders for children to see their parents or other significant family members in cases where the Court has found there is no realistic possibility of restoration.

That is to say, it is essential for the Court to maintain the power to make contact orders where there is no realistic possibility of restoration of the children to the birth family.

Children in long term care are some of the most vulnerable children in our society. Under the legislation they are entitled to special protection and assistance. To leave the issue of their contact with their parents and family as an administrative matter to be determined solely at the discretion of the Director-General is highly inappropriate and disenfranchises them. It is unfair to the children, the parents/family and to the officers of the Director-General.

In summary the reasons why this recommendation is opposed are as follows:

1. There needs to be an independent mechanism of review of any decision made by the Director-General to alter or reduce a child's contact with his or her family. Such review mechanism must be accessible and transparent. The Children's Court has been providing that mechanism for many years and should continue to do so in the future.
2. Any agreement made about contact between the child's representative, the parent and the Director-General that is not able to be enshrined in court orders lacks certainty and clarity. How can it be properly said that permanency planning for a child has been satisfactorily addressed when the very important issue of that child's contact with his or her birth family is, in effect, left up to the whim of one of the parties to the agreement – the Director-General
3. Currently a significant number of cases before the court can quite properly be resolved by negotiation. A parent can accept advice to concede on the ultimate issue of realistic possibility of restoration in return for a guaranteed contact regime which can be negotiated and made into court orders. The parent then has some certainty about the continuation of the relationship with the child. In the absence of the power to make contact orders, a parent will have no incentive to compromise on the ultimate issue. They will see that their only option is to litigate as they will not trust that DoCS will allow appropriate contact in the future. The effect of this will be that many more cases will run to a contested hearing which will involve a significant increase in the use of Court resources. The obvious consequence will be a blow out in the length of time it takes the Children's Court to determine cases. Keeping the contact power in the Court keeps the ability for settlement of all issues in a case in appropriate matters. The early resolution of the litigation is obviously in the child's best interests.
4. After final orders are made about a child in the Children's Court the management of the case is transferred to the Out of Home Care Team within the Department. This means the delegates of the Director-General who proposed and/or agreed to the care Plan about the child (generally "front line" child protection caseworkers) will hand the matter over to other delegates of the Director-General (the out of home care team) or to external agencies (e.g. Barnados, Life Without barriers etc). Those persons who were not a party to the negotiations about the child's contact with the birth family may well take an entirely different view as to what is appropriate contact for that child. In the absence of any court orders about contact, the latter caseworkers will be able to completely vary the contact

arrangements that were proposed at court. If the Court is deprived of jurisdiction over contact disputes, the family will have nowhere to go to enforce the contact arrangements agreed to when final orders were made. The effect of this will be that the child will see the birth family less than was envisaged by the child's lawyer and the Court at the time the Care Plan was approved and the family will have no remedy to go to about this. Such an outcome will be disastrous for many children in long term Out of Home care.

5. The fact that a parent is found by the court not to be capable of raising the child full time does not necessarily mean the parent has nothing to offer the child as a contact parent. This is particularly the case with slightly older children who have had the time to bond and attach to their birth family. The maintenance of such a bond is essential for the child's sense of self and of self worth. Children need to be able to maintain a connection with their primary attachment figure who is almost invariably a member of their birth family – be it mother, father, and older sibling or a grandparent. It is unconscionable to allow the maintenance of that important relationship (through contact arrangements) to be subject only to administrative whim rather than judicial assessment. Further to allow it to be subject to mere administrative assessment with absolutely no access to an avenue of review or appeal is the antithesis of making the child's welfare the paramount considerations.
6. The absence of court ordered contact also disadvantages birth families who are not experienced in engaging with or advocating a position with bureaucracies. Indigenous children make up more than 30% of children in out of home care. Indigenous families and non-English speaking families traditionally have difficulty in dealing with government and near-government agencies in terms of advocating a position – such as the desire to see their children. In the absence of court orders, a family will have to put their own "case" to the Department about their desire to see their children. This will significantly disadvantage indigenous families and families from non-English speaking backgrounds. Currently, such families are entitled to representation and advocacy by legal representatives in the court process to produce contact orders. This recommendation will remove that right.
7. If contact is decided administratively rather than judicially then there will be a strong tendency for the adoption of a "one size fits all" approach. Proposed contact standards already exist with the Department and it can reasonably be anticipated that if the decision making power is vested solely within the Department then these will be applied across the board. The current approach of the Court determining contact allows a detailed consideration of each child's needs on a case by case basis. Each child and each family are different. What suits one family may be wholly inappropriate for another. The power to make contact orders allows this individual assessment of each child's contact needs.
8. Parents with children in the "family law system" have the right to bring applications about contact to their children before the court at any time that there is a significant change of circumstance. This allows the alteration of contact orders to adjust to changes in the child's life. Why should children in the "care system" be afforded substantially less rights in this area of contact with their family?
9. The Court's ability to monitor the progress of a child in his or her placement through the use of section 82 reports will be significantly compromised if the court has no power to make orders about one vital aspect of a child's life – contact with significant persons. If a concerning issue about contact appears in a section 82 report then the child's representative, the parents and indeed the court will be

powerless to do anything about it. Only the Director-General will have any power to act. This undermines the safeguards provided by the section 82 reporting system.

10. Some birth families can be aggressive and demanding in their dealings with the Department. Currently, when faced with demands by such families to see their children in out of home care, the delegates of the Director-General can abide by court imposed orders in regulating contact with the children. Without contact orders, the Departmental officers will have no court orders to fall back on and may be faced with repeated and aggressive approached by angry parents over the whole time period that a child is in care. The Court Orders provide a useful gate-keeping role in these circumstances.

Whilst strongly advocating for the retention of the Court's power to make contact orders, the Society supports the requirement for some form of compulsory alternative dispute resolution before a contact dispute is litigated in the Children's Court. This could be similar to the requirement in the Family Court for compulsory ADR (mediation, conciliation or counselling) before commencing proceedings.

- 11.1.xi As a matter of principle this is supported. However the Committee identified there may be inherent difficulties in the Independent Children's Lawyer or the Direct Children's Lawyer commencing proceedings by way of an affidavit outlining the evidence to rely on to satisfy the leave requirements of the Act. There are also identified difficulties that arise from the capacity of the ICR/DLR to nominate placement options particularly in circumstances where other parties are not seeking to disturb current care arrangements and/or orders.
- 11.1. xiv The members noted the current process works well but agreed that the Act should be amended so that a section 82 report be filed and served to all parties and the Court.
- 11.1. xv It was noted that the Court currently has this power but only if the parties consent. The Committee supported the Court's power to direct the clinic report without the parties consent.
- 11.2 The Committee does not agree there should be a feasibility study.
- 11.6 The Committee does not support this recommendation as it is considered this would be confusing.

Chapter 12: Other Models of Decision Making

Whilst the Law Society supports the concept of Mediation, the Committee recommends that it not be mandatory as compulsion will not necessarily bring about agreement. It would be more likely to be successful if voluntary.

- 12.122 The Committee agrees with this, provided it is done so only in appropriate cases by trained Mediators, with consent of all parties (not mandatory).
- 12.123 This was also agreed, provided that it is structured and confidential and convened by a legally trained person who is also trained in Mediation.
- 12.124 ADR should occur only when appropriate and be voluntary rather than mandatory.

- 12.125 The Care Act would require some amendment, in respect of the qualifications of who is able to conduct ADR. Although the Law Society supports the concept of Mediation, the Committee's view is that it not be mandatory and more likely to be successful if voluntary.
- 12.126 ADR processes, when compulsory, can actually have the effect of extending the length of time a case is in the Court system, resulting in delays in finalising a case and increase in costs, as often parties have intractable differences.
- 12.127 Judicial Officers serve the Court system best when hearing and determining cases, rather than being involved in ADR process or in carrying out duties which a Registrar can conduct.

Delays in hearings in the Family Court have occurred partly as a result of the Judges of the Court adopting docket systems (as a result of the Less Adversarial Trial process 'LAT') and conducting directions hearings (which Registrars can do), rather than hearing cases. This has had the effect of increasing parties' costs in these matters, including the cost of transcripts in cases where there are lengthy delays between the first day of the LAT and the next day of the LAT being listed several months later

It would be best if requirements for adducing evidence are in accordance with the Common Law Rules of Evidence and The Evidence Act, to assist the Court in determining cases.

Chapter 13: Court Processes

- 13.1 The Committee does not agree with this recommendation and recommends that an overseeing body should act as a Rules Committee by setting the Rules and Practice Directions and seek community consultation in doing so. The overseeing body should be representative of the stakeholders involved in care and protection matters.
- 13.2. The Committee agrees, as a general principle, with the recommendation that the Director General should be required to only to file relevant information immediately, as the current requirement to file all evidence relied on at the first return date is perhaps overly onerous.

However, the Committee is also of the view for natural justice transparency and to ensure that there is best evidence placed before the Court in order for the Court to make child focused safe decisions that all evidence relied on by the Director General should be filed in a timely manner.

There remains the aspect of who determines what is relevant and in those circumstances the "Model Litigant Principle should apply". That is, all information is placed before the Court and that there is full and frank disclosure.

The removal of children /young people from the care of their parents/significant others should be made where there is evidence to support that decision.

- 13.3 The Society does not support the recommendation that the Department of Community Services produce its file as evidence to support its case with the onus on the parties defining what elements of the Departmental file is relied on to support an assertion that a child is in need of care and protection.
- 13.8 The Committee did not support this recommendation to limit only specially accredited children's lawyers to act for children. Despite the concerns in the Report about a poor standard of legal representation, there are sufficient safeguards in place to protect care clients under the Practice and Conduct Rules. In addition, it was noted that Legal Aid provides special training to solicitors acting for children.
- 13.9 The Committee supports as a matter of principle any action which will elevate the status of the Children's Court judicial officers and of the Court itself. However, problems were envisaged in appointing the Children's Court Magistrate to the status of a District Court Judge, which is a higher judicial status than that of the Chief Magistrate of the Local Court.
- 13.10 The Committee supports this. However it emphasises that while this change is occurring, there should be no impediment to non-specialist magistrates sitting, when specialist magistrates are not available.
- 13.11 The Committee strongly disagrees with this recommendation as it was considered that the adoption of a docket system would result in additional time and further delays. A docket system would also place extra pressure on the already strained resources of Legal Aid.
- 13.12 The Committee agrees with this item however recommended that applicants for this position, who have suitable qualifications and experience.

Chapter 15 Child Protection and the criminal justice system

- 15.1 The Committee supports the single recommendation for an after hours bail placement service but is of the view that further and stronger recommendations were warranted.

I trust these comments are useful. Members of the Family Issues Committee would be willing to participate in further consultation.

Should you require any additional information, please contact Maryanne Plastiras, Responsible Legal Officer, Family Issues Committee, on 9926 0212.

Yours sincerely



Joe Catanzariti
President