



**Office of the Public Advocate submission to the Development  
of a charter of rights for children and young people in care**

**July 2005**

## **Summary of Recommendations**

**Recommendation 1 (in reference to section 5.2):** That permanent removal into care of a child and the consequent severing of relationships with family is an option that the Charter should only allow as a last resort when all other less restrictive alternatives have been tried and failed.

**Recommendation 2 ( in reference to section 5.1):** That any reference in the Charter to a restriction on the rights of a child to have contact with family on the basis of their “best interests”, should require the reasons for this decision to be clearly documented and explained to both the parents and child. Part of this should require clear evidence of serious risk to the child. Moreover there should be a right of independent appeal by the child or parent to this decision.

**Recommendation 3:** That any Charter of Children’s Rights in Care specifically refer to the rights and specific needs of children with a disability or mental illness and the State’s responsibility to cater for those needs. Similarly in relation to developmental periods the Charter should acknowledge the changing needs of children at different developmental stages to ensure that these are responded to appropriately.

## **About the Public Advocate**

The Public Advocate in Victoria is appointed by the Governor in Council pursuant to the *Guardianship and Administration Act 1986* (Vic). The Office of the Public Advocate (OPA) represents the interests of people with a disability, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with disabilities are exploited, neglected or abused. Further material on the role of the office can be provided if required by consulting the Office of the Public Advocate's (OPA's) website: [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au).

## **Introduction**

The Public Advocate appreciates the opportunity to comment on this discussion paper, given our concern for families where parents and or children may have a disability or mental illness. A key test for any community is how well it supports the most vulnerable. Some families where the parent and/or child has a disability or mental illness can be amongst some of the most vulnerable and disadvantaged in our community. Many of these parents and children are disproportionately represented amongst those families whose children are in care. In the 2001 audit of children in care 34.5% of mothers and 7.5% of fathers were known to have mental health issues. (Dept. of Human Services, 2001). In this same report the comment was made that there is:

“...an extremely high level of disability” amongst children in care and indeed 37.5% of children in care had also been diagnosed as suffering from some form of mental illness. (Dept. of Human Services, 2001). For those children aged 13 and over this was as much as 43% of children in care having been formally diagnosed as having a mental illness”.

The Office has commented previously on the two papers released by the Department of Human Services entitled: *Protecting Children: Child Protection Outcomes Project* and

*on Protecting children: ten priorities for children's wellbeing and safety – position paper and technical options paper.* This submission will draw on the material presented in those reports and on material presented in the Office's *Submission to the Human Rights and Equal Opportunity Commission's and Mental Health Council of Australia's review of mental illness and human rights: 11 years on from the "Burdekin Report"* in 2004.

### **A Charter of Rights for Children in Care**

Specific mention is made in the discussion paper of the various national and international jurisdictions which have adopted such a charter. However, what is not clear is the extent to which such charters have improved the level to which the rights of children are actively promoted and protected. In the absence of this information it will be presumed that the existence of such charters has been proved to be beneficial.

In establishing a Charter of rights for children in care careful consideration needs to be given to the need to create a broader charter of rights which should apply to all children in the state of Victoria. Within this context the proposed charter could specifically address the needs of children in care. Given the documented problems of system abuse experienced by many children in care (Dept. of Human Services, 2001), the Office of the Public Advocate welcomes the proposed development of a Charter of rights. In having such a charter the responsibilities of both the service system and children should be outlined to offer greater clarity and accountability in the system which has a responsibility for promoting and protecting the rights of children in care.

The development of a charter which focuses on the rights of the child needs to be approached with some level of caution as there is a growing divide in the area of child welfare which is increasingly defined along rights lines, namely whether you are supportive of the child or the parents' rights. This divide is further assisted at times by the investigative focus of the child protection system which has a child rights perspective. Such a divide can make it difficult to support the family when one can be forced to choose sides. Care needs to be taken in any Charter of rights that this divide in policy and practice is not given further encouragement. The rights of child should not be seen as

occurring in isolation from the parent, or indeed family, context and this is equally the case when the child is placed in care.

### **Supporting families**

Whilst beyond the scope of this Charter it is important to outline why such a Charter needs to consider the needs of families where the parent and/or child have a disability or mental illness. In relation to parents with a disability, it is a concern of the Office that the judgements made by Child Protection Services workers and others about what is in the best interests of the child often highlight a clear lack of understanding of disability and indeed at times these responses can be discriminatory. The disproportionate representation of these families in child protection matters may, in part, reflect this bias in the way child protection assessments can be conducted. We are concerned by the attitude of some workers within the child protection system, which questions the extent to which parents with a disability or mental illness can adequately care for their children. Care should be taken with the presumption that disability in and of itself is a key determinant of parenting ability. There is a significant body of research, which has effectively refuted this belief (Mildon, 2003; McConnell et al, 2000). There are other factors, which have been found to have a more profound impact upon families and the capacity to parent such as unemployment, poverty, homelessness and social isolation. These judgements can also reveal presumptions about what is considered to be an effective parent, when the definition of effective parenting is far from clear. Indeed insufficient focus has been given to those parents with a disability who are successfully parenting. What this does reflect is a potential bias in the way in which these parents are viewed by the Child Protection system in relation to their capacity to parent.

The problems and damaging aspects of the current system of out of home care are well documented. However, despite the significant body of research undertaken in relation to the damaging effects of placing children in care, there appears to be a degree of eagerness by some workers within the child protection system to pursue this as the first rather than the last option in relation to families where the parent has a disability or mental illness. Sometimes this can be due to the lack of appropriate support services. The planning for

permanency should only occur after comprehensive assessments and trials have taken place. In the experience of this Office, too often planning for the child's permanent removal can be premature and based on prejudices and assumptions about disability and its perceived effect upon parenting.

Interventions with a beneficent intent which occur under the *Mental Health Act* and the *Guardianship and Administration Act* are governed by statutory requirements that the least restrictive option be used wherever possible. That principle should similarly be enshrined in this area of intervention.

**Recommendation 1 (in reference to section 5.2) :** That permanent removal into care of a child and the consequent severing of relationships with family is an option that the Charter should only allow as a last resort when all other less restrictive alternatives have been tried and failed.

### **Maintaining key relationships**

The OPA supports the inclusion of the right to maintain key relationships with family friends and community. There appears to be a prevailing belief that a complete break with the family of origin is more beneficial to the child's welfare than maintaining contact. This approach is not supported in any of the literature and seems to contribute to the system abuse experienced by some children in care (Thomson and Thorpe, 2003). This is of concern when ongoing contact with the birth parents does not appear to pose any significant immediate or ongoing risk to the child. This can have quite detrimental effects upon the child, particularly where they are moved between several placements (Dept. of Human Services, 2001). These decisions made by the court or workers as to whether contact between the child and their parents is in their best interests, needs to be clearly documented and reasons given to both parties if this contact is deemed inappropriate.

Therefore there is a clear need to review the current approach to out of home care to ensure that:

- A comprehensive and strengths-based assessment of the family situation should be the basis of intervention. This should minimise the extent to which presumptions are made about the person's capacity to parent often before they have had the opportunity to parent.
- It is genuinely considered as a last resort.
- Where a child is placed in care clear arrangements are made to ensure ongoing contact with the natural family is maintained unless it can clearly be demonstrated that this is not in the child's best interests.
- Greater transitional support needs to be offered to young people coming out of these care arrangements in order to ensure that they are adequately protected and supported.

**Recommendation 2 ( in reference to section 5.1).:** That any reference in the Charter to a restriction on the rights of a child to have contact with family on the basis of their “best interests”, should require the reasons for this decision to be clearly documented and explained to both the parents and child. Part of this should require clear evidence of serious risk to the child. Moreover there should be a right of independent appeal by the child or parent to this decision.

### **Good parenting**

The issue of good parenting as a standard for the system without more specific criteria is potentially value laden and as such is difficult to put forward as a standard for which the system should strive.

### **Supporting children with a disability or mental illness in care**

It is noted that in the covering letter to this discussion paper, the Advocate for Children in Care stated that: *Particular attention will be given to engaging ...Aboriginal communities to ensure their voice is heard and their views are taken into consideration in the drafting of the Charter.* The Public Advocate applauds this statement but considers that it is equally important to ensure that the voices and views of people with a disability or mental

illness whether they be a parent or child, so that people with a disability are not further stigmatised within the Child Protection system.

The discussion paper refers to the specific responsibility of the State to assist parents in the raising of their children, including specific groups of children such as “ the disabled” [sic] in the United Nations *Convention on the Rights of the Child (CROC)* )(Section 2.3.1 p.9), which Australia has ratified. Yet in relation to children with a disability or mental illness, the child protection system seems to have difficulty being able to effectively respond to the care needs of these children, when they are placed in care. This highlights the problems with intra Department of Human Services systems dysfunctions. An example is where children/young people who have significant physical or intellectual disabilities have been placed in long-term foster care by child protection. Such children can be ideal candidates for Permanent Care Orders, however, carers are often unwilling to proceed to such Orders due to DisAbility Services refusal to commit to appropriate resourcing in order to support the care of the child/young person.

Then as the child moves into their early teens the system seems to be even less capable of providing adequate guidance and support for this group. Here the emphasis of child protection seems to be noticeably upon young infants and this also appeared to be the focus of this report. This Office is sometimes approached about protective concerns regarding a young adult who may be between 15 and 17 years old because Child protection services seem unable or unwilling to intervene.

**Recommendation 3:** That any Charter of Children’s Rights in Care specifically refer to the rights and specific needs of children with a disability or mental illness and the State’s responsibility to cater for those needs. Similarly in relation to developmental periods the Charter should acknowledge the changing needs of children at different developmental stages to ensure that these are responded to appropriately.

## **Conclusion**

The Public Advocate acknowledges the need to protect the rights of the child and believes that the development of a Charter of Rights for children in care is an important initiative. However, such a Charter needs to fit within a broader Charter of the rights of the child which is not limited to those in care. Such a Charter needs to recognise the central role of family in the development of the child and that appropriate and timely levels of support need to be offered to families to minimise the extent to which out of home care is necessary.

Only in cases of clearly identified risk or where significant efforts have been made to provide appropriate levels of support to families should out of home care be considered. In these situations care must be taken not to discriminate against families where the parent has a disability or mental illness, who are disproportionately represented amongst families where the child is in care.

However, in those instances where out of home care is appropriate care must be taken to ensure that these family links are preserved unless there are very clear risks to the child if these links are continued.

## References

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