Dear Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee,

Thankyou for the opportunity to make a submission in relation to this important reform.

I am a lawyer with a background in administrative and child protection law, although I am currently working in another area of law. I am not a child protection practitioner.

It is likely that I will return to child protection, including possibly working for or with the Director of Child Protection Litigation (the DCPL), so I make this submission anonymously. I am happy for the submission to be published, however I ask that my email address be hidden. I can provide evidence of my qualifications on request.

The Government is to be commended for its willingness to break new ground. The *Director of Child Protection Litigation Bill* (the Bill) is a bold reform in an area of policy that I believe requires bold reform, however no evidence base is provided to support the DCPL, and I am concerned it is an example of blind implementation of a report recommendation.

I have serious reservations about the Bill, which I hope I have adequately articulated. I have attempted to keep it brief, and apologise for getting a bit repetitive where issues overlap.

I encourage the Committee to recommend the Bill progress no further. Failing that, please consider my recommendations for amendments to the Bill.

[redacted] 11 March 2016

1. Rationale for the reform

This reform is the implementation of a recommendation of the 2013 Carmody report, commissioned by the Newman government and carried over by Labor.

Despite considerable effort I have not been able to find a precedent for the DCPL in any comparable jurisdiction. I've tried researching but there's little rationale for it online besides the Carmody report itself.

The public briefing provided some further guidance: "the policy rationale for an independent statutory agency is to establish greater accountability and oversight for applications that are being proposed by the department of Child Safety."[1] The explanatory notes state similar.

I believe that's more a policy objective than a rationale, as a rationale should entail a bit more reasoning as to how the proposal would achieve the objective.

Therefore the rationale provided as I see it is really only Tim Carmody thought it was a good idea in 2013, accompanied by vague ideas of accountability and efficiency.

[1] Ms Masotti- Public Briefing – Inquiry into the Child Protection Reform Amendment Bill 2015 and the Director of Child Protection Litigation Bill 2015 24 February 2016

Efficiency:

Some systems aren't efficient because the features that lead to their use make them so. Child protection is messy business, even when working according to design. Litigating around human relationships is fraught. Child protection workers all over Australia struggle to prepare decent affidavits. Affording parents natural justice often involves multiple adjournments.

Carmody also recommended for the sake of efficiency that children in the criminal courts lose their right to appeal decisions other than errors of law[2].

It is worth contrasting Carmody's view of efficiency with that of economist Paul Samuelson, who believed "every good cause is worth some inefficiency".

I think this bill in various ways distorts interventions in the name of efficiency. The existence of the DCPL as a gatekeeper to long term orders will inherently incentivise lighter interventions, the applications for which will remain within the power of Child Safety.

Similarly the DCPL might be incentivised to accept a short term order if it means avoiding a contested hearing over a long term order. This outcome, on its face an efficient one, really only means that in a year or two another application will be made to the court to extend the order. It would also mean the child drifts on a succession of short term orders, instead of confronting the issue early in the child's life and pushing on for a long term order.

Further- it's hard to see how splitting the agency's legal services so that some matters go to DCPL and others go to in-house lawyers, transferring the function of applying for some orders from the Department and creating a new entity, and then papering over the cracks created with information exchange provisions (from cl 22) is any more efficient than the status quo.

Accountability/oversight:

The argument that the Bill improves accountability should rejected. Fundamentally, the Bill transfers what is currently a function of the Department to the DCPL. The Director-General is subject to direction from the Minister, and can be hired and fired for poor performance, as can individual child protection workers. The Minister similarly can be replaced, either by the Premier or the electorate at an election. Decisions of magistrates can be appealed. The only person in the new world who is not subject to oversight of anyone is the DCPL (cl 13). Where previously the decision to apply for a long term order was subject to a degree of oversight (Child Safety line management, Director General, Minister), in the new world there is none.

It is a legal fact that decisions made by the DCPL will be subject to less oversight and accountability than they are currently, due to the Bill specifically ensuring it is an independent entity. It is plainly incorrect to state that the Bill improves accountability or oversight. It has the opposite effect.

This is particularly important given the functions the DCPL will have. The decision to intervene in the family unit in such a radical and permanent way is among the most intrusive and important functions the executive government has. While Child Safety's image may be battered, who would the community prefer has that function- Child Safety (with its child protection experts

[2] http://www.theguardian.com/australia-news/2014/dec/17/children-likely-serving-excessive-jail-time-after-queensland-strips-right-to-appeal-sentences

who can assess the best interests of a child, and are trained in assessing risk to children), or the DCPL, a lawyer "who has demonstrated qualities of leadership, management and innovation in a senior government or private sector role" (cl 25(2)(b))?

Similarly, fundamental to Australian child protection systems for the last few decades, for very well publicised historical reasons, is the principle that the decision to approve the state's intervention into the family unit belongs with a court. Who is the DCPL to stand between Child Safety and the court, particularly given the DCPL is not subject to direction from anyone?

Recommendation:

1. *Queensland is not the first jurisdiction to confront the problem of inefficiencies at court, but it is the only jurisdiction to legislate in the manner proposed in the Bill. Consideration should be given to other, less radical ways of achieving efficiencies in the court process, preferring methods with a robust evidence base.*
2. *If the intention is to improve accountability:*
    a. *cl 13 should be amended so that the DCPL be subject to ministerial oversight;*
    b. *the guidelines at cl 39 should be approved by the Minister or the Governor, not the DCPL itself; and*
    c. *consideration should be given to providing Child Safety an avenue to appeal adverse DCPL decisions, as currently there is potential for Child Safety to hit a brick wall with no way around it.*

2. Principles

I'm concerned that the current bill might inadvertently support interpretations that obstruct the best interests of the child.

Scenario:

Child protection worker wants to apply for an order for a young child until her 18th birthday having assessed that there is no realistic prospect of reunification with family, and it is therefore in the child's best interests to pursue a long term order. The DCPL is briefed. The child's parents (through their legal representative) will not consent to a long term order, however they will consent to a shorter order.

It would be within the power of the DCPL to apply for a short term order, as that would be the least intrusive (per clause 6(1)(b)). It would be cheaper and arguably more efficient on the day for all concerned to simply agree to a short term order, avoiding the expense and hassle of a hearing. However, it would not be in the child's best interest.

The best interests of the child in this case require having the hearing to determine whether a long term order should be made, as opposed to consenting to a short term order which gets extended again and again, thereby achieving neither reunification or permanency, and over time being less efficient than simply applying for the long term order in the first place.

If you look at the high complexity cases of young people currently in care and incarcerated, almost inevitably you will find their first few years are marked by cautious, least intrusive options, with removal (although in their cases inevitable) only done as a last resort and *after* they had suffered further avoidable harm.

If a child is to spend most of their childhood in care, there is an abundance of evidence that it is better that the intervention happen sooner, on a long term order as opposed to a number of short term orders that get extended as soon as they are about to expire. As mentioned previously, I am concerned that the bill is calibrated in a way that encourages the succession of short term orders as opposed to the single long term order.

Recommendation:

3. The Bill be amended so that the DCPL is required to consider the legitimate goals of permanency and stability, and realistic prospects of reunification when deciding which order is appropriate.

4. The emphasis on the least intrusive order should be removed or reframed as it is out of step with contemporary understanding of child development and needs, and could be used to justify consenting to short term orders despite the best interests of the child requiring a contested hearing of an application for a long term order.

3. Functions and qualities

The effect of the Bill is that when the department wants to intervene into a family unit in a radical, long term way, it can only do so with the DCPL's approval. The DCPL essentially becomes the gate-keeper of the court system.

The DCPL is also tasked with deciding which order to apply for, and the duration of the order to be sought.

The decision as to which order type is to be sought usually turns on what casework the department intends to do. For example, is the department working towards reunification with family, or permanency in care? Or is the casework goal to prepare an older child for life after care?

The qualities of the DCPL in clause 25 include "the person has demonstrated qualities of leadership, management and innovation in a senior government or private sector role". They are entirely incongruous with the functions outlined above.

Nothing qualifies the person currently described in clause 25 to make the decisions the Bill affords them, let alone to make what will be one of the most important decisions that will ever impact a child.

Recommendation:

5. Qualities for appointment be overhauled to align with the DCPL's functions and reflect community expectations - such as an understanding of contemporary child protection practice; commitment to the rights and interests of children and young people, the principles of the Director of Child Protection Litigation Act *and the* Child Protection Act*; and integrity.*

4. Duty of Care (litigation in negligence)

While the public briefing states that the intention is "not to discharge the chief executive's duty of care to that child"[3], I'm not sure that is actually the effect of the bill.

Case law exists which clarifies the duty of care owed to children by the Department. When a child is injured by the Department failing to take reasonable steps to safeguard the child (including failing to remove a child), the child might have a cause of action against the Department. This Bill transfers some of what are currently the Department's functions to the DCPL, and probably as an unintended consequence also transfers some liability.

Child Safety's stated belief that its duty of care is not diminished by the Bill, while laudable, is beside the point when it comes to an objective assessment of whether a valid cause of action exists under the law of the day.

Negligence and the scope of the duty of care owed is assessed by looking at an entity's functions and powers. The removal of certain functions also diminishes the duty of care owed by the Department to the child. How can a department be negligent in the performance of a function it no longer has?

If a child is injured in the new world, in some circumstances the child will no longer have a valid cause of action. The Department will have an "out" it doesn't currently have- effectively that it took reasonable steps but the DCPL was remiss in some way. Or, that given what was known about the DCPL's preference for certain orders (or whatever is in the guidelines), the Department acted reasonably in the circumstances.

It is also worth noting that the Bill gives the DCPL "outs" that Child Safety currently does not have in relation to the same function. Any decision not to apply for a long term order could be framed in reasons of court efficiency or the "least intrusive order" principle.

Recommendation

6. *The Committee consider the circumstances of a child injured in a failed reunification brought about because the DCPL refused to apply for a long term order, despite the evidence at the time indicating that doing so would have been in the child's best interests. Who can the child sue, if anyone?*
7. *Given the findings of the Royal Commission regarding the difficulties in identifying the right defendant, the committee consider whether the Director-General should be vicariously liable for the acts and omissions of the DCPL so that a child who is injured due to a collective failure of the system is not forced to litigate against multiple entities, and there can be no buck passing between the two.*

[3] Ms Masotti- Public Briefing – Inquiry into the Child Protection Reform Amendment Bill 2015 and the Director of Child Protection Litigation Bill 2015 24 February 2016

5. Reasons for refusal

The Bill is silent on the reasons the DCPL can refuse a request from Child Safety to apply for a protection order. The two possibilities I can see are:

1. The DCPL believes the order proposed is not in the child's best interests; or
2. The DCPL considers the brief of evidence is inadequate to obtain the proposed order.

However it is not clear to me which of the above is the intention of the Bill.

Lawyers act on instructions. We're not child protection workers. Nothing qualifies us to assess the best interests of a child. For that reason I think option 1 is not appropriate. In my view the only grounds for a lawyer to refuse anything should be those related to a lawyer's legal expertise – for example the brief is flawed.

Recommendation

8. *the Bill should explicitly state the grounds for the DCPL legitimately refusing a request from child safety to make an application (whatever those grounds are intended to be).*

6. Guidelines

Cl 39 gives the power to the DCPL to make guidelines, essentially controlling how Child Safety interacts with it. This establishes an incredible power imbalance between two entities who should be working collaboratively in a shared endeavor of ensuring child safety and wellbeing. Whenever things get too hard for the DCPL, it can simply update the guidelines in a way that suits them, writing their own job description, or putting more back on Child Safety. The DCPL shouldn't be able to call the shots in this relationship. This is particularly extraordinary given the DCPL's functions, and that he or she is not subject to direction from anyone, and his or her decisions cannot be appealed.

Recommendation

9. *The Guidelines should be made by the minister or the governor. They should be tabled in Parliament, made available publicly, and reviewed from time to time.*

7. Review of legislation

The Bill requires the internal review of the Act after five years. Given the experimental nature of the reform, that it is a radical change to a key decision point in the system without precedent in any comparable jurisdiction, the review should be undertaken sooner and by a person with a degree of independence.

It is unlikely that anything will be learned in the fourth or fifth year that hasn't already been learned in the first two or three. If the impact is transformative and wonderful then all the better the rest of Australia learns about Queensland's innovation sooner. If it's harmful, or has created inefficiencies, then it can be corrected sooner. No one benefits from waiting five years to learn the results of this reform.

Recommendation:

10. *The Bill be reviewed two – three years from commencement and by an appropriately qualified, independent person.*

Conclusion

I think it worth defining the category of people who are most impacted by the Bill: children who would have under the current law been subject to a straightforward application to the Court by Child Safety, but who in the new world have their application delayed, modified or knocked back entirely due to the variable of the DCPL's intervention. Would those children benefit from this reform? If not, then what value is added by the Bill?