

Achieving safe and certain homes for children

Recommendations to the *Childrens, Youth and Families Act 2005* based on the experiences of VLA clients

Since changes to the *Children, Youth and Families (Permanent Care and Other Matters) Act 2014* were first introduced, GPV/KCV, along with a number of other authorities, has campaigned against them, as addressed in this article. GPV/KCV can only hope that this report brings enough pressure to bear that the legislation will be changed to better protect family rights.

In August 2014, the Victorian Government passed the *Children, Youth and Families (Permanent Care and Other Matters) Act 2014* (the permanency amendments) in an effort to ensure that decisions about the care of children are made in a timely way, and that decisions promote permanency of care.

Four years since the permanency amendments came into effect, Victoria Legal Aid (VLA) has undertaken a comprehensive review of its data to understand the impact of the permanency amendments for its clients.

VLA has a significant presence in the Family Division of the Children's Court (court), providing legal advice and representation services to Victorians who are involved in matters before the court. In 2018-19, VLA provided 9,626 grants of assistance to child protection clients.

This report makes five key findings showing that the intention of the amendments – timely, safe, permanent homes for children who need state intervention and prompt support for families at risk – are not being achieved. It also finds that necessary public health measures responding to the COVID-19 pandemic have exacerbated existing challenges for parents seeking reunification with their children.

VLA makes four overarching recommendations and most urgently call for an amendment to the reunification timeframes to provide the court with greater discretion to make reunification decisions including but not only for delays caused by COVID-19 service reduction or hearing delays and in the best interests of the child recognised in the *COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020*.

VLA has been engaging in the government's longitudinal study into the impacts of the permanency amendments. And has prepared this report to contribute to the important public policy discussion on the legislative, policy, practice and resourcing changes necessary to enable the amendments to operate in a way that will provide the best outcomes for children and not unfairly disadvantage families.

Key Findings

Permanency in law is not the same as a permanent home

The permanency amendments are not achieving their objective of certain, permanent homes as quickly as possible for children in the child protection system. Four years since the amendments were introduced, there has only been a slight increase, at best, in the use of child protection orders that place children on a pathway to remaining or returning to the care of their parents or, for those children who cannot be safely cared for at home, facilitate a permanent care arrangement as soon as practicable.

At the same time, there has been an increase of approximately 50 percent in the proportion of care by Secretary orders made despite this being the least certain and permanent outcome for a child.

Rigid timeframes may prevent family reunification, contrary to the intent of the legislation and best interests of the child

The limited time family reunification orders place on a parent to address protective concerns (refer to page 10 for further details) and be reunified with a child is not working as intended to minimise the time that a child is in out-of-home care, and may be unfairly penalising parents for circumstances outside of their control.

Where parents are provided with early and ongoing support from child protection practitioners, there are consistently better outcomes for children and families. However, in VLA's experience, long wait times, costs, limited services near to a parent's home or lack of other services such as public housing are causing significant barriers to parents addressing protective concerns within the timeframe.

For parents who may need additional or more intensive supports – such as those with a disability, experiencing a mental health issue or family violence – a lack of availability, delay or challenge in accessing services can be more acute and VLA data shows they are at an increased risk of having their children removed from their care.

Initiatives that support connection to community and culture are showing positive results, where complied with, but Aboriginal and Torres Strait Islander families remain overrepresented

Where used and complied with, new initiatives and legislative amendments including the requirement to adhere to existing initiatives aimed at improving connection to community and culture, provide culturally appropriate court processes that facilitate greater family participation and support the right to self-determination are contributing to improved outcomes for Aboriginal and Torres Strait Islander children. Four years later, the proportion of Aboriginal and Torres Strait Islander children in out-of-home care has reduced by approximately 14 percent. However, Aboriginal and Torres Strait Islander children remain over-represented in the child protection system and including on care by Secretary orders.

For the period 2016-2020, of all final orders made, the proportion of Aboriginal and Torres Strait Islander children on care by Secretary orders was an average of 22 percent compared to an average of 17 percent of non-Indigenous children on the same order.

At the same time, significant delays in the planning and finalisation of cultural support plans is contributing to connection to culture and community for Aboriginal and Torres Strait Islander children being impeded.

Reduced court oversight limits opportunity for review of decisions to ensure they are in the best interests of the child

The court's reduced level of decision-making oversight and discretion as a result of the permanency amendments may be leading to outcomes that are not always in the best interests of the child and inadvertently prolonging court proceedings.

VLA sees examples where children would benefit from maintaining an ongoing relationship with their parents despite living in out-of-home care but the court is unable to make conditions on protection orders to support this if the child is unlikely to be reunified with their parents.

A child can also be moved between different placements on several order types without any independent court oversight of the frequency or reason that a child is being moved. Recent reports (1) have shown that some children are at more risk than others of experiencing placement changes, causing significant and potentially ongoing instability and uncertainty in their lives.

While administrative review avenues were introduced to provide children and families the opportunity to seek case plan reviews of decisions made by Department of Health and Human Services (DHHS), VLA has observed a lack of clarity about the process for conducting a review and obligation for DHHS to do so

when there are concurrent court proceedings, uncertainty about the length of time before an outcome to an internal review should be provided and whether VCAT has jurisdiction to conduct an external review before, or if, an internal review has not been completed (but significant time has lapsed since the internal review was sought).

COVID-19 has exacerbated existing challenges to family reunification

At time of writing, it has been over six months since Victorians have experienced a range of public health measures responding to COVID-19. VLA's experience indicates that there are many parents for whom existing challenges to meeting reunification such as barriers to service access and availability have been exacerbated. Families are experiencing reduced or temporary cessation of services, restrictions on movement and social distancing measures preventing face-to-face contact with children, and court adjournments and backlog.

VLA is pleased to see the government's recognition of the risk COVID-19 measures present for many parents to meet reunification timeframes in the extension of the COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020 (2). However, VLA is concerned that this amendment only allows for a maximum of six months longer on a family reunification order, when service reduction and delays in court hearings have already affected families for six months and are likely to continue to do so for some time yet.

Further, COVID-19 has highlighted an existing challenge with the rigidity of the current timeframes. VLA continues to encourage the government to amend the timeframes for exceptional circumstances, including but not only for delays caused by COVID-19 service reduction or hearing delays and where it is in the best interests of the child.

Recommendations

Recommendation one: Amend reunification time frames to allow the court to make decisions in the best interest of the child.

Allow the Children's Court to make any protection order that it deems to be in the best interest of a child, including making or extending a family reunification order, even if that child has been in court - ordered out-of-home care for a cumulative period of over 24 months

Recommendation Two: Improve court oversight and discretion through legislative reform to enable better outcomes for children

Allow the Children's Court to, in the best interests of the child:

- Make conditions on any protection orders; and
- Name a placement on an order

Recommendation three: Address the ongoing over-representation of Aboriginal and Torres Strait Islander children on Care by Secretary orders by:

- continuing to build upon the success of initiatives such as Marram Ngala Ganbu that provides a culturally safe and appropriate response specifically tailored to Aboriginal and Torres Strait Islander families involved in the child protection system; and
- introducing oversight mechanisms to ensure that there is compliance with requirements for cultural support planning and adherence to the Aboriginal Child Placement Principles

Recommendation four: Support parents to reunify with their children safely and quickly by providing more and better resourcing to:

- expand availability and timely access to vital service such as family violence services, public housing, drug and alcohol services, children's services, parenting support, mental health service;
- expand access to culturally safe initiatives and services for Aboriginal and Torres Strait Islanders families; and
- increase the capacity for specialist Children's Court Magistrates to hear matters, especially in regional areas, to mitigate the impacts of COVID-19 adjournments.

What is this report about?

In August 2014, the Victorian Government passed the *Children, Youth and Families (Permanent Care and Other Matters) Act 2014*.

The permanency amendments introduced a range of changes to simplify court orders, focus the role of the court on a narrower range of matters, and to strengthen case planning processes (3). The intended objective of these changes was to ensure that decisions about the care of children are made in a timely way, and that decisions promote permanency of care.

The permanency amendments responded to findings made by the Protecting Victoria's Vulnerable Children Inquiry (4) and the Stability Planning and Permanent Care Project (5) undertaken by the DHHS. Both reviews found permanent care arrangements for children and young people were taking too long to achieve and there needed to be changes to policy, practice, and legislation to mitigate barriers to achieving permanency for children. Both reviews recommended the introduction of a new set of protection orders, and improvements to support and planning for Aboriginal and Torres Strait Islander children and families involved in the child protection system. The Stability Planning and Permanent Care Project also recommended that a time-limit was placed on family reunification (6).

The former Minister for Community Services, the Hon. Mary Wooldridge, in her second reading speech for the

permanency amendments, outlined the objectives of the permanency amendments:

'care arrangements for vulnerable children need to be settled as quickly as possible. Ideally, permanency will be provided by the child's own parents. Where this is not possible, within a reasonable timeframe, it is critical for the child's stability that an alternate permanent carer is identified to care for them until adulthood, while maintaining the child's relationship and connection with their birth family and culture' (7)

The permanency amendments came into effect on 1 March 2016. Throughout the drafting process of the amendments, concerns were raised by stakeholders about the short timeframe in which the amendments were drafted and passed, limiting the extent and depth of consultation. Stakeholders, including VLA, also expressed concerns about the fairness of some of the amendments such as the introduction of reunification timeframes and the reduction of court oversight.

Shortly after the amendments were introduced, a changed Government requested that the Commission for Children and Young People (CCYP) conduct a review to ascertain whether the amendments were meeting their intended objectives and if there had been any unintended consequences arising from the reforms. This review was conducted six months after the amendments were introduced.

In its submission to the CCYP review VLA expressed support for the objectives of the permanency amendments in principle but expressed concerns about how the provisions could impact on fairness and outcomes (8). The VLA submission included an assessment of the impact of the permanency amendments on its clients in the first six months of operation. At that early stage, it was difficult to assess the full impacts that the amendments were having on outcomes for clients. VLA recommended that a further review of the amendments be conducted after 24 months of operation.

CCYP in their final report also recommended a detailed review of the amendments be conducted in 24 months.

In response, the Victorian Government funded a two-year longitudinal study to understand the impacts of the permanency amendments on child protection practices (9). This study is now nearing completion and a final report containing recommendations is due to be delivered to DHHS in early 2021.

Four years on, VLA have undertaken a comprehensive review of VLA data to understand the impact of the permanency amendments for its clients.

Methodology VLA employed in this study

VLA analysed the data of all legally-aided child protection grants files from 2014-15 to 2019-20, including where it represented children and where it represented parents. It looked at substantive grants of

aid issued for primary and secondary applications, in-house and private practitioner duty lawyer services (grouped by application type). To understand client experiences pre-amendments, VLA analysed the average length of a grant file from first approval to closure of the file, file outcomes recorded at the closure of the grant file, and the relationship of the grant applicant to the child and child protection grant extensions. VLA also looked at the correlation between client demographics such as whether a client identifies as Aboriginal and Torres Strait Islander, has a disability, is experiencing a mental health issue, family violence or homelessness.

Where possible, VLA verified its data and findings with the Children's Court 2014-2019 annual reports,(10) DHHS quarterly reporting, (11) and findings of CCYP Inquiries: *In our own words*, Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system (2019) and Safe and Wanted – an inquiry into the implementation of the permanency arrangements (2014) (12).

VLA also conducted interviews with VLA lawyers to hear their reflections on the effect of the permanency amendments and whether its data reflected their clients' experiences. VLA has included several individual client experiences throughout this report.

A note on VLA data

The data used in this report has been de-identified and cannot be used to determine the outcomes of individual legal matters. Unless otherwise specified, all data is presented by financial year.

Limitations to data

- VLA data reflects file outcomes recorded at the close of a grant of aid file. This does not reflect the final order or outcome of a child protection legal matter. It reflects the order that was in place when a legal aid lawyer closed the grant file.
- There can be multiple grants of aid provided for one legal matter (for example, if there are multiple clients involved in the proceedings or if there is a secondary application made), therefore each VLA grant does not represent one legal matter, this can result in its data showing a higher overall number of legal matters than would have been concluded by the court in a year.
- There are limitations to VLA ability to draw conclusions on the length of a child's legal proceedings or to differentiate how long children, on average, are spending in out- of-home care on any one order because its data is based on close of grant file.
- VLA data on client demographics is dependent on a client disclosing this information, thus it is likely to be under- reported.

Client stories used in this report

Client consent has been obtained to include each client story. Given this, client stories featured throughout this submission may not reflect the full diversity of clients that VLA provides services to. The material procedural aspects have been retained for the client story however to protect clients' anonymity, names have been changed and other identifying details including age, gender or location may have been changed.

A note on language used in this report

VLA has used 'children' throughout the report to refer to children and young people under 18 years of age.

Where talking about Aboriginal and Torres Strait Islander people VLA has occasionally used 'Aboriginal' or 'Indigenous' including where it cite a report or quotation from another source.

What were the permanency amendments?

The permanency amendments introduced significant changes to the Children, Youth and Families Act 2005 including:

Changes to the 'best interests' principles

One of the considerations that informs what is in the 'best interests' of the child (the paramount consideration for decision-makers such as the DHHS and the court under the legislation) is to consider 'continuity and permanency' in the child's care instead of 'continuity and stability'.

Earlier case planning

It is a requirement that a case plan must be prepared for all children identified as needing protection at the point of substantiation (previously a case plan did not need to be prepared unless and until after a final court order was made). A case plan sets out the objective of the DHHS intervention and significant decisions made or intended for the care and wellbeing of the child, including where the child will live and who will have contact with the child.

Introduction of a hierarchy of permanency

All case plans must include a permanency objective to be considered in the following order of preference, depending on the best interests of the child: family preservation; family reunification; adoption; permanent care; long-term out-of-home care.

Aboriginal and Torres Strait Islander children

The DHHS must provide all Aboriginal and Torres Strait Islander children in out-of-home care with a cultural support plan that aligns with their case plan. Further, case plans are required to be consistent with the child's cultural support needs, maintain and develop the child's Aboriginal and Torres Strait Islander identity, and encourage the child's connection to their Aboriginal community and culture.

A permanent care order for an Aboriginal and Torres Strait Islander child cannot be made unless a cultural support plan has been prepared.

Removal of orders

Removal of the court's powers to make interim protection orders, supervised custody orders and

custody to third party orders.

Language changes made to the *Children, Youth and Families Act 2005*

Replacement of the language of 'custody' and 'guardianship' throughout the *Children, Youth and Families Act 2005* with 'parental responsibility.'

1 Sentencing Advisory Council 2019, 'Crossover Kids: Vulnerable Children in the Youth Justice System, Report 1: Children who are known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court, accessed 13 September 2020 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Crossover_Kids_Report_1.pdf> 69- 72.

2 COVID-19 Omnibus (Emergency Measures) and other Acts Amendment Act 2020, accessed 21 September 2020 <https://content.legislation.vic.gov.au/sites/default/files/bills/591238bi1.pdf>

3 The Commission for Children and Young People 2017 '...safe and wanted...: Inquiry into the implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014' accessed on 20 March 2020 <<https://www.dhhs.vic.gov.au/sites/default/files/documents/201712/Safe%20and%20wanted%20inquiry%20into%20permanency%20arrangements%20report%20June%202017.pdf>> 37.

4 The Honourable Phillip Cummins, Emeritus Professor Dorothy Scott OAM and Mr Bill Scales, published by the Department of Premier and Cabinet 2012 'Report of the Protecting Victoria's Vulnerable Children Inquiry' accessed on 11 September 2020. <<http://childprotectioninquiry.vic.gov.au/images/stories/inquiry/consolidated%20%20protecting%20victorias%20vulnerable%20children%20inquiry%20report%2027%20january%202012.pdf>>.

5 The Department of Health and Human Services 2014 'Stability Planning and Permanent Care Project 2013-14' (Final Report) accessed on 11 September 2020 <https://www.parliament.vic.gov.au/images/stories/committees/SCLSI/Children_Youth_Families_Bill/Stability-planning-and-permanent-care-project-2013-14.pdf>.

6 CCYP 2017, '...safe and wanted...': Inquiry (n3) 37-38.

7 Ibid.

8 Victoria Legal Aid 2016 'Submission to the CCYP Child Protection Permanency Amendments Inquiry' accessed on 20 Feb 2020 <<https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/submission-to-the-child-protection-permanency-amendments-inquiry.docx>>.

9 Department of Health and Human Services 2018 'safe and wanted – an inquiry into the implementation of the permanency arrangements' (webpage) accessed on 10 August 2020 <<https://www.dhhs.vic.gov.au/publications/safe-and-wanted-inquiry-implementation-permanency-arrangements>>.

10 Children's Court of Victoria 2015 'Annual Report 2014-2015' accessed on 13 September 2020 https://www.childrenscourt.vic.gov.au/sites/default/files/LIQ4183%20-%20CCV%20-%20Annual%20Report%202014-15%20%28Web%20Ready%29_R2.pdf,

Children's Court of Victoria 2016 'Annual Report 2015-2016' accessed on 13 September 2020 <<https://www.childrenscourt.vic.gov.au/sites/default/files/Children%27s%20Court%20Annual%20Report%202015-2016.pdf>>.

Children's Court of Victoria 2017 'Annual Report 2016-2017' accessed on 13 September 2020 <<https://www.childrenscourt.vic.gov.au/sites/default/files/Annual%20Report%202016%202017%20%28web%29.pdf>>.

Children's Court of Victoria 2018 'Annual Report 2017-2018' accessed on 13 September 2020 <https://www.childrenscourt.vic.gov.au/sites/default/files/Childrens%20Court%20of%20Victoria%20Annual%20Report_%C6%92_WEB%20%28final%29.pdf>

and Children's Court of Victoria 2018 'Annual Report 2018-2019' accessed on 13 September 2020 <https://www.childrenscourt.vic.gov.au/sites/default/files/191114%20Childrens%20Court%20of%20Victoria%20Annual%20Report%20A4%202018_19_WEB.pdf>.

11 Department of Health and Human Services 2020 'Child Protection and Family Services quarterly incident reporting data 2015-2016 to 2019-2020' accessed on 13 September 2020 <<https://www.dhhs.vic.gov.au/publications/quarterly-incident-data>>.

12 Commission for Children and Young People 2017 '...safe and wanted...: Inquiry into the implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014' accessed on 20 March 2020 <<https://www.dhhs.vic.gov.au/sites/default/files/documents/201712/Safe%20and%20wanted%20inquiry%20into%20permanency%20arrangements%20report%20June%202017.pdf>>

Commission for Children and Young People 2019 'In our own words: systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system' accessed on 20 March 2020 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-In-Our-Own-Words.pdf>>

Commission for Children and Young People 2016 'Always was always will be Koori children: systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria' accessed on 13 September 2020 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/always-was-always-will-be-koori-children-inquiry-report-oct16.pdf>>

and Commission for Children and Young People 2016 'In the Child's Best Interests: Inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria' accessed on 13 September 2020 <<https://ccyp.vic.gov.au/assets/Publications-inquiries/In-the-childs-best-interests-inquiry-report.pdf>>.