Options and Proposals

CHAPTER 7

OPTION 1—A NEW SYSTEM: PROCESSES FOR ACHIEVING APPROPRIATE CHILD-CENTRED AGREEMENTS

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.

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

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

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

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

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.

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.

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.

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.

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.

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.

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) or where any person engages in unlawful conduct during a conference

f) capable of producing an agreement that may become a consent order.

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

CHAPTER 8

OPTION 2—A NEW SYSTEM: ENHANCED COURT PRACTICES AND PROCESSES

2.1 All protection applications should commence by notice.

2.2 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.

2.3 An application by a protective intervener (including an application for any interim orders) should contain:

a) a precise summary of the ground(s) upon which it is made

b) a precise summary of the information upon which the application is based

c) the orders sought.

2.4 The Court should be permitted to make interim accommodation orders on the application of a party at any time after a protection application has been filed and before it has been finalised.

The duration of an interim accommodation order should not be limited to 21 days, except where a child is placed in secure welfare, but should be for a limited period necessary to enable the next court-ordered process to occur.

2.5 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.

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2.6 If an application is not resolved by agreement, it should be set down for hearing. Any parties who oppose the application and/or the orders sought by the protective intervener should be required to file a document in which they identify that opposition and their grounds for doing so.

2.7 A protective intervener may apply to a judicial officer at any time for an emergency removal order when the protective intervener believes on reasonable grounds that:

a) a child is at risk of significant harm, and

b) the risk is of such magnitude that an order is necessary to protect the child, and

c) a safety notice or intervention order (or variation of existing order) would not be sufficient to protect the child from that risk.

2.8 A judicial officer may make an emergency removal order on the application of a protective intervener in the absence of interested parties. If a judicial officer makes an emergency removal order the judicial officer:

a) must authorise a nominated person(s) to remove the child from his or her parents and keep that child at a nominated place, and

b) must order that the matter be returnable for further determination at a time no later than 72 hours after the time at which the Court believes that its order will be executed, and

c) may make any order the Court thinks fit in order to protect the child from the risk of harm.

2.9 The Court may make an interim care order for a period not exceeding 14 days on the return of an emergency removal order or on application for an interim care order following an 'immediate risk removal', if satisfied that there is unacceptable risk of harm to the child. An interim care order may include:

a) an order about where and with whom a child must live

b) an order requiring a parent, guardian or carer to accept supervision by the Secretary

c) any other order the Court thinks fit in order to protect the child from the risk of harm.

2.10 A protective intervener should be permitted to remove a child from his or her parents without parental consent or judicial authorisation only when the protective intervener believes on reasonable grounds that:

a) a child is at immediate risk of significant harm, and

b) there is insufficient time to apply to the Court for an emergency removal order, and

c) a safety notice or intervention order (or variation of existing order) would not be sufficient to protect the child from that risk.

2.11 After involuntary removal of a child from his or her parents, a protective intervener must apply to the Court within one working day for an interim care order unless the child has been returned to the care of a parent or guardian and the Court must seek to determine the application on the day it is made unless there are exceptional circumstances.[1]

2.12 Prior to the conclusion of an interim care order, the Court may make a short-term assessment order if satisfied that the child remains at unacceptable risk of harm. A short-term assessment order, which may not exceed six weeks, may include:

a) an order about where and with whom a child must live

b) an order requiring a parent, guardian or carer to accept supervision by the Secretary

c) any other order the Court thinks fit in order to protect the child from the risk of harm.

2.13 The Court should be given a range of powers that encourage and permit it to control the conduct of proceedings by taking an inquisitorial and problem-oriented approach.

2.14 The Court should have powers that are similar to those given to the Family Court and the Federal Magistrates Court in Division 12A of Part VII of the *Family Law Act 1975* (Cth).

2.15 Every child who is the subject of a protection application should be a party to the proceedings.

2.16 Every child who is a party to a protection application should be legally represented in a manner that takes account of the level of maturity and understanding of that particular child. Two distinct models of representation—'best interests' and 'instructions'—should be available. The two roles and the circumstances of appointment for one or the other (or in rare cases both) should be clearly defined by guidelines. Children represented on an instructions model should:

a) have capacity to instruct a legal practitioner, and

b) indicate a desire to participate in proceedings by instructing a legal practitioner, and

c) indicate an unwillingness to be represented on a 'best interests' basis.

2.17 Section 522(1)(c) of the *Children, Youth and Families Act 2005* (Vic) should be amended to ensure that a child is given the opportunity to participate directly in proceedings if the child expresses a wish to do so, having regard to his or her maturity and understanding.

2.18 There should be additional new 'no fault' grounds for finding that a child is in need of protection:

a) It should be possible for the Court to find that a child is in need of protection if it is satisfied that the child is behaving in a manner that is likely to cause significant harm to the physical or emotional wellbeing of the child and the child's parents are unable to prevent the harmful behaviour.

b) Section 162(1)(c), (d), (e) and (f) of the *Children, Youth and Families Act 2005* (Vic) should be amended by including reference to the fact that the child's parents are 'unable' to protect the child from the relevant harm or provide the relevant care.

1 If a child is returned to the care of a parent or guardian within one working day, the protective intervener should be required to file a document with the Court in which he or she explains why the child was involuntarily removed from the care of his or her parents. If the protective intervener applies for interim orders, he or she must explain to the Court why it was necessary to exercise this removal power.

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2.19 If there is no agreement about the particular ground for determining that a child is in need of protection, but there is agreement between the child's parents and the Secretary that it is in the best interests of the child to be placed on a protection order to address concerns about significant harm to the child as contemplated by section 162(1)(c), (d), (e) or (f) of the *Children, Youth and Families Act 2005* (Vic), the Court may make a finding that a child is in need of protection and may make any of the orders open to it under Part 4.9 of the *Children, Youth and Families Act 2005* (Vic) as agreed by the child's parents and the Secretary if:

a) any views and wishes of the child have been taken into account, and

b) a child who is represented on instructions does not oppose a finding that he or she is in need of protection or any of the orders sought, and

c) the Court is satisfied that it is in the best interests of the child to make the orders sought.

2.20 Section 215(1)(c) of the *Children, Youth and Families Act 2005* (Vic) should be amended to make it clear that whenever the Court is required to be satisfied as to the existence of a fact or any other matter in Family Division proceedings, that the level of satisfaction is the civil standard of the balance of probabilities and not any higher standard.

2.21 Section 333 of the *Children, Youth and Families Act 2005* (Vic) should be amended to permit a child or a child's parent to apply to the Court for review of a decision in a case plan or any other decision made by the Secretary concerning the child.

2.22 The definition of 'child' in section 3 of the *Children, Youth and Families Act 2005* (Vic) should be amended so that it is possible to make a protection application for any child under the age of 18 years.

2.23 If the Court finds that a child is in need of protection it should be permitted to make an order granting guardianship and/or custody of the child to one parent of the child to the exclusion of another parent when satisfied that this order is necessary to meet the needs of the child.

2.24 Section 146 of the *Family Violence Protection Act 2008* (Vic) should be amended to permit the Court to exercise jurisdiction under that Act when a child who is the subject of a child protection application is a child of 'the affected family member' or 'the protected person'.

CHAPTER 9

OPTION 3—THE OFFICE OF THE CHILDREN AND YOUTH ADVOCATE (OCYA): A NEW MULTI-DISCIPLINARY BODY TO ADVANCE THE INTERESTS OF CHILDREN AND YOUNG PEOPLE

3.1 A statutory commissioner should be established to head the Office of the Children and Youth Advocate (OCYA).

3.2 The Commissioner should have the following functions and powers:

a) To convene family group conferences and assist the parties to reach an agreement that is in the best interests of the child or young person.

b) To act as the representative of the child or young person in child protection matters and to appear on behalf of the child or young person in all proceedings before the Court.

c) When acting as a best interests representative for a child:

(i) to assist the Children's Court to act in an inquisitorial and problem-oriented manner by gathering evidence, including expert reports

(ii) to assist decision making at family group conferences and family decision-making processes in the Children's Court by gathering evidence, including expert reports.

3.3 In performing its functions, OCYA should assist and encourage the parties to reach an agreement that is in the best interests of the child or young person whenever possible.

3.4 OCYA should have a sufficient number and range of professionally qualified staff including lawyers, social workers, psychologists and other appropriate professionals to fulfil these functions in relation to every child protection matter.

3.5 The Commissioner should:

a) be appointed by the Governor in Council

b) hold office for a period of seven years

c) be otherwise appointed and hold office on terms similar to those that apply to the Public Advocate

d) be required to report to Parliament on an annual basis about its activities and its financial operations.

3.6 The Attorney-General should be the Minister responsible for the Commissioner.

CHAPTER 10

OPTION 4—REPRESENTING THE DEPARTMENT OF HUMAN SERVICES: A ROLE FOR THE VGSO IN PROTECTION MATTERS

4.1 The Victorian Government Solicitor should be primarily responsible for conducting proceedings on behalf of protective interveners in Victoria.

4.2 The Victorian Government Solicitor should prepare, in conjunction with the protective interveners, and after consulting the Managing Director of Victoria Legal Aid and the President of the Children's Court, model litigant guidelines that are specifically designed for protection applications in the Children's Court.

4.3 In preparing these guidelines, regard should be had to the following:

a) the model litigant guidelines prepared by the State of Victoria

b) relevant guidelines prepared by the Office of Public Prosecutions and the Director of Public Prosecutions

c) relevant rules of the Victorian Bar Association and the Law Institute of Victoria.

4.4 The model litigant guidelines should be evaluated and reviewed after they have been in operation for three years.

CHAPTER 11

OPTION 5—BROADENING THE ROLE OF THE CHILD SAFETY COMMISSIONER

5.1 The Child Safety Commissioner should have the following additional functions:

a) to oversee and review the child protection system

b) to investigate and report to the Minister about the operation of the *Children, Youth and Families Act 2005* (Vic)

c) to advocate for children across government and throughout the community

d) to liaise with the Aboriginal community in order to ensure that the Commissioner is able to effectively advocate for Aboriginal children

e) to promote awareness of children's and young people's rights

f) to report to Parliament on an annual basis and when reporting to the Minister about the operation of the *Children, Youth and Families Act 2005* (Vic)

g) to consult children about the performance of the Commissioner's functions.

5.2 The Child Safety Commissioner should:

a) be appointed by the Governor in Council

b) hold office for a period not exceeding five years

c) be otherwise appointed and hold office on terms similar to those that apply to the Public Advocate

d) be required to report to Parliament on an annual basis about the Commissioner's activities and financial operations.

5.3 The Attorney-General should be the Minister responsible for the Child Safety Commissioner.