Introduction

This Submission is made in response to the Call for Submissions for the reference on Victoria’s Child Protection Legislative Arrangements. This Submission does not address all questions posed by the February 2010 Information Paper. Rather, it focuses upon questions 2.14, 2.15, 4.1 and 4.2 and provides a constitutional law perspective on some of the options presented by the Information Paper.

Section 1.1 sets out the State constitutional law framework relevant to the options discussed by this Submission. Section 1.2 addresses the extent to which the ‘best interests’ principle may allow the Children’s Court of Victoria (the Children’s Court) to depart from strictly adversarial procedures. Section 1.3 explores the constitutional framework in which section 215 of the Children, Youth and Families Act 2005 (Vic) (the Act) operates. Section 1.4 focuses upon the constitutionality of instituting interdisciplinary Children’s Court managerial teams and of including non-judicial officers in the decision-making of the Court.

1.1 Background – State Constitutional Law

It is well established that State courts, like the Children’s Court, are not subject to the same constitutional limits from Chapter III of the Commonwealth Constitution (Constitution) as Australia’s federal courts. Further State Constitutions do not mirror the restrictions existing at the federal level. However, in Kable, a majority of the High Court found that it was contrary to the Constitution for powers to be conferred on State courts which thwarted their ability to continue to be vested with Commonwealth judicial power. Legislation which had this effect would be found constitutionally invalid. As McHugh J explained:

a State court when it exercises federal jurisdiction invested under s 77(iii) is not a court different from the court that exercises the judicial power of the State… Under the Constitution, therefore, the State courts have a status and a role that extends beyond their status and role as part of the State judicial systems. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power….It is axiomatic that neither the Commonwealth nor a State can legislate in a way that might alter or undermine the constitutional scheme set up by Ch III of the Constitution…Because the State courts are an integral and equal part of the judicial system set up by Ch III, it also follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power.  

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2 Kable v Director of Public Prosecutions (1996) 189 CLR 51.

3 Ibid 114-6.
In other words, the Australian court structure means that there are limits on what powers can be exercised by State courts so that a quasi-separation of powers doctrine exists at the State level. This does not mean that State courts are required to operate in accordance with federal court stringencies. Rather, for State courts, there is ‘a degree of institutional and procedural flexibility…which may travel beyond the limits permissible in federal courts’.\(^4\) It does however mean that if a function would be considered constitutional at the federal level its constitutional acceptability at the State level is likely to be assured.\(^5\)

The *Kable* principle, as developed by later cases focuses on the retention of a State court’s ‘institutional integrity’. For example, in *Fardon*, Gummow J referred to ‘repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system’.\(^6\) In the same case Gleeson CJ referred to the State legislation as invalid if it bestows on a State court ‘a function which substantially impairs its institutional integrity’ so as to be ‘incompatible with its role as a repository of federal jurisdiction’.\(^7\)

Although the law in *Kable* related to unconstitutional powers vested in Supreme Courts, the *K-Generation* decision has clarified that the doctrine does not only apply to State Supreme Courts but to ‘“any” court of a State’.\(^8\) This is because, by virtue of the ‘autochthonous expedient’,\(^9\) such courts may exercise federal judicial power pursuant to s 77(iii) of the *Constitution* and s 39(2) of the *Judiciary Act 1903* (Cth).

It is likely that the Children’s Court would be a ‘court of a State’ to which the *Kable* principle could potentially apply particularly as it is vested with federal judicial power, such as pursuant to the *Crimes Act 1958* (Cth).

The *Kable* principle has only very rarely been applied to invalidate legislation.\(^10\) This is partly because, in the post-*Kable* context of ‘institutional integrity’, ‘incompatibility’ has been very difficult to establish, at least in the factual contexts that have so far arisen before the courts. The recent High Court case of *International Finance Trust Company Limited v New South Wales Crime Commission*\(^11\) has reversed this trend, in striking down, by majority, s 10 of the *Criminal Assets Recovery Act 1990* (NSW).

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\(^7\) Ibid [15].
1.1.1 What is Institutional Integrity?

The concept of ‘institutional integrity’ has not been uniformly or definitively described, however, the courts have tended to relate it to the fundamental attributes of a court and particularly to the retention of a State court’s ‘institutional independence’ and ‘integrity’.12

For example, in Forge, Gummow, Hayne and Crennan JJ explained, in relation to ‘institutional integrity’ that:

the relevant principle is one which hinges upon maintenance of the defining characteristics of a “court”, or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to “institutional integrity” alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.13

In the High Court decision of Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police,14 Gummow, Hayne, Heydon and Kiefel JJ acknowledged the ambiguity surrounding ‘institutional integrity’ and determining, with finality, what amounts to ‘an independent and impartial tribunal’, but indicated that it relates to courts being in a position to operate free of ‘external control’.15 Similarly, in Fardon, Callinan and Heydon JJ emphasised the important of the courts partaking in ‘a genuine adjudicative process’ and not acting as the ‘alter ego of the legislature or the executive’.16

McHugh J in Fardon gave a number of examples of types of State laws which would not violate the ‘institutional integrity’ threshold including laws ‘altering the burden of proof’ or ‘rules of evidence’ ‘in ways repugnant to the traditional judicial process’.17 His Honour explained that such legislation would only be struck down:

when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law. That conclusion is likely to be reached only when other provisions of the legislation or the surrounding circumstances as well as the departure from the traditional judicial process indicate that the State court might

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13 Forge v Australian Securities Investments Commission (2006) 228 CLR 45, [63]-[64].
15 Ibid.
17 Ibid [41]-[42].
not be an impartial tribunal that is independent of the legislative and the executive arms of government.\textsuperscript{18}

Ultimately, the role of a State court as a ‘court’ operates as a limiting factor. Certainly, State courts can adapt to new circumstances and reform agendas but there are ‘limits upon permissible departures from the basic character and methodologies of a court’.\textsuperscript{19} Further, French CJ has recently indicated that it not necessarily possible to argue that these departures are ‘confined’ or ‘limited’ in nature when these can combine to result in the ‘death of the judicial function by a thousand cuts’.\textsuperscript{20}

\textbf{1.2 – The ‘Best Interests’ Principle in the Children’s Court and Less-Adversarial Procedures - \textit{Addressing Questions 2.14, 2.15 and 4.1}}

\textbf{1.2.1 Case Management}

The introduction of straight-forward case managerial mechanisms into the Children’s Court are likely to be constitutionally valid. Case management has become a well accepted part of court processes in federal and State courts.\textsuperscript{21} Further, as set out in 1.1, State courts have even greater latitude to implement such reforms because they are not as rigidly constrained as federal courts by the \textit{Constitution}.

\textbf{1.2.2 The ‘Best Interests’ Principle}

In the Family Court of Australia (\textit{FCA}), children’s cases have always been seen as less adversarial in nature because of the operation of the ‘best interests’ principle.\textsuperscript{22} Accordingly, it has been recognised that although ‘best interests’ does not mean that the trials bear no resemblance to standard judicial procedures\textsuperscript{23} and still requires that proceedings be heard ‘within the broad confines of the adversary system’,\textsuperscript{24} it does mean that the standard adversarial model of ‘disputes inter partes’ is significantly qualified.\textsuperscript{25}

Within this framework, to allow the interests of the parties to determine the shape of the proceedings could detrimentally affect the interests of the child.\textsuperscript{26} For this reason less-adversarial procedures seem consonant with the nature of the jurisdiction itself. Of course, recognising that such proceedings depart from the strict adversarial model

\textsuperscript{18} Ibid.
\textsuperscript{19} \textit{Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police} (2008) 234 CLR 532, [103] (Kirby J, although in dissent).
\textsuperscript{20} \textit{International Finance Trust Company Limited} [2009] HCA 49 (12 November 2009) [57] (French CJ).
\textsuperscript{21} \textit{Aon Risk Services Australia Limited v Australian National University} (2009) 239 CLR 175, [92] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
\textsuperscript{23} \textit{Re JRL; Ex parte CJL} (1986) 161 CLR 342, 363-4 (Wilson J) and 349 (Gibbs CJ).
\textsuperscript{24} \textit{In the Marriage of Harris} [1977] FLC 90-276, 76,478 (Fogarty J); \textit{In the Marriage of D and Y} (1995) 18 Fam LR 662, 670 (Nicholson CJ, Baker & Tolcon JJ).
does not necessarily ensure that the parties will approach the hearing in a less-adversarial way.27

Recent amendments to Division 12A, Part VII the Family Law Act 1975 (Cth) (FLA) having given the FCA statutory endorsement for more interventionist and managerial style procedures which build upon this traditionally less-adversarial approach adopted in child-related matters. These reforms include giving the FCA wide powers in relation to the evidence given in court, such as the ability to make orders in relation to how and what evidence is accepted.

In the context of the Children’s Court, s 10(1) of the Act provides that ‘the best interests of the child must always be paramount’. Section 10(2) proceeds to set out that a best interests decision must consider ‘the need to protect the child from harm, to protect his or her rights and to promote his or her development’. Section 10(3) includes a list of other factors which must be considered if they are relevant on the facts, such as the ‘child’s views and wishes’ (s 10(3)(d)) and ‘the desirability of continuity and stability in the child’s care’ (s 10(3)(f)). Determining whether a decision is in the best interests of a child is likely to amount to an exercise of judicial power, when in the context of children’s matters in the FCA, judicial power is generally accepted as being exercised ‘even though they involve a very large element of discretion’.28

It is submitted that s 10 of the Act, in a similar way to the equivalent provisions under the FCA, allow the Children’s Court to depart to some extent from a strictly adversarial approach while still retaining ‘institutional integrity’. This conclusion seems likely when departing from a strictly adversarial approach does not necessarily mean that the characteristics of a “court”29 are lost. Although in Fardon, Gummow, Hayne and Crennan JJ assert that the ‘capacity to administer the common law system of adversarial trial’ is an ‘important’ institutional characteristi[c] of courts’ they align this with the body being ‘independent and impartial’ rather than focusing solely upon the retention of adversarial procedures.30 Even if s 10 was supplemented with more specific powers, such as those found in Division 12A of the FLA, it is likely that the reforms would be constitutionally valid and that the Court would continue to be a suitable repository for federal judicial power. Fundamentally, the adoption of less-adversarial procedures, particularly in the context of the jurisdiction of the Children’s Court, does not automatically violate the requirements of independence or impartiality prioritised by the post-Kable jurisprudence.

The key caveat to this conclusion is ensuring that the Children’s Court does not, in exercising less-adversarial mechanisms, undermine the provision of procedural


30 Ibid.
fairness. The importance of this in the child welfare context was recognised by Brennan J in *Leischke*, where his Honour noted that:

> It would offend the deepest human sentiments as well as a basic legal principle to permit a court to take a child from its parents without hearing the parents when they can be heard and when they wish to be heard in opposition to the making of an order.\(^{31}\)

In the recent decision of *International Finance Trust Company Limited*\(^{32}\) French CJ identified procedural fairness as existing ‘at the heart of the judicial function’ when ‘[i]t requires that a court be and appear to be impartial, and provide each party to proceedings before it with an opportunity to be heard, to advance its own case and to answer, by evidence and argument, the case put against it’.\(^{33}\) The Chief Justice proceeded to acknowledge that procedural fairness is an ambulatory notion for which the ‘content of the requirements of procedural fairness may vary’.\(^{34}\) His Honour also referred to the potential for legislative or executive direction to ‘deprive the court of an important characteristic of judicial power’ namely, ‘the power to ensure, so far as practicable, fairness between the parties’.\(^{35}\)

The fact that the content of procedural fairness can vary depending on the nature of the jurisdiction is something particularly relevant to courts applying the ‘best interests’ principle. As Brennan J has noted:

> a desire to promote the welfare of the child does not exclude application of the principles of natural justice except so far as is necessary to avoid frustration of the purpose for which the jurisdiction is conferred.\(^{36}\)

This means that giving paramountcy to the best interests of the child may mean that the parties do not have an unqualified right to be heard. However, determining what is in a child’s ‘best interests’ will often require the parties to produce evidence on topics such as the nature of the child’s relationship with the parents.\(^{37}\) To this extent the ‘best interests’ inquiry may itself require the parents to be heard.\(^{38}\)

Overall, if less-adversarial procedures are adopted by the Children’s Court, it is important that s 10 of the Act is not exercised (or amended) so as to deny the provision of procedural fairness. This is unlikely to prove problematic. In interpreting the Division 12A amendments the Full Court of the FCA has noted that:

> Whatever process for adjudication of cases is adopted by the Court, procedural fairness must be accorded to the parties...The process adopted in the LAT, particularly on Day 1, gives no warrant to compromise issues of fairness and the

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\(^{31}\) (1986-7) 162 CLR 447, 458.

\(^{32}\) [2009] HCA 49 (12 November 2009).

\(^{33}\) Ibid [54].

\(^{34}\) Ibid.

\(^{35}\) Ibid [55].

\(^{36}\) (1986-7) 162 CLR 447, 457.

\(^{37}\) Section 10(3)(b) *Children, Youth and Families Act 2005* (Vic).

usual requirements must be met. These are that determinations be made impartially, on the basis of all relevant material that the parties were able to put before the trial judge, without any pre-judgment and that the parties were given an adequate opportunity to be heard.39

The real issue for the adoption of less-adversarial procedures in the Children’s Court will be to strike the appropriate balance in exercising the Court’s jurisdiction in the child’s ‘best interests’ while also complying with the necessary procedural fairness requirements. It may be advisable for the Children’s Court to draft practice notes or guidelines, as the FCA has done, to give some certainty for judicial officers in terms of what interpretations of the Act are likely to be appropriate in the circumstances.

1.3 - Constitutional Framework of s 215 of the Children, Youth and Families Act 2005 (Vic) - Addressing Questions 2.14, 2.15 and 4.1

This section explores the constitutional framework in which section 215 of the Children, Youth and Families Act 2005 (Vic) (the Act) operates and what would amount to an unconstitutional interpretation of the provision by the Family Division. Section 215 (works alongside provisions such as s 522) and provides as follows:

Conduct of proceedings in Family Division
(1) The Family Division—
(a) must conduct proceedings before it in an informal manner; and
(b) must proceed without regard to legal forms; and
(c) must consider evidence on the balance of probabilities; and
(d) may inform itself on a matter in such manner as it thinks fit, despite any rules of evidence to the contrary.

Section 215, in requiring proceedings to be conducted informally and without regard to legal forms is likely to be constitutional. As a State court, the Children’s Court would be given considerable latitude in applying this provision. This conclusion is influenced by the fact that the Children’s Court is not required or compelled by the Act to conduct proceedings in potentially unconstitutional ways, such as to violate procedural fairness or to rely on executive guidance. Instead, the Children’s Court is given considerable flexibility in applying s 125. This flexibility could, for example, extend to the adoption of less-adversarial approaches by the Court.

Similarly, s 215(1)(d) indicates that the Division ‘may inform itself…as it thinks fit, despite any rules of evidence to the contrary’. This provision is permissive rather than mandatory and does not amount to direction by the legislative arm.40 This means that the Court is not prevented in all cases from drawing upon the rules of evidence or assessing the weight that it should be given.41 Relevantly, the High Court has confirmed the legitimacy of provisions that bestow flexibility in the admission of

evidence\textsuperscript{42} but has noted that, from a constitutional point of view, ‘require the application of, the rules of procedural fairness’\textsuperscript{43} Similarly, French CJ has explained that they won’t ‘excuse the Court from the duty to act lawfully rationally and fairly’.\textsuperscript{44} Provided s 215(1)(d) is exercised in light of procedural fairness considerations it should not pose any constitutional difficulties for the Children’s Court.

The difficulty for courts is determining at what point institutional integrity is likely to be jeopardised by curial procedures and when an interpretation of a provision is likely to be deemed as too expansive from a constitutional point of view. At the State level, this line is only rarely going to be crossed and typically in situations where the Court’s independence and impartiality is called into question, so it strays from the essential attributes of what a ‘court’ requires. In this instance, the real issue is that unconstitutional interpretations of the provision could be adopted rather than the provisions being struck down themselves. Examples of too wide interpretations would include relying on s 215(1)(a) to justify ex parte conversations between the judge and litigants or witnesses,\textsuperscript{45} or, fundamentally failing to comply with the bias limb of procedural fairness.

Overall s 215 of the Act should give the Children’s Court suitable flexibility in the procedures it adopts in child protection matters. Any constitutional issues flagged here could easily be addressed, like at 1.2, through the preparation of practice guidelines or practice notes for the bench.

1.4 – The Constitutionality of Team-based Managerial Conferences and the Use of Non-Judicial Officers on Decision-Making Panels - Addressing Questions 2.14, 2.15, 4.1 and 4.2

This section explores two inter-related but divergent options for the Court. First, would it be constitutional for the Children’s Court to employ inter-disciplinary team-based case management conferences, like those used by the Drug Courts? Second, could judicial officers in the Court make decisions alongside non-judicial officers?

1.4.1 Inter-disciplinary team-based managerial conferences

Inter-disciplinary Drug Court teams are an established part of the Drug Court model. These involve the Drug Court judicial officer meeting prior to a hearing (usually in the absence of the defendant) with other team members, including the case worker, corrections staff, counsellor, prosecutor and the defendant’s lawyer. At these meetings the team discusses the defendant’s progress and whether benefits or sanctions are justified.

The obvious constitutional concern these meetings present is that the judicial officer may be tainted by their involvement so as to compromise the institutional integrity of

\textsuperscript{42} K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501, [124]-125 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).


\textsuperscript{44} K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501, [79] (French CJ).

\textsuperscript{45} See for example Re JRL; Ex Parte CJL (1986) 161 CLR 342.
the State court. This may arise by the judicial officer discussing the treatment and evidentiary matters in a closed pre-court ‘hearing’, in the absence of the Drug Court participant.\textsuperscript{46} From these meetings, a potentially risky partnership, or the perception of such a partnership, may arise between the judicial and executive arms\textsuperscript{47} through the judiciary’s involvement in treatment\textsuperscript{48} and involvement in a non-adjudicative process alien from the traditional exercise of judicial power.\textsuperscript{49} The integrity of the hearing process may therefore be compromised by the judicial officer’s communications with the team and information obtained which may not have been aired before all parties to the proceedings.

These issues could also have relevance if the Children’s Court were to adopt a similar interdisciplinary team model.

From a State constitutional point of view, the focus is upon whether the judicial officer’s involvement with the team compromises the court’s institutional integrity by seemingly merging the executive and judicial roles and therefore questioning the independence and impartiality of the court.\textsuperscript{50} Although in dissent and in different context, Kirby J in the \textit{Gypsy Jokers} decision referred to the risk posed by executive affiliation as follows:

\begin{quote}
That [executive] officer, in law or in substance, thereby controls the discharge of the judicial process, the effective participation of the Supreme Court in that process and the capacity of the Supreme Court to explain the reasons for its decision to the parties and the public. The judge may appear in robes to pronounce what shall be done. But the hand that directs the process is elsewhere, outside the courtroom...\textsuperscript{51}
\end{quote}

It is submitted that the use of such teams in the State court setting is unlikely to be found unconstitutional provided there is a clear division between the collaborative/investigative role of the team and the judicial function of the judicial officer.\textsuperscript{52} This requires that the judicial officer is in a position to make the final court decision, independently,\textsuperscript{53} in a ‘genuine adjudicative’\textsuperscript{54} setting where the court is more than ‘the alter ego of the...executive’.\textsuperscript{55} The hearing would therefore need to stand alone as a fair, impartial and legitimate process entirely separate from the

\textsuperscript{46} See for example, \textit{Drug Court Regulation 2006} (Qld) sch 6, s 3(2); Andrew Phelan, ‘Solving Human Problems or Deciding Cases? Judicial Innovation in New York and its Relevance to Australia: Part III’ (2004) 13 \textit{Journal of Judicial Administration} 244, 248.
\textsuperscript{48} Terry Carney, ‘New Configurations of Justice and Services for the Vulnerable: Panacea or Panegyric?’ (2000) 33(3) \textit{The Australian and New Zealand Journal of Criminology} 318, 324.
\textsuperscript{51} \textit{Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police} (2008) 234 CLR 532, [103].
\textsuperscript{54} Ibid [219] (Callinan and Heydon JJ).
\textsuperscript{55} Ibid.
influence of the interdisciplinary team. And the judicial officer would need to ensure that the court’s ‘integrity and independence as a court are not compromised’ by the collaborative pre-court process.\textsuperscript{56} This may require the judicial officer to disclose at the hearing all information influencing the court’s decision, particularly if this arose from communications with the team, as well as permitting submissions to be made on this information.

It is submitted that the Children’s Court should be able to take advantage of interdisciplinary teams within its child protection jurisdiction provided the Court’s final decision-making processes are not compromised. In exploring the most appropriate interdisciplinary model for the Children’s Court, the Commission may also want to explore the suitability of some of the creative strategies employed by the Court at the Victorian Neighbourhood Justice Centre.\textsuperscript{57}

1.4.2 - Judicial officers making decisions alongside non-judicial officers?

The constitutionality of this option is going to depend on precisely what is contemplated by involving non-judicial officers in the decision making of the Children’s Court. On its face, if the involvement is going to the Court’s decisions themselves, the proposal has the potential to be constitutionally invalid in creating too close a relationship between the executive and judicial arms so as to taint the independence and integrity of the State Court.\textsuperscript{58}

It is recommended that if this option is pursued for the Children’s Court that it be structured with this constitutional risk in mind. Question 4.6 of the Information Paper refers to the possibility of the functions of the Children’s Court being exercised by a Tribunal and it is likely that combining judicial and non-judicial members on a Tribunal would be an easier alternative from a constitutional point of view.

Conclusion

This submission has been limited to some of the constitutional law issues presented by the Victorian Law Reform Commission’s Information Paper. It has concluded that, constitutionally, there is considerable potential for the Children’s Court to adopt less-adversarial and more informal procedures as well as take advantage of interdisciplinary teams. The central theme of this submission is the importance of preserving the Children’s Court institutional integrity by ensuring that its decision remain independent, impartial and do not compromise the integrity of the Court’s role.

\textsuperscript{56} Ibid.
