Australian Institute of Family Studies Submission to the Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Arrangements

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Australian Government

Australian Institute of Family Studies

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1 Overview

This submission to the Victorian Law Reform Commission Review of Victoria's Child Protection Legislative Arrangements is based upon research undertaken by the Australian Institute of Family Studies (AIFS) in the areas of child protection and the intersection between child protection and family law. Much of this work has been done under the auspices of the National Child Protection Clearinghouse, which is run by AIFS.

The submission provides a systems perspective on key factors influencing the Children's Court of Victoria. The existing practice in child protection of family group conferencing will be presented with a view to considering how this practice could be adapted as part of a less adversarial decision-making model. The submission will also present evidence from the jurisdiction of family law in relation to the Magellan case management model and family dispute resolution under the implementation of Division 12A of Part VII of the *Family Law Act 1975* (Cth). In the final part, evidence regarding child-friendly and child-inclusive practice in child protection decision-making and legislative arrangements is offered.

2 Key challenges, reforms and future directions in Australian child protection

This section outlines what the Institute's research has identified as being the key challenges and strategic directions for Australian statutory child protection services.

Child protection services were originally established to provide a crisis response for cases of severe abuse. While there is a continuing need for "forensically astute" statutory interventions to protect children from severe maltreatment, this crisis response is not working for the high numbers of families who are reported to child protection services and assessed as not requiring a statutory response but as being in need of support (Scott, 2006). This is the case for about four in every five notifications to child protection departments across Australia.

2.1 Key challenges

AIFS has undertaken research into what each of the state and territory child protection departments and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA; the Commonwealth Government department with responsibility for child protection issues) see as the key challenges ahead for enhancing the protection of children in their jurisdiction (Bromfield & Holzer, 2008). This research offers a national perspective of shared concerns, with the 11 most frequently nominated key challenges, listed in order of frequency, being:

1. responding to the pressure of demand at the front end of child protection services;
2. building prevention and early intervention services, especially for families in need;
3. enhancing and monitoring practice consistency and quality;
4. reforming the consistency and quality of policy and practice;
5. recruiting and retraining a skilled workforce (including, for example, reviewing organisational structure, the operating model, job design, specialist roles, supporting staff);
6. implementing and enhancing culturally appropriate interventions for Aboriginal and Torres Strait Islander children and their families, and services to assist in preventing their over-representation in statutory care and protection services;
7. provision of a quality out-of-home care service;
8. breaking down silos (including between government departments and non-government agencies and between practitioners);

9. supporting families with multiple and complex problems (especially parental substance abuse, family violence, mental health and chronic involvement with child protection services);
10. providing staff with the necessary tools and resources (e.g., information systems) to perform their respective roles; and
11. designing and delivering community education, in terms of managing community expectations of child protection departments and promoting the message that child protection is everyone's responsibility.

It should be noted that this research was conducted prior to changes to child protection in two jurisdictions: (a) the Northern Territory, following the *Little Children are Sacred* report; and (b) New South Wales, in response to the Special Commission of Inquiry into Child Protection Services (Wood, 2008).

In April 2009, the Council of Australian Governments (COAG) endorsed *Protecting Children is Everyone's Responsibility: National Framework for Protecting Australia's Children 2009–2020*. The framework moves Australia's approach from seeing child protection as a response to abuse and neglect to promoting the safety and wellbeing of children, and explicitly adopts a public health approach to care and protection. Many of the objectives and actions set out in the framework are designed to meet the challenges identified in 2008 (Bromfield & Holzer, 2008).

The national target and the six supporting outcomes clearly reflect that the national framework is intended as a coordinated and strategic approach to addressing the key challenges in child protection. One of the primary drivers underpinning the framework is a strong focus on prevention (e.g., preventing abuse and neglect, preventing entry into care) and on a coordinated and integrated service system.

3 Child protection activity: How does Victoria compare to other states and territories?

The Victorian Government has taken steps to address the problem of the statutory child protection service receiving a very large number of notifications, which can result in the system being "overwhelmed" and unable to effectively identify the cases that require a statutory child response. In 2002, the Victorian Government implemented the Family Support Innovation Pilot Projects, which provided longer term and/or episodic support for children and families where chronic and/or complex needs are present. The objectives of Family Support Innovation Projects were to: (a) divert a significant proportion of families currently notified to child protection services to community-based services; (b) minimise client re-notifications and the progression of families into the child protection system; and (c) provide an improved service capacity for families who may not come into contact with child protection services. This program was subsequently implemented statewide as the ChildFIRST program.

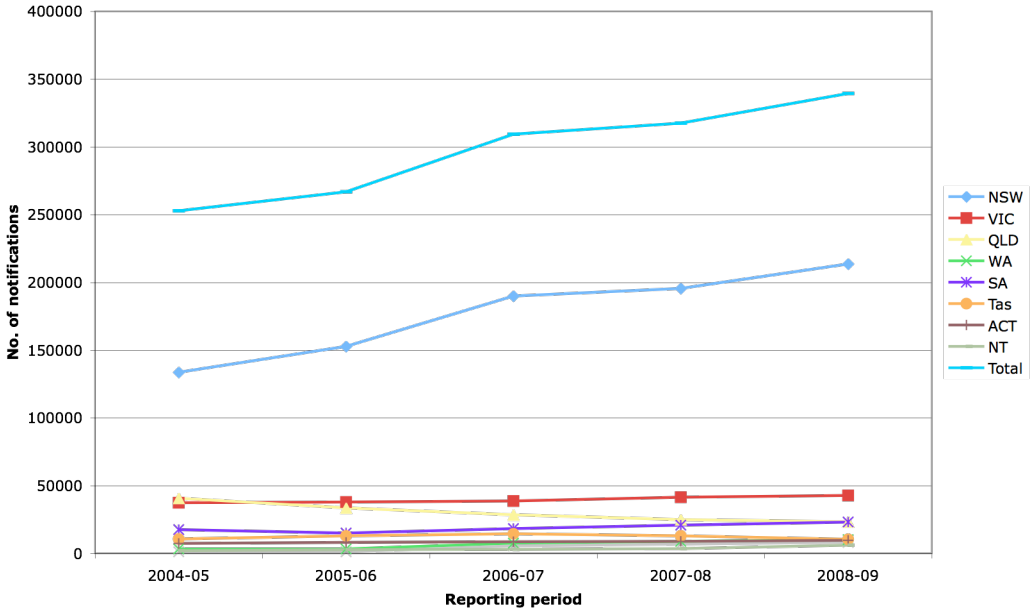
After a period of rapid rises over the previous decade, the number of notifications to the Victoria child protection system has remained roughly constant in the past five years (Bromfield & Holzer, 2008). The stabilisation in notification rates in Victoria is likely attributable to the following factors:

- a policy reform agenda reshaping the Victorian child welfare system (of which ChildFIRST was a critical element);
- increased resources for a wide array of non-government prevention and family support services; and
- the consultative and collaborative processes undertaken in order to develop and implement structural changes to the service system, which encouraged broad cultural change throughout the child welfare sector and the wider community.

Trends in child protection activity in Victoria compared to other Australian states and territories over the 5-year period 2004–05 to 2008–09 are presented in Figures 1 to 4. These figures are based on data from the Australian Institute of Health and Welfare's (2010) annual report of child protection in Australia. In Figures 2 to 4, the child protection department activities are expressed in rates per 1,000. This allows for more meaningful comparison between jurisdictions with different population sizes. (Note: rates of notifications per 1000 children are not available nationally).

Despite relatively favourable trends in child protection activity in Victoria compared to other Australian jurisdictions, it is worth noting that Ombudsman Brouwer (2009) concluded that there was considerable inequality in access to the Child FIRST program and in the delivery of child protection services (including the allocation of a case worker) between regions across Victoria.

3.1 Notifications

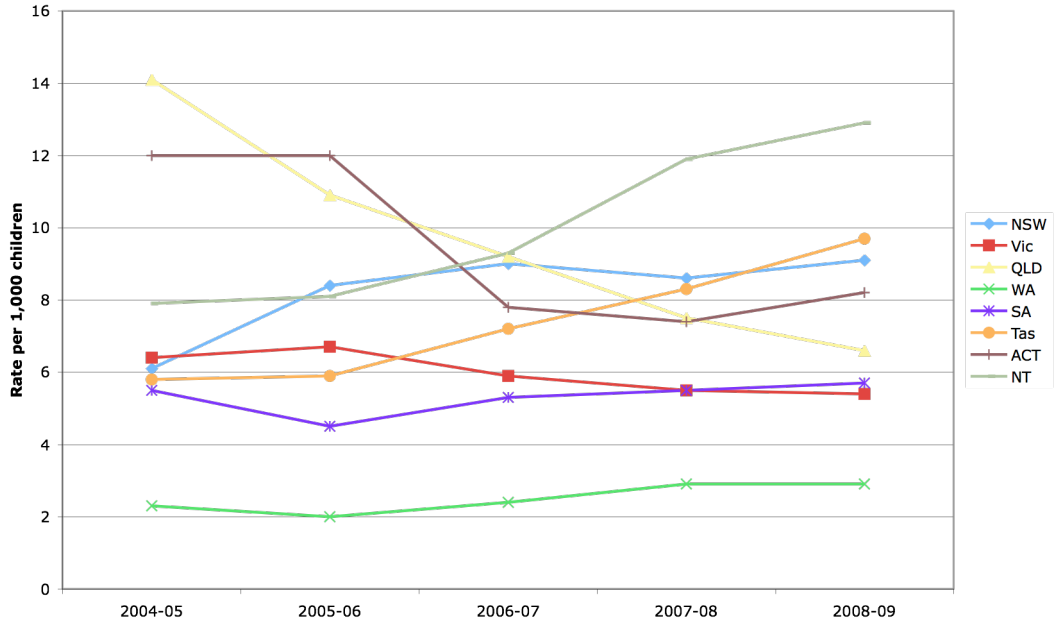


Source: AIHW, 2010

Figure 1. Annual number of notifications across Australia 2004–05 to 2008–09

The number of notifications to the child protection department has remained relatively stable over the previous five years compared to other states and territories.

3.2 Substantiations

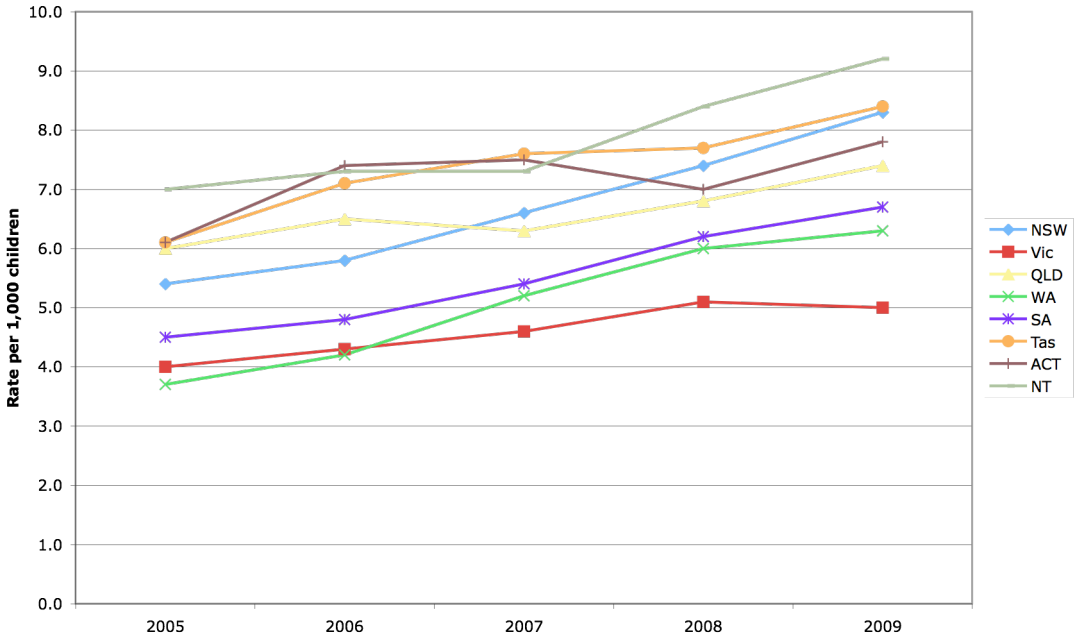


Source: AIHW, 2010

Figure 2. Annual rate of substantiations per 1,000 children across Australia 2004–05 to 2008–09

Figure 2 describes the rate per 1,000 children (0–17 years) who were subject to a substantiation of child maltreatment between 2004 and 2009. As can been seen, Victoria has experienced a small but steady decline in the rate of recorded substantiations compared to a prevailing upward trend in other states and territories.

3.3 Children on care and protection orders

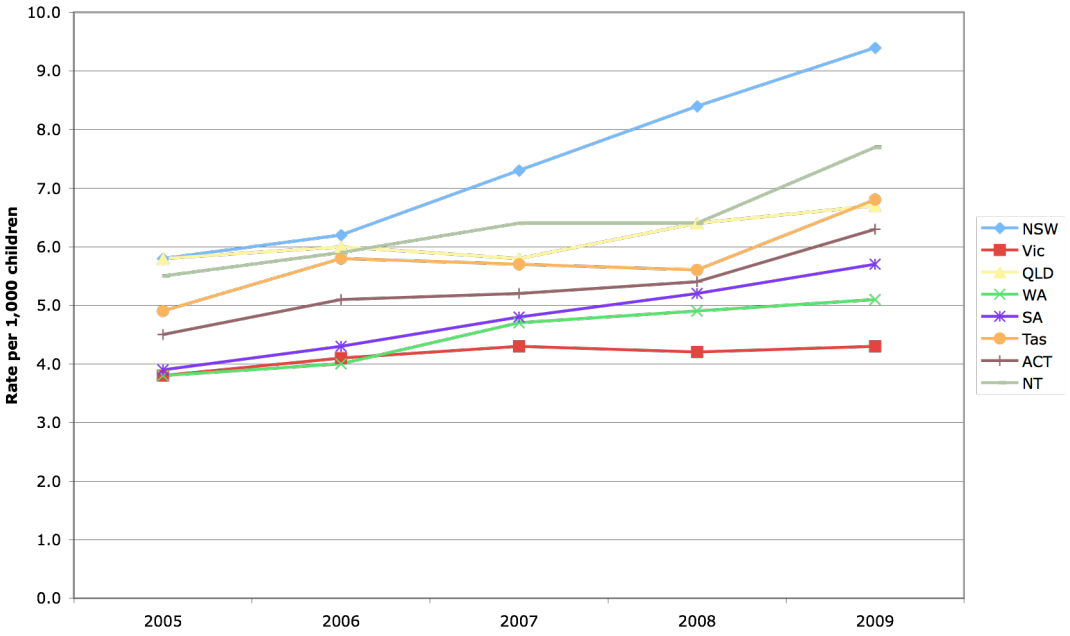


Source: AIHW, 2010

Figure 3. Annual rate of children on care and protection orders across Australia, 2005–09

Figure 3 illustrates that in 2009, compared to all other states and territories, Victoria had the lowest rate per 1,000 children in the population of children on care and protection orders. This is within the broader context of an overall upward trend in the rate per 1,000 of children on care and protection orders.

3.4 Children in out-of-home care



Source: AIHW, 2010

Figure 4. Annual rates of children in out-of-home care across Australia 2005–09

While all other states and territories have continued to experience an increase in the proportion of children placed in out-of-home care, the rate in Victoria has been relatively stable over the past five years. Victoria now has the lowest rate of all jurisdictions.

3.4 Victoria compared to international trends

Table 1 presents child protection data for Victoria compared to the Australian national average and to other developed countries with a comparable approach to child protection (the United States, United Kingdom and Canada).

Table 1. Child protection statistics, rate per 1,000 children (0–17 years), comparing Victoria, Australian average and international populations

Nation	Annual notifications/ reported/ referred cases	Annual total substantiated/ registered cases	Children in notifications/ in referrals	Children in substantiations / on child protection register/ plan	Children on care orders/ looked after/ in care of authorities	Children in OOHC/ looked after (not with parents)
Victoria	35.1	5.2	27.6	5.0	5.0	4.3
Australia	67.2	10.8	41.0	6.5	7.0	4.5
United States	43.0	6.3	77.8	na	na	6.7
England	49.0	3.1	na	2.7	5.4	5.0
Scotland	11.8	2.7	na	2.3	14.0	8.0
Wales	68.1	4.6	na	3.6	7.3	6.4
Northern Ireland	7.1	3.5	na	4.8	5.6	4.2
Canada*	n.a	21.7	na	na	9.2	9.0
New Zealand	82.5	19.0	na	na	na	4.2

Notes: Data sources are listed in Appendix A.
*Caution, this figure is an estimate only. There are no national level comparable data for child protection or out-of-home care in Canada. Total numbers in care and out-of-home care calculated using provincial/territory estimates and exclude Quebec and Nunavut.

In the Victorian Law Reform Commission's Information Paper for this review, we note that particular interest was expressed in relation to the child protection systems of Scotland and England. A brief description of these systems is provided below, along with additional information about Northern Ireland that may be of interest to the Commission. These descriptions provide insight into some of the reasons for the differing patterns of rates per 1,000 children in child protection activity data between these nations and Victoria and Australia.

3.4.1 Scotland

Across Scotland, local authorities are responsible for delivering services, including child protection, for families and children in need within their area. An annual survey of each local authority is conducted by the Scottish Government Unit of National Statistics to collect national child protection data.

Child protection in Scotland operates through local authority areas under the regulation and guidance of the national *Children (Scotland) Act 1995*. Court orders can be made to protect children when the child is likely to suffer unnecessarily or be impaired seriously in their health or development due to a lack of parental care.

Referrals concerning the safety and wellbeing of children are processed by local authority social work services. The local authorities then conduct preliminary screening of referrals. Child protection interventions are activated when it has been determined that a child is suffering, or is likely to suffer, significant harm. Child protection procedures are one of a range of responses that may be activated at this stage. This means that not all referrals concerning a child reported to local authorities will go to child protection. As can be seen in Table 1, the process of screening referrals is likely to have contributed to the substantially lower rate per 1,000 children of annual notifications, reported or referred cases in Scotland compared to Australia and other nations.

The annual total substantiations/registered cases for Scotland refers to the number of registrations to the child protection register following a case conference, over the year ending 31 March. There may be multiple registrations for individual children/young people during the year because this figure is the number of registrations made, not the number of children

registered. The equivalent data point in Australia to children on the Scottish child protection register is the number of children with substantiations.

Similar to England, data for children looked after in Scotland refers to children or young people who have the legal status of being looked after by local authorities. This can include a range of living placements, including those children under supervision orders still placed with parents (Scotland Government, 2008). The rate per 1,000 children looked after by Scotland local authorities is similar in definition to children on care orders in Victoria and Australia. Likewise, the data on children who are looked after by local authorities and do not reside with a parent are comparable to children in out-of-home care in Victoria and Australia.

3.4.2 England

The Department for Children, Schools and Families issues national statistics on referrals, assessment and the number of children and young people subject to a child protection plan annually (Department for Children, Schools and Families, 2008). The data is collated from 150 local authorities across England.

The *Children Act 1989* provides the legislative threshold for the activation of a child protection response. Under the Act, a child is defined as requiring child protection intervention if the child concerned is suffering, or is likely to suffer, significant harm. The *Children Act 2004* (Every Child Matters) has been introduced to support the introduction of a national framework for reforming children's services in England and Wales.

Concerns about the welfare of a child are reported to the social services department of local authorities. The Department for Children, Schools and Families (2008) defines the intake of a referral as a request for services made to a local social services department. The annual number of referred cases is equivalent in definition to annual notifications in Victoria and Australia.

Following referral, a practitioner in the social services department then determines whether the request warrants assessment by the local authority's children's social care services. This screening process may determine that: no further action is required; the child is considered to be a "child in need" of family support services; or a child protection plan is warranted (HM Government, 2006).

When a child has been assessed to be in need of urgent action to safeguard them from harm or is at continuing risk of significant harm, they become the subject of a child protection plan. These are cases where maltreatment has been substantiated (HM Government, 2006; Department for Children, Schools and Families, 2008). However, there are no absolute criteria for determining statutory child protection intervention; rather, harm may be judged according to a single event or events (HM Government, 2006). A child or young person under 18 years of age can be subject to a care order or supervision order if the court is satisfied that they are, or are likely to, suffer significant harm, and that this is attributable to the care they are receiving or likely to receive. This results in the child having the legal status of being looked after by the local authority according to the *Children's Act 1989*. Circumstances where a child is looked after/in care of authority in England is equivalent to children on care orders in Australia. For the purposes of this submission, data referring to children who are looked after by the local authority and do not continue to live with a parent, are comparable to figures for children in out-of-home care in Victoria and Australia.

3.4.3 Northern Ireland

In Northern Ireland, Area Health and Social Services Trusts make assessments and plan services, including child protection, for all children in need. Trusts are the responsibility of an Area Child Protection Committee, which in turn is led by an Area Health and Services Board. The Department of Health, Social Services and Public Safety collates and issues national child protection statistics annually.

The *Children (Northern Ireland) Order 1995* is the legislation under which child protection operates in Northern Ireland. Orders pertaining to the protection of children can be made when the child is suffering, or is likely to suffer, significant harm.

Referrals concerning the welfare of a child are made to the local Area Health and Social Services Trust. Each trust maintains a child protection register to record every child who is considered to be suffering harm or likely to suffer significant harm and is the subject of a child protection plan. Annual total referred cases are counted as referrals made to Social Services that have been determined to involve child protection issues based on an initial assessment. A child can be referred more than one time in a given year. Similar to referrals in Scotland, some referrals made to Social Services are determined to require action other than a child protection response. This contributes to the total number of child protection referrals in Northern Ireland being considerably lower than Australia and other nations.

A child is recorded on the child protection register when an investigation, assessment, and initial case conference establish that a child protection plan is required. Every child who is recorded on the register is subject to a child protection plan. The annual total registered cases, or substantiations, across Northern Ireland refer to total occurrences of children being recorded on the child protection register. This figure includes multiple events where children have been recorded entering and exiting the register more than once in a year. In contrast, the number of children on the register counts each child once. This is similar to the number of children in substantiations in Victoria and Australia.

As is the case with children on care orders in Victoria and Australia, children who are looked after by an authority in Northern Ireland can be in out-of-home care or remain placed with parents under a care order. Data on children looked after by an authority are similar to children on care orders in Victoria and Australia. To aid comparability of out-of-home care data, the rate per 1,000 children in out-of-home care in Northern Ireland (Table 1) has excluded the number of children categorised as being "placed with family/parents".

3.6 Key observations

Child protection data illustrate the size of the system, workload and functioning. This is important for understanding the part of the child protection department's work that relates to the children's court—when departments need to take out a care and protection order.

There are a number of factors potentially influencing the differences in notifications and substantiations between Victoria, Australia and other Western nations. The pattern suggests that the average Australian rates are affected by re-notifications and re-substantiations, compared to Victoria and other nations, especially the United Kingdom. For example, the Special Commission of Inquiry into Child Protection Services in New South Wales observed a trend of significant increases in re-reporting, with an increase of 76.7% in re-reports of the same reporter type and reported issue between 2004–05 to 2007–08 (Wood, 2008, p. 131).

System-related differences across nations in the processes of receiving and screening of cases referred to child protection services is an additional potential factor affecting differences between Australia and other nations. This is evident in the comparatively low rates of annual notifications (or reported/referred cases) in Scotland and Northern Ireland. Both of these nations conduct initial assessments that involve directing referred cases to child protection or an alternative response prior to being recorded as a child protection matter. This also means that not all cases in Scotland and Northern Ireland have a tertiary entrance point into child protection. Therefore, it is likely that a range of pathways to a statutory child protection response occurs through primary, secondary and tertiary services across nations. The divergent pathways in child protection systems may be contributing to differences in how child protection data are collected and the resulting data produced.

A further significant pattern that can be seen in Table 1 is that the data pertaining to out-of-home care arrangements where children do not reside with their parents is much lower and

narrower in range, and tends to cluster towards the median across nations. The median is 6.4 children in out-of-home care (not with parents) per 1,000 in the population, and Victoria is positioned just below this median. There are also a number of factors likely to be influencing the similarity in rates per 1,000 children living in out-of-home care. Cases of child maltreatment requiring removal of children from their parents represent an extreme level of child abuse and neglect. An implication is that the consistently lower rates for out-of-home care may reflect the lower incidence of extreme maltreatment. The threshold for deciding when to remove a child from parental care is likely to be similar across nations and decided under the close direction of the child protection department and the courts. In contrast, there can be fluctuations in notification and substantiation trends depending on: legislated reporting requirements; community attitudes toward children, parenting and child protection involvement; and media publicity. For example, in the 1990s, Victoria experienced a 38% increase in notifications during the first year of mandatory reporting (Victorian Auditor-General's Office, 1996). The legislation occurred in conjunction with a media campaign in favour of mandatory reporting and increased community awareness of child abuse and neglect, following a highly publicised child abuse fatality (Goddard & Liddell, 1995). Finally, an additional potential factor is that data for out-of-home care are likely to be less influenced by systemic issues of how cases are counted compared to notifications and substantiations. For instance, the definition of when a child is in out-of-home care is less subjective compared to what constitutes a notification or report to child protection.

4 The public health model of child protection and levels for legislative intervention

(Information applicable to Options 2 & 4)

4.1 The public health model

Increasingly, there are calls for child welfare initiatives, including child protection policies and programs, to adopt a public health model (Scott, 2006). This is reflected in the National Framework for Protecting Australia's Children 2009–2020 (COAG, 2009). In the context of the Victorian Law Reform Commission review of Victoria's child protection legislative arrangements, it is helpful to contextulise the role of legislation across the child protection system. This section first introduces the theoretical framework of the public health model of child protection and identifies levels of regulation and decision-making about children's best interests in the public health model. Second, the section describes and compares the definition of when a child is in need of protection as a form of tertiary legislative intervention across the states and territories of Australia. Third, the role of secondary level intervention, or responsive regulation (Braithwaite, 2002), is introduced. Responsive regulation is based on the premise that "governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is need" (Braithwaite, 2002, p. 29). The approach of responsive regulation represents a formal approach to intervention that also seeks to be democratic. In section 5.1 of this submission, responsive regulation will be further examined in relation to family group conferencing as a model for less adversarial decision-making.

The public health model offers a theoretical framework to understand the continuum of child protection interventions, responsive regulation and decision-making regarding children's best interests (Braithwaite, 2002; Crampton, 2007; Holzer, 2007), from universal services to statutory intervention.[1] Table 2 describes this framework as it applies to communities for child protection purposes.

[1] For further information on the public health model as it pertains to prevention of child maltreatment, see Holzer, Higgins, Bromfield, Richardson, and Higgins (2006).

Changes to the scope and threshold at which child protection services intervene, the prevailing attitude that protecting children is a statutory rather than a community responsibility, and increasingly risk-averse approaches to child protection practice have culminated in high levels of tertiary child protection activity. Eighty five per cent of cases reported to child protection services are assessed as not meeting the statutory grounds for intervention. Of the 42,851 notifications to Victorian child protection in 2008–09, only 2,344 cases (15%) were substantiated following an investigation. Furthermore, not all of these case that meet the statutory threshold for intervention will be assessed as requiring an immediate response. This means that there is a large administrative burden related to processing reports to child protection in order to redirect those families who do immediately require statutory intervention to secondary support services (including to the Child FIRST program in Victoria).

Table 2. Child protection interventions, responsive regulation and best-interests decision-making, according to the public health model

Public health model level	Population	Intervention	Regulation	Decision-making
Primary/ universal	Whole communities	Public resources, support and education services	Self-regulation	Decisions made by families who are willing and able to care for children
Secondary	Families where children are at risk* of maltreatment	Specialist support services to alleviate problems, prevent escalation and early intervention	Supported self-regulation	Decisions made in cooperation between the state and families who are willing to care for children but require support to be able do so
Tertiary	Families where child maltreatment has occurred or is occurring	Statutory child protection and treatment services	Coercive regulation	Decisions of the state imposed on families as parents are unable or unwilling to care for children

Note: The term "at risk" is used to mean "families who exhibit risk factors for child maltreatment", including poverty, parental mental health problems, family violence and parental drug and alcohol use. "The presence of these 'risk factors' does not necessarily mean that a child will experience maltreatment", rather there is a "capacity or likelihood on abuse and/or neglect occurring" (Holzer et al., 2006).

The disproportionate rate of notifications to substantiations indicates there is a strong need for more appropriate responses for those families who fall below the threshold for statutory intervention, but would benefit from supported self-regulation to address current problems, is a critical issue. Possible legislative solutions to this issue are further examined in section 5 of this submission. Reform at this secondary level of intervention and regulation would lead to a reduced demand on the tertiary sector so that statutory intervention can be focused upon the most severe and complex cases. This approach recognises that tertiary child protection services must exist to provide forensically astute responses to those children whose parents are unwilling or unable to protect them, even with support (i.e., parents requiring coercive regulation).

4.2 Tertiary intervention: Legal definitions of when a child is in need of protection

As each state and territory sets its own legal definition of when a child is in need of statutory protection, there are noteworthy differences that determine whether tertiary intervention is required.

A point of difference across jurisdictions is the degree to which the need for child protection is determined by consequences of harm experienced by the child or young person or by a type of harm perpetrated by a parent or caregiver (i.e., the presence of harmful behaviour or absence of protective behaviour). Most states and territories have some elements of both; however, Queensland, Western Australia and Tasmania have a stronger emphasis on outcomes for the child rather than demonstrating a type of harm (see Appendix B: Legal definitions of when a child is in need of protection).

A strength of having the outcomes of harm as the threshold for tertiary intervention is that the best interests of the child are at the forefront of determining if the child has experienced or is at risk of experiencing maltreatment. The consequences of harmful actions or omissions in the care of a child become the threshold for statutory intervention. This recognises that deleterious outcomes are complex and multifactorial, rather than necessarily classifiable according to specific types of harm caused by parental action or omission (i.e., physical injury, emotional or psychological harm). It also means that the legislative grounds for intervention are not restricted to parental actions or tied to individual incidents.

5 Models for less adversarial decision-making

(Information applicable to Option 1 and Option 2)

5.1 Family group conferencing: A decision-making model within existing child protection proceedings

Family group conferencing in child protection was first legislated in New Zealand and is now a rapidly growing practice around the world (Crampton, 2007; Harris, 2008). The concept of family group conferencing describes a range of family group decision-making models that seek to balance the otherwise apparently contradictory elements of family empowerment and state coercion (Adams & Chandler, 2004). Family group conferences are essentially a decision-making process involving the child or young person and/or, in some jurisdictions such as New Zealand, their independent advocate, the parent/s, extended family members or other significant people and the child protection practitioner (Harris, 2008). One of the key features of family group conferencing is that family members are afforded an opportunity to have time on their own to deliberate on possible agreements. Family group conferences are distinguished from more routine family meetings by their formal, "high tariff" character (Harris, 2008, p. 16). The process is therefore a form of supported regulation. The advantage of family group conferencing is that it is child-inclusive, and focuses on family strengths while conveying to parents that the concerns of the statutory child protection authority are very serious (Harris, 2008; Holland & O'Neil, 2006; Olson, 2009). Increasing the power of family group conferencing is a promising approach for reducing the need for coercive court-based decision-making.

In his study of family group conferencing in Australia, Harris (2008) compared the use of family group conferencing in states, territories and New Zealand. He observed that Victoria adopted family group conferencing early in 1992, but lacked consistent use and support for the practice between regions. Unlike in New Zealand, South Australia, Tasmania and Queensland (and, to some extent, the Australian Capital Territory), in Victoria conferences have been used on a non-legislative basis (with the exception of significant decisions made about Aboriginal children). In Queensland and Tasmania, agreements that have been reached in a conference can inform later court proceedings (unlike information from mediation in the family law system). In those states with specific legislation, family group conferencing is required in certain circumstances, especially prior to an application for a protection order. Therefore, 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.

Harris (2008) observed a number of strengths and innovations in family group conferencing programs in Australia that offer insight into how the practice may be better utilised in statutory child protection interventions in Victoria. The first of these is independent facilitation.[2] At the time of his research, there was a conferencing team in the South Australian courts who served as independent facilitators of conferences across the state. In contrast, Victorian family group conferencing facilitators can be specialist employees of the department or from non-government agencies or an approved Aboriginal facilitator. Second, in the Australian Capital Territory, there can be some changes in parental responsibility recommended and registered by the Children's Court following an agreement made in a family group conference, thereby avoiding the need for an additional case. This means that conferencing outcomes can be ratified.

If the decisions made through family group conferencing are to have the best possible chance of being realised, the secondary service system and early intervention programs, like Victoria's Child FIRST, must be adequately resourced to meet increasing demand. 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 (L. Maloney, personal communication, 19 March 2010). Attention to the availability of services will be required when determining changes to legislation. If, following a family group conference decision (or other decision-making process), a parent is willing to accept support, attend to the problems identified and able to engage in the process of ensuring care and protection of their child (or children) with adequate support, then support services need to be available.

5.2 Models outside child protection: The family law context

There are two points that we wish to direct attention to in relation to the application of making decisions in the jurisdiction of family law compared to the jurisdiction of Children's Court proceedings. Less adversarial trials rely on judges to actively seek information from the relevant parties and rely on judges to execute discretion in the process. As was evident in research conducted by Sheehan (2001), magistrates may rely more on their legal training and individual discretion than on information from the child protection service when making these decisions. In turn, this can marginalise children in the legal process. Furthermore, the context of family law involves disputes between parents over the care of a child or children, whereas the context of child protection proceedings is one of state versus parent where significant concerns about the care and safety of a child or children are evident.

5.2.1 The Magellan case management model

Magellan is an innovative case management response to these challenging issues where serious allegations of sexual abuse or physical abuse of children are raised in the Family Court of Australia (FCoA). (In the Family Court of Western Australia [FCoWA], a similar case management system to deal with matters involving both family violence and child abuse was developed through the Columbus Pilot; see Murphy and Pike, 2005.)

As described in Higgins (2007) and Higgins and Kaspiew (2008), Magellan is a collaborative, inter-agency model of case management. Key aspects of Magellan are: the child-focused approach, judicial management, interagency cooperation (particularly with child protection departments and police), early intervention, prioritisation in order to meet specified timeframes, use of court-ordered reports, and independent representation of children's interests. Some of the key features are described below.

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[2] It is important to note that while Harris (2008) identified independent facilitation as essential, a further critical element paired with this was the need for both the families and child protection caseworkers to agree on the outcomes of the case conference. In Tasmania, where facilitation is independent but the process does not require agreement by both the family and the caseworker, family group conferencing is not always effective in avoiding matters being referred to a hearing.

The Magellan Team

In each registry of the FCoA, there is a Magellan Team, which consists of one specific judge (or in some registries, two judges) designated as that registry's Magellan Judge, their Judicial Associate, the Manager of the Child Dispute Services (which provides clients with the services of a mediator, now known as a Family Consultant), as well as a Registrar and a Client Services Officer (Case Coordinator) dedicated to specifically looking after Magellan matters.

Magellan Steering Committee

As interagency collaboration is a key element of the model, in order to establish and maintain critical relationships with external stakeholders, each registry has a Magellan Stakeholder Committee, chaired by the Magellan Judge. The committee has representatives from the FCoA's Magellan Team, as well as representatives from that state/territory's legal aid commission, the family law section of the law society and the bar, the statutory child protection department, and the police service.

Overview of Magellan procedures

As soon as practicable after the court is aware of the allegations, the court appoints an Independent Children's Lawyer (ICL) and considers what (if any) procedural or interim orders should be made to protect the child or any of the parties to the proceeding, and to enable appropriate evidence to be obtained about the allegation as expeditiously as possible. The court may also request the intervention of an officer of the relevant state/territory child protection authority, and order a report on the allegations (referred to as the Magellan Report). A Family Report (usually completed by the court's internal Family Consultants), as well as other reports from experts as necessary are ordered. Throughout the process, the court is required to deal with the issues raised by the allegation as expeditiously as possible, with the aim of finalising cases within six months. On the first return date, the purpose of Magellan is explained to parties. A representative from the court's Child Dispute Services provides assistance and advice, as requested, to the Magellan Judge and the Magellan Registrar, particularly in relation to whether a Family Report is needed.

Although there are many areas of overlap between the procedures of Magellan and the new less adversarial trial (LAT) procedures introduced to the FCoA in 2006, there are still key differences: all cases involving sexual abuse or serious abuse allegations should be heard in a Magellan list, because of the interagency protocols that allow for the necessary information to be provided to the court in a timely way (particularly the Magellan Report from the state/territory child protection department). Magellan is also an exception to the new rules of evidence that apply in LAT cases (see Higgins, 2007; Higgins & Kaspiew, 2008).

The evaluation of Magellan

Results of an evaluation conducted by the Australian Institute of Family Studies in 2006–07 show that Magellan was effectively meeting its aim of providing a more streamlined, coordinated and focused response to these difficult cases (Higgins, 2007). Compared to similar cases from a jurisdiction where Magellan had not yet been implemented, Magellan matters:

- were resolved more quickly (the total length of cases, from the date of application to finalisation were shorter by an average of 4.6 months; from the date the court was advised of the allegations to the case outcome, Magellan cases were 3.4 months quicker);
- had greater involvement of the statutory child protection department (as demonstrated by the number of investigations, the evidence on file of the department planning to give evidence at trial, and the preparation of a short, focused Magellan Report that is presented to the court early in the matter);
- had fewer court events; and
- were dealt with by fewer different judicial officers.

Strengths and limitations of Magellan in the family court context

Magellan provides a significant improvement, but does not completely address the absence of a federal forensic mechanism to respond to such allegations (Higgins & Kaspiew, 2008). There is a jurisdictional gap, in that parenting disputes are dealt with in a federal law framework through the *Family Law Act 1975* (*FLA*) (Cth),[3] while child protection concerns are dealt with through state-based legal frameworks and by state government administered child protection departments. It is now well recognised that the lack of alignment between these two frameworks—the Commonwealth's private family law system, and the state's public children's court system—has created a range of practical problems for the resolution of *FLA* parenting disputes.

Strengths and limitations of Magellan in the child protection context

In the context of the Children's Court of Victoria, Magellan provides an example of how interagency coordination can be achieved in order to provide timely information for judicial decision-making. However, it does not incorporate other aspects of the mainstream less adversarial trial process (e.g., around rules of evidence), or other collaborative decision-making processes (such as family group conferencing).

In the family law context, it was apparent that the information required to make decisions is not only about the current risks that the child faces, but the likely consequence of any change to the current patterns of residence/contact. In other words, the child might be safe because they are solely spending time with a protective parent. According to state legislation, there are therefore no grounds for statutory child protection departments to substantiate any harm or to otherwise intervene in the family (see Bromfield & Higgins, 2005a).

As noted by Higgins (in press), the key issue that needs to be discerned in family law matters is not the quality of the evidence about alleged past abuse, but *current* risks. Despite innovations in video-taping evidence from victims, the number of charges and convictions in sexual assault cases for children and adults is low. From the viewpoint of the safety and wellbeing of children and young people, what is most important are evidence and informed opinions about the future wellbeing of children and the safety risks that they may face, depending on what arrangements are made regarding spending time with either parent. Ultimately, this has to rely on the professional judgement of experts, who are trained in investigating cases of children at risk. Such information from existing sources is vital to ensuring children are neither placed at risk nor unnecessarily denied time with a parent where it is safe to do so (i.e., that the future safety needs of children are reasonably met). Unlike in criminal matters, family and children's courts must also consider the implications of granting parents the right to spend time with a child against whom they have perpetrated abuse.

A significant issue that persists, though, is the question of the level of "proof" required by the court for such questions of future risk, and the importance of discretionary judgements based on the best evidence available, rather than an exacting test to determine that such a risk exists to the reasonable satisfaction of the court (Carmody, 2005; Fogarty, 2006). Such concerns about the evidentiary threshold and jurisdictional boundaries faced by the Family Court of Australia need also to be balanced by the critical need for parents to realise the purpose of the court—namely, to resolve private parenting disputes, not to prove or resolve criminal allegations. State/territory child protection departments have the legislative responsibility for investigating such criminal allegations (usually conducted jointly with police) and, where there is sufficient evidence, to prosecute. Rather than relying on either family courts or children's courts, parents' protective concerns should ideally be dealt with by police and directors of public prosecutions instituting criminal proceedings. Where there is good evidence, criminal charges against the perpetrator are the best mechanism for ensuring the

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3 *Family Law Act 1975* (Cth). See <www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s67za.html>.

safety of children into the future, notwithstanding the difficulties involved in prosecuting criminal cases of child abuse (see Higgins, in press).

A final limitation to note is that the Magellan model attends specifically to allegations of child sexual abuse and physical abuse. However, child protection cases are often complex and may involve more than one form of abuse or neglect, chronic maltreatment and cumulative harm (Bromfield & Higgins, 2005a). These must also be dealt with in a timely manner to meet the developmental needs of children and prevent case drift.

5.2.2 Less adversarial trials and Division 12A of Part VII of the *Family Law Act 1975* (Cth)

As part of a changes to the family law system implemented in 2006, a series of provisions designed to ensure that child-related cases were conducted in a less adversarial way were introduced into the *Family Law Act 1975* (Cth) by the *Family Law Amendment (Shared Parental Responsibility) Act 1975*.

These changes were based on the FCoA's Children's Cases Program, which piloted a set of case management practices designed to reduce adversarialism and increase child focus in court proceedings involving children (Harrison, 2007).

Division 12A of Part VII articulates in legislation the duties and powers of the court—and the principles that guide the application of these duties and powers—to manage proceedings relating to parenting orders. Key principles include:

- the court must consider the needs of the child and the impact of proceedings upon them in determining the conduct of the proceedings (s69ZN(3));
- the court is to actively direct, control and manage the proceedings (s69ZN(4));
- the proceedings should be conducted in a way that safeguards the child against family violence, child abuse and neglect, and the parties to the proceedings against family violence (s69ZN(5));
- the proceedings are to be conducted in a way that promotes cooperative and child-focused parenting by the parties (s69ZN(6)); and
- proceedings are to be conducted without undue delay and with as little formality and legal technicality as possible (s69ZN(7)).

The duties articulated in Division 12A include:

- deciding which issues may be disposed of summarily and which require full investigation (s69ZQ(1)(a));
- deciding the order in which issues should be decided (s69ZQ(1)(b)); and
- giving directions and making orders regarding procedural steps (s69ZQ(1)(c)), subject to deciding whether a step is justified on the basis of likely benefits considered against the cost of taking it (s69ZQ(1)(d)).

Powers set out in Division 12A include the ability, at any stage after a matter has commenced and prior to final determination, to:

- make a finding of fact (s69ZR(1)(a));
- determine a matter arising from the proceedings (s69ZR(1)(b)); and
- make an order in relation to an issue arising out of the proceedings (s69ZR(1)(c)).

As described in the AIFS *Evaluation of the 2006 Family Law Reforms* (Kaspiew et al., 2009),[4] each of the three main courts exercising *FLA* jurisdiction (the FCoA, the FCoWA and the Federal Magistrates Court (FMC)) has a different case management approach to support the implementation of Division 12A of Part VII. Both the FCoA and the FCoWA introduced

[4] See chapters 13 and 14 of the report for further details.

case management approaches involving initial assessment of families by social science professionals who work in the courts (Family Consultants) and ongoing Family Consultant involvement. However, at the time of the reforms, the FMC did not have sufficient Family Consultant resources to change its approach in the same way.

Evaluations of the FCoA pilot program on which Division 12A was based demonstrated positive impacts for families (McIntosh & Long, 2007) and significant benefits in terms of: increased child focus, less adversarial processes, quicker timeframes for resolution of disputes, and support for the less adversarial approach among professionals (Hunter, 2006).

In examining the implementation of Division 12A as part of a much larger set of research question about the impact of the 2006 reforms to the family law system, the AIFS *Evaluation of the 2006 Family Law Reforms* highlighted both negative and positive aspects of Division 12A and the case management models that support it in each court. The following key findings, based on the views of professionals working the system rather than of parents and/or children, emerge from the evaluation report. In considering them, it should be appreciated that many professionals do not make distinctions between Division12A of Part VII as a set of legislative provisions and the case management models that were implemented at the same time.

- Support for the changes was particularly strong among judicial officers and Family Consultants, but the views of lawyers were mixed.
- Judicial officers expressed appreciation for having a legislative mandate for taking an active, child-focused approach to case management, particularly in terms of determining what the key issues were in any dispute and what evidence should be adduced to address them.
- Family Consultants expressed the view that the changes had resulted in processes where the interests of the child were in focus earlier and more strongly through early social science involvement.
- Professionals from all groups (Family Consultants, judicial officers and lawyers) felt that particular effort needed to be directed to training professionals to operate effectively in the model, particularly in terms of interdisciplinary engagement.
- There was acknowledgement that different judicial officers exercised their case management powers in different ways. Many lawyers indicated this made it difficult to prepare cases.
- Some professionals saw the opportunity for parents to speak to the judge directly as an advantage but others saw it as a disadvantage. Judges indicated that this enabled them to get to the bottom of the issues in dispute more quickly and to garner a more honest impression of the parties by seeing them unmediated by their lawyers. Some lawyers indicated that clients appreciated the opportunity to speak directly to the judge and felt "heard" in the proceedings as result. Others expressed concern that the practice was disadvantageous for clients who were not articulate, well-educated and well-presented.
- Lawyers were concerned that the new processes had resulted in more hearings, delays and higher costs to clients. There were concerns among lawyers about whether the courts were sufficiently resourced to deliver the model effectively, though this issue was not directly examined in the evaluation report.

The following summarises the key insights from the Family Lawyers Survey conducted in 2006 and 2008 for the AIFS evaluation. The surveys examined lawyers' views of Division 12A of Part VII through a series of statements seeking to elicit views on some important aims of the changes. The purpose of including these in the survey was to gauge professionals' responses to the aims and implementation of Division 12A of Part VII, in the overall context of the 2006 reform package. In addition to examining professionals' views through a series of specific propositions, FLS 2008 participants were also given the opportunity to make open-ended comments. Broadly, it was found that:

- the less adversarial court processes in the Division 12A reforms will be/are more attentive to the interests of the child;
- 35% of respondents in 2006 and 40% in 2008 agreed that for most children the less adversarial court processes in the Division 12A reforms will deliver/delivers better outcomes than the traditional court process;
- the less adversarial court processes in the Division 12A reforms will be/are more attentive to the goal of future parental cooperation (approximately 60%);
- Division 12A provides sufficient flexibility to deal appropriately with allegations of violence and abuse (although 33% of 2006 respondents and 37% of the 2008 respondents expressed disagreement with this statement); and
- most litigants will feel/feel they got a fair hearing in the Division 12A process.

6 Further recommended reading and references

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Appendix B: Legal definitions of when a child is in need of protection

For further information, see National Child Protection Clearinghouse Resource Sheet: *Australian Legal Definitions: When is a Child in Need of Protection*.

Queensland

According to section 10 of the *Child Protection Act 1999* (QLD), a child in need of protection is a child who:

(a) has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm; and

(b) does not have a parent able and willing to protect the child from the harm.

Threshold employed

In Queensland, a child is in need of protection if he or she *has* suffered harm, *is* suffering harm, or *is at risk of* suffering harm; that is, statutory intervention is triggered due to the consequences of abusive or neglectful behaviours.

Harm, according to section 9 of the Act, is defined as:

(1) Any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing.

(2) It is immaterial how the harm is caused.

(3) Harm can be caused by—

a) physical, psychological or emotional abuse or neglect; or

b) sexual abuse or exploitation.

Western Australia

According to section 28(2) of the *Children and Community Services Act 2004* (WA), a child is in need of protection when:

(a) the child has been abandoned by his or her parents and, after reasonable inquiries —

(i) the parents cannot be found; and

(ii) no suitable adult relative or other suitable adult can be found who is willing and able to care for the child;

(b) the child's parents are dead or incapacitated and, after reasonable inquiries, no suitable adult relative or other suitable adult can be found who is willing and able to care for the child;

(c) the child has suffered, or is likely to suffer, harm as a result of any one or more of the following:

(i) physical abuse;

(ii) sexual abuse;

(iii) emotional abuse;

(iv) psychological abuse;

(v) neglect,

and the child's parents have not protected, or are unlikely or unable to protect, the child

from harm, or further harm, of that kind; or

(d) the child has suffered, or is likely to suffer, harm as a result of —

(i) the child's parents being unable to provide, or arrange the provision of, adequate care for the child; or

(ii) the child's parents being unable to provide, or arrange the provision of, effective

(iii) medical, therapeutic or other remedial treatment for the child.

Threshold employed

In WA, a child is in need of protection where he or she *has* suffered, or *is likely to* suffer, harm as a result of physical, sexual, emotional, or psychological abuse, or neglect; that is, statutory intervention is triggered as a result of the consequences of abusive or neglectful behaviours.

According to section 28(1):

(1) "harm" means any detrimental effect of a significant nature on the child's wellbeing;

(2) "neglect" includes failure by a child's parents to provide, arrange, or allow the provision of:

(a) adequate care for the child; or

(b) effective medical, therapeutic or remedial treatment for the child.

Tasmania

The *Children, Young Persons and Their Families Act 1997* (TAS) does not make reference to a child in need of care and protection; instead the Act refers to children "at risk". According to section 4, a child is at risk if:

(a) (i) the child has been, is being, or is likely to be, abused or neglected; or

(b) any person with whom the child resides or who has frequent contact with the child (whether the person is or is not a guardian of the child) –

(i) has threatened to kill or abuse or neglect the child and there is a reasonable likelihood of the threat being carried out; or

(ii) has killed or abused or neglected some other child or an adult and there is a reasonable likelihood of the child in question being killed, abused or neglected by that person; or

(ba) the child is an affected child within the meaning of the Family Violence Act 2004 (Tas); or

(c) the guardians of the child are –

(i) unable to maintain the child; or

(ii) unable to exercise adequate supervision and control over the child; or

(iii) unwilling to maintain the child; or

(iv) unwilling to exercise adequate supervision and control over the child; or

(v) dead, have abandoned the child or cannot be found after reasonable inquiry; or

(vi) are unwilling or unable to prevent the child from suffering abuse or neglect; or

(d) the child is under 16 years of age and does not, without lawful excuse, attend school regularly.

Threshold employed

In Tasmania, a child is deemed to be at risk if he or she has been, is being, or is likely to be abused or neglected.

According to section 3, abuse and neglect means:

(a) sexual abuse; or

(b) physical or emotional injury or other abuse, or neglect, to the extent that –

  (i) the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's wellbeing; or

  (ii) the injured, abused or neglected person's physical or psychological development is in jeopardy.

While Tasmania's definition of "at risk" extends to acts/behaviours only (that is, abusive or neglectful behaviours), the definition of abuse and neglect encompass the consequences of such acts/behaviours (that is, a child being injured or suffering physical or psychological harm).