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19 March 2010

Inquiry into the Child Protection
System in the Northern Territory
GPO Box 1708
DARWIN NT 0801

**By email: submissions.childprotectioninquiry@nt.gov.au**

Dear Board

**RE: SUBMISSION - LEGAL MATTERS**

I refer to the above matter and the email from Ms Kathleen Chong-Fong dated 10th March 2010 granting me an extension for the lodgement of my submission.

I am the supervising legal practitioner at the Central Australian Women's Legal Service Inc. ("CAWLS"), located in Alice Springs.

CAWLS is a dedicated women's legal service providing free legal advice to all women and legal representation to those who cannot obtain it elsewhere. We have a special focus on women who suffer disadvantage, for example because of income, language and race.

CAWLS provides these services pursuant to 3 grants of funding to operate a women's legal service and an indigenous women's project both funded by the Commonwealth Attorney General and a domestic violence legal service funded by the NT Department of Justice.

The deficiencies in the legal system associated with child protection are extensive and complex. Unfortunately given the tight deadline for making submissions and the competing demands for my time, the following is only a few of the problems with the current system.

**Issues prior to legal proceedings being commenced**

Before legal proceedings are commenced in the Family Matters jurisdiction of the Local Court here in Alice Springs, it is my experience that it is the exception

rather than the norm that a conference, attended by all of the parties including their legal representatives, is held to identify protective concerns and then discuss and try to agree on measures to address them before proceedings are commenced. The proceedings are being issued very last minute, with parents often being served with court documents on Monday in relation to proceedings returnable on Wednesday. This makes it extremely difficult for parents to obtain legal advice and representation at the first hearing, even more so for parents living remotely.

Assuming that the parents are able to travel to the Court at such last minute for the hearing, they are often forced to use the services of the duty lawyer who can only provide them with brief advice due to time constraints and sometimes not at all due to an interpreter not being available. In the event the parents have been able to secure legal representation, the legal practitioner is usually forced to then make an application for an adjournment for 1 to 2 weeks to enable them to read through the court documents and to advise their clients accordingly. Requests for adjournments to the court liaison officer for the CEO are often opposed, totally disregarding the parents' rights. Often the court liaison officer emits the impression that lawyers are a hindrance to the process, rather than an integral and critical part of it.

My clients often report that before and even after proceedings have been issued, that they do not or have not understood through their communications with the CEO:

1. The role of the CEO;
2. The reasons that the CEO has become involved; and
3. What the CEO is requiring of them.

In my 9 months experience at CAWLS, I have not once known a CEO case worker to utilise the services of an interpreter when dealing with an Aboriginal or non-English speaking client. On one occasion I specifically raised concerns about my client's English comprehension and asked that the CEO utilise an interpreter when dealing with my client. No interpreter was ever used by the CEO in that case.

Further, the CEO's case workers do not explain to clients that all the information that they disclose to them, can be used against them in court proceedings. I have had one client report that they had confided certain information to a case worker about the father of her children on the basis that it was confidential, only to find that the information was then conveyed to the father placing her in a very difficult situation.

Accordingly, I believe that the Act should be amended

(a) to include a provision that a mediation conference be conducted prior to proceedings being issued except in cases of urgency; and

(b) to include a provision that parents must be served at least 7 days before court proceedings are commenced, except in cases of urgency.

Further, I believe that case workers require better

(a) training in relation to the ways in which they communicate with clients;

(b) training in relation to the information that they should communicate to clients;

(c) training to assist them identify when a client requires an interpreter and then actually utilising the services of a interpreter;

(d) access to interpreters; and

(e) training in relation to the legal aspects of proceedings eg. the rights of parties to be involved in proceedings and to have legal representation.

**Once legal proceedings are on foot**

1. The *Care and Protection of Children Act* (the "Act") is full of inconsistencies and short comings, for example:

   (a) The types of directions in protection orders contained in section 123 of the Act are inconsistent with the definitions contained in section 21 (which defines daily care and control of a child) and section 22 (which defines parental responsibility as including a person who has both the daily care and control of the child and all the powers and rights in relation to the long-term care and development of the child). The definition in section 22 means that it is not possible for parents to legitimately retain parental responsibility for their child on protective orders where the CEO wants to have the daily care and control of the child.

   Due to this problem, in Alice Springs a practice has developed whereby the following 2 orders are being made in relation to the one child

   (a) the CEO and the parents have the short term parental responsibility for the child; and

   (b) the CEO has the daily care and control of the child.

   In light of the definitions in section 22, the second order is inconsistent with the first order as the first order already includes the daily care and control of the child.

I believe that the definition in section 22 should be amended to adopt a similar approach to that contained in the *Family Law Act 1975* (Cth) where parental responsibility is broken down into

(a) parental responsibility, which is limited to longer term issues affecting a child such as medical, culture and education, but specifically excludes where the child is to live; and

(b) where the child is to live.

I believe that such an amendment is crucial to enable parents to retain parental responsibility for their children who are the subject of a protection order when the CEO wants the daily care and control of the child. Such an amendment would give effect to some of the fundamental principles of the Act, in particular the role of the family as set out in section 8.

The approach being taken in Alice Springs raises real concerns surrounding the validity of the orders currently in place and which continue to be made, and accordingly I believe the definition must be addressed as a matter of urgency to maintain the integrity of the system.

(a) The Act does not address how guardianship orders made until a child turns 18 under the Welfare Act, which required reviews to be conducted, are to be treated under the current Act, when they come back to the Court for review and what, if any, orders can be made in relation to discharging the old orders and to make new orders under the Act. I believe that an amendment needs to be made to the Act as a matter of urgency to address this issue to ensure the integrity of orders being made.

(b) The Act does not provide sufficient flexibility in relation to the orders that a Court can make on an adjournment. In Alice Springs, it is not uncommon for there to be some 6 months or more between when proceedings are commenced in the Local Court and when they proceed to a final hearing. This creates a real need for flexibility in relation to the orders that the Court can make during that 6 month period. For example on 2 occasions I have acted for separate clients where the CEO, whilst proceedings have been on foot, has refused to allow my client any contact to their child. On each occasion my client had been the primary carer of the child leading up to the CEO's involvement.

Pursuant to s.139 (d) an order can be made restricting the contact between a child and a person but there is no provision for an order to be made that contact must occur. On both occasions, although I was able to secure an order for contact for my clients, there was no clear provision in the Act that I could rely upon.

Further, I have been involved in numerous cases where whilst proceedings have been on foot, the CEO has promised to do certain things during a period of an adjournment, for example conduct DNA testing where there was a question of paternity or make arrangements for the client to access support services, but when the matter next comes back to court the CEO has failed to do the agreed things, usually to the detriment of my clients. I believe if the Court had had the capacity to record those promises in an order, that the likelihood of the CEO not complying would have been significantly reduced.

Accordingly, I believe that S139 should be amended

(a) so that s139(d) makes it clear that the court has a general power to deal with the issue of contact; and

(b) to add a further subsection (f) allowing the court to make such further and other orders as it deems appropriate.

2. Lack of familiarity and understanding of the Act by magistrates

3. Lack of Rules or Regulations to support the Act

   Despite the Act having been operative since 2008, there are still no regulations (save in relation to the Care and Protection of Children [Children's Services] Regulations) to support it. As a result, really beneficial sections such as section 127, which provides for a court ordered mediation conference, are still ineffective.

   Further, I believe rules specific to the Family Matters jurisdiction of the Local Court need to be developed, as currently it is unclear how other rules, such as the Local Court Rules apply in that jurisdiction.

**Following the conclusion of legal proceedings**

1. The Act does not provide any formal process for a person aggrieved by a decision made by or action taken by the CEO to have that decision or action reviewed.

   Although the Act does establish a Children's Commissioner, its functions are currently limited to an investigatory and monitoring role, it does not have any powers to rectify a decision or action taken where, following an investigation, it is apparent that such action is necessary and the service at fault refuses to address the issue. Therefore it is my experience that people making complaints to the Commissioner aren't doing so with a view to them receiving a direct benefit, but rather it is merely premised upon a hope that as a result of the Commissioner's investigation the service provided, in this case the CEO, won't make the same bad decision again to somebody else.

   Further, even the current eligibility of who can make a complaint to the Commissioner is so narrow that it excludes many complaints being made by people such as parents, foster carers and other service providers who cannot establish a sufficient nexus between the complaint and the child eg. a requirement for a parent to attend upon a psychologist or other medical practitioner.

   It is fundamental to good government that its decisions should not be beyond review which is effectively what has happened with the child protection system, as save for the Children's Commissioner and an appeal from a court decision to the Supreme Court, it fails to formalise any review process.

   I believe that a tiered review system should be implemented in the Northern Territory similar to that in operation in Victoria, namely:

(a) A decision by a team leader should be reviewed by the branch head of NTFC;

(b) A decision by the branch head of NTFC department should be reviewed by the head of NTFC generally;

(c) A decision by the head of NTFC generally should be reviewed by an independent court or tribunal (preferably a specialised one); and

(d) A decision of that court or tribunal can be reviewed by the Supreme Court of the Northern Territory

This model has a significant benefit to aggrieved persons, as it means that a decision has been reviewed at least twice before the need for formal legal proceedings becomes necessary. It is often extremely difficult for an aggrieved person to access legal representation to commence legal proceedings, as few people can afford to pay for a private lawyer and NT Legal Aid's guidelines only extend to grants of assistance where a party is the respondent, not the applicant to the proceedings. This lack of access to legal representation also as a matter of practicality precludes application being made by parents to vary or revoke protection orders per section 137 of the Act.

Often grievances arise in relation to the CEOs preparation and implementation of care plans, which can be modified effectively at any time, and which deals with significant issues such as where a child is to live and the contact that a person is to have with a child. Although parents and persons considered by the CEO to have a direct and significant interest in the wellbeing of a child are entitled to express their views and for regard to be taken of them, the Act is silent in relation to what rights these people have where they feel the CEO has failed to afford their views sufficient weight. These parents and other people are also precluded generally from having an advocate appear at the meeting with them to ensure that they can adequately express them, again because of a lack of access to legal representation.

In light of the above matters, I believe that the Act needs to be amended to incorporate a formal review procedure.

I further believe that NT Legal Aid's guidelines need to be reviewed (along with a subsequent increase in funding) to

(a) Fund applicants in relation to proceedings pursuant to the Act, along with funding to represent people who otherwise would be unable to advocate adequately for themselves at care plan meetings. This will also reduce the possible misunderstandings which currently occur between the CEO and parties and potentially lead to a greater number

of children being returned to the care of their parents and less legal proceedings being instigated in relation to needs for extensions for orders. In support of which, I say that on one occasion a case worker had my client sign a written agreement, without my knowledge or involvement, despite me having been on the record as acting for the client. My client breached the agreement but fortunately we were able to arrange a mediation to discuss the agreement and my client's breach. At the mediation, it became apparent extremely quickly, that my client had not understood the terms of the agreement and that is what resulted in the breach. I am confident that if I had been involved in the negotiation of that agreement, with an opportunity to discuss with the client its practical implications upon her, that she would not have entered into the agreement in the form that it was but with a slight modification which would have been acceptable to both the CEO and the client.

(b) Increasing the funding available to private practitioners funded by NT Legal Aid to act on behalf of parties in relation to child protection matters to make it more lucrative for private practitioners to get involved in this area of work (there is currently a massive disparity between the funding available to private practitioners undertaking NT Legal Aid funded family law proceedings and those in child protection proceedings. The disparity does not seem appropriate given the often more complex issues and further reaching implications of protection orders upon a child's/ parent's rights versus under a family law order.

As stated above, the short comings in relation to the child protection system from a legal perspective are significant and it is simply not possible to address them in such a short timeframe but rather needs a person, full-time, for probably 6-12 months to fully document its short comings.

The matters that I have raised I believe can be changed relatively quickly and would make an immediate, significant difference.

Should you require further information or clarification, please do not hesitate to contact me.

Yours faithfully,

Rowena Petrenas
Supervising Legal Practitioner