

Chapter 7

Option 1—A New System: Processes for Achieving Appropriate Child-Centred Agreements

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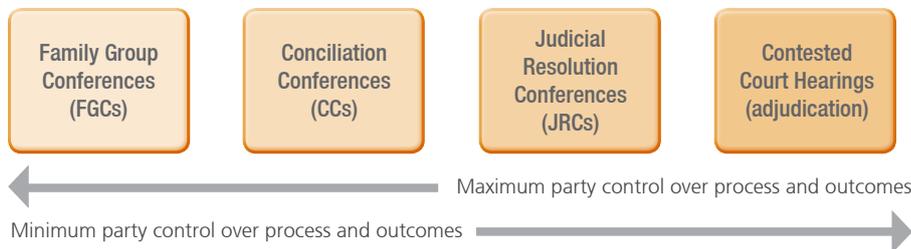
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APPROPRIATE DISPUTE RESOLUTION AND FAMILY DECISION MAKING

- 7.1 The Commission proposes that a graduated range of supported,¹ structured² and child-centred³ agreement-making processes should become the principal means of determining the outcome of child protection applications. These processes are designed to minimise disputation in child protection matters while maintaining a focus on the best interests of children.⁴
- 7.2 The Commission was asked to consider ‘the themes and principles of the Attorney-General’s Justice Statement (2004) and Justice Statement 2 (2008), particularly the focus on appropriate dispute resolution⁵ and measures to reduce the adversarial nature of the justice system’. The Commission’s proposals in this chapter sit firmly within the government’s commitment to appropriate dispute resolution (ADR) and the dispute resolution policy outlined in the Justice Statement and Justice Statement 2.
- 7.3 The outcome of most Victorian child protection cases is not determined by a hearing in the Children’s Court. Only a small number of reports of child abuse to the Department of Human Services (DHS/the Department) lead to a protection application in the Children’s Court.⁶ Less than three per cent of all primary and secondary protection applications filed in the Children’s Court proceed to a final hearing.⁷ These statements suggest that a settlement culture already exists in Victoria’s child protection jurisdiction.
- 7.4 The options presented in this chapter are designed to reform the manner in which settlements are achieved in Victoria’s child protection jurisdiction by changing the processes used throughout the system. At present, most agreements are the result of informal bargaining between the parties’ lawyers. The Commission believes that the parties should be encouraged to use supported and child-centred agreement-making processes in order to reach negotiated outcomes.
- 7.5 The Commission proposes developing and expanding a range of family decision-making processes designed to assist the Department, children, families, carers and the professionals assisting them to negotiate child-centred outcomes for children and families. These processes are designed to foster negotiation and provide:
- a well-structured process with adequate safeguards to ensure fairness
 - adequate support for participants so that they can participate on equal footing with each other and with knowledge of the consequences of agreement
 - a child-focused and child-inclusive environment.

A PROCESS CONTINUUM

- 7.6 The Commission proposes that a graduated range of supported, structured and child-centred agreement-making processes should be the principal means of determining protection application outcomes. Previous reviews of the child protection system supported the creation of a decision-making continuum, including:⁸
- family group conferencing
 - conciliation conferences
 - judicial resolution conferences
 - adjudication.



7.7 At one end of the continuum is family group conferencing (FGC). It is envisaged that FGCs will become the primary decision-making forum in Victoria's child protection system.⁹ At the other end are contested court hearings in the Children's Court, where the Court decides how proceedings are conducted using inquisitorial and problem-solving approaches. These approaches are discussed in Option 2. Between the outer limits of FGCs and adjudication lie proposed conciliation conferences (CCs) and the existing judicial resolution conferences (JRCs).

7.8 It is proposed that CCs be used on a model drawn largely from the Court's new model conferences (NMCs), which have been developed by the Court, Victoria Legal Aid (VLA) and DHS and are being trialled from July 2010.¹⁰ Senior court employees—who may advise the parties about potential outcomes but will allow the parties to make decisions themselves—will conduct NMCs. There are some points of difference between the Commission's proposed CC model and NMCs, which are discussed later in this chapter.

7.9 Further along the continuum are JRCs, which provide the parties with more control than they would have in an adjudicatory process. Finally, including adjudication as part of this decision-making continuum allows for proper integration of all processes into the justice system.¹¹

7.10 Properly integrating all forms of decision-making processes, including adjudication, into the same system may also provide protection for children and families negotiating with the state in the child protection system. In providing a range of processes, the Commission has responded to submissions, such as those of the Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria), which calls for the most appropriate process for each case to be used at each stage in the child protection justice system.¹²

1 By 'supported' processes the Commission means that participants in decision-making processes are provided with professional support and information so that they can participate as equally as possible with each other and with full knowledge of the consequences of any agreement made.

2 By 'structured' processes the Commission means decision-making processes that are well-structured with adequate safeguards to ensure fairness, including protecting vulnerable participants.

3 By 'child-centred' the Commission means processes that foster an environment which is both child-focused (centred on the best interests of the children concerned) and child-inclusive (involving children in the processes and taking their views into account to an extent that is consistent with their level of maturity and understanding).

4 The Commission has chosen not to use the term 'Appropriate Dispute Resolution' or ADR to describe these proposed new processes in Victoria's child protection system. Although ADR has been commonly used to describe non-adjudicative processes in civil matters, it is now widely used as a shorthand term for non-adjudicative processes throughout the legal system. However, the Commission prefers the use of the terms 'family decision-making processes' or 'decision-making processes' to refer to the use of appropriate dispute resolution processes in the child protection jurisdiction. Child protection is an area of public law in which the state intervenes in family life where a child is at risk of harm. That is not an ordinary civil dispute requiring 'resolution'. While the principles of ADR have relevance to the child protection jurisdiction, the term does not. The Commission believes that the terms 'family decision-making processes' and 'decision-making processes' are more suited to this field.

5 The Attorney-General's Justice Statement used the term 'Appropriate Dispute Resolution' in preference to the more common 'Alternative Dispute Resolution.' That name change was suggested 'in recognition of the fact that such approaches are often not just an alternative to litigation, but may be the best and most appropriate way to resolve a dispute'. Department of Justice (Victoria), *New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement* (2004) 33.

6 According to the Australian Institute of Health and Welfare, 62 per cent of finalised investigations conducted by DHS in 2008-09 were substantiated. Of substantiated cases, protection applications were filed in 48 per cent of cases: Australian Institute of Health and Welfare, *Child Protection in Australia 2008-09* (2010) 12. See also Chapter 3.

7 Submission 46 (Children's Court of Victoria) 23.

8 For example in 2004, Freiberg, Kirby and Ward called for a range of processes to allow parents, children and families to attempt to negotiate resolutions for child protection matters in Victoria with the Department, noting '[i]n the Panel's view, family group conferences, case planning and pre-hearing conferences are different facets of what should be a continuum of processes or forums for negotiation which should provide the foundations of the child protection system.' Arie Freiberg, Peter Kirby and Lisa Ward, *The Report of the Panel to Oversee the Consultation on Protecting Children: The Child Protection Outcomes Project* (2004) 41.

9 FGCs will emphasise participation of children and their families in decision-making processes and will provide parties with maximum control over determining outcomes in their matter.

10 NMCs are explained later in this chapter under the heading 'The Taskforce Report and New Model Conferences'.

11 Traditionally, as noted by King et al, ADR processes have been thought of in opposition to litigation practices: Michael King et al, *Non-Adversarial Justice* (2009) 90. Moreover, the separation of adjudication from other decision-making processes has been described as false, misleading and counter-productive by Astor and Chinkin: Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (2nd ed, 2002) 43.

12 Submission 26 (FVPLS Victoria). In ADR literature this is known as 'fitting the forum to the fuss'. For further discussion on this see Frank Sander and Stephen Goldberg, 'Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure' (1994) 10 *Negotiation Journal* 49.

IS ADR SUITABLE FOR THE CHILD PROTECTION JURISDICTION?

7.11 While the use of ADR in the civil justice system is widespread, the Commission believes it is important to consider whether ADR processes (known here as family decision-making or decision-making processes) are appropriate in the child protection jurisdiction.¹³ In the following sections, the Commission considers arguments for and against the use of civil ADR processes in the child protection jurisdiction.

ARGUMENTS AGAINST USE OF ADR PROCESSES

7.12 In its submission to the Commission, the Federation of Community Legal Centres stated that it had significant ‘concerns about the applicability of ADR to child protection matters given the nature of the dispute and the inherent unequal bargaining position of the family’ in relation to DHS.¹⁴ The Federation stated:

*In child protection matters, the need for safeguards is greater given that one of the parties to the matter is the state and the others are likely to be among the most vulnerable members of the community.*¹⁵

7.13 This argument is developed by others who note that while family decision-making processes generally assume that individuals have more or less equal power and are not fearful of other participants, in the case of child protection this can be misleading.¹⁶ For Aboriginal families in particular, the history of highly interventionist state policy in Aboriginal family life means today that a significant power imbalance exists between Aboriginal families and DHS. Submissions to the Commission argued that family decision-making processes should only be used for child protection matters for Aboriginal families where the children and families have legal representation in their dealings with DHS before and during family decision-making processes.¹⁷

7.14 Families from diverse cultural and language backgrounds who are unfamiliar with the Victorian child protection system may face numerous disadvantages when negotiating with the Department.¹⁸ They may not know why they are being investigated and why certain decisions are being made. This may make them especially vulnerable to agreeing to conditions that they do not understand or cannot achieve. Springvale Monash Legal Service argued in their submission that their clients, who frequently come from culturally and linguistically diverse backgrounds, say that

*they would rather sign ‘voluntary’ agreements with DHS as they think that if they comply with requests now, they will be seen to be compliant and it will reduce the time the department is involved with their family.*¹⁹

7.15 This submission highlights the potentially coercive nature of the state’s power to intervene in family life and the difficulty that families can have when negotiating with a state welfare authority that can exercise those powers.

ARGUMENTS FOR USE OF ADR PROCESSES

7.16 One argument commonly used in support of family decision-making processes in the child protection area is that they reduce the need for families to use adversarial court processes and that ‘disputes in child protection are better resolved, as much as possible, away from court hearings’.²⁰ It is also argued that it is far preferable for families rather than the state to be making decisions about the care of children. Properly convened family decision-making processes enable children and their families to contribute to decision making.²¹

7.17 Submissions received by the Commission supported the use of family decision-making processes in Victoria's child protection jurisdiction, providing there were adequate safeguards to guard against power imbalances and unreasonable use of state control.²² The Victorian Council of Social Services and the Youth Affairs Council of Victoria argued that Aboriginal families and families from culturally and linguistically diverse backgrounds would need additional supports through family decision-making processes, including the presence of someone culturally knowledgeable who can both translate and contextualise the process.²³ The Victorian Aboriginal Child Care Agency (VACCA) also supported this approach, suggesting that any decision-making processes should focus on:

- seeking outcomes in the best interests of children
- agreeing that all parties participate and are heard
- being culturally sensitive and referring to Elders where appropriate
- using trained convenors
- being in a less formal setting
- being non-adversarial
- providing the option for wider family involvement where appropriate.²⁴

THE COMMISSION'S RESPONSE AND PROPOSAL

7.18 The Commission believes that the use of family decision-making processes is appropriate in the child protection field if there are appropriate safeguards to protect children and families. Further, the Commission believes that the creation of a process continuum is an appropriate regulatory response to ensure that children are safe within their own families. They will enable a greater number of families to have a say in what happens to children at risk of harm. The proposed continuum of decision-making processes provides a range of progressively more coercive responses within the secondary and tertiary sectors of the child protection system.²⁵

- 13 Child protection is not a civil area of law. It is a branch of public law and the initiation of matters by the state creates a special dynamic which is not present in most civil cases, even in family law matters. Children and parents, especially first-timers within the system, who are attempting to negotiate with the Department may be at a systemic disadvantage because of the 'repeat player' status held by of the Department.
- 14 Submission 45 (FCLC).
- 15 Ibid.
- 16 As noted by Rosemary Sheehan, '[t]he reality is that child protection proceedings canvass a wide range of problems and vulnerabilities, and parents rarely feel they have any power when confronted by the statutory welfare authority. Children may fear the consequences of the instructions they give.' Rosemary Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59 *Australian Social Work* 157, 169.
- 17 Submission 26 (FVPLS Victoria).
- 18 DHS has developed a working group to advise the Minister for Community Services on family strengthening for newly arrived communities. The group, which consists of members from DHS, DoH, Victoria Police and key stakeholders from the community sector, is exploring responses to: the need for agencies and child protection staff to better understand the needs of families from refugee backgrounds and the need for newly arrived communities to better understand the child protection, family services and family violence service systems, including Australian laws and cultural expectations. Email from Department of Human Services, 8 June 2010. The many challenges facing new and emerging communities in this area were further highlighted in Myriad Consultants, *Protection Applications in the Children's Court: Report of Consultations with New and Emerging Communities* (2010).
- 19 Submission 32 (SMLS).
- 20 Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience'. above n 16, 169.
- 21 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 438.
- 22 The Victorian Council of Social Services and the Youth Affairs Council of Victoria provided guarded support for the introduction of further ADR into the Victorian child protection system in their joint submission. They argued that because of the significant risk of power imbalances between DHS and families, a number of procedural safeguards would need to be introduced to protect children and families, including the provision of basic information regarding the process and its implications and the provision of legal representation. Submission 43 (VCOSS & YACVic).
- 23 Submission 43 (VCOSS & YACVic).
- 24 Submission 39 (VACCA).
- 25 The Commission's proposals encourage a less interventionist response initially, through use of FGC. Other processes are available if this less-interventionist response is inappropriate, if there is an emergency or if it does not work. The theory of responsive regulation suggests that this graduated response may lend more legitimacy to the use of more coercive processes (such as adjudication). It is hoped that systematic use of quality family decision-making processes, despite a potentially coercive backdrop, will enable children and families, with proper support, to have a greater say in outcomes in the child protection system.

- 7.19 The Commission believes that the suite of processes it proposes in this report contain sufficient safeguards to ensure that they are appropriate for use in child protection matters. The Commission acknowledges that family decision-making processes will not be appropriate in *all* matters and that adjudication remains an important part of Victoria's child protection system for use in some cases.

Proposal 1.1: A graduated range of supported, structured and child-centred agreement-making processes should be the principal means of determining the outcome of child protection matters.

QUALIFICATIONS AND TRAINING OF CONVENORS

- 7.20 The Commission believes that the convenors of family decision-making processes should have appropriate qualifications and training. In examining the issue of qualifications and training, the Commission has chosen to focus on the issues of accreditation, qualifications and required areas of knowledge for family decision-making convenors as well as, briefly, possible complaints processes.²⁶

ACCREDITATION

- 7.21 It is important that convenors who conduct family decision-making processes are accredited. In this report, the Commission has sought to outline broad principles for the accreditation of convenors. Further detail will be required if this proposal is adopted.
- 7.22 Accreditation is part of a trend in the professionalisation of decision-making processes, which are 'progressively being regulated in a manner similar to that of other professions such as lawyers, psychologists, doctors and social workers'.²⁷
- 7.23 The 'piecemeal' development of ADR convenor regulation has been noted previously,²⁸ largely because decision-making processes are still evolving. The Commission recognises that while ADR accreditation is in its formative phases in Australia, there is an opportunity to develop specialised processes for accreditation in the Victoria's child protection system. This accreditation will help provide family decision-making processes with integrity, consistency and quality standards, important elements of any processes that the Commission proposes should become central to the child protection justice system.
- 7.24 In the context of ADR, accreditation has been described as

*the recognition or approval by an organisation that a person meets certain levels of education, training and/or performance that the organisation requires in order for him or her to practise ADR.*²⁹

In Australia, most efforts for establishing standards have been directed at mediators, 'the largest group of "third party interveners"'.³⁰

Advantages and disadvantages of accreditation

- 7.25 The Commission recognises that there may be many advantages and disadvantages in standardising convenor accreditation for family decision making. The advantages of accreditation include:
- credibility for family decision-making processes and family decision-making convenors³¹
 - ensuring convenors have minimum levels of knowledge³²
 - enhancing convenors' current skills³³
 - accountability in a context where attendance at family decision making may be legislatively required.³⁴

7.26 The disadvantages of accreditation include:

- the potential to hinder the development of diversity and creativity in family decision-making practice³⁵
- a potential failure to acknowledge the longstanding experience of practitioners in the field.³⁶ '[R]equirements such as tertiary qualifications can create obstacles which would limit the number of persons who could practise ADR'³⁷
- the difficulty of determining appropriate standards
- that accreditation may overemphasise the role of training, a challenge to the perception that 'good mediators are born and not trained'³⁸
- an 'oversupply of ADR training resulting in false expectations of practitioner competence or work available'.³⁹

Use of the National Mediator Accreditation Scheme

7.27 The Commission suggests that convenor accreditation in the field of child protection family decision making in Victoria may be conducted partly under the National Mediator Accreditation Scheme (NMAS). This should apply to all forms of family decision making proposed in this option: FGCs, CCs and JRCs.

7.28 The Child Protection Proceedings Taskforce recommended that all convenors in the 'new model conferences' be trained and accredited in mediation in accordance with the NMAS.⁴⁰ In line with the Taskforce recommendations, the Court's draft guidelines provide that NMCs will be presided over by a convenor who is trained and accredited in mediation in accordance with the National Mediator Accreditation System.⁴¹ Further, three submissions received by the Commission suggested use of NMAS for child protection convenors in Victoria.⁴²

26 Training in general is discussed in Chapter 8.

27 King et al, above n 11, 121.

28 Ibid. Family law is a practice area where uniform regulation has been introduced, as discussed later in this section.

29 National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR: Discussion Paper* (2000) 64.

30 Tania Sourdin, *Alternative Dispute Resolution* (3rd ed, 2008) 288.

31 This is especially important as most family decision-making processes are private and, unlike court processes, not open to public scrutiny. Accreditation will assist with demonstrating 'to the community that ADR practitioners and service providers are comparable with other professions and occupations'. National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR*, above n 29, 25.

32 Without an accreditation system, incompetent and inadequately trained people can hold themselves out to be family decision-making convenors. This is of particular concern in areas where family decision-making is compulsory, as there generally exists no option for review or appeal of such decisions/agreements. National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR*, above n 29, 73.

33 Based upon the idea that convenor qualities can be learnt or developed through a training course. National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR*, above n 29, 70.

34 Ibid 25–6.

35 Ibid 27–8.

36 Ibid 73.

37 Ibid.

38 Ibid 65.

39 National Alternative Dispute Resolution Advisory Council, *Report to the Commonwealth Attorney-General: A Framework for ADR Standards* (2001) 84.

40 Child Protection Proceedings Taskforce, *Report of the Child Protection Proceedings Taskforce* (2010) 20.

41 Children's Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences (New Model Conferences)* (2010) 4, effective from 1 July 2010.

42 Submissions 46 (Children's Court of Victoria) 40, 28 (Anonymous), 35 (FRSA).

7.29 If NMAS is used, the Commission believes that further specialised accreditation may be necessary for child protection convenors. That is the approach that has been taken recently for child protection convenors in the Northern Territory⁴³ and in the family law field for family dispute resolution (FDR) practitioners.⁴⁴

Qualifications and specialist areas of knowledge for child protection convenors

- 7.30 The Commission believes that in addition to general accreditation under NMAS, child protection convenors will need knowledge and perhaps qualifications in specific areas. These areas of specialist knowledge and qualifications will vary between the convenors of FGCs and CCs, and the judicial officers who will conduct JRCs.
- 7.31 As there is no specific accreditation scheme for child protection family decision-making convenors in Australia, the Commission has referred to accreditation schemes in other jurisdictions to help identify the principal areas of knowledge and qualifications that might be expected of child protection convenors in Victoria. These areas of knowledge and qualifications could be set out in regulations under the *CYF Act 2005* (Vic). They could be required as a condition of accreditation as a family decision-making convenor, or as part of an ongoing training requirement. Provision will need to be made for existing practitioners within any new accreditation scheme.
- 7.32 Child protection matters are often ‘emotionally intense and complex and may include violence, fear and severe power imbalance’.⁴⁵ This may require convenors to be equipped with additional areas of knowledge and skills. The Commission received submissions and comments on this issue in consultations. In consultation with current dispute resolution conference (DRC) convenors, participants agreed that child protection convenors required additional areas of specialist knowledge, which constituted a ‘layer of specialisation above ADR training’.⁴⁶
- 7.33 The core competencies suggested include:
- suitable qualifications and experience in ADR and family decision-making processes⁴⁷
 - significant knowledge of the child protection system and legislative framework⁴⁸
 - demonstrated understanding of family dynamics, child development⁴⁹ (including attachment and trauma) and child protection issues⁵⁰
 - cultural competency in relation to Aboriginal⁵¹ and culturally and linguistically diverse (CALD) communities⁵²
 - demonstrated understanding of risk assessment
 - communication skills and the ability to encourage open discussion.⁵³
- 7.34 Current Children’s Court DRC convenors are appointed by the Governor in Council and must have ‘appropriate qualifications and experience’. In the Melbourne Children’s Court, the four sessional convenors currently have qualifications in social work and or law.⁵⁴ At Moorabbin and at rural courts, court registrars currently convene DRCs. JRCs are currently conducted by a magistrate or by the President of the Court.⁵⁵ There are no current requirements about ADR accreditation for judicial officers who conduct JRCs.

- 7.35 The Commission has considered the recently created national scheme to accredit FDR practitioners in family law practice. Under the *Family Law Act 1975* (Cth) (FLA 1975), specialised accreditation is required of FDR practitioners.⁵⁶ The common focus on the child's best interests in both the family law and child protection jurisdictions suggests that there may be much overlap in required areas of knowledge across both areas of convenor practice. It is clear, however, that this scheme alone is not entirely satisfactory for child protection convenor practice, as the core areas of competency are highly specific to the family law environment.⁵⁷
- 7.36 The Commission has proposed that three family decision-making processes are used as part of a process continuum in child protection matters: FGCs, CCs and JRCs.⁵⁸ In relation to FGCs and CCs, the Commission believes that in addition to the potential for NMAS accreditation, some additional ongoing or required specialist training might be provided.
- 7.37 The scheme created for FDR practitioners provides a potential model for such training but is probably not appropriate in its current form. The Commission believes that the list of core competencies for child protection matters suggested in consultation is sensible and appropriate. While the Commission recommends that convenors should have appropriate qualifications and training, the detail of the areas of specialist knowledge convenors of FGCs and CCs should possess is a matter to be determined if this option is adopted.
- 7.38 For any family decision-making process proposed in this chapter, the convenor will need to have the knowledge necessary to conduct quality intake processes involving a thorough risk assessment.⁵⁹ It is the Commission's understanding that the current training of FGC convenors in Victoria does not deal effectively with allegations of sexual abuse of a child by a family member.⁶⁰ The Commission believes that a core part of convenor training used for any forms of family decision making proposed—FGCs, CCs or JRCs—needs to include family violence, the sexual abuse of children and risk.⁶¹
- 43 In the Northern Territory, convenors may be appointed if they are accredited under the Australian National Mediator Accreditation System and also have experience relevant to convening a mediation conference: *Care and Protection of Children (Mediation Conferences) Regulations 2010* (NT) reg 11.
- 44 National Alternative Dispute Resolution Advisory Council, *National Mediation Accreditation System* (2007) <www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/WhatsADR_NationalMediatorAccreditationSystem> at 31 May 2010; Sourdin, *Alternative Dispute Resolution*, above n 30, 288.
- 45 National Alternative Dispute Resolution Advisory Council, *The Development of Standards for ADR*, above n 29, 60.
- 46 The areas of competencies outlined by the DRC convenors included knowledge of: the Act; child development and child protection issues (based upon current research); how the system operates; family assistance and family support services; cultural sensitivities, including Aboriginal cultural competencies; and risk assessment. Consultation 23 (DRC).
- 47 It is clear to the Commission that while almost everyone accepts that a social work or psychology background is useful for convenors, that opinion is divided about whether legally qualified convenors should be conducting family decision-making processes.
- 48 Submission 48 (The Victorian Bar) suggested that all convenors had to be qualified and accredited as mediators, and that any convenors who were not legally qualified should also receive training so that they are 'able to fully understand the legislative requirements and the practice of the Court'.
- 49 In contrast, a participant in the Commission's consultation with DHS child protection workers in the Eastern and North West regions suggested that lawyers should not convene DRCs and that they should have expertise in child development: Consultation 25 (DHS CP Workers East & Nth West).
- 50 Submission 8 (Angela Smith) argued that convenors with knowledge of attachment and trauma as well as with legal training would have more authority and weight through the process.
- 51 Submission 26 (FVPLS Victoria) stated that all convenors of family decision-making processes must have local Aboriginal and Torres Strait Islander knowledge, as well as being specifically trained in respect of the concepts of procedural fairness, child development, family violence and dispute resolution. Further, they argued that the training of new Aboriginal convenors ought to be prioritised, so that they are available to conduct AFDM meetings for Aboriginal children when required.
- 52 Submission 15 (Connections) also argued that family decision-making must be conducted by a non-legal facilitator with a social work or psychology qualification or equivalent. Connections suggested that a key area of competency is working with participants from CALD backgrounds. They recommended that the training required of family law family dispute resolution practitioners might be suitable for use in the child protection area.
- 53 In consultations, participants from DHS commented on the benefit of having a convenor who explains the process and provides an opportunity for all parties to speak, noting that a well run process could allow for open discussion between parties: Consultation 22 (DHS CP Workers Southern).
- 54 Submission 46 (Children's Court of Victoria) 39.
- 55 *Children, Youth and Families Act 2005* (Vic) s 588(1).
- 56 Section 10G provides the definition of family dispute resolution practitioner, if the Secretary determines, in accordance with the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), that the person meets the accreditation criteria.
- 57 The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) require family dispute resolution practitioners to have completed a Vocational Diploma of Family Dispute Resolution or an equivalent qualification. Once accredited, family dispute resolution practitioners must comply with additional notification, education, training, professional development and professional standards requirements. Accredited family dispute resolution practitioners must undertake at least 24 hours of education, training or professional development in family dispute resolution in every two year period from the date of accreditation. *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 5, see also regs 6–8, 13–15.
- 58 Judicial resolution conferences will naturally demand a different set of qualifications due to the convenors' role as a judicial officer. JRCs are discussed separately.
- 59 In the Family Violence Risk Assessment and Risk Management framework, the Victorian government has stated that '[e]ffective risk assessment in terms of family violence relies on the assessor: having the knowledge and ability to effectively undertake the assessment; and having a sound understanding of the theory of risk generally and of the specific risk indicators inherent in family violence'. Department for Victorian Communities, *Family Violence Risk Assessment and Risk Management: Supporting an Integrated Family Violence Service System* (2007) 15.
- 60 This point is made by Dr Michelle Meyer, who advocates for additional training in the areas of: 'indicators of child sexual abuse; understanding the family dynamics of child sexual abuse including grooming and secrecy; responding to the family dynamics in relation to child sexual abuse such as denial, anger and grief; and safety issues such as the protective requirements for contact arrangements, understanding the range of ways in which perpetrators avoid full responsibility and family reunification'. Michelle Meyer, *Family Decision-Making and Child Sexual Abuse: Facing the Challenges in this Contested Area of Practice* (PhD Thesis, University of Melbourne, 2007) 286.
- 61 The Commission understands that the Domestic Violence Resource Centre has developed and provided important training in relation to family violence. Department for Victorian Communities, above n 59, 15.

A COMPLAINTS PROCESS FOR FAMILY GROUP CONFERENCE AND CONCILIATION CONFERENCE CONVENORS

7.39 Complaints are an important part of any professional accreditation process; a formalised complaints process serves to hold practitioners accountable and maintain consumer trust. The Commission believes that non-judicial convenors of family decision-making processes ought to be subject to a formalised complaints process as part of their accreditation.⁶² A suitable complaints process is a necessary condition of registration for FDR practitioners.⁶³ This is particularly relevant because 'mediators frequently encounter the same participants over time'.⁶⁴ In child protection matters, this would include child protection workers, and representatives of families and children.⁶⁵

Proposal 1.2: The convenors of family decision-making processes should have appropriate qualifications and training.

LEGAL REPRESENTATION AND ADVICE IN FAMILY DECISION-MAKING PROCESSES

INTRODUCTION

7.40 The Commission proposes that the parties involved in these processes should have access to appropriate legal assistance. Legal advice is an essential part of the Commission's proposed family decision-making process. In summary, the Commission's proposed model for legal assistance in and around family decision-making processes is that:

- the Department should always have an authorised decision maker, who may choose to be legally represented, in all family decision-making processes⁶⁶
- a representative for the child or young person should always be present within family decision-making processes, regardless of the representation of other parties⁶⁷
- parents should always have access to legal advice before and after conferences, as well as between conference sessions⁶⁸
- parents' representation within family decision-making conferences might vary according to the type of process.⁶⁹

7.41 The Commission proposes that this model for lawyer involvement in family decision-making processes should be included in practice standards for each family decision-making process. The involvement of lawyers in family decision-making processes is often contested.⁷⁰ The Commission received a range of responses about the lawyer's role in family decision-making processes.⁷¹ Overall, there was considerable support for legal advice around and representation within family decision-making processes.⁷²

ARGUMENTS SUPPORTING LAWYERS' INVOLVEMENT IN FAMILY DECISION-MAKING PROCESSES

Vulnerable participants⁷³

- 7.42 A large number of consultations and submissions recognised the vulnerability of families involved in child protection matters, and argued for lawyers' involvement to assist the parents in family decision-making processes.⁷⁴ A number of submissions argued that there is a power imbalance between the Department and vulnerable families, and that lawyers' involvement in family decision-making processes would correct this balance.⁷⁵ The Law Institute of Victoria was 'concerned that the reduction or removal of lawyers from the ADR process would strengthen what is already a considerable power imbalance in favour of the State'.⁷⁶ This view was also supported by the Victorian Bar, which noted that 'it is imperative that respondent parties to proceedings are legally represented to ensure fairness, in the process and the public perception'.⁷⁷
- 7.43 The Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria) argued that legal representation in family decision-making processes was especially important for victims of family violence, including Aboriginal victims. They stated that the FVPLS Victoria could not 'support the extension of conferencing, or dispute resolution processes for ATSI children and families unless the option for legal representation is guaranteed'.⁷⁸
- 7.44 In Victoria Legal Aid's (VLA) view, 'lawyer assisted mediation provides a useful option to resolve disputes without compromising the legal rights of any party'.⁷⁹ Protections for vulnerable participants in the decision-making process include

*maintaining the right to legal representation for those who take part (including children), and having facilities available for consultations and retreat in the event that the situation becomes particularly conflicted.*⁸⁰

- 62 This requirement should not apply to judicial officers who conduct JRCs as judicial officers have separate processes for hearing complaints. See Rob Hulls, Deputy Premier and Attorney-General (Victoria), 'New Commission to Receive Complaints Against Judges' (Press Release, 2 June 2010) 1.
- 63 King et al, above n 11, 122.
- 64 Marilou Giovannucci and Karen Largent, 'A Guide to Effective Child Protection Mediation: Lessons from 25 Years of Practice' (2009) 47(1) *Family Court Review* 38, 45.
- 65 NADRAC recommends that an effective complaints process is 'an essential element within an acceptable code of practice, and considers improved complaints handling as a priority for the future development of ADR standards.' NADRAC also notes that the 'number of complaints may have as much to do with the effectiveness of the complaint handling system as with the quality of service provided', therefore a 'proactive and strategic approach to complaints may be required'. National Alternative Dispute Resolution Advisory Council, *Report to the Commonwealth Attorney-General*, above n 39, 72.
- 66 At the final stage of court-based conciliation conferences, a DHS legal representative must be present in the conference to enable minutes to be drafted, where an agreement has been reached.
- 67 That includes advice offered to the child before and after conferences, as well as between conference sessions. Funding will need to be provided to enable early provision of this advice.
- 68 Funding will need to be provided to enable early provision of this advice.
- 69 For *family group conferences*, convenors should have the discretion to admit legal representatives for the parents into the conference sessions and to determine the terms on which parents' lawyers can attend conferences; for *conciliation conferences*, lawyers for parents should attend all conferences; and for *judicial resolution conferences*, lawyers for parents should attend all conferences.
- 70 King et al, above n 11, 119.
- 71 Question 1.9 in Victorian Law Reform Commission, *Review of Victoria's Child Protection Legislative Arrangements: Information Paper* (2010) - 'What role (if any) should lawyers play in ADR processes?'
- 72 Submissions 1 (Anonymous), 46 (Children's Court of Victoria) 40–1, 27 (CPS), 45 (FCLC), 36 (FLS), 19 (Joe Gorman), 28 (Anonymous), 25 (LIV), 38 (VALS), 43 (VCOSS & YACVic), 11 (VLA), 24 (WHCLS), 48 (Victorian Bar); consultations 11 (FCLC), 7 (Private Practitioners 2), 27 (FVPLS Victoria), 16 (VLA).
- 73 In 1997, the Australian Law Reform Commission in conjunction with the Human Rights and Equal Opportunity Commission released the report, *Seen and Heard*. The Commissions recognised that there are concerns with the vulnerability of families in negotiating with social workers, and vulnerability of some family members within abusive or violent families. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 21, 439.
- 74 Submissions 24 (WHCLS), 48 (Victorian Bar), 38 (VALS), 45 (FCLC), 25 (LIV); consultations 7 (Private Practitioners 2), 11 (FCLC).
- 75 Submissions 48 (Victorian Bar), 38 (VALS), 43 (VCOSS & YACVic).
- 76 Submission 25 (LIV).
- 77 Submission 48 (Victorian Bar).
- 78 Email from Shelley Burchfield, Aboriginal Family Violence Prevention Legal Service Victoria, 15 June 2010.
- 79 Submission 11 (VLA).
- 80 *Ibid.*

- 7.45 A number of submissions highlighted the need for legal advice at an early stage of child protection matters for disadvantaged families, particularly when negotiating voluntary child-care agreements.⁸¹ These submissions expressed concern about the problems experienced by families who do not have access to legal advice at an early stage of a child protection matter.⁸²
- 7.46 Aboriginal agencies and organisations expressed concern about the vulnerability of Aboriginal people in family decision-making processes.⁸³ According to the Victorian Aboriginal Legal Service:

*Legal representation, or even legal advice as a minimum should be provided for the family and/or child participating in the Family Group Conference to better equip children and families to combat imbalance between themselves, child protection services and other service providers. This is especially important for Aboriginal and Torres Strait Islander and other marginalised groups that are overrepresented in the child protection system.*⁸⁴

Legal advice and support for children and young people

- 7.47 Some submissions highlighted lawyers' roles in providing legal advice and supporting children and young people in family decision-making processes.⁸⁵ In a joint submission, the Victorian Council of Social Services and the Youth Affairs Council of Victoria advocated for the introduction of well-resourced FGC and stated that 'it is vital that all parties, including both the children and their families are adequately supported to participate'.⁸⁶ In its submission, Youthlaw expressed concern that 'children are not often heard in the separation and placement processes and other administrative and judicial proceedings'.⁸⁷
- 7.48 Previous reviews of this area have also commented on the level of children's involvement in family conferences and found that legal advice should be provided before the child decides whether to participate in the conference.⁸⁸ In a report by the CREATE Foundation, children and young people also expressed this view, saying that they wanted greater explanation and to be involved more directly in decisions that affect them.⁸⁹

Access to justice

- 7.49 Access to justice was a common theme in many of the submissions supporting legal representation in family decision-making processes. The Federation of Community Legal Centres advanced the view that self-represented participants accepting 'settlements that do not reflect their true legal entitlements' weaken, not enhance, access to justice.⁹⁰ In addition, the Victorian Aboriginal Legal Service stated that

*[t]he failure of legal advice and representation of families in the dispute resolution process reduces the chance for meaningful participation in the process and poses a risk to access to justice.*⁹¹

Legal advice as a procedural safeguard

- 7.50 A number of submissions argued that legal representation is more important in family decision-making processes, as the Court's procedural safeguards are absent.⁹² The Federation of Community Legal Centres expressed concern about self-represented participants and the ability of mediators to provide assistance to the same degree as a court.⁹³ The Victorian Aboriginal Legal Service expressed similar concerns as 'the convenor or facilitator will hold a "neutral" role and can therefore not provide assistance' to self-represented participants.⁹⁴

7.51 The Children’s Protection Society (CPS) stated that:

*CPS would suggest that there are good reasons to believe that the presence of lawyers would assist rather than undermine ADR processes. As long as the disputing parties are encouraged to speak for themselves, and lawyers are restricted to providing a largely advisory role, then the presence of lawyers is likely to make the disputing parties more confident that their rights are being respected throughout the proceedings. This confidence is likely to lead to a greater willingness to enter honestly into the ADR process.*⁹⁵

7.52 The 2005 Maughan and Daglis *Evaluation of Pre-hearing Conferences* highlighted the importance of families having access to support and advice throughout the process of pre-hearing conferences. Legal representatives were seen as capable of providing such support.⁹⁶ Maughan and Daglis argued that the opportunity to obtain legal advice can empower participants and increase their confidence to have a say.⁹⁷

Lawyers enable clients’ participation

7.53 During consultations with dispute resolution convenors, the Commission heard that lawyers do sometimes encourage family participation in the existing decision-making processes.⁹⁸ Currently, if parents are not attending dispute resolution conferences (DRCs), lawyers may attend as long as they have instructions from parents.⁹⁹ This means that parents’ voices are still presented in the process. However, the convenors also reported that in current DRCs, lawyers often speak on behalf of families even if family members do attend.¹⁰⁰ According to the Children’s Court, ‘legal representation of parties is critical to the conduct of good practice ADR’.¹⁰¹

7.54 FVPLS Victoria challenged the notion that lawyers are confined to an adversarial approach and stated that

*Whilst rigorous pursuit of legal rights of children and adults is critical, including for example to ensure that decisions and proposals with significant implication are supported by evidence and appropriate to the particular circumstance, community lawyers are experts in broad ranging advocacy for clients which incorporates accessible and understandable advice, negotiation, engagement when appropriate with dispute resolution processes and an holistic approach to service provision which takes into account the full range of issues and disadvantage our clients are experiencing. To assert that the lawyer’s role in child protection is purely adversarial, or that ‘adversarial’ is automatically at odds with the best interests of the child is simply wrong and appears extremely self-serving on the part of those making the assertion.*¹⁰²

ARGUMENTS AGAINST LAWYERS’ INVOLVEMENT IN FAMILY DECISION-MAKING PROCESSES

7.55 A number of submissions argued that lawyers should not be involved in family decision-making processes at all.¹⁰³ Some further submissions acknowledged the importance of appropriate advice, but expressed concern that lawyers may impede family decision-making processes.¹⁰⁴

- 81 Submissions 45 (FCLC), 24 (WHCLS), 26 (FVPLS Victoria), 32 (SMLS).
- 82 Submissions 45 (FCLC), 24 (WHCLS), 26 (FVPLS Victoria).
- 83 Submissions 26 (FVPLS Victoria), 38 (VALS), 38 (VACCA).
- 84 Submission 38 (VALS).
- 85 Submission 43 (VCOSS & YACVic), 45 (FCLC), 33 (Youthlaw), 11 (VLA), 24 (WHCLS).
- 86 Submission 43 (VCOSS & YACVic).
- 87 Youthlaw stated further that ‘[f]amily group conferencing is one model to help ensure that the child’s views are considered and valued as partners in proceedings. It is critically important that children are able to participate or at the very least that their wishes or best interests are made clear when conference participants are making decisions about children... Children should be informed of process in an accessible way, and be supported to then decide if they want to be part of process or have someone represent their views – based on their capacity and maturity. All interested parties including children and young people should be required to obtain independent legal advice prior to signing voluntary agreements.’ Submission 33 (Youthlaw).
- 88 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 21, 440, 442, recommendation 170: In addition, it was noted that ‘children who are too young to participate or who wish to have additional support during the conference should be represented by a lawyer or advocate of their choice in these conferences’.
- 89 CREATE Foundation, *Children and Young People in Care Consultation for the Victorian Law Reform Commission* (2010) 24.
- 90 Submission 45 (FCLC).
- 91 Submission 38 (VALS).
- 92 Submissions 45 (FCLC), 25 (LIV), 19 (Joe Gorman).
- 93 Submission 45 (FCLC).
- 94 Submission 38 (VALS).
- 95 Submission 27 (CPS).
- 96 Jeannette Maughan and Andrea Daglis, *An Evaluation of Pre-Hearing Conferences in the Family Division of the Children’s Court of Victoria* (2005) 18–19.
- 97 Ibid 19.
- 98 Consultation 23 (DRC).
- 99 Ibid.
- 100 Ibid.
- 101 Submission 46 (Children’s Court of Victoria) 40.
- 102 Submission 26 (FVPLS Victoria).
- 103 Submission 15 (Connections); consultations 22 (DHS CP Workers Southern), 25 (DHS CP Workers - East & Nth West), 20 (DHS Community Care Managers), 4 (DHS Managers).
- 104 Consultation 3 (CAU); submission 1 (Anonymous).

Lawyers' involvement will lead to adversarial family decision-making processes

- 7.56 In consultations, concerns were expressed about the current operation of DRCs.¹⁰⁵ Some participants in consultations felt that lawyers' involvement in family decision-making processes would create an adversarial atmosphere.¹⁰⁶ One submission noted that '[l]awyers often seem to make the process a lot more difficult and combative'.¹⁰⁷
- 7.57 The Commission is aware of concerns cited in academic literature about the tension between traditional legal training and the principles espoused in mediation practices.¹⁰⁸ The Taskforce Report also noted that current Children's Court convenors believe that 'the conferences are not as effective as they could be', citing concern that some lawyers 'adopt an adversarial approach'.¹⁰⁹

Lawyers thwart client participation in family decision-making

- 7.58 In consultations, the Commission heard concerns that the influence and dominance of lawyers in DRCs may overpower participants' voices.¹¹⁰ Anchor Foster Care stated that '[t]he role of lawyers should be to take instructions from clients, but not attempt to change their minds or influence them'.¹¹¹

FAMILY DECISION-MAKING PROCESSES IN OTHER JURISDICTIONS

- 7.59 This section contains a brief overview of legal advice and representation in family decision-making processes in other jurisdictions.

Legal representation in family decision-making processes in other Australian states and territories

- 7.60 In the other Australian states and territories, the law is generally silent on the subject of legal representation for children and families in pre-court family decision-making meetings. Notable exceptions include Queensland, Western Australia and South Australia. In Queensland, the legal representative for the child or young person and a support person for the parents (which can be a legal representative) may attend and participate in the family group meeting.¹¹² In Western Australia, the Signs of Safety pilot allows lawyers for all parties to assist in the Signs of Safety Meetings.¹¹³ The Children's Court noted, when referring to the Western Australian model, that the meetings were improved by the attendance of lawyers.¹¹⁴ In South Australia, a Family Care Meeting Coordinator must always appoint an advocate for the child who will attend the meeting, unless he or she is satisfied that the child has made an independent decision to waive his or her right to have an advocate.¹¹⁵ No lawyers attend a South Australian Family Care Meeting,¹¹⁶ but the child's parent may have a support person present.¹¹⁷ If the child is Aboriginal, a cultural representative must attend the meeting.¹¹⁸
- 7.61 In the ACT, a support person may assist any participants in the FGC, but lawyers are excluded.¹¹⁹ The FGC facilitator must, however, give those with parental responsibility for the child or young person an opportunity for legal advice prior to the parties entering into any agreement.¹²⁰ If the young person is 15 years old or older, the facilitator must also provide the young person with an opportunity to obtain legal advice.¹²¹

Legal representation in family dispute resolution

- 7.62 The current rules for FDR conferences in federal family law are silent on the issue of whether FDR practitioners should direct parties to seek legal advice.¹²² Since July 2009, a prohibition on lawyers attending FDR conferences at Family Relationship Centres has been lifted, in recognition of the fact that lawyers do not automatically make FDR adversarial and that their services may especially assist survivors of family violence who are involved in the process.¹²³

7.63 A number of pilot programs that fund legal advice in conjunction with FDR are currently underway for cases involving allegations of family violence. Announcing the pilots in 2009, the federal Attorney-General said, 'My view is that, in the right circumstances, lawyers can assist parties to resolve their disputes out of court, including in family matters'.¹²⁴ Despite the prohibition's removal, in practice, family lawyers do not usually attend such sessions with their clients, but provide advice to their clients before and after the process.¹²⁵ An independent children's lawyer (as discussed in Chapter 4) may be involved in Victoria Legal Aid's Roundtable Dispute Management process, but only after family proceedings have already commenced.¹²⁶

7.64 The Office of the Child Safety Commissioner (OCSC) proposed a new model for child protection proceedings—part of which is the establishment of the Family Solutions Roundtable—to seek a negotiated agreement that is in the child's best interests.¹²⁷ In this model, parties are to seek independent legal advice prior to the Family Solutions Roundtable session.¹²⁸ This proposal is based on the Family Court's FDR processes.¹²⁹

REPRESENTATION OF DHS WITHIN FAMILY DECISION-MAKING PROCESSES

7.65 The Commission proposes that the Department provide an authorised Department decision maker in all family decision-making processes. An 'authorised Department decision-maker' in this context means a person who 'has the necessary authority to negotiate a range of possible outcomes, and make decisions that would lead to settlement'.¹³⁰ It may be desirable for the Department to be legally represented at these conferences where parents are represented in the process, although the Commission does not specifically propose this course of action. The Commission does propose that at the final stage of a court-based CC where an agreement has been reached, a DHS legal representative be present to enable minutes to be drafted.¹³¹

105 Consultations 22 (DHS CP Workers Southern), 25 (DHS CP Workers East & Nth West).

106 Consultations 22 (DHS CP Workers Southern), 25 (DHS CP Workers East & Nth West), 3 (CAU).

107 Submission 1 (Anonymous).

108 See King et al, above n 11, 119. Two particular aspects of lawyers' professional mindset have been argued to limit their engagement with ADR processes: one is lawyers' assumption that disputants are adversaries and the second is the belief that the application of legal principles will resolve all disputes. Leonard L. Riskin, 'Mediation and Lawyers' (1982) 43 *Ohio State Law Journal* 29, 44. Further, there is concern that lawyers will adopt mediation processes as 'another weapon in the adversarial arsenal to manipulate time, methods of discovery, and rules of procedure for perceived client advantage'. Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"' (1991-1992) 19 *Florida State University Law Review* 1, 3.

109 Child Protection Proceedings Taskforce, above n 40, 19–20.

110 Consultation 22 (DHS CP Workers Southern).

111 Submission 22 (Anchor).

112 *Child Protection Act 1999* (Qld) s 51L(1)–(2).

113 Material provided to the Victorian Law Reform Commission by WA Legal Aid on 4 February 2010.

114 Submission 46 (Children's Court of Victoria) 47.

115 *Children's Protection Act 1999* (SA) s 29(2).

116 There is a limited exception in cases where a lawyer has already been appointed for the child by the Youth Court in concurrent court proceedings, in which case that lawyer will attend the FCM, but as a lay advocate for the child, not as a legal representative.

117 *Children's Protection Act 1999* (SA) s 31(h).

118 *Children's Protection Act 1999* (SA) s 30(1)(e).

119 *Children and Young People Act 2008* (ACT) s 83(4)–(5).

120 *Children and Young People Act 2008* (ACT) s 85(3).

121 *Children and Young People Act 2008* (ACT) s 85(3).

122 Becky Batagol, 'Fomenters of Strife, Gladiatorial Champions or Something Else Entirely? Lawyers and Family Dispute Resolution' (2008) 8(1) *QUT Law and Justice Journal* 24, 26.

123 Attorney-General's Department (Australian Government), 'Appendix C: Guidelines for Referrals to Legal Advice by Staff in Family Relationship Centres', *Operational Framework for Family Relationship Centres* (2007) 47.

124 Robert McClelland (Australian Attorney-General), 'Speech' (Speech to the Albury-Wodonga Family Pathways Network Event, Albury, 24 July 2009).

125 Batagol, above n 122, 28.

126 The Family Court may order that the child or young person's interests be represented by an ICL where the child or young person's best interests or welfare is the paramount or a relevant consideration in proceedings. *Family Law Act 1975* (Cth) s 68L(1)–(2).

127 Submission 37 (OCSC).

128 Ibid.

129 Ibid.

130 Children's Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 5.

131 Ibid 2.

- 7.66 A number of submissions highlighted the need for authorised Department decision makers in family decision-making processes.¹³² The Federation of Community Legal Centres recommended that DHS ‘staff with the appropriate decision-making authority must attend’.¹³³
- 7.67 The Taskforce reported that the Department ‘is on occasion not represented by someone with the authority to make a decision and this undermines the effectiveness of the conference’.¹³⁴ The Taskforce anticipated that the new conference model will address this issue, amongst others identified
- by taking the Melbourne conferences off site, requiring better preparation from all concerned, allowing more time for discussion (in a less stressful environment), requiring decision makers to be present and reinforcing appropriate behaviour through a practice direction.*¹³⁵
- 7.68 The Court’s draft NMC guidelines stipulate that Department workers present at an NMC ‘must respect the authority of the convenor and:
- be legally represented; or
 - have the necessary authority to negotiate a range of possible outcomes, and make decisions that would lead to settlement; and
 - have legal representation during the final phase of the conference to assist with drafting of minutes where an agreement has been reached’.¹³⁶
- 7.69 The 2005 evaluation by Maughan and Dagleis, discussed in Chapter 2 and Appendix D, provided strong arguments for and against the need for legal representation of the Department at pre-hearing conferences.¹³⁷ The evaluation concluded that on balance, ‘there is a strong case for the Department ... to consider providing legal representation to its workers in Pre-hearing conferences, particularly in Melbourne, on a case by case basis’.¹³⁸
- 7.70 The report of the Wallis Consulting Group (the Wallis Report)¹³⁹ found that Department workers consulted the Court Advocacy Unit in less than a third of cases.¹⁴⁰ Moreover, the report found that Department workers appeared to have little faith in legal advice and that those ‘who had not consulted with the CAU were of the opinion that having done so prior to the DRC would have had little impact on the outcome’.¹⁴¹ The key findings of this report were that the attendance of a DHS Team Leader with the power to make an on-the-spot decision in negotiations was found to be the key contributing factor to a settlement,¹⁴² and enabled discussions to flow more smoothly and effectively.¹⁴³ Interviewees agreed that the presence of Team Leaders in decision-making processes was especially important when unexpected issues arose during negotiations.¹⁴⁴ The survey found that Department workers ‘sometimes feel outnumbered and outmanoeuvred by legal representatives’.¹⁴⁵
- 7.71 The Commission believes that an authorised Department decision maker must be present during family decision-making processes. While it may be desirable for the Department to be legally represented at family decision-making processes, especially where parents are represented in the process, this is ultimately a matter for the Department.

REPRESENTATION FOR CHILD OR YOUNG PERSON IN FAMILY DECISION-MAKING PROCESSES

- 7.72 It is the Commission’s view that a representative for the child or young person should always be present in a family decision-making process, regardless of the representation of other parties. Representation of the child or young person is important in a context where other participants in family decision-making processes—including the child’s parents and the Department—will attend and have a voice in negotiations and in the final outcome, but the child may not be physically present during the process or may be unable to express a view.
- 7.73 Current practice in DRCs is that if a child is mature enough to give instructions and has a separate legal representative, that legal representative may attend the conference.¹⁴⁶ Further, in exceptional circumstances the Court may determine that if a child is not mature enough to give instructions, it is in his or her best interests to be legally represented at a DRC.¹⁴⁷ The Children’s Court’s draft guidelines for the operation of NMCs state that where a child has a lawyer, the lawyer should attend the conference on behalf of the child.¹⁴⁸ Those guidelines only apply to children who are represented and do not include children who are deemed not mature enough to give instructions.
- 7.74 The joint submission of the Victorian Council of Social Services and the Youth Council of Victoria argued for increased independent representation of children in child protection matters, especially for children under the age of seven. They stated:

*The lack of independent representation for these children is concerning and VCOSS and YACVic would welcome the introduction of independent advocates, with early childhood expertise, to work with these children to represent their views.*¹⁴⁹

- 7.75 Systematic representation of children and young people is consistent with article 12 of the *United Nations Convention on the Rights of the Child*¹⁵⁰ and occurs in New Zealand, where the child’s representative is the only representative entitled to attend the FGC.¹⁵¹
- 7.76 In Option 2, the Commission proposes that all children and young people should be a party to protection proceedings affecting them and should be represented in those proceedings. This proposal concerning family decision-making processes is consistent with the position relating to court proceedings. If Option 3 is accepted, which proposes that a new statutory commissioner is created to represent and promote the best interests of children, then the role of the child and young person’s representative at family decision making would be undertaken by an Office of the Children and Youth Advocate (OCYA) advocate.

LEGAL REPRESENTATION OF PARENTS IN FAMILY DECISION MAKING

- 7.77 Because of the varied nature of the family decision-making processes suggested by the Commission, the Commission proposes different models for the representation of parents during FGCs, CCs and JRCs.
- 7.78 The Commission proposes that parents involved in family decision-making processes should always have access to legal advice before and after conferences, as well as between conference sessions. Legal representatives would support their clients in preparing for an FGC, by informing them about the FGC process and assisting them to weigh their options and decide on their preferred outcome.

132 Submissions 17 (CCC), 45 (FCLC), 31 (Gatehouse Centre), 28 (Anonymously), 48 (Victorian Bar); consultations 9 (Barristers), 7 (Legal Practitioners 2).

133 Submission 45 (FCLC).

134 Child Protection Proceedings Taskforce, above n 40, 20.

135 Ibid.

136 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 5.

137 Maughan and Daglis, above n 96, 52–3. See Appendix D for further information about the report.

138 Ibid, 53.

139 In September 2008, the Wallis group conducted a survey of convenors and Departmental workers attending DRCs at the Melbourne Children’s Court. Wallis Consulting Group, *Survey of Participants and Convenors in Dispute Resolution Conferences at Melbourne’s Children’s Court Report* (2008). In all, 117 interviews were conducted from 61 DRCs that were held in the period – at i.

140 Ibid 16 – in 61 per cent of cases Departmental workers did not request the assistance of CAU.

141 Ibid ii, 16.

142 Ibid ii, 17–18.

143 Ibid iv.

144 Ibid ii.

145 Ibid iii.

146 *Children, Youth and Families Act 2005* (Vic) s 222(4).

147 *Children, Youth and Families Act 2005* (Vic) s 222(5).

148 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 2.

149 Submission 43 (VCOSS & YACVic).

150 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990). That article provides that where a child is capable of forming his or her own views, States parties shall allow the child to express those views freely in all matters affecting him or her.

151 *Children, Young Persons and Their Families Act 1989* (NZ) s 22(1). With some narrow exceptions, the representative for the child is the only representative listed as an attendee.

- 7.79 All of the Commission's proposed processes—FGCs, CCs and JRCs—should be capable of leading to consent orders. To ensure that families' rights are protected, the Commission believes that independent legal advice is an essential component of any agreement formalisation process. The Commission proposes that the registration of consent orders should be conditional on the parents receiving legal advice.

Model for involvement of parents' lawyers in family group conferencing sessions

- 7.80 The Commission proposes that parents involved in an FGC should always have access to legal advice before and after conferences, as well as between conference sessions.
- 7.81 The Commission proposes that the parents' lawyers should be permitted to attend FGCs with the permission of the convenor, who may believe that the parents' circumstances make their representatives' presence necessary. The convenor should also be able to determine the terms on which parents' lawyers can attend conferences. Convenors should link the decision about whether and how to admit parents' lawyers to conferencing sessions to the thorough risk assessment that is an essential part of any FGC intake process.
- 7.82 This proposal does not constitute either a direct prohibition on parents' lawyers' attendance at FGC or support for their presence on every occasion. In practice, it will be necessary to strike a balance, taking into account matters such as participants' vulnerability, the availability of appropriately trained lawyers and cost. Guidelines that assist convenors to make consistent decisions on a case-by-case basis should be devised within practice standards for FGC.
- 7.83 Where the Court has made a referral to an FGC following an emergency intervention, the Commission believes that there is an increased imperative for parents to have legal advice during the conferencing process because court proceedings will already be on foot. If proceedings have already been initiated for an emergency intervention, the Commission believes that FGC practice standards should encourage parents' lawyers to attend FGCs.
- 7.84 The Commission proposes that Victoria adopts New Zealand's three-stage model of FGC.¹⁵² The first stage is the information sharing stage, during which the coordinator is responsible for making all relevant information available to the family group.¹⁵³ The second stage is private family deliberation, where non-family members withdraw from the process and leave the family alone to begin decision making.¹⁵⁴ Although ordinarily only the child is represented in FGCs in New Zealand, even the representative for the child must withdraw from deliberations at this stage, unless members of the family request that the representative is present.¹⁵⁵ At the third stage, the professionals return and the coordinator seeks agreement between the family group and the referral source.¹⁵⁶ The conference decides together whether the child is in need of care and protection and, if so, decides on an appropriate course of action.¹⁵⁷
- 7.85 The Commission proposes that parents' lawyers who do attend FGCs do not attend the family-only 'private time' middle stage of the conference where families make decisions without the presence of any professionals. The retention of private family-only time, even where parents are represented during other stages, will assist in retaining the unique family-led nature of the process. Parents' lawyers could be present at the other two stages of the conference, with the convenor's permission.

- 7.86 In developing this conditional representation model for parents, the Commission has taken into account two important, but competing, considerations. The first is the great importance of legal representation for parents during FGCs in levelling out any imbalances of bargaining power that may exist between parents and the Department. This issue is especially acute where parents might be vulnerable due to the existence of family violence, language difficulties, cultural background, substance abuse and mental health issues.
- 7.87 In addition, the ability to turn FGC agreements into outcomes that have the status of court orders necessitates the presence of sound legal advice for parents at appropriate times. Many submissions made this point.¹⁵⁸
- 7.88 The second consideration that has been taken into account when devising this model of parental representation is that an FGC is a process where, by its nature, families should lead the decision-making process and the professionals should follow. It differs from other family decision-making processes, such as child protection mediation, which aim to have families and child protection workers working in conjunction with legal professionals to achieve consensus. In such a family-focused process as an FGC, there is a danger that the presence of lawyers will divert decision making away from families and towards the professionals supporting them. In the New Zealand model of FGC, parents' lawyers are not admitted to the process. For these reasons, the Commission does not propose that all FGCs be open to the parents' legal representatives.

Model for involvement of parents' lawyers in conciliation conferencing sessions

- 7.89 Parents involved in CCs should be legally represented. The CCs proposed by the Commission should replace the current system of DRCs. The CC model is based on the NMC process that commences in the Children's Court as a pilot in July 2010. The model of parental legal representation in CCs supported by the Commission is the same as those outlined for NMCs. This section briefly discusses the current practice, the Child Protection Taskforce report and the NMC guidelines.

Current practice: dispute resolution conferences

- 7.90 Under section 217 of the *Children, Youth and Families Act 2005* (Vic) (CYF Act 2005), the Court can refer contested applications to a DRC. The current DRC process is described in Chapter 3. The Act allows legal representatives to attend a DRC, including a parent's legal representative.¹⁵⁹

Report of the Child Protection Proceedings Taskforce and New Model Conference guidelines

- 7.91 The Child Protection Proceedings Taskforce recommended the phased implementation of a new process, now known as NMCs.¹⁶⁰ The Taskforce suggested that lawyers for parents may attend conferences but their role is to advise clients rather than to advocate.¹⁶¹
- 7.92 The report also recommended that the fee structure and remuneration for private practitioners be reviewed to provide incentives for early preparation of child protection matters and for lawyers to see children away from the Court.¹⁶²
- 7.93 During 2010, in conjunction with VLA and DHS, the Children's Court responded to the Taskforce's recommendations by developing draft guidelines for the operation of NMCs. The guidelines take effect on 1 July 2010 and apply to applications from the Department's Footscray office at the discretion of the judicial officer.¹⁶³ 'NMC's are to facilitate the early resolution of applications through a less adversarial process.'¹⁶⁴

152 Marie Connolly, 'An Act of Empowerment: The Children, Young Persons and their Families Act (1989)' (1994) 24 *British Journal of Social Work* 87, 92–3. The New Zealand model is discussed in Chapter 5.

153 Ibid 92.

154 Ibid 92–3.

155 *Children, Young Persons and their Families Act 1989* (NZ) s 22(2).

156 Connolly, 'An Act of Empowerment', above n 152, 93.

157 Ibid.

158 Submissions 45 (FCLC), 24 (WHCLS), 26 (FVPLS Victoria), 32 (SMLS).

159 *Children, Youth and Families Act 2005* (Vic) s 222(3).

160 Child Protection Proceedings Taskforce, above n 40, recommendation 1, 11, 19–22.

161 Ibid 36.

162 Ibid 23–4.

163 Children's Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 1.

164 Ibid.

- 7.94 Parents' lawyers may attend NMCs.¹⁶⁵ Lawyers are required to adopt a non-adversarial role in representing their clients in an NMC.¹⁶⁶ The guidelines stipulate a number of requirements for a lawyer participating in an NMC, including that they:
- be available for the conference at the time arranged and for the whole conference
 - work with their clients to ensure that they understand the process
 - encourage the client to directly participate and contribute to discussions
 - be sensitive to any power imbalances.¹⁶⁷
- 7.95 The Commission supports the guidelines' principles concerning parental legal representation and the role of lawyers in CCs.

Models for involvement of parents' lawyers in judicial resolution conferences

- 7.96 Following an amendment to the CYF Act 2005 in 2009, JRCs may occur in child protection matters at any time between commencement of a protection application and finalisation.¹⁶⁸ There are no rules yet for JRCs, but the Court has prepared a draft practice direction.¹⁶⁹
- 7.97 As court proceedings will be well underway by the time a JRC occurs, legal representatives for parents will be involved in the process. The Commission believes this position should continue and that parents' lawyers should attend JRCs, subject to any standards of behaviour and conduct set out in practice directions.

THE COMMISSION'S PROPOSAL

- 7.98 The Commission proposes that the parties involved in family decision-making processes should have access to appropriate legal assistance. In summary, the Commission's proposed model for provision of legal assistance in and around family decision-making processes is that:
- The Department should always have an authorised Department decision maker in all family decision-making processes. In conferences where parents are legally represented, it may be desirable for the Department to be represented also, although the Commission does not specifically propose this course of action. At the final stage of court-based CCs, if an agreement has been reached a DHS legal representative must be present in the conference to enable minutes to be drafted.
 - A representative for the child or young person should always be present within family decision-making processes, regardless of the representation of other parties. This includes advice offered to the child before and after conferences, as well as between conference sessions.
 - Parents should always have access to legal advice before and after conferences, as well as between conference sessions.
 - Representation of parents within family decision-making conferences should vary according to the process:
 - For *FGCs*, convenors should have the discretion to admit legal representatives for the parents into the conference sessions and to determine the terms on which parents' lawyers can attend conferences.
 - For *CCs*, parents' lawyers should attend all conferences.
 - For *JRCs*, parents' lawyers should attend all conferences.

7.99 This model for lawyers' involvement in family decision-making processes should be included in practice standards to be developed for each family decision-making process.

Proposal 1.3: The parties involved in family decision-making processes should have access to appropriate legal assistance.

INTER-PROFESSIONAL COLLABORATION AND TRAINING

7.100 The Commission believes that professionals who participate in family decision-making processes should have appropriate qualifications and training that support inter-professional collaboration. The importance of multi-disciplinary knowledge for decision makers in the child protection area was noted in a number of submissions and consultations.¹⁷⁰

THE DIFFICULTIES OF COLLABORATION AROUND FAMILY DECISION-MAKING PROCESSES

- 7.101 Traditionally, there appears to have been little collaboration between lawyers and social workers involved in child protection matters. But family decision-making programs in the child protection field frequently require child protection workers and lawyers to engage with each other to negotiate an outcome. Only lawyers representing the Department have consistently worked across the disciplinary divide. The lack of collaboration may stem from the vastly different approaches to problem solving used by lawyers and practitioners from social science backgrounds.¹⁷¹
- 7.102 In other jurisdictions, family decision-making programs have often met with initial resistance from the professionals involved, who are reluctant to collaborate but later see the program's value. For example, in a Californian child protection mediation program, caseworkers and legal representatives initially expressed resistance to the mediation process. Some legal representatives worried about parties attending mediation simply "to get some free discovery" with no intention of settling in mediation'.¹⁷² However, it was eventually found that '[r]esistance to mediation on the part of the professionals was typically short lived',¹⁷³ with participants finding that the process opened up communication between the parties.¹⁷⁴ A major factor in the success of family decision-making processes was judicial support.¹⁷⁵
- 7.103 Due to their 'gatekeeper' role in the legal system,¹⁷⁶ lawyers in many fields have traditionally been perceived as hostile to ADR. One reason for this is the adversarial focus of legal training and practice.¹⁷⁷ However, 'there is no doubt that legal culture has been changed by the presence of ADR'.¹⁷⁸ Canadian Julie Macfarlane argues that ADR and the increased use of settlement practices in many fields of law means that lawyers have begun to identify new roles for themselves around these processes. That role, she argues, must involve increased inter-professional collaboration.¹⁷⁹

165 Ibid 2.

166 Ibid 5.

167 Ibid.

168 *Courts Legislation Amendment (Judicial Resolution Conference) Act 2009 (Vic)*.

169 Submission 46 (Children's Court of Victoria) 41.

170 Consultation 10 (VFPMS); submission 39 (VACCA).

171 Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (2008) 241.

172 Nancy Thoennes, 'An Evaluation of Child Protection Mediation in Five California Courts', (1997) 35(2) *Family and Conciliation Courts Review* 184, 188.

173 Ibid 189.

174 Ibid.

175 Ibid 190.

176 King et al, above n 11, 118.

177 Ibid.

178 Ibid 119.

179 Macfarlane, above n 171, 241–2.

7.104 Child protection workers are not trained in legal processes and often find the language, processes and values of the legal system do not sit well with their own training and professional values. That can make child protection workers' interactions with lawyers and magistrates stressful, bewildering and sometimes hostile. Rosemary Sheehan has described how, as a senior social worker in a non-government family welfare agency, she saw child protection workers interpret court decisions not to make a protection order as 'a lack of trust, by the court, in [the workers'] assessments of child abuse cases and their recommendations about the need for intervention'.¹⁸⁰ Sheehan maintains that lawyers and child protection workers approach 'the best interests of the child' in vastly different ways, with lawyers and magistrates concerned with statutory definitions and legally admissible evidence, and social workers focusing on describing the behaviour of children and parents, their individual environmental influences, their needs and the help the families required.¹⁸¹

WHY INTER-PROFESSIONAL COLLABORATION?

- 7.105 The Commission believes that inter-professional collaboration around new decision-making processes in child protection is crucial to their success. Maintaining trust and respect among practitioners is essential. The Commission believes that cultivating a 'complementary services approach' between child protection workers and lawyers is necessary for family decision-making processes to operate in a manner that is less adversarial and more child-focused.¹⁸² Such an approach involves each profession viewing the work of the others as a different but necessary intervention in the family's life.
- 7.106 In its submission, the Children's Court recognised the importance of inter-professional collaboration.¹⁸³ The Child Protection Proceedings Taskforce report also suggested that collaborative training may 'develop a greater spirit of collaboration between the two professional groups' of child protection workers and lawyers.¹⁸⁴ The Taskforce stressed the importance of multi-disciplinary training between lawyers and co-workers:

*This will have the dual benefit of encouraging lawyers to become more familiar with child protection practice and familiarising child protection workers in their preparation for and involvement in Children's Court processes.*¹⁸⁵

- 7.107 VLA's submission provided that the

*current process could be improved by training all professionals involved in the process (convenors, DHS workers and all legal representatives) about procedures and goals, including the need to attend with an open mind and a willingness to discuss and compromise.*¹⁸⁶

- 7.108 Judicial support for family decision-making processes is also important in 'generating referrals, ensuring acceptance of mediated agreements, and upholding the confidentiality provisions of mediation'.¹⁸⁷ Judicial officers 'play a vital role in fostering ongoing communication between the program and judiciary'.¹⁸⁸ For this reason, the Commission believes that training on the proposed family decision-making processes should be part of the regular training of the Court's judicial officers.
- 7.109 The Children's Court, VLA and the Department have recognised the benefits of inter-professional collaboration in developing the NMCs in the Children's Court.

Inter-professional training

7.110 The Commission proposes joint training for child protection workers, lawyers and the convenors of FGCs and CCs. Previous research has suggested that

*inter-professional relationships within legal settings are often affected by professional tensions, which may arise from the different training and professional cultures of the two groups or a lack of familiarity with the 'other' profession's roles and responsibilities.*¹⁸⁹

Joint training has the potential to overcome these tensions.

7.111 VLA's submission highlighted the continual process of training, noting that it 'would be useful for those who are regularly involved in the process to also have continuing education about mediation, the legal framework and child protection'.¹⁹⁰

7.112 While emphasising the importance of collaborative training, the Commission believes that the Department and VLA should determine the matters of detail. The Commission wishes, however, to highlight four examples of successful inter-professional collaborative training that could be used as models for family decision-making processes in Victoria. These examples have been expressed as case studies.

7.113 **Case study one: Roundtable Dispute Management (RDM)** is the FDR service of VLA. RDM is staffed by a team of case managers who have either social science or legal professional qualifications. A team of administrative staff also organise RDM conferences.¹⁹¹ A collaborative relationship has been established between RDM and the Domestic Violence Resource Centre (DVRC) in order to provide general and specialised training to RDM staff. The two organisations complement each other's aims, in that the main client group of RDMs have a high incidence of family violence.¹⁹²

7.114 **Case study two: Family Pathways Networks** are examples of joint training and development in the family law field. Pathways Networks are funded for local areas by the federal Attorney-General's Department. Family Pathways Networks 'aim to improve collaboration and coordination between organisations operating in the family law system in order to help separating families obtain appropriate services'.¹⁹³ The Networks allow collaborative referrals between

*a range of independent local service providers and organisations, including the Family Court, Federal Magistrates Court, family relationship service providers, family counsellors, Legal Aid Commissions, Community Legal Centres, private legal practitioners, and relevant government departments and agencies.*¹⁹⁴

A key element of Pathways Networks is regular training and networking opportunities for local service providers, including for FDR practitioners and lawyers.

7.115 **Case study three: The Signs of Safety Program in Western Australia** is a new

*process whereby everyone who has an interest in the child has an opportunity to discuss what is working well and what is worrying them, and to be involved in the development of a safety plan for the child.*¹⁹⁵

An important part of the Signs of Safety program is the joint training of lawyers and child protection workers, including on the Western Australian risk assessment framework. The Child Protection Proceedings Taskforce reported that in relation to this training, 'The consensus was that this broke down barriers between the two professions and enabled the development of a shared language around child protection'.¹⁹⁶

180 Rosemary Sheehan, *Magistrates' Decision-Making in Child Protection Cases* (2001) 2.

181 *Ibid* 58.

182 That term is taken from the research of Helen Rhoades et al, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008) 49.

183 Submission 46 (Children's Court of Victoria) 39.

184 Child Protection Proceedings Taskforce, above n 40, 8.

185 *Ibid*.

186 Submission 11 (VLA).

187 Giovannucci and Largent, above n 64, 40.

188 *Ibid* 41.

189 Rhoades et al, above n 182, 2–3. The Child Protection Proceedings Taskforce, above n 40, 33 states that '[t]he Western Australians told us that training was the key to the success of a more collaborative approach in that State'.

190 Submission 11 (VLA).

191 Margot Scott and Walter Ibbs, 'Fasten Your Seatbelts: We're in for a Bumpy Night!': *The story of Collaboration between FDR and Family Violence Organisations* (2008) 3.

192 *Ibid* 7.

193 Robert McClelland (Australian Attorney-General), '\$2.8 Million for Family Pathways Networks' (Press Release, 27 April 2010).

194 *Ibid*.

195 Child Protection Proceedings Taskforce, above n 40, 23.

196 *Ibid*.

7.116 **Case study four: the Victorian Family Violence Risk Assessment and Risk Management Framework** also takes an integrated approach to supporting clients who experience family violence. Collaborative and structured decision-making aims to overcome barriers to effective risk assessment and risk management.¹⁹⁷ Training, and the utilisation of existing networks, will contribute to this approach.¹⁹⁸

Joint development and review of new processes

7.117 The Commission believes that it is important to involve a broad range of professionals in developing and reviewing new decision-making processes in order to establish and maintain ongoing inter-professional contact and collaboration. The collaboration demonstrated already by the Children’s Court, VLA and the Department in NMCs in the Children’s Court is an excellent example of conjoint development processes.

7.118 In Ontario, Canada, two government ministries—the Ministry of Children and Family Development, and the Ministry of the Attorney-General—have collaborated to promote Child Protection Mediation (CPM).¹⁹⁹ The collaboration draws on the child welfare experience of the Ministry and the Attorney-General’s knowledge of the court system and extensive mediation process experience.²⁰⁰ The emphasis is on an integrated approach to program design and implementation.²⁰¹ Essential to the program’s success is the shift in values of the people working in the system:

Effectively implementing a different dispute resolution process depends on having people adopt a new way of thinking about conflict. Anecdotal advice from mediators involved in the early stages of the program was to the effect that mediation is very valuable in this setting but it needs to be sold; it is an excellent tool but more education is required.²⁰²

7.119 The Commission believes that ongoing collaboration is essential during regular review and evaluation of family decision-making processes to ensure that they are meeting participants’ needs.

Proposal 1.4: The professionals who participate in family decision-making processes should have appropriate qualifications and training that fosters inter-professional collaboration.

FAMILY GROUP CONFERENCES

FAMILY GROUP CONFERENCES AND THEIR USE IN CHILD PROTECTION

7.120 The Commission proposes that FGCs should become the primary decision-making forum in Victoria’s child protection system. The Commission believes Victoria should join the more than 150 jurisdictions worldwide²⁰³ that systematically use FGCs in child protection matters.

7.121 FGC, also known sometimes as ‘family group decision-making’, has been described as

a method of resolving, or attempting to resolve, family issues in relation to child protection. It involves bringing together three sets of people—the child or young person, members of their immediate and extended family, and child protection professionals—to air issues, come to a resolution and develop a plan for future action.²⁰⁴

- 7.122 A key tenet of FGC is the participation of children and families in important decisions that affect them.²⁰⁵ Crampton maintains that FGC recognises that ‘families have the most information about themselves to make well-informed decisions and that individuals can find security and a sense of belonging within their families’.²⁰⁶
- 7.123 FGC draws from both the restorative justice and ADR movements. FGC has some features in common with other ADR processes used in the field, such as child protection mediation, which attempt to bring families together and to engage them more fully in decision making.²⁰⁷ However, FGC differs from other family decision-making processes in that the ‘underlying assumption’ of FGC is that families should lead the decision-making process and the professionals should follow. In child protection mediation, parents and child protection professionals are expected to work together as a team in arriving at outcomes.²⁰⁸ Bernie Mayer describes this difference as an attempt to create a process through FGC which facilitates family responsibility for the care of children:
- By putting the family at the center [sic] of decision making and not assigning them peripheral roles as support figures, advisors or potential placement alternatives, the hope is to completely change the dynamic of accountability and responsibility for the care of children.*²⁰⁹
- 7.124 FGC also has links to restorative justice. It has been used extensively in relation to juvenile justice.²¹⁰ Restorative justice, usually thought of in the criminal context, is ‘a method of bringing together all stakeholders in an undominated dialogue about the consequences of an injustice and what is to be done to put them right’.²¹¹ In child protection jurisdictions, FGC still incorporates restorative values. In its submission to the Commission, the Victorian Aboriginal Legal Service (VALS) stated that FGC can be seen as
- aligning with a restorative justice movement that fosters wellbeing and empowerment, shared interests and the strengths of children, young people, families and their communities. A restorative reform is theoretically linked to a broader shift in approaches to governance from the centralised, formal, top-down state regulation regime to a more pluralistic, informal, participatory, bottom-up decentralised regime.*²¹²
- 7.125 FGC originated in New Zealand where it was introduced in 1989 for both child protection and youth justice cases. It has been strongly influenced by Maori family and community structures and values.²¹³ In New Zealand, an FGC is ordinarily mandatory before commencing court proceedings in child protection matters. The introduction of mandatory FGC significantly transformed child protection processes in that country; in the first year of operation, approximately 2000 conferences were convened with agreements reached in all but a small percentage of cases.²¹⁴ It was a sudden change in practice, as described by Marie Connolly, Chief Social Worker in the Department of Child, Youth and Family Services:
- From November 1, 1989, New Zealand law required that all children assessed as being in need of care and/or protection be referred to an FGC. Overnight practice changed to include this formal legal process and coordinators were expected to manage the dynamics, whatever they were.*²¹⁵

- 197 Department for Victorian Communities, above n 59, 25.
- 198 Ibid.
- 199 M. Jerry McHale, Irene Robertson, and Andrea Clarke, ‘Building a Child Protection Mediation Program in British Columbia’ (2009) 47(1) *Family Law Court Review* 86, 89.
- 200 Ibid.
- 201 Ibid 90.
- 202 Ibid.
- 203 See David Crampton, ‘Research Review: Family Group Decision-Making: A Promising Practice in Need of More Program Theory and Research’ (2007) 12 *Child and Family Social Work* 202.
- 204 Leone Huntsman, *Family Group Conferencing in a Child Welfare Context* (2006) 1.
- 205 Joe Hudson et al, ‘Introduction’ in Hudson et al (eds), *Family Group Conferences: Perspectives Policy and Practice* (1996) 1, 2.
- 206 Crampton, ‘Research Review’, above n 203, 203.
- 207 Bernie Mayer, ‘Reflection on the State of Consensus-Based Decision-Making in Child Welfare’ (2009) 47 *Family Court Review* 10, 13.
- 208 Ibid.
- 209 Ibid.
- 210 John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) 25.
- 211 Ibid 12.
- 212 Submission 38 (VALS).
- 213 Nathan Harris, National Child Protection Clearinghouse, Australian Institute of Family Studies, ‘Family Group Conferencing in Australia 15 Years On’, *Child Abuse Prevention Issues* (2008) No 27, 2.
- 214 Ibid 3.
- 215 Marie Connolly, ‘Fifteen Years of Family Group Conferencing: Co-ordinators Talk About their Experiences in Aotearoa New Zealand’ (2006) 36 *British Journal of Social Work* 523, 528.

- 7.126 The New Zealand model of conferencing centralises family decision making and views the role of participants accordingly. In that model, the convenor, known as the care and protection coordinator, should create an environment in which a family is able to plan effectively. The role of the child protection worker is to provide information relating to the care and protection needs of the child and to agree or disagree with the family plan based on safety and child wellbeing.²¹⁶ The family, coordinator and the child protection worker all have to agree on outcomes. Decisions made in conferences have some legal status, although they are not formally registrable in the Court.²¹⁷
- 7.127 Nathan Harris identifies two key aspects of the New Zealand model that have contributed to its success. First, that FGC is offered to families on a routine basis in the belief that they have a right to be engaged though this process prior to seeking court orders. Second, those agreements which result from conferences have a high status, making FGC a central decision-making forum. These two aspects combine to ensure that FGC in New Zealand provides systematic empowerment to families within the child protection system.²¹⁸
- 7.128 Crampton argues that there has not yet been enough large-scale research on FGC to understand its effectiveness fully.²¹⁹ Nevertheless, the existing research suggests that:
- family members attend FGCs when given an opportunity
 - children and family members participate appropriately at family group conferences and develop plans that are child-centred
 - both family members and child protection professionals believe that FGCs improve child protection processes
 - children over whom placement decisions are made at FGCs are more likely to be placed with members of their extended families.²²⁰

USE OF FAMILY GROUP CONFERENCING IN VICTORIA

- 7.129 FGC has been used in Victoria by DHS since around 1992.²²¹ Victoria was the first state in Australia to introduce the process and the program has been sustained in this state longer than in any other. Victoria is the only state in Australia to have developed an ongoing FGC program without any legislative basis.²²² FGC is not provided for nor required under the CYF Act 2005 for non-Aboriginal children.
- 7.130 For decisions about placement of Aboriginal children, the CYF Act 2005 requires that a meeting convened by an approved Aboriginal convenor should be held and where possible attended by the child, the child's parents and extended family, and other appropriate members of the Aboriginal community as determined by the child's parents.²²³ This process is known as Aboriginal Family Decision Making (AFDM). Submissions received and consultations held by the Commission suggested that despite this legislative mandate, few AFDM meetings are currently convened in Victoria.²²⁴
- 7.131 The 1993 evaluation of the Victorian FGC pilot study concluded that the 'majority of the children considered in the family group conferences ... have been able to be cared for within their wider family networks'.²²⁵ The review confirmed that family members who used the process felt that they had greater participation and control over decision making.²²⁶ In its submission to the 1997 Australian Law Reform and Human Rights and Equal Opportunity Commission, *Seen and Heard*, the Victorian Government argued that FGC

*plays an important role in maintaining children at home, or within their extended family network. While not necessarily diverting matters from court action, Family Group Conferencing increases the likelihood of these processes being settled by consent.*²²⁷

7.132 VALS argued in its submission to the Commission that existing conferencing models employed in Victoria, including AFDM, are 'very limited'.²²⁸ The Victorian model of FGC is decentralised and relies, in part, upon ground-level enthusiasm in each Department region.²²⁹ As a consequence, FGC is practised in some regions more than others, although the numbers of conferences held are small. In the case of AFDMs, the Family Violence Prevention and Legal Service Victoria suggested that AFDM meetings are only occurring in very limited numbers and that it understands that DHS has a policy that these meetings can only occur after substantiation.²³⁰

7.133 There have been many calls for the introduction and further expansion of FGC in Victoria. While the Carney Committee did not specifically recommend the introduction of FGC in 1984, it did recommend that case-planning responsibility should be assumed by the Department prior to court, rather than after the Court has determined that the child is in need of protection.²³¹ The Carney Committee envisioned that a case planning conference would be 'a decision-making forum, rather than just an administrative procedure', and that generally the Regional Deputy Manager would have responsibility for convening and chairing the conferences.²³² The Carney Committee recommended that the convenor of a case planning conference should 'invite people with relevant expertise who may be able to assist the child or family, or who are likely to be interested in caring for the child'.²³³ Further, where Aboriginal children are involved, a member of the Aboriginal community must be present. The Carney Committee recommended that legal advocates be excluded from case planning decisions.²³⁴ It suggested that a separate, lay advocate should be appointed for the child where there is a potential conflict between the interests of the child and the family.²³⁵

7.134 In 2003, the Allen Consulting Group (ACG) highlighted the need for intermediate structures in the child protection system, to sit between completely voluntary services and the coercive use of legal power.²³⁶ ACG stated that the intermediate structure needed to exist outside of formal legal processes, and that

*participation in these intermediate level processes would be voluntary for these families. Any decisions would require the agreement and cooperation of the family. However, equally as important, child protection officers would retain existing statutory powers to issue a Protection Application if they considered the child was not being adequately protected.*²³⁷

7.135 ACG suggested that FGC could be one of these intermediate structures:

*Family group conferences are another example of an intermediate structure in place in some child protection systems that can be viewed as enforced self-regulation. Family group conferences based on trust and negotiation provide a forum through which conflict is resolved and acceptable plans are made for children at risk.*²³⁸

216 Ibid 537.

217 Unless the agreement reached in the conference is impractical or inconsistent with the Act, then the Department must give effect to the decisions, recommendations and plans made by the family group conference: *Children, Young Persons and Their Families Act 1989* (NZ) s 34(1).

218 Harris, above n 213, 13–14.

219 Crampton, 'Research Review', above n 203, 207.

220 This summary is taken from the work of Crampton, 'Research Review', above n 203, 202.

221 Harris, above n 213, 7. See Paul Ban and Phillip Swain, 'Family Group Conferences Part 1: Australia's First Project Within Child Protection' (1994) 19 (3) *Children Australia* 19.

222 Harris, above n 213, 9.

223 *Children, Youth and Families Act 2005* (Vic) s 12(1)(b).

224 Consultation 11 (FCLC).

225 Phillip Swain, *Safe in Our Hands — The Evaluation Report of the Family Decision-Making Project* (1993) 6 quoted in Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 21, 437.

226 Paul Ban and Phillip Swain, 'Family Group Conferences Part 2: Putting the "Family" Back into Child Protection' (1994) 19 (4) *Children Australia* 11, 11.

227 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 21, 438.

228 Submission 38 (VALS).

229 Harris, above n 213, 9.

230 Submission 26 (FVPLS Victoria).

231 Child Welfare Practice and Legislation Review, *Report: Equity and Social Justice for Children, Families and Communities* (1984) vol 2, 232.

232 Ibid 299.

233 Ibid 300.

234 Ibid 317.

235 Ibid 301.

236 Allen Consulting Group, *Protecting Children: The Child Protection Outcomes Project* (2003) 56.

237 Ibid 84.

238 Ibid (2003) 59 (citations omitted).

7.136 One year later, Freiberg, Kirby and Ward (the Panel) found that there was ‘widespread support for the proposed development of a range of “intermediate” responses to bridge the divide between voluntary support and court-mandated service provision’, as the ACG report had proposed.²³⁹ The Panel accordingly recommended that intermediate or quasi-legal responses to children at risk be expanded to enable child protection workers to work together with families away from the legal system, for extended periods of time.²⁴⁰ However, the Panel stated that

*While Family Group Conferencing was generally supported by respondents, the Panel believes this is best conceptualised as a process rather than an intermediate regulatory response which can have application along the service continuum.*²⁴¹

7.137 It went on to say that FGCs, together with case planning and pre-hearing conferences, ought to be part of a continuum of negotiation forums that formed ‘the foundations of the child protection system’.²⁴² The Panel noted that a possible ‘immediate response’ could take the form of

*the development of case plans or voluntary agreements, possibly through Family Group Conferencing processes, but not exclusively so, which can then be submitted to the Children’s Court for approval. These could also be made either before or after a protection application, but prior to the making of a court order. The Court might maintain a supervisory role over these agreements.*²⁴³

SUBMISSIONS ON FAMILY GROUP CONFERENCING

7.138 The Commission received a number of submissions that supported the expansion of the FGC program in Victoria’s child protection system. In its submission, the Australian Institute of Family Studies (AIFS) examined the role of the family group in the child protection system and argued that ‘it is a promising approach for reducing the need for coercive court-based decision-making’.²⁴⁴ AIFS also noted, however, that greater use of FGC would need to be complemented by adequate resourcing for the secondary service system to meet increased demand resulting from agreements made during FGCs. AIFS stated:

*As seen in the context of family law, legislative change towards less adversarial decision-making inevitably results in greater demand on support services that a parent may be required to attend as part of an agreed outcome.*²⁴⁵

7.139 Similarly, FVPLS Victoria suggested in its submission that in relation to Aboriginal families in Victoria, the failure to coordinate support services around AFDM meetings ‘has been at the heart of significant failures within the current system’.²⁴⁶ As a result, their submission stated that

*All alternative dispute resolution process including AFDM must also or separately include dedicated attention to provision of the range of support services required for the family members to meet whatever conditions are part of an agreement.*²⁴⁷

7.140 The Child Safety Commissioner recommended the introduction of a ‘Family Solutions Roundtable’ based on an FGC model as ‘the primary and preferred method for dealing with issues that have led to Child Protection intervention’.²⁴⁸ The submission proposed that this model would recognise the importance of the extended family’s involvement in decisions impacting on children’s lives.²⁴⁹

7.141 The Centre for Excellence in Child and Family Welfare supported the increased use of FGC as a means of adopting ‘a family-inclusive approach underpinned by a strengths-based system that has a child’s wellbeing needs at the forefront’.²⁵⁰ Fitzroy Legal Service was cautiously positive about the use of ‘the New Zealand version of family group conferencing’ in the Victorian system to create a less adversarial environment, but expressed concern that many jurisdictions in Australia had only introduced a very watered-down model.²⁵¹ In its submission, VALS supported the introduction of an FGC model in Victoria based on existing Aboriginal processes:

*The best model of this kind can be found in the Aboriginal and Torres Strait Islander Family Decision Making program outlined below. While this program is strongly geared towards the engagement of members of the Aboriginal and Torres Strait Islander community, we argue that there are many elements to this approach that could be applied to benefit all parents, children, families and communities coming into contact with Victoria’s child protection system.*²⁵²

7.142 In particular, VALS commended the whole-of-community approach, early intervention, family engagement, cost efficiency and child-focused aspects of some AFDM programs.²⁵³

7.143 The Victorian Council of Social Services and the Youth Affairs Council of Victoria suggested in their joint submission that they would support the well-resourced introduction of an FGC process in cases where it was appropriate. They cautioned that it ‘is vital however that all parties, including both the children and their families are adequately supported to participate’.²⁵⁴ West Heidelberg Community Legal Service also argued that FGC could be implemented, providing important safeguards are incorporated into the process, including independent legal advice for families and children, careful conference preparation, the involvement of extended family, good intra-agency cooperation and the presence of a proactive convenor, amongst others.²⁵⁵

7.144 All of the submissions the Commission received on FGC favoured the introduction of more widespread conferencing practices in Victoria, although some of these submissions expressed concern that FGC should only be introduced if particular safeguards are built into the process. Many submissions called for adequate support services to be funded alongside FGC.

MODELS OF FAMILY GROUP CONFERENCING

7.145 There are many models of FGC, although Harris argues that a number of features distinguish this form of conferencing from other family decision-making processes, including adherence to the three-stage format (described in the following paragraph), the inclusion of extended family and/or community and a philosophy that centres on family empowerment.²⁵⁶

7.146 The New Zealand model has become the international template for FGC in child protection matters. Under this model, there are ordinarily three phases to the conference:

1. information sharing
2. private family deliberation
3. the coordinator seeking agreement to conference decisions.²⁵⁷

239 Freiberg, Kirby and Ward, above n 8, 16.

240 Ibid 38.

241 Ibid.

242 Ibid 42.

243 Ibid 39.

244 Submission 40 (AIFS).

245 Ibid.

246 Submission 26 (FVPLS Victoria).

247 Ibid.

248 Submission 37 (OCSC).

249 Ibid.

250 Submission 30 (CECFW).

251 Submission 36 (FLS).

252 Submission 38 (VALS).

253 Ibid.

254 Submission 43 (VCOSS & YACVic).

255 Submission 24 (WHCLS).

256 Harris, above n 213, 6–7.

257 Connolly, ‘An Act of Empowerment’, above n 152, 92–3.

- 7.147 At the first stage, the coordinator is responsible for making all relevant information available to the family group. The referring social worker and other professionals often provide this information.²⁵⁸ During the second stage, non-family members withdraw from the process, leaving the family alone to begin decision-making.²⁵⁹ The third stage involves the coordinator seeking the family group's agreement and then that of the referral source.²⁶⁰ The conference decides together whether the child is in need of care and protection and, if so, decides on an appropriate course of action.²⁶¹ The procedure of the family group conference will be regulated by the conference participants and does not operate under strict procedural requirements.²⁶²
- 7.148 In his review of FGC in Australian jurisdictions, Nathan Harris stated that
- Programs in Australia, as a whole, also place less emphasis than New Zealand on using conferencing as a means to change the way in which problems are solved in mainstream, child protection cases.*²⁶³
- 7.149 Harris questioned whether the New Zealand model has been implemented in Australia at all.²⁶⁴ This means that FGC plays an entirely different role in the Australian jurisdictions than it does across the Tasman: 'it would seem that Australian jurisdictions have implemented conferencing in ways that fall short of the systematic empowerment of families that is envisaged in the New Zealand model'.²⁶⁵
- 7.150 Submissions received by the Commission supported not just the introduction of FGC into Victoria's child protection system, but the use of an appropriate model of FGC. West Heidelberg Community Legal Service submitted that the model of FGC implemented in Victoria should require approaches that 'empower families, children and immediate communities to be involved in decision making rather than continuing their exclusion from decision making'.²⁶⁶
- 7.151 In its submission, the Federation of Community Legal Centres supported greater use of FGC in Victoria provided that families are granted private time during the course of conferences.²⁶⁷
- 7.152 Properly convened FGCs require more time for preparation than they do to hold the conference. During the preparation phase, the convenors speak to the parties including the child protection workers and their representatives, determine who should attend, conduct a thorough intake and risk assessment and establish the issues at stake, as well as making arrangements for the conference. Crampton argued that providing funding and time for adequate preparation is essential to the success of any FGC program:
- One way to attempt to ensure programme integrity is by insisting that FGDM [family group conferencing] must include quality preparation time, which is described as 20–25 hours on average per case.*²⁶⁸
- 7.153 Another important aspect of FGC modelling is the decision about who should attend conferences. The Commission believes this issue should be given close attention when developing a Victorian process. VALS, after noting that their list was resource intensive, suggested that attendees at FGC should be the
- nuclear family; extended family; relevant community member(s) (including a community Elder or Respected Person if appropriate or other person that could potentially be in a position of future guardianship); generalist and specialist service representatives (relevant to the case determined through a pre-conference planning mechanism); DHS Child Protection representative; child or young person (if appropriate); child or young person legal representation (if applicable); legal representative to the parent(s); and Aboriginal and Torres Strait Islander or non-Aboriginal and Torres Strait Islander facilitator.*²⁶⁹

7.154 The FVPLS Victoria argued that in relation to AFDM conferences, it should not be assumed that parents or children will want to participate in the process nor have extended family members present. The submission emphasised that individual family circumstances must be considered and advocated for consent to attend to be a requirement.²⁷⁰

7.155 The Victorian Council of Social Services and the Youth Affairs Council of Victoria argue that family service organisations in the community sector should also be involved in family decision-making processes. Their joint submission makes a case for adequate resourcing of community sector organisations in order that they may participate in family decision-making processes and support families to implement the agreements made.²⁷¹

7.156 The submission made by Grandparents Victoria Inc expressed the frustration experienced by grandparents of children in the child protection system at being denied access to proceedings involving their grandchildren. Their submission commented that

*These grandparents are not necessarily seeking custody of the children but they are keen to ensure that a wide range of evidence is taken into consideration when deliberating on the outcomes for children ... If grandparents' views were actively sought the decisions made would be more creative, based on better information and have a better chance of succeeding.*²⁷²

7.157 The Commission believes that a wide range of family and community members, carers (including foster carers) and interested professionals should be encouraged to attend FGCs. Their attendance will better support children and families as well as actively involve extended family members, carers and these professionals in decision-making processes for children and families, where previously they may have felt excluded. The convenor should facilitate the discussion about who should attend during the preparation phase of the conference.

7.158 The importance of family-only private time as a routine part of the FGC process cannot be overstated. The Commission believes that family-only time should be an essential part of the Victorian model. FVPLS Victoria argued in its submission that in relation to AFDM conferences, there should be some family-only time without DHS and the Aboriginal Child Specialist Advice and Support Service worker present.²⁷³ Harris described family-only time as the 'heart of family group conferencing' and essential to the integrity of the process.²⁷⁴ Family-only time, without professionals present (providing that is safe for the parties) provides important decision-making and connection time for families in the child protection system. The private time encourages families to take responsibility for their own decisions and may lessen the need for future state involvement.

7.159 Research suggests that implementation of FGC programs is more likely to succeed where the following matters are clarified at the outset:

- What outcomes are being sought by introducing FGC? These should be commonly agreed by program implementers.
- Which families will participate in FGC and what referral practices will be followed?
- Which FGC processes are important and what model will be used?²⁷⁵

258 Ibid 92.

259 Ibid 92–3.

260 Ibid 93.

261 Ibid.

262 *Children, Young Persons and their Families Act 1989* (NZ) s 26.

263 Harris, above n 213, 16.

264 Ibid 13.

265 Ibid 14.

266 Submission 24 (WHCLS).

267 Submission 45 (FCLC).

268 Crampton, 'Research Review', above n 203, 207.

269 Submission 38 (VALS).

270 Submission 26 (FVPLS Victoria).

271 Submission 43 (VCOSS & YACVic).

272 Submission 21 (Grandparents Victoria Inc).

273 Submission 26 (FVPLS Victoria).

274 Harris, above n 213, 5.

275 Crampton, 'Research Review', above n 203, 207–8.

ABORIGINAL CHILDREN AND FAMILIES AND ABORIGINAL FAMILY DECISION MAKING (AFDM)**Work of the Children’s Court (Family Division) Koori Family Support Program**

7.160 The Commission consulted members of the Children’s Court (Family Division) Koori Family Support Program (KFSP). The Children’s Court has described the project as having the following purposes:

- to improve outcomes for Koori children going through the Family Division of the Children’s Court
- to ensure the best interests of Koori children are paramount in Family Division decision making
- to improve the decision making around best interests planning by the Court
- to improve the participation of Koori family members in child protection hearings
- to improve adherence to the Aboriginal Child Placement Principles in accordance with the CYF Act 2005
- to improve the consistency and completion of Cultural Support Plans.²⁷⁶

7.161 The safety of Aboriginal²⁷⁷ children is paramount in the KFSP. The Victorian Aboriginal Child Care Agency (VACCA) has stated that

*An Aboriginal child’s safety would be seen as paramount and their development most likely to be assured if the child can remain within their community. Aboriginal workers would not place any Aboriginal child at risk.*²⁷⁸

7.162 The KFSP has also been examining the role of pre-court processes for Aboriginal families in Victoria. According to the Children’s Court, key stakeholders around the project have reached consensus over the ‘need to adopt a multi-staged approach to improve the child protection process’ and are considering in particular ‘the wider provision of early intervention programs, Aboriginal Family Decision-making programs’.²⁷⁹

7.163 The Commission received many submissions supporting the work of this project. Due to the short timeframe for completion of the Commission’s reference on child protection, FVPLS Victoria stated that it

*acknowledged the Koori specific child protection project underway within the Department of Justice Victoria, as the appropriate forum for the Koori community to determine a preferred path forward in improved child protection outcomes for ATSI children and families.*²⁸⁰

7.164 The Children’s Court stated in its submission that

The Court accepts that all those involved in decision-making for Koori children can do better. The Court is determined to develop the learnings from the successful Koori Court initiative in the Criminal Division and translate those learnings into the Family Division. The Court has been keenly participating in the ‘Children’s Koori Court (Family Division) Project.’²⁸¹

- 7.165 The Commission believes that the Children’s KFSP is the appropriate vehicle for identifying the specific needs of Aboriginal communities in relation to Victorian child protection processes. The project intends to engage in extensive consultation with stakeholders and Victoria’s Aboriginal communities. The work of the project team is ongoing. Due to the short duration of this reference, the Commission has not been able to consult with Victoria’s Aboriginal communities and agencies as extensively as it would wish. The Commission has therefore chosen not to make specific recommendations in relation to the development or operation of AFDM or other Aboriginal-specific family decision-making processes. Nor has it devised specific proposals in relation to Aboriginal families within the other options in this report.
- 7.166 The Commission received many submissions in relation to AFDM and other family decision-making processes for Aboriginal children and families. In response to these submissions, the Commission has chosen to canvass the issues of how the family decision-making processes it proposes might affect Aboriginal children and families. These issues are discussed in the following section on AFDM and throughout the text of this chapter. Specific proposals have not been made, in order to allow the Koori Family Support Program team to complete their process and devise recommendations.

The relationship between Aboriginal-specific processes and the Commission’s proposals relating to new family decision-making processes

- 7.167 The Commission’s proposals in this chapter relating to increased use, coordination and governance of family decision-making processes are not intended to replace existing or proposed Aboriginal-specific child protection processes such as AFDM. It is intended that existing Aboriginal processes will continue and new processes will be developed, subject to the work of the KFSP.
- 7.168 The new processes proposed by the Commission could operate alongside Aboriginal-specific processes, and may be used by Aboriginal and non-Aboriginal Victorian children and families alike. The proposed processes will need to be designed so that they are suitable for use by Aboriginal families. This chapter notes, at various points, the areas where it believes that specific issues might arise in relation to use of these programs by Aboriginal children and families.

Aboriginal family decision making

- 7.169 The AFDM process aims to yield decisions about placement of Aboriginal children. For all significant decisions, a meeting convened by an approved Aboriginal convenor should be held and, where possible, attended by the child, the child’s parents and extended family, and other appropriate members of the Aboriginal community as determined by the child’s parents.²⁸²
- 7.170 AFDM conferences are co-convened by an Aboriginal convenor from an Aboriginal agency and a convenor from DHS. Also attending are an Aboriginal Elder, a child protection worker, an Aboriginal Child Specialist Advice and Support Service worker (who provides information and advice to the child protection worker to assist in identifying members of the child’s kinship or community network who may be suitable to provide a placement), family members, extended family and other support people such as lawyers.

- 276 Submission 46 (Children’s Court of Victoria) 43.
- 277 In this section, the word ‘Aboriginal’ is used as a generic term to refer to both Aboriginal and Torres Strait Islander people, unless otherwise specified.
- 278 Victorian Aboriginal Child Care Agency, *Working with Aboriginal Children and Families: A Guide for Child Protection and Child and Family Welfare Workers* (2006) 48.
- 279 Submission 46 (Children’s Court of Victoria) 43.
- 280 Submission 26 (FVPLS Victoria).
- 281 Submission 46 (Children’s Court of Victoria) 43.
- 282 *Children, Youth and Families Act 2005* (Vic) s 12(1)(b).

7.171 An example of a successful AFDM program is that run by Rumbalara Aboriginal Cooperative Limited.²⁸³ In an evaluation of the program, families involved described it as ‘the most significant improvement in service delivery in terms of outcomes for Aboriginal children at risk that had ever been experienced within the Aboriginal community’.²⁸⁴ Some of the key factors in the program’s success were:

- ownership of the program by the Aboriginal community
- the involvement of an Aboriginal health agency to partner with DHS
- recognition of the important role of community Elders in the process
- the voluntary involvement of Aboriginal families
- the ability of families to have input into the process.²⁸⁵

Nathan Harris has described the Rumbalara program as ‘an important innovation’ and ‘a significant opportunity to empower, rather than disempower, Aboriginal families and communities in relation to child protection issues’.²⁸⁶

7.172 Many submissions and consultations raised issues relating to AFDM. A common problem reported with AFDM is that these conferences are rarely convened, despite legislative encouragement to do so. FVPLS Victoria suggested that AFDM meetings are only occurring in very limited numbers and that DHS has a policy of commencing these meetings only after substantiation.²⁸⁷ Regional variations are apparent in practices of convening AFDMs.²⁸⁸ Further, FVPLS Victoria argued that the meetings that do occur take considerable time to arrange.²⁸⁹

7.173 VACCA’s submission made a case for greater use of AFDM meetings as a first step, rather than being court-driven.²⁹⁰ Similarly, at the consultation held with the Child Protection Working Group of the Federation of Community Legal Centres, some participants argued that DHS needs to run more AFDM conferences at the pre-court stage, and not just when considering whether to place a child into out-of-home care.²⁹¹

7.174 FVPLS Victoria called for a specific review of AFDM processes in consultation with Victorian Aboriginal communities:

*The AFDM process itself requires review to clarify the functions of the meetings, when they occur, who should be involved, where they sit with other Dispute Resolution processes, how it is determined whether an AFDM is in fact appropriate in an individual case or the type of AFDM which is appropriate in a particular case and realistic resourcing requirements.*²⁹²

7.175 The submission also raised issues about the role of AFDM meetings once court proceedings have been initiated. FVPLS Victoria stated ‘Voluntary AFDMs could continue during the court process (with court oversight of outcomes) and preferably with the same convenor for consistency’.²⁹³ In relation to mandatory decision-making processes annexed to court proceedings, the submission encouraged any development of new Koori-specific decision-making processes to be part of the wider development of Koori-specific court procedures within the Children’s Court (Family Division).²⁹⁴

7.176 The Victorian Aboriginal Legal Service (VALS) argued in its submission that there is a strong need for an increased number of Aboriginal convenors to run AFDMs.²⁹⁵ FVPLS Victoria also argued that training of Aboriginal convenors should be prioritised, including training of new Aboriginal convenors so that they are available for Aboriginal children when required.²⁹⁶

7.177 FVPLS Victoria argued that AFDM could be legislatively required, necessitating the convening of a meeting before a protection application could be initiated (provided that the parties agree to participate and a family violence/safety assessment is conducted).²⁹⁷ Similarly, in a consultation held with DHS Statewide Child Protection Managers, one participant suggested that the New Zealand FGC model could apply to decisions involving Aboriginal families.²⁹⁸

7.178 Some submissions questioned the appropriateness of AFDM in cases where there are allegations of family violence, substance abuse or sexual abuse. This is discussed in more detail in the section under 'Circumstances where family group conferencing is inappropriate' below.

7.179 FVPLS Victoria made a strong case for making mandatory early provision of legal representation for AFDM meetings and other forms of family decision making.²⁹⁹ It stated:

It is the experience of FVPLS Victoria that the absence of early legal assistance for ATSI children and in out of court meetings in particular is resulting in inappropriate agreements being made by ATSI families. It must be mandated that ATSI parties are referred to Aboriginal legal services (currently FVPLS Victoria and VALS in Victoria) and mainstream legal options at the very beginning of the child protection process and certainly prior to any ADR.³⁰⁰

7.180 FVPLS Victoria stated that because of its experiences working with survivors of abuse, it would not support the extension of conferencing or dispute resolution services unless the option for legal representation was guaranteed.³⁰¹ They argued that it is particularly critical that survivors of family violence are legally represented at conferences and meetings.

7.181 Further, FVPLS Victoria explained that any other pre-court dispute resolution processes involving Aboriginal children and families must:

- be culturally appropriate
- be developed in consultation with Aboriginal communities
- guarantee the option of legal representation for Aboriginal children and family members.³⁰²

FVPLS Victoria also called for greater guaranteed resourcing by government of Aboriginal-specific child protection processes and services.³⁰³

7.182 These submissions raise significant issues about the conduct of AFDM meetings, including:

- their limited numbers in practice despite a legislative preference for them to be held
- the limited numbers of Aboriginal convenors available to run AFDMs
- regional variations in practice
- the late stage that many AFDM conferences are convened
- the appropriateness of AFDMs for each family and their community
- the use of AFDM meetings in conjunction with court proceedings
- the role of legal representation around and in meetings
- the potential introduction of a requirement that an AFDM meeting be held before a protection application can be commenced.

283 See Submission 38 (VALS).

284 Ibid.

285 Ibid.

286 Harris, above n 213, 15–16.

287 Submission 26 (FVPLS Victoria).

288 Ibid.

289 Ibid.

290 Submission 39 (VACCA).

291 Consultation 11 (FCLC).

292 Submission 26 (FVPLS Victoria).

293 Ibid.

294 Ibid.

295 Submission 38 (VALS).

296 Submission 26 (FVPLS Victoria).

297 Ibid.

298 Consultation 4 (DHS Managers).

299 Submission 26 (FVPLS Victoria).

300 Ibid (emphasis in original).

301 Email from Shelley Burchfield, Aboriginal Family Violence Prevention Legal Service Victoria, 15 June 2010.

302 Email from Shelley Burchfield, Aboriginal Family Violence Prevention Legal Service Victoria, 18 June 2010.

303 Emails from Shelley Burchfield, Aboriginal Family Violence Prevention Legal Service Victoria, 15 and 18 June 2010.

7.183 Although the Commission has chosen not to make specific proposals about AFDM conferences—leaving that task to the Children’s Court (Family Division) Koori Family Support Program—the Commission believes that many of its proposals about family decision making might benefit Aboriginal children and families.

Proposal 1.5: Family group conferences should become the primary decision-making forum in Victoria’s child protection system.

FAMILY GROUP CONFERENCES AND COMMENCEMENT OF PRIMARY APPLICATIONS

A NEW COMMENCEMENT PROCEDURE FOR PROTECTION APPLICATIONS

- 7.184 The Commission proposes that an FGC should be conducted prior to filing a protection application, unless there are exceptional circumstances that warrant a departure from this general rule.³⁰⁴ At present, the Department convenes FGCs in a small number of cases. The practice has no legislative backing and its use varies from region to region.
- 7.185 Under the proposed process, instead of filing a protection application in court, a child protection practitioner would request an FGC with the relevant agency. The relevant agency to conduct FGCs is VLA or, if Option 3 is adopted, the Office of the Children and Youth Advocate (OCYA).
- 7.186 The requirement that an FGC should be conducted prior to filing a protection application should not prevent DHS and families making child care agreements (known as ‘voluntary placements’ or ‘voluntary agreements’) under Part 3.5 of the CYF Act 2005. Where possible, however, there is merit in DHS using the structured, supported and child-centred FGC process outlined in this chapter in preference to negotiating child-care agreements directly with families.
- 7.187 The Commission’s proposals for commencement of primary applications other than protection applications and for FGC and secondary applications are dealt with in subsequent sections of this chapter.

THE NEED FOR LEGISLATIVE REFORM

- 7.188 The Commission proposes that consideration be given to amending the CYF Act 2005 to direct that an FGC should be conducted prior to filing a protection application, unless there are exceptional circumstances that warrant a departure from this general rule.
- 7.189 Many of the submissions received by the Commission called for legislative entrenchment of FGC. In its submission, the Australian Institute of Family Studies (AIFS) examined the role of FGCs in the child protection system, arguing that ‘[i]ncreasing the power of family group conferencing is a promising approach for reducing the need for coercive court-based decision-making’.³⁰⁵ AIFS compared the use of FGC in the various Australian jurisdictions and considered whether it had a legislative base. It concluded that

*if there is supporting legislation, family group conferencing can engage families prior to seeking court orders so that decision-making can occur in a less adversarial way and focus on what is in the best interests of the child.*³⁰⁶

7.190 The Federation of Community Legal Centres also supported a recommendation that any FGC scheme be enshrined in legislation. It stated:

*The Federation supports entrenching family group conferences into Victoria's child protection system where they seek to apply the principles and practices that will empower nuclear families and their immediate communities, such as extended family and friends, to be involved in making decisions about their children and mobilise informal and formal support services for families.*³⁰⁷

7.191 The Commission agrees with these views.

7.192 In its submission, FVPLS Victoria argued that the decision about whether to hold an AFDM conference for Aboriginal families should not rest solely with the Department. It proposed a legislative requirement that an AFDM meeting be held before a protection application can be initiated for an Aboriginal child.³⁰⁸

LEGISLATIVE SCHEMES FOR FAMILY GROUP CONFERENCING IN OTHER JURISDICTIONS

7.193 While FGC has been implemented to some extent in every Australian jurisdiction, it is most used in the jurisdictions where it has been legislatively mandated.³⁰⁹ Some of the other Australasian jurisdictions with legislatively-enshrined FGC schemes are New Zealand, South Australia, Queensland and Tasmania. While the law and practice in these jurisdictions have been discussed in Chapters 4 and 5 of this report, it is useful to briefly review their use of FGCs.

7.194 The Commission's proposal is closest to the New Zealand statutory provision. Nathan Harris has argued that the routine offering of FGC in New Zealand is one of the model's two key aspects that has contributed to its success.³¹⁰

7.195 In New Zealand, FGC is ordinarily mandatory before commencing court proceedings in relation to the care and protection of a child or young person.³¹¹ A care and protection matter commences when a report is made to a social worker or police officer that a child has been, or is likely to be, harmed physically, emotionally or sexually, ill-treated, neglected or deprived.³¹² The matter will be investigated by the social worker or police officer to whom the report was made,³¹³ then referred to a care and protection coordinator if it is believed that the child is in need of care and protection.³¹⁴ The coordinator is responsible for convening an FGC.³¹⁵ An FGC will only be convened where the coordinator believes that a child is in need of care and protection.³¹⁶

7.196 Many of the grounds for determining that a child is in need of care and protection under the New Zealand Act are similar to those in the Victorian Act. In all but rare cases, care and protection matters will be dealt with in the first instance by an FGC. There are, however, circumstances in which it will not be possible or practicable to convene an FGC to resolve urgent care and protection issues.³¹⁷

7.197 In South Australia, it is not possible to make an application for a care and protection order before a family care meeting has been held, unless the Department is satisfied that:

- it has not been possible to hold a meeting despite reasonable endeavours to do so
- an order should be made without delay
- the child's guardians consent to the application
- there is other good reason to dispense with the meeting.³¹⁸

304 The Commission makes further proposals relating to commencement in Chapter 8, Option 2.

305 Submission 40 (AIFS).

306 Ibid.

307 Submission 45 (FCLC).

308 Submission 26 (FVPLS Victoria).

309 Harris, above n 213, 8.

310 Ibid 13–14.

311 *Children, Young Persons and their Families Act 1989* (NZ) s 70. See Chapter 5 discussion on New Zealand.

312 *Children, Young Persons and their Families Act 1989* (NZ) s 15.

313 *Children, Young Persons and their Families Act 1989* (NZ) s 17(1).

314 *Children, Young Persons and their Families Act 1989* (NZ) s 17(1). At this investigation stage, the social worker or police officer will consult with a care and protection resource panel—an advisory panel appointed by the chief executive from occupations and organisations concerned with the care and protection of young persons: *Children, Young Persons and their Families Act 1989* (NZ) s 428. If the report is made by a body, organisation or court then the matter can be referred to a co-ordinator directly and the investigation stage may not be necessary: *Children, Young Persons and their Families Act 1989* (NZ) s 19.

315 *Children, Young Persons and their Families Act 1989* (NZ) ss 18(1), 20 if referred by a social worker or police officer; s 19(2)–(3) if referred by a body, organisation or court.

316 *Children, Young Persons and their Families Act 1989* (NZ) ss 18(1), 19(1).

317 For discussion see Chapter 5 'New Zealand', 'Emergency removal powers'.

318 *Children's Protection Act 1999* (SA) s 27(2).

- 7.198 In Queensland, the *Child Protection Act 1999* (Qld) requires the Department to convene a family group meeting to develop (or review) a case plan for a child.³¹⁹ The Children’s Court will only make a child protection order if there is a case plan for a child,³²⁰ meaning that a family group meeting must be convened before the Court will issue a child protection order.
- 7.199 In Tasmania, the Secretary of the Department may convene an FGC in respect of a child if she or he believes that the child is at risk, and that arrangements should be made to secure the child’s care and protection.³²¹ For the purposes of deciding whether an FGC is a suitable means of determining arrangements for the child’s care and protection, the Secretary may require an advisory assessment panel to consider and report on the child’s circumstances.³²² The *Children, Young Persons and Their Families Act 1997* (Tas) requires that the conference be held within three weeks of the Secretary’s decision to convene one, if reasonably practicable.³²³

PRIMARY APPLICATIONS OTHER THAN PROTECTION APPLICATIONS

- 7.200 There are five primary applications and numerous secondary applications in relation to Victorian protection proceedings. Primary applications are protection applications, irreconcilable difference applications, permanent care applications, temporary assessment order applications and therapeutic treatment order applications.
- 7.201 For primary applications other than a protection application, the Commission believes that FGC should not be required before filing. If the Court considers it appropriate, it can refer these other primary applications to an FGC as one of a range of family decision-making processes available.
- 7.202 For irreconcilable difference applications, conciliation counselling must be attempted prior to filing an application.³²⁴ With therapeutic treatment assessment order applications, the Therapeutic Treatment Board must have referred the matter for advice prior to filing an application.³²⁵ In both instances, it would appear that if the required referrals had failed to resolve the issues of concern, then an initiating party should be able to file an application in Court without necessarily participating in an FGC.
- 7.203 A temporary assessment order application—which seeks orders that permit the Department to investigate and assess in circumstances where cooperation is not forthcoming—is clearly not suitable for FGC prior to filing the application.
- 7.204 The Commission believes that permanent care applications should also be exempt from being referred to an FGC before filing. The custody and guardianship powers that are sought to be transferred from a child’s parent to a carer are extensive and the Court is required to ensure that certain requirements are met prior to making a permanent care order. For instance, a stability plan must be prepared before the Court can make a permanent care order³²⁶ and if the child is Aboriginal, the Court has particular obligations to ensure adherence to the Aboriginal Child Placement Principle.³²⁷ It is therefore suggested that the Court ought to begin to actively direct and manage the application from the outset. The Court could consider the appropriateness of any family decision-making process on the first return date following the filing of an application.

ATTENDANCE AT FAMILY GROUP CONFERENCES

- 7.205 The Commission believes that families cannot be compelled to attend FGC. The very character of this process is family-centred and the success of conferences depends on the willing participation by families. In circumstances where one or more family members refuse to participate in an FGC, the convenor will not be able to force them to participate. Without the involvement of these family members, the convenor must decide whether FGC is appropriate. Refusal to participate by key family members might be one of the 'exceptional circumstances' that would override the need to conduct an FGC before a protection application is commenced.
- 7.206 The Federation of Community Legal Centres proposed that participation by DHS in FGCs should be compulsory while participation by families should be voluntary.³²⁸ The legislative requirement that an FGC should be conducted before a protection application is commenced will mean that workers from DHS will need to request that an FGC be convened before a protection application can be filed with the Children's Court, unless there are exceptional circumstances that justify departure from the rule.

EXCEPTIONAL CIRCUMSTANCES

- 7.207 FGCs should not be convened in exceptional circumstances. There are at least two categories of cases that may be exceptional circumstances:
- when the convenor determines that FGC is inappropriate for a particular case
 - in emergency circumstances where it may be necessary to institute court proceedings without first going to an FGC.

As discussed above, unwillingness by key family members to attend an FGC may also be an exceptional circumstance.

Circumstances where family group conferencing is inappropriate

- 7.208 A thorough risk assessment is an essential part of any FGC intake process. The practice standards should outline factors that may be taken into account during the intake and risk assessment process.
- 7.209 Inappropriateness will constitute one of the exceptional circumstances to the legislative requirement that new protection applications will proceed through FGC. In cases where FGC is deemed inappropriate, such matters may go straight to the Children's Court after undergoing the assessment process.
- 7.210 As noted above, the Commission received submissions outlining circumstances when FGC might be inappropriate. Dr Anne Smith, the Medical Director of the Victorian Forensic Paediatric Medical Service, suggested that FGC would be inappropriate in cases of serious abuse.³²⁹ West Heidelberg Community Legal Service argued that 'ADR can be dangerous when there are power imbalances or people participating are frightened or intimidated'.³³⁰
- 7.211 FVPLS Victoria argued that AFDM conferences may be inappropriate where family violence, including extended family violence, is present.³³¹ It recommended that all cases be assessed in respect to family violence and safety issues to ensure that AFDM is appropriate. It added that careful consideration would need to be given to the appropriate person or agency to make the assessment.³³²

- 319 *Child Protection Act 1999* (Qld) s 51H.
- 320 *Child Protection Act 1999* (Qld) s 59(1)(b).
- 321 *Children, Young Persons and Their Families Act 1997* (Tas) s 30(1). Also, the Secretary must cause an FGC to be convened if he or she has approved arrangements for the care of a child (under s 37), or if arrangements have been implemented pursuant to a care and protection order, and the child, or 2 or more family members of the child, requests an FGC to review those arrangements: *Children, Young Persons and Their Families Act 1997* (Tas) ss 39, 53.
- 322 *Children, Young Persons and Their Families Act 1997* (Tas) s 30(2).
- 323 *Children, Young Persons and Their Families Act 1997* (Tas) s 32(5).
- 324 *Children, Youth and Families Act 2005* (Vic) s 260.
- 325 *Children, Youth and Families Act 2005* (Vic) s 245.
- 326 *Children, Youth and Families Act 2005* (Vic) s 322.
- 327 *Children, Youth and Families Act 2005* (Vic) s 268(1).
- 328 Submission 45 (FCLC).
- 329 Consultation 10 (VFPMS).
- 330 Submission 24 (WHCLS).
- 331 Submission 26 (FVPLS Victoria).
- 332 Ibid.

- 7.212 VALS argued that the New Zealand experience of FGC shows that many 'high risk' cases that other jurisdictions might consider inappropriate for AFDM can successfully use the process.³³³ Its submission advocated the use of FGC in cases involving parents with substance abuse and family violence issues, as well as for cases involving allegations of sexual abuse, providing that appropriate treatment and safety plans were in place.³³⁴
- 7.213 Dr Michelle Meyer has argued that with caution, most child sexual abuse cases can be referred safely to an FGC, provided it is clear that abuse has occurred.³³⁵ Meyer argues that the convenor's role is critical to the success of FGCs where there are allegations that a family member has sexually abused a child.³³⁶ She suggests a set of enhanced practice guidelines to strengthen FGC as a process when allegations of child sexual abuse have been raised.
- 7.214 The Commission proposes that decisions about the appropriateness of FGC should be made in individual cases, and should rest with the convenor. The convenors should be independent of both DHS and the Court and could be employed by VLA or by the proposed Office of the Children and Youth Advocate (proposed in Chapter 9). In its submission, the Federation of Community Legal Centres supported greater use of FGC in Victoria, provided that a body other than DHS is responsible for deciding whether an FGC is appropriate.³³⁷
- 7.215 The Commission proposes that the convenor's decision about whether FGC is appropriate should be made during an intake process that involves a thorough risk assessment. The convenor should be guided by new FGC practice standards that are not prescriptive, but should provide convenors with a list of matters that they may take into account during this risk assessment process.

Family group conferencing practice standards to guide risk assessment

- 7.216 There are several excellent models of quality intake and/or risk assessment frameworks that could be adapted for use in FGC practice standards. One such model can be seen in family law, where regulations direct FDR practitioners to assess whether FDR is appropriate for the parties to the family law dispute.³³⁸ Those regulations set out a list of factors that the FDR practitioner must take into account during the assessment, but do not dictate when FDR is inappropriate. Regulation 25(2) of the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) states:

In determining whether family dispute resolution is appropriate, the family dispute resolution practitioner must be satisfied that consideration has been given to whether the ability of any party to negotiate freely in the dispute is affected by any of the following matters:

- (a) a history of family violence (if any) among the parties;
- (b) the likely safety of the parties;
- (c) the equality of bargaining power among the parties;
- (d) the risk that a child may suffer abuse;
- (e) the emotional, psychological and physical health of the parties;
- (f) any other matter that the family dispute resolution practitioner considers relevant to the proposed family dispute resolution.

- 7.217 Another more specific model is the assessment process used by VLA in its Roundtable Dispute Management (RDM) service, which is performed under these regulations. RDM case managers assess the risk, urgency, safety, and capacity of all parties to participate. In conducting the assessment, the case manager will speak directly with each client, their lawyers, the independent children’s lawyer, DHS (if they are involved), as well as review any documentation. This assessment stage usually takes two to three weeks.³³⁹
- 7.218 A third model that should be considered when developing FGC practice standards in relation to assessment is the Victorian Family Violence Risk Assessment and Risk Management framework.³⁴⁰ The framework outlines a standardised approach to the assessment and management of family violence, and is consistent with the principles in the CYF Act 2005.³⁴¹
- 7.219 An important aspect in determining the appropriateness of FGC or any family decision-making process is that the process must continue to be appropriate throughout its duration. This means that the convenors should continually monitor the wellbeing of participants and should make procedural modifications to ensure the process remains safe and suitable. It may be appropriate, for example, to provide a shuttle process in cases where there are allegations of family violence so that the alleged perpetrator and victim are not in the same room.

Urgent and emergency cases

- 7.220 The Commission accepts that in emergencies it may be necessary to institute court proceedings to remove a child from her or his care arrangement involuntarily without first going to an FGC. Urgent and emergency cases should constitute an exceptional circumstance that might warrant a departure from the general rule that an FGC should be conducted before a protection application is commenced.
- 7.221 In Chapter 8, the Commission proposes a new commencement process for protection matters. This process identifies two emergencies where there would not be enough time to convene an FGC prior to the commencement of proceedings. The Commission proposes that these two emergencies would constitute exceptional circumstances, meaning that an FGC would not have to be convened prior to commencing a protection application in the Court. FGC following these emergency interventions is discussed in the next part of this chapter.

Proposal 1.6: A family group conference should be conducted prior to filing a protection application unless there are exceptional circumstances that warrant a departure from this general rule.

COURT-ORDERED FAMILY GROUP CONFERENCING FOLLOWING EMERGENCY INTERVENTION

- 7.222 The Commission proposes that when an interim care order is made following emergency intervention, the Court should order an FGC at the earliest possible opportunity unless there are exceptional circumstances that warrant a departure from this general rule. This proposal is designed to ensure that even in cases where emergency intervention has been necessary to remove children from their existing living arrangements, FGCs should still be held, where appropriate.
- 7.223 In New Zealand, an FGC must be attempted before the Court can declare that a child is in need of protection, even when there has been emergency removal of a child.³⁴²

333 Submission 38 (VALS).

334 Ibid.

335 Meyer, above n 60, 284.

336 Ibid 286.

337 Submission 45 (FCLC).

338 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(1).

339 Victoria Legal Aid, *Roundtable Dispute Management Practice Manual: A Resource Guide for Lawyers* (2009) 4.

340 Department for Victorian Communities, above n 59.

341 Ibid 13.

342 *Children, Young Persons and Their Families Act 1989* (NZ) ss 72, 14(1)(g), 70(2)(c), 72(2).

- 7.224 The new commencement process proposed in Chapter 8 permits the Children’s Court to make two types of orders following an emergency intervention: interim care orders and short-term assessment orders. It is proposed that interim care orders should last for a maximum of 14 days. They are designed to protect the child while further assessment of the circumstances takes place. Prior to the expiry of an interim care order, the Court may make a short-term assessment order that may last for up to six weeks. Short-term assessment orders enable a child to be protected by an order while the parties attempt decision making through an FGC or, if the Court considers this inappropriate, the matter is listed for hearing.
- 7.225 The Commission proposes that a magistrate or judge who hears an interim care or short-term assessment order should be required to order an FGC at the earliest possible opportunity, unless exceptional circumstances exist. Although it will probably not be possible for an FGC to be convened before the maximum 14-day return date of an interim care order, an early order for FGC will enable preparation and risk assessment to commence. While the FGC process is underway, the Court can make a further short-term assessment order if necessary. The FGC process should be concluded by the maximum six-week return date for the short-term assessment order.
- 7.226 ‘Exceptional circumstances’ have been discussed previously in this chapter. Where an interim care or short-term assessment order is being considered following the involuntary removal of a child, ‘exceptional circumstances’ should mean that the judicial officer believes that FGC is inappropriate for a particular case. It was clear from submissions that there is little agreement on what factors make FGC inappropriate. The Court will need to develop practice directions that outline the conditions for exceptional circumstances.
- 7.227 If the Court considers that FGC is appropriate, then the magistrate or judge would be required to make an order that is communicated directly to the relevant agency coordinating FGCs with a request for an FGC.
- 7.228 FGC convenors should still conduct screening and risk assessment practices to determine whether the process is appropriate in each case. If the convenor concludes that an FGC is inappropriate despite the court referral, the matter should be returned to the Court as an exceptional circumstance.
- 7.229 If the Court considers exceptional circumstances exist to exclude the case from being referred to an FGC, then it may grant leave to the Secretary to file a protection application. Where the Court has made a referral to FGC following an emergency intervention, the Commission believes that there is an increased imperative for parents to have legal advice during the conferencing process because court proceedings will already be on foot. The Commission believes that FGC practice standards should permit the attendance of parents’ lawyers at FGCs if proceedings have already been initiated for an emergency intervention.

Proposal 1.7: When an interim care order is made following emergency intervention, the Court should order a family group conference at the earliest possible opportunity unless there are exceptional circumstances that warrant a departure from this general rule.

SECONDARY APPLICATIONS AND FAMILY GROUP CONFERENCES

- 7.230 The Commission proposes that an FGC should be conducted before some secondary applications are filed in the Court, unless there are exceptional circumstances that warrant a departure from this general rule.
- 7.231 Numerous secondary applications may be made once a primary application has been initiated.³⁴³ The Commission believes that some of these secondary applications lend themselves to referral to an FGC prior to filing the application. Certain secondary applications, however, should first commence at court, with the Court then considering the appropriateness of an FGC. The categories could be distinguished based on whether immediate court supervision, management and control of the case are required.

SECONDARY APPLICATIONS THAT SHOULD GO STRAIGHT TO COURT

- 7.232 The cases in which the Court could determine the matter without an FGC might include either: applications for a new interim accommodation order and applications to vary or breach an interim accommodation order;³⁴⁴ or applications to breach a supervision order, a supervised custody order or interim protection order.³⁴⁵ These applications often follow swift changes in a child's circumstance and fresh orders (including conditions on orders) are often required to reflect those changes. Applications for transfers of interstate child protection orders and applications for therapeutic treatment (placement) orders are also secondary applications that require early court management without the need for an FGC prior to filing the application.

POSSIBLE SECONDARY APPLICATIONS WHERE A FAMILY GROUP CONFERENCE COULD FIRST BE HELD

- 7.233 Applications for extensions of orders may lend themselves to an FGC prior to filing, with the exception of an extension to an interim accommodation order. Extension applications include:
- supervision orders³⁴⁶
 - supervised custody orders³⁴⁷
 - custody to Secretary orders³⁴⁸
 - guardianship to Secretary orders.³⁴⁹

The numbers of extension applications are significant,³⁵⁰ however, and in many instances parties may agree to extend an order, in which case an FGC would be unnecessary. Generally, a child protection practitioner will have reviewed a case plan with the family approximately six weeks prior to expiry of the existing order.³⁵¹ When considering an extension of the existing order, the child protection practitioner would be aware from the case plan discussion whether the family agreed with an extension. The child protection worker should be required to refer the matter to an FGC if there is a substantive issue in dispute, or else file the extension application in court.

- 7.234 Secondary applications involving disputes between two people with joint custody (under a custody to third party order)³⁵² or disputes between two people with joint custody or guardianship under a permanent care order³⁵³ are not generally cases that would require immediate court intervention, and should be referred to FGC prior to filing an application.

Proposal 1.8: A family group conference should be conducted before certain secondary applications are filed in the Court unless there are exceptional circumstances that warrant a departure from this general rule.

- 343 Secondary applications include interim accommodation order applications (original and new); applications for revocation, variation, extension or breach of various protection orders; applications by joint custodians or guardians of a child regarding the exercise of any right, power or duty; applications regarding interstate orders; and applications for therapeutic treatment (placement) orders.
- 344 *Children, Youth and Families Act 2005* (Vic) ss 268(1), (6), 269(1), (6), 270(1), (7).
- 345 *Children, Youth and Families Act 2005* (Vic) ss 311, 313, 315.
- 346 *Children, Youth and Families Act 2005* (Vic) ss 293, 296(1). See Chapter 3 for further discussion.
- 347 *Children, Youth and Families Act 2005* (Vic) s 280(3)–(4). See Chapter 3 for further discussion.
- 348 *Children, Youth and Families Act 2005* (Vic) s 296(2). See Chapter 3 for further discussion.
- 349 *Children, Youth and Families Act 2005* (Vic) s 296(2). See Chapter 3 for further discussion.
- 350 Boston Consulting Group, *Child Protection Proceedings Taskforce: Children's Court Data (2010) 7*: in 2008–09 there were 1 669 applications for extensions of custody to Secretary orders, 507 applications for extension of guardianship orders, 99 applications for extensions of supervised custody orders and 480 applications for extensions of supervision orders.
- 351 Department of Human Services (Victoria), *Protecting Victoria's Children: Child Protection Practice Manual*, 'Concluding the Protection Order Phase', Advice No 1496 (23 April 2007), from CD-ROM provided at 23 March 2010.
- 352 *Children, Youth and Families Act 2005* (Vic) s 283(3).
- 353 *Children, Youth and Families Act 2005* (Vic) s 325.

THE PROPOSED MODEL OF FAMILY GROUP CONFERENCING

7.235 This section outlines some essential elements of the Commission’s proposed model of FGC. These features are:

- the independence of the convenor
- the appropriate location of conferences
- the development and use of practice standards
- the participation of children
- the confidentiality of the process
- the status of any agreement that results from FGC.

THE INDEPENDENCE OF THE FAMILY GROUP CONFERENCE CONVENOR

7.236 The independence of FGC convenors is essential to the success of the widespread introduction of this process into Victoria.

7.237 The Commission proposes that if the existing child protection framework remains unchanged, Victoria Legal Aid (VLA) should have the function of planning, developing and implementing the FGC proposal. This will enable VLA to apply the extensive knowledge it has gained in developing its flagship Roundtable Dispute Management program in the family law context. If Option 3 is adopted, one of the key functions of the new Office of the Children and Youth Advocate will be to convene FGCs.³⁵⁴

7.238 Many submissions emphasised the issue of independence. The Federation of Community Legal Centres supported greater use of FGC if facilitators are independent of DHS.³⁵⁵ The Victorian Aboriginal Legal Service (VALS) suggested that FGC convenors need to be independent from DHS but able to work in collaboration with child protection workers from the Department.³⁵⁶ West Heidelberg Community Legal Service argued that the convenor of any family decision-making program in this field needs to be independent as a critical safeguard of the processes.³⁵⁷ FVPLS Victoria maintained that any mediators or convenors of family decision-making processes need to be independent of DHS, although they acknowledged that some AFDM meetings, depending on their purpose, could be convened by DHS.³⁵⁸

7.239 The American Humane Association and the Family Group Decision Making Guidelines Committee developed *Guidelines for Family Group Decision Making in Child Welfare* in 2010 after two years of deliberations. In relation to coordinator independence the guidelines state:

Communities need to consider their community climate, organizational structures, benefits and challenges to determine which entity is best positioned to employ the FGDM coordinator. The power dynamics in each context must be carefully assessed when choosing the most appropriate location for the coordinator. No one type of entity is considered superior in being the employment agent of the FGDM coordinator.³⁵⁹

7.240 Harris has argued that while commentators in many jurisdictions argue that convenors of FGC should be independent from the child welfare service, there is little consensus on how to achieve independence.³⁶⁰

- 7.241 Currently in Victoria, conferences are convened by DHS at its own discretion. AFDM conferences are jointly convened by DHS and by a convenor from an Aboriginal agency such as VACCA. In New Zealand, care and protection coordinators are specialists employed by the child protection service. In South Australia, the Care and Protection Unit, a body that is independent of the Department and attached to the Youth Court, is responsible for running family care meetings. The coordinators are appointed by the Senior Judge of the Youth Court, and have social science/psychology qualifications and previous experience of working with children. There are currently five full-time coordinators in the Unit.
- 7.242 It is important that any new or expanded conference program in Victoria is convened by a body that sits outside the Department and the Court. The convenor's independence should promote professional and family confidence in the process, which is crucial for its success. The Commission believes that the advantage of separating the convening function from DHS is that it allows child protection workers to perform the function of information provider to the conference without needing to organise and facilitate the family meeting. Child protection workers may work with an independent convenor in preparing for the conference, but will not bear the responsibility of convening the conference themselves. Independence from the Court is important because it will distinguish this lower level intervention from the more directive adjudicatory practices often associated with the Court.

LOCATION OF FAMILY GROUP CONFERENCES

- 7.243 The Commission proposes that FGCs should be conducted in appropriate locations. Suitable locations will need to be found in metropolitan as well as regional areas. The Commission suggests that given the need to emphasise family rather than state-based decision making during the process, a court-based location would be inappropriate. The following information might assist the selection of appropriate locations.
- 7.244 In New Zealand, there is a trend towards greater use of departmental facilities to hold FGCs and away from holding conferences at community venues or the home of a family member.³⁶¹ In the early days after FGCs were introduced, care and protection coordinators were encouraged to organise conferences at a time and place that best suited families, often after hours and at family homes. One New Zealand study of care and protection coordinators found that the reasons coordinators gave for preferring departmental offices was to avoid wasted professional time during private family deliberations (meaning that the professionals could undertake other work during this phase of FGC) and to preserve their safety, which was sometimes compromised at isolated community halls or family homes.³⁶² Although there have been criticisms of the use of departmental facilities in New Zealand to host FGCs, it seems that many families do not perceive this as a conflict and view these premises as neutral territory.³⁶³
- 7.245 The submission made by VALS commented how for Aboriginal families, it may be particularly important that FGC processes are offered on a local basis and in the client's home where possible. VALS argues that offering FGC at a non-institutional location 'acutely applies to Aboriginal and Torres Strait Islander peoples given the legacy of traumatic past child welfare interventions'.³⁶⁴ The FVPLS Victoria also confirmed that family decision-making processes must take place at a culturally appropriate location for Aboriginal families and children.³⁶⁵

- 354 See Chapter 9, for discussion of Option 3.
 355 Submission 45 (FCLC).
 356 Submission 38 (VALS).
 357 Submission 24 (WHCLS).
 358 Submission 26 (FVPLS Victoria).
 359 American Humane Association and the Family Group Decision Making Guidelines Committee, *Guidelines for Family Group Decision Making in Child Welfare* (2010) 14.
 360 Harris, above n 213, 10.
 361 Connolly, 'Fifteen Years of Family Group Conferencing', above n 215, 535.
 362 Ibid 535-6.
 363 Ibid 535.
 364 Submission 38 (VALS).
 365 Submission 26 (FVPLS Victoria).

7.246 One of the relevant considerations in determining the appropriateness of a location for FGC is the ability of the venue to comfortably accommodate large families as well as small groups. The Victorian FGC pilot in 1993 found that FGCs had from four to 30 participants.³⁶⁶ The location chosen would need to be flexible enough to accommodate different family groups.

PRACTICE STANDARDS FOR FAMILY GROUP CONFERENCING

7.247 FGCs should be conducted in accordance with practice standards. The Commission believes it is essential that VLA and the DHS work together to develop these standards following consultation with the Children's Court. The development of these practice standards will build on the good work done by VLA, DHS and the Court in their collaborative development of the NMC process.

7.248 The National Alternative Dispute Resolution Advisory Council has stated that ADR practice standards are necessary to promote the following objectives:

- *to enhance the quality and ethics of ADR practice*
- *to protect consumers of ADR services*
- *to facilitate consumer education about ADR*
- *to build consumer confidence in ADR services*
- *to improve the credibility of ADR as an alternative to litigation*
- *to build the capacity and coherence of the ADR field.*³⁶⁷

7.249 Rosemary Sheehan argues that any framework for FGC practice standards in child protection should ensure

*professionalism and ensure pre-hearings resolve or limit disputes in an effective and efficient way, achieving outcomes that are seen to be consistent with the general aims of alternative dispute resolution and meet the needs of individual parties.*³⁶⁸

7.250 The Commission believes that practice standards for FGCs should address the following issues:

- the model and philosophy of FGC to be used in Victoria (including who attends, preparation time, the role of the convenor)
- the risk assessment and intake process
- legal representation at conferences and the ethical obligations of professionals and standards of behaviour expected at conferences.

7.251 Practice standards should set out the model and philosophy of FGC to be used. As discussed previously in this chapter, the central philosophy of FGC is family empowerment. Family empowerment is achieved by making children and families the central decision makers in conferences, with the professionals in the process assisting them rather than playing a leading determinative role. The practice standards will need to reflect these values.

7.252 The Commission believes that it would be preferable if the model chosen for Victoria reflects the New Zealand model as closely as is appropriate for implementation in this state.

7.253 The role of the convenor will need to be outlined in the process. This role will need to be linked to the philosophy and objectives of the model chosen, including how child-centred the process will be. One option is that the convenors adopt an explicitly child-centred, dual role where they are obliged to both convene the process and foster an outcome that is in the child's best interests. In the federal family law jurisdiction, FDR practitioners, who facilitate legislatively required FDR processes in children's disputes, generally see themselves as holding this dual role. This means that FDR practitioners must have a sound knowledge of the literature on child wellbeing:

*family dispute resolution practitioners will usually draw on an understanding of conflict dynamics and family dynamics and the research evidence on child development to assist clients to settle arrangements for their children, and will adopt a child focused (and sometimes a child inclusive) approach to working with parents.*³⁶⁹

7.254 The Commission has considered risk assessment and intake processes used for FGC to ensure that the process is appropriate for children and families. FGC practice standards will need to carefully outline the intake process and factors that may be taken into account during this risk assessment process. The practice standards should not be prescriptive but should provide convenors with a list of matters that they may take into account in determining appropriateness. Further, the intake and risk-assessment process set out in the standards will need to establish criteria to assist convenors in making decisions about the attendance of parents' lawyers at FGCs.

7.255 Practice standards should also establish how FGC participants will be represented, including their legal representation. The issue of legal advice and representation around the FGC process was discussed earlier in this chapter.

7.256 Finally, the Commission believes that practice standards should contain expectations of the standards of behaviour and ethical conduct for professionals involved in the process, including convenors, lawyers, child protection workers and other professionals attending in a supporting or information-provision capacity. It may also be useful to suggest standards of behaviour expected from family and supporting community members who also attend. These standards may assist convenors to control the conference process and to establish the framework of inter-professional collaboration necessary for the effective operation of FGC.

PARTICIPATION OF CHILDREN AND YOUNG PEOPLE IN FAMILY GROUP CONFERENCES

7.257 The Commission proposes that FGCs should be conducted in a manner that allows a child or young person to participate if he or she wishes to do so and to have his or her views taken into account, having regard to his or her level of maturity and understanding.

Views on children's participation in family group conferencing

7.258 In 1997, the Australian Law Reform and Human Rights and Equal Opportunity Commissions emphasised the participation of children and young people in FGC, stating 'it is important that children are able to participate or at the very least that their wishes or best interests are made clear when conference participants are making decisions'.³⁷⁰ At the same time, the Commissions expressed caution about the wholesale involvement of children in these processes, stating:

*Where the conference convenor is unable to protect the child or is unaware of negative family dynamics, participation by the child could constitute further abuse of the child. It may involve the child in discussions with an allegedly abusive parent or with family members who may intimidate or blame the child for 'disrupting' the family.*³⁷¹

366 Ban and Swain, 'Family Group Conferences Part 2', above n 226, 12.

367 National Alternative Dispute Resolution Council, *Report to the Commonwealth Attorney-General*, above n 39, 69–70.

368 Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience', above n 16, 168–9.

369 Rhoades et al, above n 182, 9.

370 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 21, 439.

371 *Ibid.*

7.259 In its submission, Youthlaw made a strong case for the introduction of FGC as a process that enables the participation of children in child protection family decision making:

Family group conferencing is one model to help ensure that the child's views are considered, and valued as partners in proceedings. It is critically important that children are able to participate or at the very least that their wishes or best interests are made clear when conference participants are making decisions about children.³⁷²

7.260 One of the recommendations from the children and young people consulted by CREATE Foundation on behalf of the Commission was that decision-making processes should be in a 'room set up with a round table which everyone can sit around'. That would 'allow young people to have more opportunities to be involved and feel empowered throughout the decision making and recommendation processes'.³⁷³

7.261 The research of Holland and O'Neill in Wales suggests that the young people they spoke to were generally able to participate in FGCs and that most felt positive about the experience. Only a very small number of children found the experience distressing or disempowering.³⁷⁴ Holland and O'Neill concluded that

there are some potential pitfalls and unexpected effects when children are enabled to participate in family group conferences. However, we maintain that the benefits for children appear to outweigh the difficulties.³⁷⁵

7.262 The Commission notes that the CYF Act 2005 requires the Court, as far as practicable, to allow the child to participate fully in any proceeding.³⁷⁶ The participation of children and young people in FGCs and taking their views into account in the process is consistent with article 12(1) of the *UN Convention on the Rights of the Child*, which provides that where a child is capable of forming his or her own views, states parties shall allow the child to express those views freely in all matters affecting him or her.³⁷⁷ Article 12(2) provides that the child may do this either directly or through a representative or appropriate body.³⁷⁸ The Committee on the Rights of the Child has interpreted 'capable of forming his or her own views' broadly, so as to encompass play, body language, facial expressions, drawing and painting.³⁷⁹

The Commission's response and proposal

7.263 The Commission proposes that children should be able to participate directly in FGCs where the children would like to and where this is appropriate. Where children attend, convenors will need to conduct FGC sessions in a manner that is child-inclusive and which facilitates children's genuine contribution to decision making. This process could potentially involve selective participation such as that used in FDR through the child-inclusive mediation process.³⁸⁰ Children who participate (and those who do not) will always have a representative in the conference, as proposed earlier in this chapter.

7.264 Further, the Commission proposes that regardless of whether children participate directly in FGC or not, they should have their views taken into account, with regard to their level of maturity and understanding. It is the role of the children's representative, proposed in Option 2 of this report, to convey the child's views if the child does not participate directly and perhaps even if they do attend.

7.265 The Commission proposes that as part of the risk assessment and intake process, convenors should ascertain, with the help of the children’s representative, whether the children and young people concerned should be attending and the manner in which they will participate. This assessment should take into account whether the child might benefit from participation (where they express a wish to attend) and weigh this against the likely risk of harm to the child.

CONFIDENTIALITY OF FAMILY GROUP CONFERENCING

7.266 The Commission believes that FGCs should be confidential except as far as agreements resulting from conferences become care plans or consent orders or where any person engages in unlawful conduct during a conference. The Commission believes that a very high standard of confidentiality should apply to all proposed family decision-making processes so that parties are encouraged to engage in open negotiations without fear of those statements being used in any subsequent court proceedings. It has been stated that

*the entire efficacy of mediation rests on the confidentiality of the proceedings; without confidentiality, frank exchanges of ideas and the climate of trust necessary for fruitful negotiations are both impossible.*³⁸¹

The Commission believes that the same statement is true of FGCs. A high level of confidentiality is therefore an important aspect of the proposed FGC process.

7.267 The Commission believes there should be two exceptions to the confidentiality of FGC proceedings. The first is where a person engages in unlawful conduct during the process. The exception would not cover admissions about past unlawful acts. This exception is narrow and exists only to discourage illegal activity during the conference itself. The narrowness of the exception should encourage frank discussion during negotiations. The second exception should permit agreements made during the conference to become consent orders or a care plan.

7.268 The Commission suggests that the introduction of a confidentiality provision for FGCs may have implications for Aboriginal families who choose to use the process. The submissions received by the Commission in relation to the confidentiality of AFDM conferences suggest that the confidentiality of conferences held for Aboriginal families may be problematic. Mainstream Western notions of confidentiality may not work in an Aboriginal context.³⁸²

7.269 FVPLS Victoria argued in its submission that AFDM meetings should be confidential, subject to child safety concerns to allow for open and robust discussion.³⁸³ The submission by VALS stated that concerns about a lack of confidentiality may inhibit Aboriginal participation in FGCs.³⁸⁴ On the other hand, VALS also commented on the difficulties of maintaining confidentiality in smaller communities, which is rarely possible in Aboriginal communities due to close kinship ties.³⁸⁵ VALS questioned the value of confidentiality in obtaining the trust and honest participation of parties. They stated in relation to confidentiality at FGCs:

*VALS would like to express caution for decisions to be made in regards to confidentiality in early conference forums that may negatively affect children, young people and families that may have their matter progress to court.*³⁸⁶

372 Submission 33 (Youthlaw).

373 CREATE Foundation, above n 89, 8.

374 Sally Holland and Sean O’Neill, “‘We Had to be There to Make Sure it Was What We Wanted’”: Enabling Children’s Participation in Family Decision-Making Through the Family Group Conference’ (2006) 13 *Childhood* 91, 108–9.

375 *Ibid* 109.

376 *Children, Youth and Families Act 2005* (Vic) s 522(1)(c).

377 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990). This is discussed in Chapter 3.

378 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(2) (entered into force 2 September 1990). This is discussed in Chapter 3.

379 Committee on the Rights of the Child, *General Comment 12: The Right of the Child to be Heard*, 51st sess, CRC/C/GC/12 (20 July 2009) [21]. This is discussed in Chapter 3.

380 Further information on use of child-inclusive practices in family dispute resolution is provided in Chapter 4.

381 Louise Otis and Eric Reiter, ‘Mediation by Judges: A New Phenomenon in the Transformation of Justice’ (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351, 395.

382 National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management* (2006) 13.

383 Submission 26 (FVPLS Victoria).

384 Submission 38 (VALS).

385 *Ibid*.

386 *Ibid*.

- 7.270 The Commission believes that further consideration may need to be given to the role of confidentiality in FGCs, and other family decision-making processes, so that these services are accessible and appropriate for Aboriginal families. That review role most appropriately rests with the Children's Court (Family Division) Koori Family Support Program (KFSP), who might consider whether an exception should exist, as appropriate, for Aboriginal children and families who choose to use the Commission's proposed mainstream family decision-making processes.
- 7.271 Working within these confidentiality provisions, convenors will need to be able to report to the Court and to participants whether an FGC was held and whether a particular case was assessed as inappropriate for FGC. That information is essential for the operation of the proposed new commencement procedure. The Court will not allow many applications to be filed unless it knows whether an FGC took place, or whether an assessment took place and the case was judged as inappropriate for a conference.
- 7.272 The Commission suggests that a certificate system could be set up to communicate this information to the Court by the convenor. This system would also need to be legislatively enshrined to ensure that convenors do not breach the Act's confidentiality provision. A certificate scheme has been recently established at federal level in relation to FDR. Since 1 July 2007, all separated parents who go to the Federal Magistrates Court or the Family Court of Australia (FCA) seeking new orders in relation to disputes over their children must attempt FDR before their case will be heard.³⁸⁷ FDR practitioners must issue certificates that state whether FDR was held and if not, why not.³⁸⁸
- 7.273 Aspects of the federal scheme may be useful for Victoria's child protection jurisdiction. To preserve confidentiality, certificates will need to contain a minimal amount of information. The Commission suggests that just two pieces of information are important: first whether FGC took place and an agreement was reached, and second, whether FGC did not take place because the case was assessed as inappropriate. The nature and content of negotiations and the agreement should not be canvassed in the certificates. Further, the Commission does not believe that any costs provisions should be attached to the certificates as in the federal system.

FORMALISATION OF FAMILY GROUP CONFERCING AGREEMENTS

- 7.274 The Commission proposes that any agreements made in FGCs should be formalised either by a consent order in the Court or by a care plan that can be taken into account in any subsequent court proceedings, FGC or other decision-making process. Two alternative agreement formats have been proposed in order to maximise the flexibility of the FGC process and the possibility that a fair agreement can be reached.
- 7.275 The proposed agreement types are based on models taken from the family law jurisdiction.³⁸⁹ They provide alternatives for determining the legal status of agreements resulting from FGCs.

Why have enforceable agreements with family group conferences?

- 7.276 Under the current system, families and protection workers may enter into voluntary child care agreements. The Commission believes that the proposed care plans and consent orders offer the benefits of enforceability and procedural safeguards, which the current voluntary agreements lack.

- 7.277 Paul Ban and Philip Swain argue that, '[i]f family group conferences are to be recognised as a useful and worthwhile forum, the decisions which result need to be enforced and enforceable'.³⁹⁰ Enforceability makes FGC a 'high tariff' intervention, meaning that the conference's outcomes are binding and that the process should therefore only be initiated where there are significant protective concerns for the children.³⁹¹
- 7.278 Enforceability is important from a Department, family and justice viewpoint. From the family's position, enforceability is important because
- if power over family lives is really to be shared between family and professionals alike, the latter too need to ensure that their undertakings are seriously made and are acted upon.*³⁹²
- Harris argues that enforceability is an important means of achieving family empowerment in the FGC process because the outcomes are legalised and cannot be summarily dismissed by the Department subsequent to the meeting.³⁹³ Protection workers must assign a level of risk to the child in individual matters and will make decisions about the appropriate course of action based upon that risk.³⁹⁴
- 7.279 The Department may value enforceability because an agreement made through conferencing that has the status of a court order potentially lowers the risk of non-compliance. Enforceability may encourage protective workers to agree to outcomes during the conferencing process and offer a real alternative to court proceedings. From a justice viewpoint, the judicial scrutiny of agreements provides a level of external oversight which should help to ensure that agreements are both in the child's best interests *and* fair.
- 7.280 Enforceability also creates the potential for coercive agreement-making within FGCs. If families can be bound by agreements made in private processes, then there is a possibility that agreements could be made 'which are considerably more adverse for families than what the Children's Court would have ordered had the matters been the subject of court applications'.³⁹⁵ The Commission believes that the 'high tariff' nature of agreements made through the proposed FGC process means that adequate safeguards must be incorporated into the conferencing and agreement formalisation process to ensure that agreements do not fall short of Children's Court and CYF Act 2005 standards.
- 7.281 Nathan Harris argues that the legal status of agreements that result from FGCs in New Zealand is one of the model's two key aspects that has lent it so much success.³⁹⁶ Unless the agreement reached in the conference is impractical or inconsistent with the Act, then the Department must give effect to the decisions, recommendations and plans made by the FGC.³⁹⁷ In most Australian jurisdictions, conferencing agreements have a much lower status than in New Zealand.³⁹⁸
- 7.282 A number of submissions noted the importance of formalising agreements. The Gatehouse Centre at the Royal Children's Hospital stated that decisions made at informal decision-making processes such as FGC 'need to be enforceable. This would require legislative power to enforce the decisions made even if they are Agreements'.³⁹⁹ The submission made by VALS highlighted the 'legal status' of agreements in the New Zealand system.⁴⁰⁰ Similarly, FVPLS Victoria argued that the outcomes of any significant decision making, including an out-of-home placement made during an AFDM meeting for an Aboriginal child, should be subject to court scrutiny. They argued this external scrutiny is especially important where participants are not legally represented.⁴⁰¹

387 *Family Law Act 1975* (Cth) s 60(7).

388 *Family Law Act 1975* (Cth) s 60(8).

389 Consent orders and parenting plans. These agreement types, in the family law context are discussed in Chapter 4.

390 Ban and Swain, 'Family Group Conferences Part 2', above n 226, 12.

391 Harris, above n 213, 4.

392 Ban and Swain, 'Family Group Conferences Part 2', above n 226, 12.

393 Harris, above n 213, 14.

394 See Chapter 3 under 'Assigning a level of risk to the child'.

395 Springvale Legal Service, *Lawyers Practice Manual Victoria* (2009) [6.2.102].

396 Harris, above n 213, 13–14.

397 *Children, Young Persons and Their Families Act 1989* (NZ) s 34(1).

398 Harris, above n 213, 14.

399 Submission 31 (Gatehouse Centre).

400 Submission 38 (VALS).

401 Submission 26 (FVPLS Victoria).

7.283 The Commission believes that the formalisation of agreements provides a level of certainty for all parties involved. As an example, agreements can set out services that parties agree will be provided, attaching a level of accountability to what was determined. Formalisation of agreements also links to more formalised consequences in the circumstance of breach.

Consent orders

7.284 The Commission proposes that an application for consent orders should be able to be brought before the Children's Court, even where there is no current case before the Court. Consent orders would become final upon judicial approval. The family courts have devised specific forms for lodging an application for consent orders, which must set out the orders that the parties wish the court to make.⁴⁰²

7.285 The making of consent orders would not require all parties to attend court. One representative could apply to the court to have the proposed consent orders finalised.

7.286 Adequate safeguards need to be built into the consent order process to ensure that all parties, especially parents and children, understand the nature of what they have agreed to, that the agreement is in the child's best interests and that it is made according to law. The Commission suggests two ways of achieving these ends. First, any consent order application should be signed by the parties and the representatives of parents and children before it can be filed in the Court. In the FCA, parties do not have to have received independent legal advice for a consent order to be registered.⁴⁰³ As noted above, such agreements in family law are essentially private negotiations, but in the child protection jurisdiction the negotiation is between a family and the state. To ensure that families' rights are protected, the Commission believes that independent legal advice and representation is essential. This may be underpinned by making consent order registration conditional on not only having the parties' signatures but also the lawyers' signatures.

7.287 The second means of achieving fairer agreements from FGCs is that judicial officers should be required to scrutinise applications for consent orders before they are finalised. The Commission suggests that magistrates assess consent order applications to those standards adopted by the Department in New Zealand: the draft orders must be practical and consistent with the Act.⁴⁰⁴

7.288 Magistrates should scrutinise proposed consent orders to the same standards that apply to other orders under the CYF Act 2005. This ensures that parties making agreements in family decision-making processes will be required to come to arrangements that meet the same standards of law applied by the Court.

7.289 Consent orders have many benefits. Upon registration in court, consent orders become enforceable in the same way as any other court order. They provide certainty and accountability to all parties, and formalised processes for dealing with breaches. This registration process also allows for judicial scrutiny. Finally, unlike other court orders, a consent order can be obtained without first initiating a contested proceeding, thereby providing an alternative to court proceedings where an enforceable outcome is desirable.

Care plans

- 7.290 Care plans provide a level of formality, without the need to engage with the Court. To constitute a care plan, an agreement made in FGC must be in written form and signed by the parties and their legal representatives. The Commission believes that the proposed care plans should be based on parenting plans in the family law jurisdiction, with some amendments to reflect the differences between the two jurisdictions.⁴⁰⁵
- 7.291 Care plans would be non-binding agreements negotiated in an FGC between families, the convenor and a child protection worker. Given the protective nature of this jurisdiction, it should be possible, however, for the Court to consider the contents of a care plan if a case comes to the Court. The Commission proposes that the Children's Court and other people involved in subsequent family decision-making processes should be able to consider any earlier care plans.
- 7.292 Section 64DAB of the FLA 1975 provides a model for this proposal. The section provides that when making a parenting order a court must have regard to the most recent parenting plan (if one exists), provided it is in the child's best interests. The Commission believes that a similar provision concerning care plans would be useful.
- 7.293 In the family law context, parenting plans do not require the involvement of legal representatives.⁴⁰⁶ However, parenting plans made in that jurisdiction are essentially private negotiations. In the child protection context, the negotiation is between a family and the state. To ensure the families' rights are protected, the Commission proposes that independent legal advice or representation is an essential component of a care plan negotiated through an FGC. The signatures of the relevant legal representatives or advisors, as well as those of the parties, should be required before a care plan may be taken into account in any subsequent matters.

Proposal 1.9: A family group conference should be:

- a) convened by an independent person
- b) conducted in an appropriate location
- c) conducted in accordance with practice standards
- d) conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding
- e) confidential, except as provided in (f) or where any person engages in unlawful conduct during a conference
- f) capable of producing an agreement that may become:
 - (i) a consent order in the Court, or
 - (ii) an agreement or 'care plan' that can be taken into account in any subsequent court proceedings, family group conference or other decision-making process.

402 For the Family Court of Australia see *Family Law Rules 2004* (Cth) r. 10.15.

403 Belinda Fehlberg and Juliet Behrens, *Australian Family Law: The Contemporary Context* (2008) 557, however parties do have to sign an affidavit stating that they are aware they have the right to do so.

404 *Children, Young Persons and Their Families Act 1989* (NZ) s 34(1).

405 Parenting plans are discussed in detail in Chapter 4.

406 As noted in Chapter 4, persons providing advice to parents in regards to parenting plans could be lawyers, but could also be family dispute resolution practitioners, mediators, or counsellors.

COURT REFERRAL TO A RANGE OF FAMILY DECISION-MAKING PROCESSES

- 7.294 In order to ensure that supported, structured and child-centred family decision-making processes are used throughout child protection proceedings, the Court should be required to direct that an appropriate referral take place once proceedings have been commenced.
- 7.295 The Court must direct that a CC, a JRC or another FGC (whichever is most appropriate) take place at the earliest possible opportunity after an application is filed, unless there are exceptional circumstances that warrant a departure from this general rule. This proposal requires judicial officers to turn their minds to ordering a suitable family decision-making process unless that would be inappropriate.
- 7.296 The Commission's proposal ensures that family decision-making processes are properly integrated into judicial processes at the Children's Court. Judicial referral to family decision-making is essential for ensuring that the Commission's proposed decision-making continuum functions effectively. Kathy Mack has argued that the use of judicial officers as referral agents to ADR processes is important because they bring authority to the referral process and may encourage reluctant users and their lawyers to attend an ADR process.⁴⁰⁷
- 7.297 This model of court-based family decision-making referral borrows from the 'multi-door courthouse', concept attributed to Professor Frank Sandler of Harvard Law School in 1976⁴⁰⁸ in reaction to:
- widely experienced delays in court processes in a range of civil jurisdictions
 - the increasing unaffordability of legal advice
 - litigants' dissatisfaction with the court process
 - a misconception of the court's role as a legal emergency room that would help resolve any legal wrong.⁴⁰⁹

A multi-door courthouse offers

*multiple options, or doors, to parties seeking to resolve disputes. An intake or referral centre helps parties to identify their dispute resolution options and which approach might be most appropriate.*⁴¹⁰

- 7.298 Dr Michael King recommended that the Commission consider this model for the Children's Court:

*When a case commences in court, the court in discussion with the parties could discuss the various options available for resolution—such as mediation, family group conferencing, a problem-solving court program under the supervision of the court or if the matter cannot be resolved in another way, a less adversarial trial (influenced by the approach of the Family Court).*⁴¹¹

- 7.299 The Commission proposes that one of the three forms of family decision-making—an FGC, a CC or a JRC—must be ordered by the Court following commencement of proceedings, unless there are exceptional circumstances that justify departure from this general rule. An example of a provision in another jurisdiction that permits a court to make a referral to various forms of ADR on its own motion or at a party's request is section 13C of the FLA 1975. Section 13D of the same Act outlines the consequences of a party's non-compliance with an order to attend ADR.⁴¹²

7.300 If the magistrate or judge determines that a matter is appropriate for a family decision-making process, an interim accommodation order would be made for a short period to enable the appropriate conference to take place and the case given a final hearing date before the judicial officer.⁴¹³ This date could be vacated if an agreement is reached following the family decision-making process.

7.301 'Exceptional circumstances' must exist to allow some cases to be fast-tracked for adjudication because some cases are not suitable for these family decision-making processes. The potential circumstances when FGCs, CCs and JRCs are inappropriate have been discussed at length in this chapter. In the context of court-connected mediation, Hilary Astor has argued that:

*Each jurisdiction will have its own range of case characteristics that must be taken into account when making referral decisions. An understanding of case characteristics that indicate exclusion from mediation will most effectively be developed through a process of consultation and development by each court ... The foundation for rules, practice directions or policies for exclusion of unsuitable cases could be developed with the assistance of ADR experts in conjunction with mediation training or advanced mediation training.*⁴¹⁴

7.302 The Court will need to develop its own practices for determining the appropriateness of cases for family decision-making processes. The Commission suggests that these standards should be developed in conjunction with the convenors of the conferencing processes and with representatives of the other participants in conferencing.

7.303 Using magistrates as referral agents to family decision-making processes will require judicial officers of the Children's Court to adopt a 'triage' role for cases that come before them. In particular, judicial officers will need to be able to determine whether a case is broadly appropriate for each process. This will demand knowledge and understanding of the full range of proposed family decision-making processes⁴¹⁵

Proposal 1.10: The Court should direct that a conciliation conference, a judicial resolution conference or another family group conference (whichever is most appropriate) take place at the earliest possible opportunity after an application is filed unless there are exceptional circumstances that warrant a departure from this general rule.

COURT-BASED CONCILIATION CONFERENCES

7.304 The Commission proposes that a court-based conciliation conference (CC) become the intermediate part of a graduated range of supported, structured and child-centred processes used for determining the outcome of protection applications.⁴¹⁶

- 407 Kathy Mack, *Court Referral to ADR: Criteria and Research* (2003) 38.
- 408 Frank E. Sandler (Paper presented at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, St Paul, Minnesota, April 7–9 1976) in *70 F.R.D.* 111 (1976).
- 409 Larry Ray and Anne Clare, 'The Multi-Door Courthouse Idea: Bringing the Courthouse of the Future ... Today' (1985) 1 *Ohio State Journal on Dispute Resolution* 7, 12–16.
- 410 James Podgers, 'Maine Route' (1993) 79 (Sept) *ABA Journal*, 118.
- 411 Submission 2 (Dr Michael King).
- 412 Under *Family Law Act 1975* (Cth) s 13D if a party fails to comply with an order of a court to attend an ADR process, then that non-compliance must be reported to the court. On receiving this report, the court may make any orders it considers appropriate.
- 413 The Commission has suggested in Chapter 8 that the 21-day limit on interim accommodation orders be removed except for secure welfare placements and that they be made for the minimum time required to enable the next court-ordered process to occur.
- 414 Hilary Astor, *Quality in Court Connected Mediation Programs: An Issues Paper* (2001) 33–4.
- 415 See Chapter 8 for a discussion of training of the judiciary, including rotation.
- 416 See the continuum of decision-making processes in child protection diagram above at paragraph 7.6.

CONCILIATION

7.305 The existing ADR process of conciliation is a suitable model for this intermediate family decision-making option. While conciliation has different meanings in different contexts, it is generally taken to mean that a CC convenor can offer the parties some advice about the content of the matter under consideration.⁴¹⁷ This is the sense in which the Commission uses the term ‘conciliation’ in this report. The National Alternative Dispute Resolution Council (NADRAC) defines the term thus:

*Conciliation is a process in which the parties to a dispute, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the participants to reach an agreement.*⁴¹⁸

7.306 NADRAC distinguishes between advisory and facilitative dispute resolution processes. This dichotomy has been incorporated into the CYF Act 2005 and is also used in this report. In facilitative processes, the convenor ‘assists the parties to a dispute to identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement about some issues or the whole dispute’.⁴¹⁹ The facilitative convenor provides a process for parties to negotiate in and does not advise the parties on the subject matter of the dispute or likely or preferable outcomes. In advisory processes, the convenor

*considers and appraises the dispute and provides advice as to the facts of the dispute, the law and, in some cases, possible or desirable outcomes, and how these may be achieved.*⁴²⁰

The advisory convenor will more actively provide views and advice to the parties. However, the parties, and not the convenor, make the final decision about outcome. The advisory convenor is usually an expert in the subject matter of the process.

7.307 Either advisory or facilitative conciliation could be used in CCs. Individual convenors of CCs may adjust the level of advice they provide depending upon the matter before them. At times, it may not be appropriate for the convenor to offer advice to the parties within a conference, while at other times advice from the convenor, combined with active management of the process, may help to resolve the more difficult matters.

7.308 Under the Commission’s proposed graduated range of supported, structured and child-centred processes, court-based CCs would be the intermediate rather than primary decision-making process in most cases. Many parties who will be directed towards CCs will already have attempted to reach agreement at an FGC. FGC is facilitative in nature, with the role of the convenor seen primarily as assisting family-led decision making. A more directive, or advisory, court-based process might assist the parties to reach an agreement if this has not been achieved at an FGC.

7.309 One consequence of using conciliation for court-based non-judicial resolution is that the convenor will need to have a high level of expertise in child protection. The Commission suggests that convenors of CCs be Children’s Court staff so that they are well placed to provide sound advice on court procedure and likely outcomes if an agreement is not reached. A new group of court officers known as judicial registrars might usefully fulfil the role of CC convenor.⁴²¹

7.310 Most DRCs currently convened in the Court are facilitative in nature. In submissions, two objections were raised about the use of advisory conference processes in the Children’s Court. These were that prescribing a particular model reduces discretion in the way the convenor runs the conference, which is especially important in regional courts, and that the extensive report-back provisions in the Act⁴²² compromise the process’s fundamental confidentiality principles.⁴²³ The Commission believes that its proposed model of CCs addresses both of these concerns. First, the model of conciliation proposed is flexible enough to allow a convenor to offer advice or to refrain, depending on what is most appropriate. Second, the Commission proposes a reworking of the confidentiality provisions relating to CCs so that there would be a high level of confidentiality around the conferences.⁴²⁴

VIEWS PRESENTED IN SUBMISSIONS AND CONSULTATIONS

7.311 Submissions generally supported the use of family decision-making processes in the Family Division of the Children’s Court. For example, VACCA stated in its submission that

*the use of dispute resolution/mediation within the court process is generally supported—any attempt to negotiate and resolve rather than contest should be the first option where possible.*⁴²⁵

7.312 However, many submissions were critical of the current model of DRCs. One submission said that as presently constituted, the DRC process is ‘generally regarded as a (sometimes inconvenient) detour on the inevitable road to a contested hearing rather than a dedicated process in its own right’.⁴²⁶ Private legal practitioners working in the Court noted that convenors’ powers were limited under the current model and that legal aid funding for conference preparation was very limited.⁴²⁷ The Victorian Bar argued that because DHS is not represented at DRCs and senior workers at DHS are not empowered to make decisions as a matter of course, many matters that could be settled at DRCs are not.⁴²⁸

7.313 Some current DRC convenors suggested in their consultation with the Commission that the current DRC process is not truly participatory for families:

*children’s representatives and parental involvement in negotiations in DRCs have been taken over by legal representatives. Previously there would be a break and parties would discuss proposals with their lawyers. Now lawyers have a case plan and are competing with DHS case planners. The families are effectively watching the arguments.*⁴²⁹

7.314 FVPLS Victoria noted that the current DRC process was not culturally accessible for Aboriginal families.⁴³⁰

7.315 Child protection workers in the Southern region argued that the Department was often required to attend DRCs, even where the conference’s purpose was unclear.⁴³¹ DHS workers in the Hume region noted the frequent need to attend a DRC even where the family was not committed to reaching an agreement, so that all that is achieved is a delayed contest.⁴³²

7.316 In contrast, DHS child protection workers in the Gippsland region commented that DRCs in the Morwell Children’s Court were well run and that all parties had the chance to be involved. Even so, some workers in that region noted that in some cases where agreement from the parents was unlikely, months might be wasted waiting for a DRC while a child is in care.⁴³³

417 National Alternative Dispute Resolution Council, *Dispute Resolution Terms* (2003) 3.

418 *Ibid* 5.

419 *Ibid* 7.

420 *Ibid* 4.

421 See below for a discussion of the independence of the conciliation conference convenor.

422 *Children, Youth and Families Act 2005* (Vic) s 219(2)(c). See further discussion below at ‘Confidentiality of conciliation conferences’.

423 Submission 46 (Children’s Court of Victoria) 36.

424 See further discussion at the heading ‘Confidentiality of conciliation conferences’, below.

425 Submission 39 (VACCA).

426 Submission 28 (Anonymous).

427 Consultation 6 (Private Practitioners 1).

428 Submission 48 (Victorian Bar).

429 Consultation 23 (DRC).

430 Submission 26 (FVPLS Victoria).

431 Consultation 22 (DHS CP Workers Southern).

432 Consultation 13 (DHS CP Workers Hume).

433 Consultation 18 (DHS CP Workers Gippsland).

- 7.317 The Children's Court stated in its submission that it is examining 'existing ADR arrangements to ensure a best practice model is achieved to reduce adversarial practices at the Court'.⁴³⁴ The Court outlined the significant amount of work it has been doing to redesign the current DRC process, including the establishment of an ADR Working Group with DHS and VLA, and participation in the Taskforce report. Since the Court made its submission to the Commission, the Court has released the draft *Guidelines for Dispute Resolution Conferences (New Model Conferences)*, effective from July 1 2010.⁴³⁵
- 7.318 In its submission, the Children's Court stated that it did not support the introduction of the two-tier model of advisory and facilitative court-based conferences in the CYF Act 2005.⁴³⁶ In particular, the Court objected to the use of advisory processes on the basis that prescribing a particular model would reduce discretion in the way convenors could run a conference, and that the Act's extensive report-back provisions of advisory conferences would compromise fundamental principles around the confidentiality of the process.⁴³⁷
- 7.319 The Commission has attempted to address the many concerns raised in submissions and consultations in its proposed model for CCs.

DISPUTE RESOLUTION CONFERENCES

- 7.320 DRCs have operated since October 2007 in the Family Division of the Children's Court under section 217 of the CYF Act 2005. The purpose of a DRC is to give the parties 'the opportunity to agree or advise on the action that should be taken in the best interests of the child'.⁴³⁸ An independent convenor chairs the conference.⁴³⁹ The Melbourne Children's Court employs sessional convenors with social science qualifications. Registrars or court project officers have been appointed as convenors at Moorabbin Children's Court and regional courts.
- 7.321 Following a recommendation from Tania Sourdin,⁴⁴⁰ DRCs may be either advisory or facilitative in nature.⁴⁴¹ It appears in practice, however, that only facilitative DRCs are conducted. The Children's Court stated in its submission that

*It has subsequently transpired that families and lawyers for families will not participate in advisory conferences. It seems the report back provisions for these conferences are regarded as problematic and compromising fundamental principles around confidentiality. This has meant that virtually all conferences in Victoria are currently conducted as facilitative conferences.*⁴⁴²

- 7.322 On 1 June 2009, the Court at the Moorabbin Justice Centre introduced a new DRC model that uses 'a very experienced and respected Registrar' as convenor and has higher settlement rates than Melbourne Children's Court conferences.⁴⁴³

THE TASKFORCE REPORT AND NEW MODEL CONFERENCES

- 7.323 In 2009, the Children's Court engaged the Directorate of Appropriate Dispute Resolution in the Department of Justice to facilitate an ADR Working Group with the Court, DHS and VLA.⁴⁴⁴ This working group met throughout 2009 and developed a model for court-based family decision making.⁴⁴⁵
- 7.324 In February 2010, the Taskforce Report described a new model for child protection resolution conferences that was based on the ADR Working Group's proposal. The Taskforce noted that DRC processes at the Melbourne Children's Court undermined the convenor's authority so that court conferences are not as effective as they could be.⁴⁴⁶ The Taskforce provided examples of poor preparation of lawyers for DRCs at Melbourne, and the occasional absence from conferences of a DHS officer with authority to make a decision as instances of this ineffectiveness.

- 7.325 The report proposed six key changes to existing conferences in the Children’s Court.
1. *Conducting the conference at the earliest practical point in the process.*
 2. *Conferences to occur offsite from the Court premises.*
 3. *Exercise of appropriate authority by convenors.*
 4. *Pre-conference preparation by convenors and parties.*
 5. *Mandatory training and accreditation of convenors.*
 6. *Integrating judicial conferences into a comprehensive conferencing process.*⁴⁴⁷
- 7.326 The Taskforce proposed that conferences at the Melbourne Children’s Court be held off-site, although for security reasons some matters might need to be held in the Court building.⁴⁴⁸
- 7.327 The model of conferencing proposed by the Taskforce has been further developed in the Court’s draft *Guidelines for Dispute Resolution Conferences (New Model Conferences)*, effective from July 1 2010.⁴⁴⁹ These guidelines rename the revised conferencing process NMCs.
- 7.328 It is intended that under section 217(1) of the CYF Act 2005, cases will be referred to NMCs at the discretion of the Court.⁴⁵⁰ The guidelines suggest that NMCs should be held as early as is practicable in proceedings.⁴⁵¹ The judicial officer will make this referral based on the case’s suitability for the new process, excluding cases that appear likely to resolve expeditiously without a conference or applications that allege serious physical violence, sexual abuse, or likelihood of these.⁴⁵² An intake officer will conduct a risk assessment process. This officer may refer the case back to the Court for determination if she or he believes that the case is unsuitable for NMC.⁴⁵³
- 7.329 NMCs are scheduled for a minimum of two hours, in order to allow more time for discussion in a less stressful environment.⁴⁵⁴ All of the parties and/or their legal representatives are required to attend an NMC.⁴⁵⁵ Child protection workers must either be legally represented or have the authority to negotiate a range of possible outcomes.⁴⁵⁶ Further, a DHS legal representative must be present at the final stage of the NMC to enable minutes to be drafted, where an agreement has been reached.⁴⁵⁷ The guidelines outline the responsibilities of all participants in NMCs and state ‘If people do not attend a NMC with an open mind or flexible attitude, the NMC will not be an effective process’.⁴⁵⁸
- 7.330 The guidelines emphasise family and community member participation in decision making.⁴⁵⁹ Families may choose to speak for themselves or have their legal representatives speak for them. Family members will be encouraged to express their views during the conferences.⁴⁶⁰
- 7.331 The role of an independent convenor with broad discretionary powers is seen as integral to the success of NMCs.⁴⁶¹ The requirement of an accredited convenor as chair of the conference is necessary to ensure that there is a controlled environment conducive to problem solving in order to promote the child’s best interests.⁴⁶² The guidelines outline the convenor’s role, emphasising that the convenor acts ‘with the authority of the Court’.⁴⁶³ Among other tasks, he or she is expected to
- give a ‘court perspective’ to help parties ‘reality test’ their positions and provide information to assist parties to identify those matters which may be central to the Court, if it were considering the case.*⁴⁶⁴
- 434 Submission 46 (Children’s Court of Victoria) 37.
- 435 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41.
- 436 Submission 46 (Children’s Court of Victoria) 36.
- 437 Ibid.
- 438 *Children, Youth and Families Act 2005* (Vic) s 217(2).
- 439 Convenors are appointed under s 227(1)–(2) of the *Children, Youth and Families Act 2005* (Vic) by the Governor in Council on the recommendation of the Attorney-General. Convenors must be of good character and have appropriate qualifications and experience.
- 440 Tania Sourdin, *Supporting Family Decision-Making: Guidelines for Legislation to Support ADR Development in Respect of the Community Services Act 1970 and the Children and Young Persons Act 1989* (2005) 8.
- 441 *Children, Youth and Families Act 2005* (Vic) s 217(3).
- 442 Submission 46 (Children’s Court of Victoria) 36.
- 443 Ibid 38.
- 444 Ibid.
- 445 The model is contained in Appendix A of the Child Protection Proceedings Taskforce, above n 40, 36–40.
- 446 Ibid 19.
- 447 Ibid 6.
- 448 Ibid 21.
- 449 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41.
- 450 Ibid 2.
- 451 Ibid 1.
- 452 Ibid.
- 453 Ibid.
- 454 Ibid.
- 455 Ibid 2.
- 456 Ibid 5.
- 457 Ibid 2.
- 458 Ibid 3.
- 459 Ibid 6.
- 460 Ibid 7.
- 461 See Child Protection Proceedings Taskforce, above n 40, 20; Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 2.
- 462 See Child Protection Proceedings Taskforce, above n 40, 20; Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 2, effective from 1 July 2010. See also, at the heading ‘Use of the National Mediation Accreditation Scheme’ above.
- 463 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 4.
- 464 Ibid.

- 7.332 Lawyers are expected to be well prepared and 'non-adversarial' during NMCs in order to represent their clients in a problem-solving environment.⁴⁶⁵ The guidelines provide for the convenor to submit a written report to the Court, together with any draft minutes of settlement terms.⁴⁶⁶
- 7.333 It is intended that NMCs will be introduced in stages.⁴⁶⁷ After an initial preparation phase, a pilot of 50 cases will be held from 1 July until 31 December 2010, drawn from cases from the DHS Footscray office. Conferences will run off-site from the Court and will last for two hours. A single convenor who is a permanent court employee will run the pilot conferences. It is proposed that the full implementation of the NMC will occur from January 2011.⁴⁶⁸

THE PROPOSED MODEL OF CONCILIATION CONFERENCES

- 7.334 This section outlines the Commission's proposed CC model. How this model differs from the NMC model is discussed below.

The independence of the conciliation conference convenor

- 7.335 CCs should be convened by an independent person. The Commission proposes the use of judicial registrars as convenors of CCs. Although the Children's Court does not have any judicial registrars, the Commission believes that such court officers could play a very important role within the Court in the future.
- 7.336 The Commission has suggested this course for four reasons. First, if convenors are permanent members of court staff they should have close knowledge of court processes and therefore be well placed to advise parties about procedural steps in cases where no agreement has been reached. Secondly, permanent court employees will have full access to court files, which they can read prior to the conference. Thirdly, CC convenors who are judicial registrars will possess the authority of the Court in the minds of participants, which should promote respect for the process. Fourthly, judicial registrars will possess the requisite legal knowledge to be able to advise parties about likely outcomes if the matter does not settle.
- 7.337 The Taskforce observed that the convenor's role is critical to the success of the proposed NMCs.⁴⁶⁹ The Commission agrees. The Taskforce also noted that there has been some undermining of the authority of the DRC convenors, which reduces the effectiveness of the current process, especially at the Melbourne Children's Court.⁴⁷⁰ The Taskforce sought to devise a new conferencing process that would be conducted by trained convenors who have the authority of the Court.⁴⁷¹
- 7.338 Currently, DRCs are convened by sessional convenors of considerable experience at the Melbourne Children's Court and by court registrars at regional courts, including Moorabbin. A single court registrar will conduct the NMC pilot in 2010.
- 7.339 The Taskforce suggested that where convenors are registrars, their position as court officers may assist with providing the convenor with authority recognised by all participants of the DRC.⁴⁷² The Taskforce highlighted that the current practice in regional courts, where registrars convene DRCs, resulted in a more effective process.⁴⁷³
- 7.340 The Children's Court does not currently have judicial registrars. However the FCA has very successfully made use of judicial registrars since 1988 in settlement processes within the Court.⁴⁷⁴ Prior to their appointment to the FCA, judicial registrars must have been experienced lawyers and must be suited, by reasons of training, experience or personality, to deal with family law matters.⁴⁷⁵ Judicial registrars may be appointed to the Family Court on a full or part-time basis,⁴⁷⁶ and are provided with a limited delegation of judicial power under the FLA 1975.⁴⁷⁷ Judicial registrars preside over interim, undefended and procedural matters that require determination⁴⁷⁸ and convene CCs within the Court for financial disputes.

7.341 The Commission proposes that all CC convenors undergo extensive training.⁴⁷⁹ The Commission agrees with the Taskforce's recommendation that convenors will need to be accredited under the National Mediator Accreditation Scheme,⁴⁸⁰ but believes that further specialist training may be necessary for child protection CC convenors.

The location of conciliation conferences

7.342 CCs should be conducted in appropriate locations. While the Commission believes that Melbourne Children's Court CCs might best be held away from the Court, a court location may be appropriate at other metropolitan and regional venues of the Court.

7.343 The Taskforce proposed that conferences should take place away from the Children's Court in Melbourne unless there were security concerns.⁴⁸¹ This recommendation was made because of the inadequacy of Melbourne's DRC facilities and because practitioners were leaving DRCs to attend other court matters. The Taskforce suggested that this meant that conferences were not taken seriously.⁴⁸²

7.344 In their consultation with the Commission, private legal practitioners commented that DRCs would need to be held within close proximity to the Court.⁴⁸³ The option of moving DRCs away from court premises in Melbourne, however, was supported by numerous submissions.⁴⁸⁴ A major reason for moving is the need to hold the conferences in an informal, neutral environment to decrease adversarialism.⁴⁸⁵

7.345 If CCs at the Melbourne Children's Court were held at other premises, lawyers representing children, DHS and parents would need to be able to travel between the existing court building and the conferencing location relatively quickly, in order to cover their caseload. Practice directions can require lawyers for parents and children to attend CCs in their entirety and legal aid funding for representation at CCs would need to be adequate to cover practitioner costs.

Practice standards for conciliation conferences

7.346 The Commission proposes that CCs should be conducted in accordance with practice standards. While the NMC guidelines prepared by the Children's Court, VLA and DHS do constitute practice standards, they would require some modification to be used for CCs.

7.347 The practice standards for court-connected conferencing should continue to be developed in a collaborative manner between the Children's Court, DHS and VLA, in the same way that NMC guidelines were developed.

7.348 The Children's Court Clinic stated in their submission to the Commission that

*It may be useful for practice standards to be developed to guide the work of staff in ADR and to address what appeared to be confusion in relation to what information is to be kept confidential. In line with practice standards some review of qualifications and experience of ADR staff appropriate to the nature of the task may be useful.*⁴⁸⁶

7.349 The Commission believes that CC practice standards should contain the following information:

- a definition of conciliation and a description of the process
- the objectives of CCs, including the circumstances when they might be ordered by the Court
- a process for risk assessment and screening
- the standard of preparation expected from parties

465 Ibid 1; Child Protection Proceedings Taskforce, above n 40, 21.

466 Children's Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 2.

467 Child Protection Proceedings Taskforce, above n 40, 21–2.

468 Ibid 22.

469 Ibid 20.

470 Ibid 19.

471 Ibid 20.

472 Ibid 19.

473 The Taskforce noted that the adversarial culture is less pronounced in regional courts, inferring that this may also contribute to the effective management of dispute resolution conferences: Ibid. Child Protection Proceedings Taskforce, above n 40, 19.

474 Margaret Harrison, 'Australia's Family Law Act: The First Twenty-Five Years' (2002) 16 *International Journal of Law, Policy and the Family* 1, 7–8.

475 *Family Law Act 1975* (Cth) s 26H.

476 *Family Law Act 1975* (Cth) s 26G.

477 *Harris v Caladine* (1991) 172 CLR 84, 95 (Mason CJ, Deane J).

478 Margaret Harrison, 'Australia's Family Law Act', above n 474, 8.

479 See above at the heading 'Qualifications and training of convenors'.

480 Child Protection Proceedings Taskforce, above n 40, 35.

481 Ibid 21. Children's Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 2. The Guidelines provide an exception to this proposal for cases where one of the parties is in custody or there are security concerns identified, in which case they will be held at the court.

482 Child Protection Proceedings Taskforce, above n 40, 21.

483 Consultation 7 (Private Practitioners 2); submission 25 (LV) concurred with this reasoning.

484 Submissions 22 (Anchor), 17 (CCC), 26 (FVPLS Victoria), 28 (Anonymous), 11 (VLA).

485 Submissions 22 (Anchor), 17 (CCC), 26 (FVPLS Victoria), 28 (Anonymous), 11 (VLA).

486 Submission 17 (CCC).

- any appropriate modifications to ensure the process is appropriate for Aboriginal children, young people and families
- a statement of the expectations of professional behaviour around the process.

Each of these issues is discussed below.

- 7.350 The issues of confidentiality and the identity of convenors are best dealt with by legislation rather than practice standards. The qualifications and accreditation of convenors are best dealt with in delegated legislation.
- 7.351 Practice standards should define ‘conciliation’ and should make it clear that the process can be both advisory and facilitative. The current NMC guidelines are silent about what ADR process convenors should use, although the description of the convenor’s role⁴⁸⁷ suggests a ‘heavy facilitative’ or ‘light advisory’ role.
- 7.352 Defining the process to be used in CCs, including the convenor’s role, will be useful for a number of reasons. First, it will give the parties and their representatives a clear understanding of the process they are undertaking. Secondly, it will permit the convenors to match the process to the specific matters and parties in different cases. Thirdly, it should promote common standards of practice between the convenors.⁴⁸⁸
- 7.353 Practice standards should outline the objectives of the CC program. Defining the objectives of a court-connected ADR program helps to maintain the quality of that service.⁴⁸⁹ The current NMC guidelines set out the purpose of NMCs in this manner.⁴⁹⁰ The practice standards might suggest which types of matters are best suited for CCs, what kind of information is required before a CC should be ordered, as well as other criteria for ordering a CC, such as the willingness of parties to attend and the potential benefits of engaging in the process. The standards should also set out those factors that might cause a case to be unsuitable for a CC.
- 7.354 Practice standards should contain a process for screening each matter that could be referred to a CC for risk assessment. This screening process should aim to ensure participants’ safety and the suitability of the case for conciliation. The Commission has previously noted in this chapter several excellent models of quality intake and/or risk assessment frameworks that have been used in other fields and which should be considered for CCs.⁴⁹¹
- 7.355 The Commission believes, as it has argued in relation to FGCs,⁴⁹² that the practice standards should set out the process and factors that may be taken into account during risk assessment. The practice standards should not prescribe the factors that might make a case inappropriate for CC, but should provide the intake officer with a list of matters that may be taken into account in determining the appropriateness of the process. The risk assessment and screening could potentially be conducted by a court administrative officer (such as the intake officer used for NMCs) or by the convenor.
- 7.356 All family decision-making processes should be designed and delivered in a manner that is appropriate for Aboriginal children, youth and families. Practice standards should explicitly establish how this would be achieved for CCs. FVPLS Victoria noted that the current DRC process was not culturally accessible for Aboriginal families.⁴⁹³ The current NMC guidelines are silent on this issue, although the Taskforce report states that under the proposed new model, ‘[c]onferences involving Aboriginal families will need to include an appropriately qualified Aboriginal mediator wherever possible’.⁴⁹⁴ The Commission suggests that in order to ensure that CCs are appropriate for Aboriginal families in Victoria, KFSP’s work in relation to court-connected family decision making should be incorporated into CC practice standards and training.

7.357 Practice standards might set out the standard of preparation expected from the parties before a CC. The Taskforce report emphasised the need for improved pre-conference preparation by parties, their representatives and convenors.⁴⁹⁵ The current NMC guidelines are adequate in this respect.⁴⁹⁶ Appropriate advice about preparation should assist legal representatives to understand what is expected of them and help ensure the smooth running of this new process.

7.358 Another role that practice standards can play is to describe behavioural expectations of convenors, lawyers and child protection workers during CCs. The inclusion of behavioural standards expected from the professionals involved should help develop a culture of cooperation around CC practice. The current NMC guidelines are adequate in this respect.⁴⁹⁷

The views and participation of children and young people in conciliation conferences

7.359 The Commission proposes that CCs should be conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding. The Commission has addressed the issue of the participation of children and young people in FGCs earlier in this chapter.⁴⁹⁸ The Commission proposes that the same principles should apply to CCs within the Court.

7.360 The NMC guidelines state that ‘parties’ would normally attend an NMC,⁴⁹⁹ but as children are not currently parties to child protection matters, they are excluded. Under section 222 CYF Act 2005, children may participate in NMCs if the Court orders. Under the same section, if the child is mature enough to give instructions and has a separate legal representative, the legal representative may attend, but this is usually taken to only cover children older than seven years of age.⁵⁰⁰

7.361 The Commission proposes a departure from the NMC model when dealing with participation, representation and conveying views of children and young people in CCs. The four key departures from the NMC guidelines in relation to children and young people are that:

1. The Commission proposes that children and young people should be parties to child protection matters and therefore able to attend where they would like to and where it is appropriate.
2. The Commission proposes a system of comprehensive representation of all children and young people in CCs to replace the existing system of partial representation.
3. Children’s and young persons’ views should always be taken into account at CCs, having regard to their level of maturity and understanding.
4. The Commission believes that CC convenors should, in consultation with a child’s representative, determine whether the child will participate in a CC.

7.362 In Chapter 8 (Option 2), the Commission proposes that all children and young people should be parties to child protection matters before the Children’s Court, entitling them to attend CCs.⁵⁰¹ The Commission’s proposals in relation to children’s attendance at FGCs and the consideration of children’s views also apply to CCs.⁵⁰² In short, the Commission proposes that children and young people should be able to participate directly in CCs where they would like to and where it is appropriate. Where children attend, CCs will need to be conducted by the convenors in a manner that is child-inclusive and which facilitates children’s genuine contribution to decision making. As proposed earlier in this chapter, children who participate, as well as those who do not attend, will always have a representative in the conference.

487 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 4.

488 National Alternative Dispute Resolution Council, *Dispute Resolution Terms*, above n 417, 1.

489 Astor, above n 414, 2.

490 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 2.

491 See above at the heading ‘Exceptional circumstances’.

492 See above at the heading ‘Exceptional circumstances’.

493 Submission 26 (FVPLS Victoria).

494 Child Protection Proceedings Taskforce, above n 40, 36.

495 *Ibid* 6.

496 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 5–6.

497 *Ibid*.

498 See above at the heading ‘Participation of children and young people in family group conferences’.

499 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 2.

500 *Children, Youth and Families Act 2005* (Vic) s 524; Springvale Legal Service, above n 395, [6.2.3010]. As is discussed in Chapter 3, the guidelines suggest that from about the age of seven years children generally have sufficient capacity to instruct a lawyer and as a result will not be granted party status until this time.

501 See Chapter 8 at the heading, ‘Children and young people as parties to proceedings’.

502 See above at the heading, ‘Representation for child or young person in family decision-making processes’.

7.363 The Commission further proposes that regardless of whether children participate directly in the conference, their views (if any) should be taken into account, having regard to their level of maturity and understanding. Where the child does not participate directly, the child's representative would convey the child's views to the conference.⁵⁰³

Confidentiality of conciliation conferences

- 7.364 The Commission proposes that CCs should be confidential, except when agreements reached during the process are contained in consent orders and when any person engages in unlawful conduct during the CC.
- 7.365 At present, DRC convenors must provide a written report to the Court about either the conclusions reached at the conference (for facilitative conferences), or the facts of the dispute, the possible outcomes of the dispute and how these outcomes might be achieved (for advisory conferences).⁵⁰⁴ The Court has created a standardised two-page form for this purpose that conveys information from the convenor to the Court, such as information on the parties' attendance, their representation, the result of the conference, any reasons for adjournment and any matters which were agreed upon if the matter did not settle.⁵⁰⁵ The report to be used for NMCs is virtually identical, except that it additionally notes the length of the conference.⁵⁰⁶ This report is admissible in proceedings for the purpose of establishing the conclusions reached at the conference (for facilitative conferences) or generally (for advisory conferences).⁵⁰⁷ The Court may consider the report in determining what orders or findings to make.⁵⁰⁸
- 7.366 Further, the CYF Act 2005 provides that evidence of anything said or done at a DRC is only admissible in proceedings if the Court grants leave or the parties all consent.⁵⁰⁹ Leave should be granted by the Court only if it is necessary to do so to ensure a child's safety and wellbeing.⁵¹⁰ Conference participants are also subject to a non-disclosure provision.⁵¹¹
- 7.367 The Children's Court argued that the extensive report-back provisions for advisory conferences contained in the Act have caused families and their lawyers to refuse to participate in these conferences because they compromise fundamental confidentiality principles of the process.⁵¹²
- 7.368 The Commission has previously outlined the reasons why it believes that confidentiality is vital to the success of family decision-making processes.⁵¹³ The information conveyed in the convenor's report and the Court's ability to take it into account in decision making, as well as the exceptions to admissibility under the Act, have the potential to inhibit frank negotiations during the conference process as well as to discourage participation by children, families and their lawyers.
- 7.369 Some of the submissions received by the Commission addressed the issue of confidentiality. The Children's Protection Society supported extending confidentiality to these processes:

There is good reason to suppose that if confidentiality is not extended to ADR procedures covering cases of alleged abuse or neglect, then parties are unlikely to admit such neglect or abuse within the negotiation process. Yet, as already stated, without such admissions ADR proceedings are likely to be ineffective. So, if ADR procedures were to be used in such cases, then it would seem that confidentiality must be extended.⁵¹⁴

7.370 The Children’s Protection Society did not support a complete confidentiality provision for court-annexed family decision-making processes:

*to extend confidentiality to child protection cases involving allegations of neglect or abuse would place an enormous burden upon ADR officers who come to learn of neglect or abuse but are not permitted to report their knowledge even when it might avert further harm to the child. Moreover, should ADR officers withhold such knowledge this is likely to lessen public confidence in Victoria’s child protection system. Any lessening in confidence might then impact upon the public’s confidence in reporting incidence of neglect and abuse and this is not in the interest of Victorian children.*⁵¹⁵

7.371 The Victorian Bar argued that the confidentiality of family decision-making must be maintained if the process is to be effective and fair.⁵¹⁶

7.372 The Commission has noted previously in this chapter that introducing a confidentiality provision for FGC may have implications for Aboriginal families who choose to use the process.⁵¹⁷ The Commission believes that further consideration may need to be given to the role of confidentiality in CCs so that the service is accessible and appropriate for Aboriginal families. That review role rests most appropriately with the Children’s Court (Family Division) Koori Family Support Program (KFSP).

7.373 The Commission believes that a very high standard of confidentiality should apply to all proposed family decision-making processes so that parties are encouraged to engage in open negotiations without fear of those negotiations being used in any subsequent court proceedings. The Commission proposes that CCs should be confidential except when agreements from the process are included in consent orders and when any person engages in unlawful conduct during the CC process. The reasons for the two exceptions have been discussed previously in this chapter.⁵¹⁸

7.374 CC convenors will need to be able to report to the Court about whether a CC was held, whether a CC was assessed as inappropriate, and whether the conference process is complete. As any agreement that is reached at a CC should be included in draft consent orders, it would be unnecessary for the convenor to report to the Court about the existence and content of any agreement.

The status of agreements made in conciliation conferences

7.375 The Commission proposes that agreements arising out of CCs should be formalised as consent orders. A consent order, once made by the Court, would have the same status as any other court order. Consent orders have been discussed earlier in this chapter in relation to FGCs.⁵¹⁹ The Commission proposes that the same consent order process should apply following agreement at a CC.

CONCILIATION CONFERENCES AND THEIR RELATIONSHIP TO NEW MODEL CONFERENCES

7.376 The Commission’s proposed CC model is based on the NMCs developed in 2009 and 2010 by the Children’s Court, VLA and DHS.⁵²⁰ There are, however, several key points of difference between the Commission’s proposed CC model and NMCs. These differences are summarised in the following table and further detail is provided in the text below.

503 See Chapter 8 at the heading, ‘The need for all children and young people to be represented in protection proceedings’.

504 *Children, Youth and Families Act 2005* (Vic) ss 218(2)(c), 219(2)(c).

505 See Appendix Q: Convenor’s Report.

506 Children’s Court of Victoria, *Draft Guidelines for Dispute Resolution Conferences*, above n 41, 9–10.

507 *Children, Youth and Families Act 2005* (Vic) s 223(1)–(2).

508 *Children, Youth and Families Act 2005* (Vic) s 224.

509 *Children, Youth and Families Act 2005* (Vic) s 226(1).

510 *Children, Youth and Families Act 2005* (Vic) s 226(2).

511 *Children, Youth and Families Act 2005* (Vic) s 226(3)–(4).

512 Submission 46 (Children’s Court of Victoria) 36.

513 See above at the heading, ‘Confidentiality of family group conferencing’.

514 Submission 27 (CPS).

515 *Ibid.*

516 Submission 48 (Victorian Bar).

517 See above at the heading, ‘Confidentiality of family group conferencing’.

518 See above at the heading, ‘Confidentiality of family group conferencing’.

519 See above at the heading ‘Consent orders’.

520 NMCs are explained earlier in this chapter at the heading ‘The Taskforce Report and New Model Conferences’.

Distinguishing features of new model conferences and conciliation conferences

New model conferences	Proposed conciliation conferences
Cases are referred to NMCs at the Court's discretion as early as practicable in proceedings. The judicial officer will make this referral based on suitability of the case for the new process.	Cases must be referred by the Court to CCs, JRCs or FGCs (whichever is the most appropriate) at the earliest possible opportunity unless there are exceptional circumstances.
The ADR model used is unspecific.	A conciliation model is proposed—it can be facilitative and/or advisory.
Participation of children and young people in conferences is by court order only. Legal representatives of children and young people are to attend NMCs. Parties to an application, with the assistance of the conference convenor, are to hear the voice of the child or young person either directly or indirectly. However, there is no requirement to take children's views into account.	Children and young people are parties who may choose to attend conferences if it is appropriate. There is comprehensive representation of all children and young people in CCs. Children's and young persons' views should always be taken into account at CCs, having regard to their level of maturity and understanding. Conference convenors should determine whether a child will participate.
Sessional convenors or court registrars convene conferences.	Judicial registrars or other court officers will convene conferences.
Confidentiality provisions are compromised by convenors reporting to the Court.	CCs should be confidential except as far as agreements from the process are contained in consent orders and where any person engages in unlawful conduct during the CC process. Reporting obligations by convenors will be lessened.
Convenors must be accredited under the National Mediator Accreditation Scheme.	Convenors must be accredited under the National Mediator Accreditation Scheme, and further specialist training may be necessary.
Agreements are formalised through a court order process. Minutes of agreements are recorded and provided to the Court with the convenor's report.	Consent order process.
The risk assessment process used to judge the appropriateness of conferences is only briefly referred to in the NMC guidelines.	Conference practice standards should set out the process and factors that may be taken into account during the risk assessment.
Conferences involving Aboriginal families will need to include an appropriately qualified Aboriginal mediator wherever possible.	Practice standards should explicitly establish how CCs will be designed and delivered in a manner that is appropriate for Aboriginal children, youth and families.

Proposal 1.11: A conciliation conference should be:

- a) convened by an independent person
- b) conducted in an appropriate location
- c) conducted in accordance with practice standards
- d) conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding
- e) confidential except as provided in (f) or where any person engages in unlawful conduct during a conference
- f) capable of producing an agreement that may become a consent order.

521 Sections 527A and 527B were added to the *Children, Youth and Families Act 2005* (Vic) by the *Courts Legislation Amendment (Judicial Resolution Conference) Act 2009* (Vic).

522 *Children, Youth and Families Act 2005* (Vic) s 3.

523 National Alternative Dispute Resolution Council, *Dispute Resolution Terms*, above n 417, 3.

524 *Ibid* 9.

525 *Ibid* 6.

526 *Ibid* 3.

527 Department of Justice (Victoria), *Attorney-General's Justice Statement 2: The Next Chapter* (2008) 40.

528 Victorian Law Reform Commission, *Civil Justice Review: Report*, Report No 14 (2008) 255–7.

529 *Ibid* 256.

JUDICIAL RESOLUTION CONFERENCES

JUDICIAL RESOLUTION CONFERENCES AND THEIR USE IN VICTORIA

7.377 The CYF Act 2005 has expressly provided for JRCs since 2009.⁵²¹ A JRC is a meeting presided over by a judicial officer involving mediation, early neutral evaluation, settlement conference or conciliation in order to reach settlement.⁵²² These ADR terms are not defined in the Act.

7.378 In facilitative mediation—the most common form of mediation—the mediator adopts a facilitative role meaning that she or he has no advisory role about the content of the dispute.⁵²³ In mediation, the parties, ‘with the assistance of a dispute resolution practitioner (the mediator), identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement’.⁵²⁴ Early neutral evaluation is a process whereby the parties present arguments and evidence and the judicial officer determines the key issues in dispute, and the most effective means of resolving the dispute without determining the facts of the dispute.⁵²⁵ Conciliation has different meanings in different contexts; convenors may, but do not always, adopt an advisory role in the dispute.⁵²⁶ Settlement conferences have no technical meaning and may require the convenor to adopt a facilitative or advisory role.

7.379 In Justice Statement 2 in 2008, the Attorney-General committed to the introduction of judge-led mediation in Victoria:

*In judge-led mediation, the judge’s authority, knowledge and experience can help parties identify the real issues at stake, enter into serious negotiations to resolve the dispute, and gain an insight into how the case might resolve if mediation is unsuccessful.*⁵²⁷

7.380 In its 2008 Civil Justice Report, the Commission recommended that judicial mediation should take place in civil courts with some safeguards implemented.⁵²⁸ The Commission stated that

*The case for the deployment of judicial officers as mediators arises in part out of increasing support for the use of ADR and out of changing perceptions of the role of courts. Courts are now more proactively involved in seeking to expedite the resolution of disputes using a variety of adjudicatory and non-adjudicatory methods.*⁵²⁹

- 7.381 The Commission is aware that some people are concerned about the constitutionality of requiring judicial officers to participate in mediation, including in state courts.⁵³⁰ The High Court of Australia has not yet comprehensively dealt with this issue.
- 7.382 In a January 2010 speech, the Chief Justice of Victoria, Marilyn Warren, provided limited support for judicial mediation. She expressed a preference for judicial involvement in other forms of ADR, including case settlement conferences, judicial early neutral evaluations and summary trials over direct judicial conduct of mediation.⁵³¹ In particular, Chief Justice Warren objected to judicial use of caucusing or private sessions with parties as part of the mediation process, which she argued could compromise or be seen to compromise judicial independence.⁵³² She suggested that if judges were to mediate, they should consider only conducting mediation with a court officer present and when proceedings were recorded, and that they should only meet the parties when lawyers were in attendance.⁵³³
- 7.383 Since the passing of the *Courts Legislation Amendment (Judicial Resolution Conference) Act 2009* (Vic), the Family Division of the Children’s Court now utilises JRCs to assist with the settlement of matters.⁵³⁴ The Children’s Court was one of the first Victorian courts to conduct JRCs.⁵³⁵ In the Family Division, a JRC is presided over by the President or a magistrate. The Court has stated that it believes that JRCs will offer ‘enhanced ADR in particularly complex and entrenched disputes where it is felt that the authority of a judicial officer may assist a resolution’.⁵³⁶ The amended CYF Act 2005 now permits the President and the magistrates of the Court to make rules of court for forms, practice and procedures relating to JRCs.⁵³⁷ The Court is in the process of preparing draft practice directions for the conduct of JRCs.⁵³⁸
- 7.384 In February 2010, the Child Protection Proceedings Taskforce supported the eventual development and integration of JRCs into ‘a comprehensive regime of conferencing in the Children’s Court’ once additional judicial officers are appointed to the Court.⁵³⁹
- 7.385 The Commission consulted on whether current dispute resolution processes, including JRCs, were effective and could be improved. Few responses were received in relation to JRCs. The Law Institute of Victoria argued that current processes could be improved by holding more JRCs instead of the current DRCs.⁵⁴⁰ The Court, after noting that the implementation of JRCs would not be cost neutral, stated in its submission that it would make greater use of JRCs once it is aware of the government’s response to the Taskforce recommendations.⁵⁴¹

RESPONSE AND PROPOSALS IN RELATION TO JUDICIAL RESOLUTION CONFERENCES

- 7.386 The Commission proposes that the Family Division of the Children’s Court should continue to conduct JRCs and supports the Court in seeking to make greater use of this judicially convened decision-making process. The Commission does not believe, however, that judicial officers conducting JRCs should use mediation. Instead, they should use the other more advisory processes available under the *Courts Legislation Amendment (Judicial Resolution Conference) Act 2009* (Vic), including early neutral evaluation, settlement conferences and conciliation.

- 7.387 It would be difficult for a judicial officer, with the authority afforded by her or his office, to convene a facilitative process such as mediation. The use of early neutral evaluation, settlement conferences and conciliation in JRCs will provide judicial officers with a greater range of settlement tools than mediation, because when using these processes they can give advice about likely outcomes. Allowing judicial officers to offer a range of more directive and advisory processes should enhance the judicial settlement role in JRCs. Private sessions in any of these processes should be avoided because of the risk of being seen to compromise the Court's independence.
- 7.388 The Court should be able to order JRCs at the request of a party or on the Court's own motion. Section 13C of the FLA 1975 provides an example of a provision in another jurisdiction that permits a court to make a referral to ADR on its own motion or at a party's request.
- 7.389 The Commission accepts that there may be resource implications for the Court in increasing its offering of JRC services. However, it may be that greater use of JRCs, along with the other family decision-making measures proposed in this report, reduces the number of applications filed in the Family Division and decreases the number of court events in most cases. Those savings may justify the greater allocation of judicial resources to the JRC process.⁵⁴²
- 7.390 The Commission proposes that judicial officers who conduct JRCs should receive formal training in the conduct of early neutral evaluation, settlement conferences and conciliation.

Recusal

- 7.391 The Commission proposes that JRCs should only be convened in the Family Division of the Court by a judicial officer who will not determine the application if the matter is not resolved at the conference. The voluntary judicial withdrawal from a hearing is known as recusal. This proposal reiterates the Commission's recommendation in the *Civil Justice Review* about this issue.⁵⁴³
- 7.392 Recusal should dispel concerns about the effect upon public confidence and perceptions of the Court's integrity and impartiality if the same judicial officer engages in ADR and then determines the matter at trial.⁵⁴⁴ It provides a way of allowing the Children's Court to offer the valuable JRC service, but avoids compromising the impartiality of the judicial officer in the minds of the parties. The efficient and fair use of JRCs may bolster public confidence in the Children's Court, as it may be perceived that the Court is meeting public expectations about the economical and timely operation of such an important public institution.⁵⁴⁵
- 7.393 The Commission believes that recusal is so integral to the integrity of the JRC process that it should be required by legislation.

Location of judicial resolution conferences

- 7.394 JRCs should be conducted in appropriate locations. The Melbourne Children's Court is currently conducting its JRCs in the Children's Koori Court room used by the Criminal Division. This room contains a large oval table around which parents, their lawyers, child protection workers, Court Advocacy Unit lawyers, children's lawyers and, if present, the child can sit. The judge or magistrate conducting the JRC may sit at the table with the parties or at the raised judicial bench, depending upon the circumstances of the case. At the Moorabbin Children's Court, JRCs are currently conducted in an ordinary courtroom and the magistrate or judge sits at the bench and the parties and lawyers at the bar table. The Commission is not aware of any JRCs being conducted at regional Children's Courts.

- 530 Ibid 254–5.
- 531 Marilyn Warren, 'Should Judges Be Mediators?' (2010) 21 *Australian Dispute Resolution Journal* 77, 84.
- 532 Ibid 78, 84.
- 533 Ibid 84.
- 534 See Chapter 3 for the current practice of JRCs at the heading 'Judicial Resolution Conferences (JRCs)'.
- 535 Submission 46 (Children's Court of Victoria) 41.
- 536 Ibid.
- 537 *Children, Youth and Families Act 2005* (Vic) s 588(1).
- 538 Submission 46 (Children's Court of Victoria) 41.
- 539 Child Protection Proceedings Taskforce, above n 40, 20.
- 540 Submission 25 (LIV).
- 541 Submission 46 (Children's Court of Victoria) 41.
- 542 Victorian Law Reform Commission, *Civil Justice Review*, above n 528, 256.
- 543 Ibid 284 (recommendation 21).
- 544 For a discussion of these views see Victorian Law Reform Commission, *Civil Justice Review*, above n 528, 254.
- 545 Ibid 255.

7.395 Louise Otis, Justice of the Quebec Court of Appeal, and Eric Reiter place importance on the spatial configuration of the room used for judicial mediation.⁵⁴⁶ They argue that the dynamics of a traditional courtroom, with the judge at the point of a V between the parties, accentuates the image of the parties as hostile adversaries.⁵⁴⁷ This setup may interfere with the judge's task of promoting a triangular conversational model more appropriate in a consensual settlement process.⁵⁴⁸

Practice standards/directions for judicial resolution conferences

7.396 The Commission proposes that JRCs are only conducted in accordance with practice standards or directions. The Court is in the process of preparing draft practice directions for the conduct of JRCs under current legislative arrangements.⁵⁴⁹ The Commission believes that practice standards are an essential supplement to any legislative regime around JRCs.

7.397 JRC practice standards should contain the following information:

- definitions of ADR processes used as part of JRCs
- the objectives of JRC processes, including the circumstances when JRCs might be ordered by the Court
- establishing a process for risk assessment and screening
- the standard of preparation expected from parties
- ethical expectations of professional behaviour around the process.

Each of these issues is discussed below.

7.398 Practice standards should define the dispute resolution processes to be used by the judicial officers. The terms 'early neutral evaluation', 'settlement conferences' and 'conciliation' are not defined in the CYF Act 2005. Definitions of JRC processes will be useful in order to ensure that

- parties and their representatives who attend JRCs have realistic and accurate expectations about the processes they are undertaking
- judicial officers can match processes to specific disputes and different parties
- common standards of practice can be developed between the Court's judicial officers.⁵⁵⁰

In applying practice standards, it is crucial that the judge or magistrate explains the ADR process that she or he will be following at the commencement of the JRC process so that negotiation takes place against a commonly understood set of procedural rules.⁵⁵¹ This common understanding is important to ensure that parties are afforded procedural fairness.

7.399 Practice standards should outline the objectives of the JRC program. These objectives may best be developed collaboratively between the Court and its key users. As with CCs, these practice standards should outline and guide JRC objectives, risk assessment and screening processes, conference preparation, and behavioural expectations of lawyers and judicial officers.

- 7.400 An extremely important element of JRC practice, which should be set out clearly in practice standards, is a process for risk assessment and screening for each matter referred to JRCs. The risk assessment and screening could potentially be conducted by an administrative officer of the court. While they will have access to court files, an additional screening process is essential for ensuring the safety of the participants and the suitability of the process for the circumstances of each case. The screening process will assist the judicial officer in conducting the JRC, including in providing an appropriate process and ensuring the process meets the concerns and guards the safety of parties.
- 7.401 As with conciliation conferences, practice standards for JRCs might set out the standard of preparation expected from the parties before a conference. That may assist legal representatives to understand what is expected of them in this new process and help to ensure the smooth running of the JRC process. In ordering a JRC, the Court may also order that particular information is provided or prepared for the conference.
- 7.402 Another role that practice standards can play is setting out modified ethical behavioural expectations of lawyers and judicial officers around the JRC process. The inclusion of standards of behaviour expected from the professionals involved will assist with the development of a cooperative culture around JRC practice. As Otis and Reiter point out, 'Our current ethical models in law were developed primarily in the context of adversarial litigation and interpersonal conflict'.⁵⁵² They argue that the private, non-reviewable nature of judicial mediation means that ethical behaviour by the lawyers and judges is especially important. They therefore emphasise ethical duties in relation to confidentiality, party autonomy and fair treatment as being especially important.⁵⁵³ In relation to lawyers' ethics, practice standards may emphasise a shift in the lawyer's role towards providing clients with general support, advice-giving and explanation around the process and also in cooperating with other parties and their representatives.

The views and participation of children and young people in judicial resolution conferences

- 7.403 JRCs should be conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding. The views and participation of children and young people have already been discussed in this chapter in relation to FGCs and CCs.⁵⁵⁴ The Commission believes that the same principles should apply to JRCs.
- 7.404 The Commission's proposal meets the requirements of the participation principle in article 12 of the *United Nations Convention on the Rights of the Child*, which requires that a child's views are taken into account in a manner that is consistent with his or her maturity and level of understanding.⁵⁵⁵ Most of the children and young people who contributed to the devolved consultation conducted by CREATE Foundation for the Commission said that they believed that it was their right to attend court proceedings and have a say in their lives. Some young people thought that attending court at a young age had limited benefits for the young person due to the trauma associated with the experience.⁵⁵⁶ The Commission believes that children and young people, especially older children and young people, should be able to participate directly in JRCs where they have had the process explained to them by their representative and express a wish to attend. The atmosphere in a JRC will be less formal than in a court hearing and, with skill exercised by the judicial officer, should enable some direct conversation between the child and other participants.

546 Otis and Reiter, 'Mediation by Judges', above n 381, 382.

547 Ibid 382–3.

548 Ibid 384–5.

549 Submission 46 (Children's Court of Victoria) 41.

550 National Alternative Dispute Resolution Council, *Dispute Resolution Terms*, above n 417, 1.

551 Otis and Reiter, 'Mediation by Judges', above n 381, 380.

552 Ibid 393.

553 Ibid 395–7.

554 See above at the headings, 'The views and participation of children and young people in conciliation conferences' and 'Participation of children and young people in family group conferences'.

555 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 12(1) (entered into force 2 September 1990).

556 CREATE Foundation, above n 89, 5.

Confidentiality of judicial resolution conferences

7.405 JRCs should be confidential except as far as agreements from the process are contained in consent orders and where any person engages in unlawful conduct during the JRC process. This proposal would require an amendment to section 527A(1) of the CYF Act 2005, which currently states:

If, in any proceeding in the Family Division of the Court, the court orders or directs that a judicial resolution conference be conducted, no evidence is admissible at the hearing of any proceeding in that Division of anything said or done by any person in the course of the conduct of the judicial resolution conference unless the court otherwise orders, having regard to the interests of justice and fairness.

7.406 The Act currently preserves confidentiality of statements made in JRCs but permits a large exception in the ‘interests of justice and fairness’. That exception may create some uncertainty in the minds of parties and their representatives about the confidentiality of statements made in JRCs. Further, the judge or magistrate who convenes the JRC cannot be compelled to give evidence in proceedings about what was said or done during a JRC.⁵⁵⁷ The Commission believes that the confidentiality of JRC should be further strengthened.

7.407 Submissions received by the Commission highlighted the importance of confidentiality to all court-based family decision-making processes. The Federation of Community Legal Centres stated that: ‘Information obtained during ADR should not be able to be used in subsequent proceedings.’⁵⁵⁸ The Gatehouse Centre at the Royal Children’s Hospital stated in its submission that ‘ADR processes should be closed and restricted to the relevant parties’.⁵⁵⁹ The Victorian Bar also supported confidentiality to engender meaningful participation by the parties:

*For ADR to be a fair process that allows good faith negotiations, the confidentiality of the proceedings must be maintained. Meaningful participation in an ADR proceeding requires knowing that one’s interests will not be prejudiced if the matter cannot settle despite the best efforts of the parties.*⁵⁶⁰

7.408 In Quebec, the *Code of Civil Procedure* states, in relation to judicial mediation, that ‘anything said or written during a settlement conference is confidential’.⁵⁶¹ The confidentiality of JRCs may also prevent the abuse of the process as a fishing expedition by the parties.⁵⁶² Because of these reasons, the Commission believes that the ‘interests of justice and fairness’ exception to confidentiality should be removed from the Act.

7.409 As discussed earlier in this chapter, the Commission believes there should be only two exceptions to the confidentiality of JRC proceedings: where a person engages in unlawful conduct during the JRC process, and where agreements made during the JRC process become consent orders.

Formalisation of agreements made in judicial resolution conferences

7.410 The Commission proposes that any agreements which arise in JRCs should be formalised through a consent order process. A consent order, once made by the Court, should have the same status as any other order of the Court. Consent orders have been discussed earlier in this chapter in relation to family group conferences.⁵⁶³ The Commission proposes that the same process should apply following agreement at a JRC, except that it should be the judge or magistrate conducting the JRC who makes the orders by consent.

Proposal 1.12: A judicial resolution conference should be:

- a) convened by a judicial officer who will not determine the application if the matter is not resolved at the conference
- b) conducted in an appropriate location
- c) conducted in accordance with practice standards
- d) conducted in a manner that allows a child or young person to participate if he or she wishes to do so and/or to have his or her views taken into account, having regard to his or her level of maturity and understanding
- e) confidential except as provided in (f) and where any person engages in unlawful conduct during a conference
- f) capable of producing an agreement that may become a consent order.

EVALUATION AND REVIEW OF NEW DECISION-MAKING PROCESSES

7.411 The Commission proposes that all new decision-making processes, including FGCs, CCs and JRCs, should be independently evaluated and regularly reviewed. The Commission believes that both formal, independent program evaluation and informal, regular stakeholder review of family decision-making processes are very important.

7.412 Evaluation is an important way of assessing the usefulness and appropriateness of the family decision-making processes proposed in this chapter. Hilary Astor argues that '[o]ne way to discover whether or not court or tribunal connected mediation is of high quality is to evaluate it'.⁵⁶⁴ She argues that the benefits of ADR processes are often assumed rather than proved. Astor highlights the need for evaluation to assess program performance against defined objectives that have been set at the outset of the process. The Commission believes that an independent and large-scale evaluation of each new process should be commissioned and funded as part of the implementation process.

7.413 Regular and less formalised review of family decision-making processes is also important. Such review should ideally involve regular participants in the process and could take the form of a stakeholder review group. The involvement of a broad range of professionals in the review of new decision-making processes is an important way of establishing and maintaining ongoing inter-professional contact and collaboration.

7.414 In May 2010, the Children's Court convened a session at the Moorabbin Justice Centre in which the Court sought feedback on the new JRC process from Southern region DHS staff. This is an example of self-reflective practice that encourages inter-professional collaboration around family decision-making processes and improves service delivery.

Proposal 1.13: All new family decision-making processes should be independently evaluated and regularly reviewed.

557 *Children, Youth and Families Act 2005* (Vic) s 527A(2).

558 Submission 45 (FCLC).

559 Submission 31 (Gatehouse Centre).

560 Submission 48 (Victorian Bar).

561 Quebec Civil Code, art. 151.21 quoted in Otis and Reiter, 'Mediation by Judges', above n 381, 380.

562 Astor and Chinkin, above n 11, 178.

563 See discussion at the heading, 'Consent orders' above.

564 Astor, above n 414, 37.

